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

FOCUS ON TORTS

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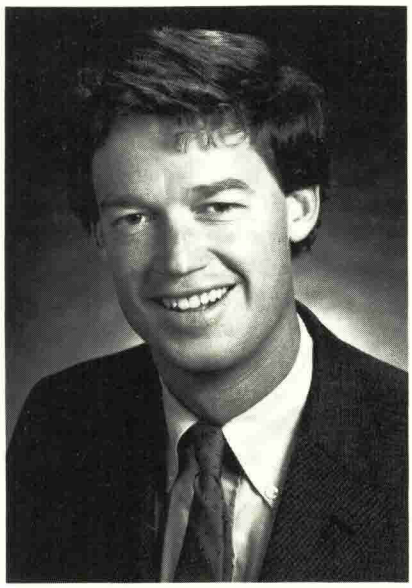
Two New Associates Join Firm

Mary E. Driscoll



Richard H. Schoenberger

We are pleased to announce that two new associates have joined our firm. Although each comes from a different legal background, both have had significant jury trial experience before joining us.

The first of our new attorneys is **Mary E. Driscoll**. Born and raised in Illinois, Mary obtained her Bachelor of Science Degree in Nursing and Psychology from Elmhurst College in 1977. Subsequent to her graduation she practiced as a registered nurse at the Illinois State Psychiatric Institute, Mercy Hospital and Medical Center and Northwestern University Hospital in Chicago. Interested in law and hoping to build upon her nursing background, Mary moved to Northern California in 1981 to enroll at the University of Santa Clara School of Law.

After obtaining her J.D. Degree in 1984, Mary was admitted to the Bar and began practice as an associate with the San Francisco personal injury firm of Bailey and Karpman where she had previously served as a law clerk. Because of her extensive medical background, the great bulk of

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Government Code Changes Alter Public Entity Exposure

The recent avalanche of legislation which has altered the California tort system included a number of provisions intended to specifically benefit public entities.

First and foremost among these is the addition of §985 to the California Government Code. This provision provides for a post-trial hearing in any action where a public entity is a defendant so that the trial judge may consider "equitable adjustments" relative to collateral source payments made to the injured plaintiff before the beginning of trial. Under the provisions of the act, such a hearing can only take place if the trial court determines that over $5,000 in collateral source payments have been paid *and* have been included in the verdict. Once such a hearing does take place, all subrogation and lien rights cease. At the post-trial hearing, the trial judge is asked to make a determination regarding to whom any collateral source benefits should accrue: plaintiff, defendant or collateral source providers. Although there are provisions for a setoff in the amount of collateral source reimbursement based on comparative fault, pro rata sharing of attorneys

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New Associates

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her work was concentrated in the areas of medical and nursing malpractice.

In February of 1986, Mary left Bailey and Karpman to join the San Francisco City Attorney's Office. While with the City Attorney's Office she had responsibility for the defense of police brutality cases, claims against the Department of Public Works, and also served as special counsel to the Superior Court Judges.

A member of the American Association of Nurse Attorneys, the American Trial Lawyers Association, the California Trial Lawyers Association and the San Francisco Trial Lawyers Association, Mary brings us special expertise which will greatly benefit those clients on whose behalf we are prosecuting medical negligence claims.

Also joining us is **Richard H. Schoenberger**. Born in Portland, Oregon, Rich moved to the Bay Area in 1963. After attending schools in Marin County, he obtained his Bachelor of Arts Degree in History at the University of Santa Clara. While there he took advantage of the Gonzaga University exchange program which permitted him to spend his junior year in Florence, Italy.

After graduation from Santa Clara, he enrolled at Hastings College of Law in San Francisco. While there he spent a one year externship as a clerk for the Marin County Superior Court. Following graduation from Hastings in May of 1985, and his admission to the Bar, Rich entered practice as a deputy district attorney for the Alameda County District Attorney's Office. His tenure at the District Attorney's Office provided him with extensive pre-trial and trial practice, including the prosecution of 18 jury trials to verdict and the conduct of a multitude of felony preliminary hearings.

A member of the American Trial Lawyers Association, the California Trial Lawyers Association, and the San Francisco Trial Lawyers Association, Rich's extensive and varied jury trial background provides him with the practical experience necessary to immediately contribute to the representation of the firm's clients.

Code Changes

Continued from front page.

fees, and premiums paid by the injured party, this new statutory enactment will limit victims' rights and the number of suits brought against governmental entities.

A companion provision, §984 of the California Government Code, permits uninsured public entities to request periodic payments of any verdict over $500,000. Because insured public entities are not given the benefit of this provision, it is possible that more entities may purposely decide to self-insure so as to take advantage of the benefits of the act. Under this section, one-half of the verdict must be paid in a lump sum, and the remaining one-half may be paid out in equal installments over a period not longer than 10 years. Installment payments must be paid out at interest equivalent to the rate of one year treasury bills.

Finally, §962 was also added to the Government Code. It creates a mandatory post-trial settlement conference in any case where a verdict in excess of $100,000 has been returned against a governmental entity. Although the settlement conference judge has no authority to impose a post-trial agreement, the clear intent of the statute is to provide for a mechanism whereby, in advance of appeal, a personal injury plaintiff is requested to take less than 100% of his or her verdict in return for an agreement to have same paid. Under the terms of the statute, the mandatory settlement conference must be conducted in good faith with the primary object being to consider structured payment plans suggested by either the plaintiff or the defendant.

Announcements

We are pleased to announce that four members of this firm, **BruceWalkup, Ralph Bastian, Paul Melodia** and **Dan Kelly,** were named in the 1987 edition of *The Best Lawyers in America.*

Mike Kelly is teaching the Trial Practice class at Hastings College of Law. Mike has been an assistant professor there since 1981.

Hot off the press is the new edition of *The California Practice Guide: Personal Injury*, co-authored by Dan Kelly and published by the Rutter Group. Dan also lectured on January 20, 1988 on the 1988 Personal Injury Update Program at the Fairmont Hotel. Mike Kelly gave a similar lecture for CEB on January 30, 1988. Mike and Dan are also on the Board of Governors, respectively, of the San Francisco Trial Lawyers Association and the California Trial Lawyers Association.

Other legal presentations and lectures have been given by Paul Melodia at Boalt Hall and **John Echeverria** to the Nevada Trial Lawyers Association. **Mary Driscoll** just recently returned from Boston where she attended the annual convention for the American Association of Nurse Attorneys. In April Dan Kelly is traveling to Washington D.C. to address the 26th Annual Risk Managers Conference.

George Shelby was recently elected secretary of the San Francisco Chapter of the American Board of Trial Advocates. In addition to George, Bruce Walkup, Ralph Bastian, Paul Melodia and Dan Kelly are also members of ABOTA.

Last, but certainly not least, the firm's softball team, the Mighty Mouthpieces, won division titles in both the first and second halves of the San Francisco Lawyers Softball League. The team's captain, **Kevin Domecus**, has the trophy in his office to prove it.

Judicial Arbitration Limits Increased

Among the less publicized changes in the law which occurred as part of the recent legislative compromise on civil liability issues, §1141.11 of the Code of Civil Procedure was amended to raise judicial arbitration limits from $25,000 to $50,000. This is a significant change in the law which will directly affect our practice, and that of our associate counsel. This change in the law applies to all cases where an At-Issue Memorandum is pending or filed after January 1, 1988.

In the past, with a much reduced arbitration limit, it was not uncommon to approach arbitration on an informal basis, utilizing the hearing much like a settlement conference. Now, however, such an approach in not prudent. Cases with substantially more value will now be funneled into arbitration. This means that the arbitration hearing must be prepared for as thoroughly as if one were proceeding to trial, particularly given the severe restrictions on post-arbitration discovery and expert utilization.

In the past, occasions have arisen where our associate counsel have taken cases through the arbitration stage, and if dissatisfied with the result, associated our firm for purposes of trial. Although this approach has been acceptable in small uncomplicated automobile cases, with the increase in the arbitration limits, this approach may no longer be practical.

We encourage our co-counsel to consult with us early in the pendency of cases which they believe are headed for arbitration. Because the value of many casees handled within our firm fall within the range of $25,000 and $50,000, members of the firm have extensive experience with judicial arbitrations: how to properly prepare them, conduct them, argue them, and enforce favorable results. Since a particularly poor arbitration result can influence a defendant's later evaluation for settlement purposes, it is important that judicial arbitrations not be taken lightly, and that appropriate discovery and preparation be undertaken in advance of any hearing.

Changes in the Law of Punitive Damages

Civil Code §3925(e) was amended to provide that no claim for punitive damages (regardless of the nature of the cause of action or whether it is filed in Superior or Municipal Court), may specify the amount of damages sought.

California Code of Civil Prodedure §425.13 has also been added and provides that no claim for punitive damages against a health care provider may be included in the complaint or other pleading unless the Court first enters an order allowing the filing of an amended pleading to include a punitive damages claim. The motion to add punitive damages must make a showing of a "substantial probability that the plaintiff will prevail on" the punitive damages claim, or it will be denied.

California Civil Code §3294 has also been changed to redefine the basis for punitive damages. "Malice" is redefined to mean conduct intended to cause injury to plaintiff or "despicable conduct" carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

"Oppression" now means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights."

The definition of fraud contained in §3294(c)(3) remains unchanged.

The burden of proof to sustain the award of punitive damages has also been raised. The defendant's "malice, oppression or fraud" must be proven by clear and convincing evidence. This is a much higher standard than the normal "preponderance of evidence."

The law now also provides that on application of any defendant the trial shall be bifurcated to preclude admission of evidence on that defendant's profits or financial condition until after a verdict is returned awarding plaintiff actual damages and finding that the defendant is guilty of malice, oppression or fraud [amended Civil Code §3295(d)].

Changes in MICRA's Limits On Attorneys Fees

The 1987 tort reform legislation (effective January 1, 1988) changes Business and Profession Code §6146 to provide a new scale for attorneys fees in medical negligence cases. The new scale is:

- 40% of the first $50,000 recovered,
- 33⅓% of the next $50,000 recovered,
- 25% of the next $500,000 recovered, and
- 15% of any amount over $600,000.

Insurance Bad Faith Update . . .

Recently a number of our referring counsel involved in processing claims under insurance policies (whether life, homeowners, disability or medical policies) have requested an update of the developing law of insurance Bad Faith. In addition, because preliminary work is often done on files by counsel before our firm is associated, it is critical that referring counsel be able to recognize whether or not the claim is being handled properly by the insurance carrier so he or she can advise the client of appropriate remedies in the event the claim is improperly processed.

Recent cases have had significant impact on the handling of insurance claims, and the future of bad faith cases as a whole.

Of these, the most important has been *Pilot Life Insurance Co. v. Dedeaux*, 107 S.Ct. 1549 (1987). The United States Supreme Court dealt a major blow to a vast number of bad faith cases nationwide. The *Pilot Life* opinion held that the Employee Retirement Income Security Act of 1974 (ERISA) pre-empted state law causes of action against insurers for the failure to provide benefits under employee welfare benefit plans. The impact of the decision is enormous. Included within the ambit of covered "employee welfare benefit plans" are all plans, funds or programs established or maintained by an employer for the purpose of providing medical, surgical or hospital care or benefits or other benefits in the event of sickness, accident, disability, death or unemployment [29 USC §1002(1)]. ERISA thus applies to any group health, life and/or disability insurance policy which is provided as a benefit of employment. Wrongful denial of benefits under such plans has in the past given rise to a cause of action alleging "bad faith" or state law insurance code violation(s). After *Pilot Life*, denial of benefits under such plans must be pursued under ERISA. Tort remedies and damages are no longer available in such cases. The practical effect of the decision is to eliminate common law first party bad faith where the underlying insurance policy is a group employment policy.

The language of ERISA appears to exempt from pre-emption state laws which regulate insurance (e.g. Insurance Code §790.03). However, the broad language of the Supreme Court in *Pilot Life* has led many commentators to believe that ERISA pre-empts all state law causes of action, even those arising under laws regulating insurance such as Insurance Code §790.03(h).

Closer to home, the recent Ninth Circuit holding in *Kanne v. Connecticut General Life Ins. Co.*, 819 F.2d 204 (9th Cir. 1987), did little to alleviate the concerns created by *Pilot Life*. In *Kanne* the Ninth Circuit made no distinction between a claim alleging breach of the obligation of good faith and fair dealing and a claim alleging violation of one of the provisions of Insurance Code §790.03(h). Lumping both together and disdaining a detailed analysis, the Court held that since the cause of action alleged improper processing of a claim, it was therefore pre-empted.

Recently, it appeared there was good news on the question of pre-emption when the California Court of Appeals held that ERISA did not pre-empt actions based upon violations of Insurance Code §790.03(h). In *Goodrich v. General Telephone*, (1987) 195 Cal.App.3d 675, the Court reversed a trial court holding that actions alleging violation of Insurance Code §790.03(h) were pre-empted by ERISA. *Goodrich* preserved a remedy for Californians whose insurance carriers acted in violation of the Insurance Code even though the policies constituted employee benefit plans. Unfortunately, just prior to the end of 1987 the California Supreme Court granted a hearing in *Goodrich*. It is therefore of little practical value until and unless the Supreme Court affirms its reasoning.

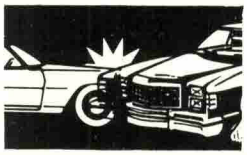
A second related area where referring counsel have recently sought our opinion involves whether they should represent their client/insured in derivative bad faith cases which arise out of underlying tort claims concluded by them. A recent case from the intermediate appellate court in New York, *Zweig v. Safeco Ins. Co of America*, 509 N.Y.S.2d 320 (1986) has held in the negative; that such an attorney is an essential witness and should not undertake the prosecution of the bad faith case.

While there are no California decisions dealing with this issue, the New York approach appears both ethically and practically sound. California Rule of Professional Conduct, Rule 2-111(a)(4) and (5) is the controlling statute here. It distinguishes between circumstances in which the attorney's testimony would be favorable to the client and those in which it would be unfavorable.

Rule (A)(5) provides that where the attorney's testimony may be prejudicial to the client, the attorney may not continue to represent the client. Rule (A)(4) states that if the attorney ought to be called as a witness on behalf of the client, the attorney may continue as attorney *only* with written consent of the client. Such written consent must be given after the client has been fully advised and has had an opportunity to seek the advice of independent counsel. Consent is not needed where the attorney's testimony relates only to an uncontested matter, or to the nature and value of legal services provided.

Almost without exception, it is our experience that the attorney who has concluded the underlying claim giving rise to a "bad faith" suit becomes a key percipient witness to settlement discussions and negotiations with regard to the claim—discussions and negotiations which are critical to the basis of any bad faith action. While counsel may continue to represent the plaintiff in the bad faith case under appropriate circumstances and with written consent, serious thought should be given to the adverse impact such continued representation may have on the client's case. The attorney should try to avoid becoming a factual witness to disputed issues which may arise in the subsequent bad faith case (i.e. oral communications not reduced to writing, pre-suit communications with carriers, motivation for rejecting offer(s) of settlement, etc.). If this cannot be avoided, as will frequently be the case, competent counsel should be associated to prosecute the bad faith suit. Once this is done both the appearance and the reality of a conflict will be eradicated.

Recent Cases



VEHICULAR NEGLIGENCE

Thompson and Sestero v. Huntington Oil

George Shelby recently concluded *Thompson and Sestero v. Huntington Oil/City of Farmington* (CV84 1633; USDC New Mexico) for a package of $455,000. Plaintiffs in the action were California engineers who were rear-ended at a changing signal light by a fuel oil truck near Farmington, New Mexico. In addition to soft tissue neck and back injuries, one plaintiff sustained a right orbital fracture, the other rib fractures and a closed head injury. By the time of settlement either had significant residual problems, each having returned to work within a few months after the accident. Because of New Mexico venue, local law was applied. Under New Mexico law, joint and several liability is not recognized, and a defendant's obligation to satisfy a judgment is exclusively limited to his or her percentage of fault. Defendants therefore argued that the operator of the plaintiffs' vehicle, a third vehicle on the roadway, and the entity responsible for maintaining the stop lights, all had responsibility for the accident. Settlement funds were contributed by the trucking company's insurer and the governmental entity responsible for signal light maintenance.

Doss v. Oroville Bus Lines

Rick Goethals settled a wrongful death case, *Doss v. Oroville Bus Lines* (Sacramento No. 335831) for $750,000. Plaintiffs were the wife and four children of a 29-year-old drywaller who was earning $14,000 per year.

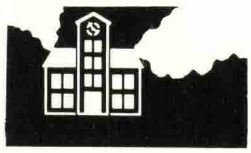
The decedent's pickup was struck head-on by an uninsured defendant who was operating a truck owned by his grandparents who owned and operated Oroville Bus Lines. Plaintiffs contended that the keys to the truck were made readily available to the driver and, thus, he had the implied consent of his grandparents to operate the vehicle. Defendants denied this consent issue.

Lawrence v. Frank, et. al.

Rick also recently settled *Lawrence v. Frank, Haggin and The Urban School* (San Francisco No. 819972). There, the 17-year-old plaintiff was a passenger on a moped owned and operated by defendant Haggin. They were on a school field trip as part of a photography class when defendant Frank turned his car in front of them resulting in a collision.

Plaintiff suffered an open fracture through the distal third of the tibia which required two surgeries. Plaintiff, who was planning a modeling career, has residual scars at the site of the open fracture and also at the bone graft donor site at the hip.

Total settlement was in the amount of $375,000 consisting of payment of $100,000 policy limits for defendant Frank and $275,000 by defendants The Urban School and Haggin.



PREMISES LIABILITY

Smith v. Nut Tree Associates and Stanley Magic Door Co.

In *Smith v. Nut Tree Associates and Stanley Magic Door Co.*, (Solano No. 93556) on the morning of trial **Kevin L. Domecus** settled a case stemming from an accident at The Nut Tree Restaurant for $100,000.

The plaintiff, an 88-year-old woman, was struck by the sliding electric doors as she attempted to enter the restaurant. She could not recall if she had stopped near the entrance or was proceeding straight through when she was hit. When operating properly, the door's motion sensor is activated by persons walking within its field and signals the door to remain open. Upon losing the signal, the door should take a full four seconds to close. Plaintiff contended that the motion sensor had a large blind spot and the doors were operating at an excessive speed when closing. The Nut Tree contended that its post-accident inspection revealed no defects in the door's operation, that it could not duplicate the incident and that there was no record of any similar incident at any of the electric doors at the restaurant. Stanley acknowledged two similar incidents at various installations around the country.

Mrs. Smith fractured her left femoral head in the fall, underwent surgery and has gone on to make a complete recovery.

AVIATION ACCIDENTS

Rarig and Stillman v. Doe Companies

In *Rarig and Stillman v. Doe Companies* (Santa Barbara Nos. 152387, 152353), **Ralph Bastian** negotiated settlements totaling $1,750,000 on behalf of the heirs of two men killed in a light plane crash in July, 1984.

Plaintiffs contended that an airworthiness directive (AD) had not been complied with by the defendant maintenance company during a 100-hour inspection in March, 1984.

Plaintiffs' employer, the owner of the aircraft, also denied receiving notification of the AD. The aircraft was purchased in October, 1983, the AD issued in November, 1983 and the FAA registration was completed in December, 1983.

Mr. Rarig, age 34, was earning $41,600 per year and was survived by his 30-year-old wife and two-year-old daughter. Settlement consisted of payment of $1,000,000 over and above the Workers Compensation payment of $96,500.

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Recent Cases

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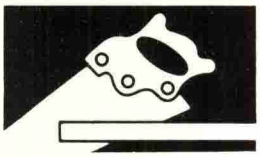
Mr. Stillman was 35-years-old and earning $31,000 per year. His survivors, his 29-year-old wife and non-dependent 63-year-old mother, received $750,000 in addition to $40,000 Workers Compensation benefits.

MEDICAL MALPRACTICE

Clemons v. Kaiser Foundation Hospital

In *Clemons v. Kaiser Foundation Hospital* (Alameda No. 600785-0) **John D. Link** negotiated a $300,000 settlement on behalf of a 53-year-old female who suffered a below-the-knee amputation as a result of claimed negligence in the post-operative management of a popliteal artery bypass.

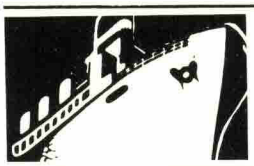
Although the plaintiff's foot pulse was abnormally low immediately following surgery, the treating surgeon waited several hours prior to exploring the graft where a clot was found and removed. Plaintiff contended that the post-operative low pulse required an immediate arteriogram and surgical intervention to attempt to preserve the viability of the leg.



WORKPLACE INJURIES

Elizarraras v. Eychner Wrecking Co.

In *Elizarraras v. Eychner Wrecking Co.* (Alameda No. 614600-9), **Michael A. Kelly** negotiated a lifetime annuity on behalf of a twenty-one year old illegal alien who was injured in a construction site accident. The plaintiff, who recently had travelled north from Mexico, was hired on a piece work basis to perform scrap metal cutting and demolition work at an East Bay construction site by defendant Newark Metals, an unlicensed and uninsured contractor. While cutting down old steel storage tanks, one of the tank walls gave way and struck plaintiff in the mid-back causing spinal cord compression and neurologic injury. The general contractor, defendant Eychner Wrecking Co., was sued under the peculiar risk of harm doctrine. Residual physical problems included bowel and bladder dysfunction and bilateral lower extremity paraparesis. The structured settlement negotiated on the plaintiff's behalf included payment of $225,000 cash, monthly payments of $1,145 increasing at 3% per annum, for life, guaranteed for twenty years, and lump sum payments totaling $100,000 at five year intervals in the future.



ADMIRALTY

In Re Merry Jane

George J. Shelby, personal counsel to the families of three decedents and one survivor, and chairman of the plaintiffs' committee representing the heirs of nine persons killed and thirty persons injured in the February 8, 1986, boating disaster at Bodega Bay, California, recently concluded a most satisfactory settlement of these cases.

The accident occurred when the sportfishing boat, Merry Jane, nearly capsized while attempting to re-enter Bodega Bay after a day of deep sea fishing. Many passengers were hurled into the water and were drowned or injured, and others suffered injuries even though not thrown overboard.

Plaintiffs' evidence demonstrated that the vessel was off course and encountered a large wave behind Bodega Rock. The defendant boat skipper and marina owners claimed that the vessel encountered a "freak" or "rogue" wave. Each side had retained experts on coastal hydrology, photogrammetry, marine engineering, navigation and small boat handling.

The case (*In Re Merry Jane* C86 2701-MHP) was settled after the start of trial before Federal District Court Judge Marilyn Hall Patel. Following several key rulings concerning exoneration and limitation of liability, the trial was recessed for three days while settlement discussions were held before retired Superior Court Judge Melvin Cohn, supplied by Judicial Resources, a San Francisco based alternative dispute resolution service.

At the defendants' request it was agreed that the amount of the settlement would be confidential.