WALKUP, MELODIA, KELLY & ECHEVERRIA

FOCUS on torts

VOLUME VIII, NUMBER ii FALL 1994

# WORKPLACE HARASSMENT EXPOSES EMPLOYERS


## *Recent Settlements Highlight Risk to Harassers*

Sex harassment and sex-based discrimination are issues employers must address to prevent exposure to substantial compensatory and punitive damage awards. As Baker & McKenzie recently learned in the suit brought by former clerical staff worker, Rena Weeks, California juries have adopted an attitude of zero tolerance for discriminatory conduct towards female employees.

The California Fair Employment and Housing Act ("FEHA") (1) prohibits an employer from harassing an employee based on sex, (2) holds an employer strictly liable for harassment of an employee by a supervisor (or co-employee) if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action, and, (3) requires an employer to take all reasonable steps to prevent harassment from occurring, and prohibits retaliation against any person opposing any forbidden practice. (Government Code, Section 12940 subds. (f), (i) and (j).)

*Continued on page 5*

# Firm Bids Farewell to Rick Goethals

On September 5, 1994, our co-worker, partner and friend of twenty years, Rick Goethals, passed away. As Kevin Domecus pointed out during the funeral services, "Rick wasn't just a good lawyer, he was a terrific lawyer". Beneath his pleasant exterior was a very competitive, bright and talented advocate. Open, engaging, interested and respectful, Rick endeared himself both to his clients and to members of the defense bar. Dan Kelly, a fellow Santa Clara law graduate who greeted Rick on his first day at the Walkup firm twenty years ago, remembers Rick's compassion and honesty. In eulogizing Rick, Dan commented:

"The late Thurgood Marshall once said, 'In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.' Those of us who practiced law with Rick Goethals cannot recall him ever raising his voice, or complaining, or degrading another person. In short, he recognized the humanity of his fellow beings and conducted himself accordingly."

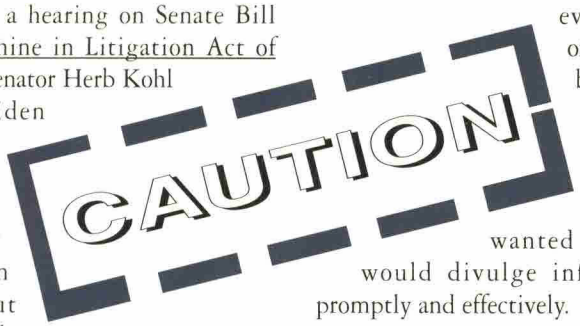
Rick attended both undergraduate and law school at the University of Santa Clara, where he obtained his J.D. in 1975. He began working as a law clerk in our firm in 1974, and joined the firm as an associate after being sworn in. He became a partner in 1980, and was elected President of the firm in 1992, the

*Continued on page 2*

# STUDY DEMONSTRATES CONSUMERS FEAR CORPORATE PRODUCT-HAZARD SECRECY

Even supporters of so-called "tort reform" proposals to restrict claims resulting from hazardous products fear that manufacturers are routinely hiding information about the dangers of their products — information which could help consumers avoid defective products thereby reducing both litigation and injuries.

This was the principal finding of a recently released focus-group study transmitted to the Senate Judiciary Committee in testimony prepared for a hearing on Senate Bill 1404, the Sunshine in Litigation Act of 1993, a bill by Senator Herb Kohl (D-WI) to widen public access to product-hazard information disclosed by manufacturers in discovery but often kept secret by court orders.




In testimony accompanying the study, Benjamin Kelley, President of the Institute for Injury Reduction, said "The basic excuse used by corporations to shield their knowledge of unsafe products is that disclosure would hurt sales and help competitors. This is a shabby argument. It asks that Americans be kept ignorant of product hazards that can kill or severely hurt them for the sake of profits."

The study, carried out by market researcher Lori Bennett and Kelley, employed focus groups drawn from a cross section of residents in the Indianapolis area (home base of former Vice President Dan Quayle — a leading proponent of "tort reform").

Initially, many participants espoused the belief that victims were principally responsible for product-related injuries because of misuse, etc. However, as the sessions progressed, panelists voiced concerns that manufacturers themselves were keeping essential knowledge about products from the public. Summing up one panel's discussions, a participant asked "If there is no recourse through lawsuits, what's to prevent companies from making unsafe products?" No panelists appeared to believe that government regulation provided adequate recourse for consumers, and some were quite vigorous in their antipathy to government regulation.

In evaluating the results of the study, the authors concluded that close attention should be paid to the concerns expressed by participants regarding corporate withholding of product-hazard information. Indeed, even though many of the panelists had been "strongly influenced" by tort reform arguments, the majority clearly wanted a system which would divulge information fully, promptly and effectively.

Copies of the study may be obtained by contacting IIR at (301) 261-0090. The Institute for Injury Reduction is a non-profit educational and research organization dedicated to reducing deaths and injuries caused by product defects.

# 1993 RECALLS SET RECORD

Auto makers recalled some 11 million vehicles in the United States because of safety-related defects in 1993. The 1993 recall total amounted to 6.5% of the vehicle population, the highest number of recalls since 1977. Most recalls were voluntary. The National Highway Traffic Safety Administration (NHTSA) claims that about 35% of all recalls occur at its request.

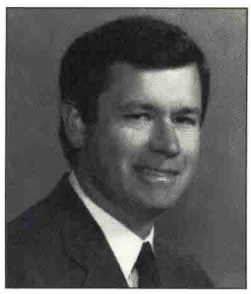
Recent recalls involving possible safety-related problems have included the 1994 Chevrolet S10 Truck (fuel filler pipe), the 1990-92 Dodge Monaco (hot coolant escaping into the passenger compartment), the 1994 Geo Tracker (steering shaft separation), and the 1992-93 Nissan Maxima (inadvertent air bag inflation).

Michael A. Kelly and Daniel Dell'Osso of our firm are presently involved in a number of automobile-related product safety suits. Defects range from fuel systems, to restraint systems, to roof crush, to tire design. Counsel with questions regarding investigation, prosecution or association in auto-related product defect cases should feel free to contact Dan or Mike.

## Farewell to Rick Goethals

*Continued from front page*

youngest firm member ever to be so honored. Rick had special expertise in medical negligence and construction accident cases. During his career he co-tried multiple cases with Bruce Walkup arising out of the Chicago DC-10 crash; served as lead counsel in the litigation arising out of the tower crane collapse at 600 California Street; published scholarly articles and still had time for outside interests, including AYSO and Little League coaching.



Rick embodied all that is good in our profession. He was a person of great character and integrity who represented his clients with impeccable honesty, humor, a special sense of fair play, and an unyielding commitment to the truth.

Rick's skills as a lawyer were surpassed only by his excellence as a husband and father. He is survived by his wife of 22 years, Chris, and his five children, Joe, Meg, Jim, Kate and J.P. Throughout his long struggle with cancer, his family was always at his side, providing the moral and emotional support necessary to carry on the fight, keeping his schedule of activities near normal and his hospital time minimal.

Rick's family has asked that memorial contributions be made to: The Rick Goethals Memorial Scholarship Fund at St. Ignatius College Preparatory, 2001 - 37th Avenue, San Francisco, CA 94116.

# AUTOMATIC BELT WARNINGS URGED

A product safety research group has petitioned the National Highway Traffic Safety Administration (NHTSA) to require that auto manufacturers place prominent, effective warnings in cars with so-called "automatic" shoulder belt systems that include manual lap belts.

The petition was presented to NHTSA's recently appointed administrator, Dr. Richard Martinez, M.D., an experienced trauma physician.

Many auto manufacturers have equipped cars with automatic shoulder belts in lieu of air bags. NHTSA originally required that manufacturers warn their customers against the dangers of shoulder-only belt use, but later exempted "automatic" belts from the warning requirement.

The recent petition was motivated, in part, by injuries produced by automatic shoulder belts in crashes reported to the NTSB. The NTSB had earlier drafted an internal factual report in March of 1993, which noted, among other findings:

"...Researchers found that with non-motorized automatic shoulder/lap belts, when the shoulder belt was used the lap belt was also utilized. However, for the motorized automatic shoulder/manual lap belt, the shoulder belt was used 94% of the time but the lap belt only 26% of the time."The failure to use a manual lap belt with an automatic shoulder belt can lead to serious injuries. Our firm is currently handling a number of automatic shoulder belt cases.

Current designs present a number of problems incorporating potential hazards to auto users. Certain designs (such as those found on early Volkswagens and 1987-88 Hyundais) provide no lap belt whatsoever. Other, more common systems, provide a motorized upper torso restraint and a manual lower torso restraint (lap belt). With such systems, in order to be adequately protected, users must buckle the lap belt. Although the systems are described as "automatic," occupant protection is inadequate unless the lap belt is worn.

Associate counsel who encounter potential product liability claims involving defective automobile passenger restraints should feel free to contact Michael A. Kelly or Dan Dell'Osso of our firm. Mike and Dan have handled a number of cases involving design failures in both domestic and foreign designed seat belt, passenger restraint and air bag systems.

# Three Strikes and You've Got An Overflowing Criminal Docket

San Francisco's, legal newspaper "The Recorder" reported on Nov. 16, 1994 that while the expected tidal of wave of "Three Strikes" cases has yet to roll in on San Francisco courts, the warning signs are beginning to emerge.

Superior Court Judge David Garcia, who runs the felony calendar at the San Francisco Hall of Justice, has begun sending criminal cases to judges sitting in civil departments, a situation that could become the civil bar's worst nightmare.

Garcia says more calendar overload has been delayed because defense lawyers in Three Strikes cases, who need time to research motions challenging prior convictions — or "strikes" — have asked for and gotten continuances.

But he anticipates that Three Strikes cases might force him to up the ante in coming months.

"We are seeing two to four cases per week that would not have been tried before." Garcia said. "Plus we're building a backlog of Three Strikes cases that have been set for trial, but have not gone out."

San Francisco District Attorney Arlo Smith estimates that criminal cases could eat up three of the city's 20 civil departments in coming months. That could not only squeeze out civil trials, but could also pose an architectural headache for the courts. The city's civil courtrooms don't have holding cells for defendants who are already in custody.

# GM Asks Court to Block Truck Recall

General Motors Corp. has asked a federal court to block a possible recall of millions of pickup trucks that Transportation Secretary Federico Pena found at risk of bursting into flames in wrecks, according to the Associated Press.

A complaint GM filed in U.S. District Court in Detroit claims that Pena's finding was illegal and arbitrary. It also said Pena rejected the recommendations of his agency's own safety experts and imposed his personal views.

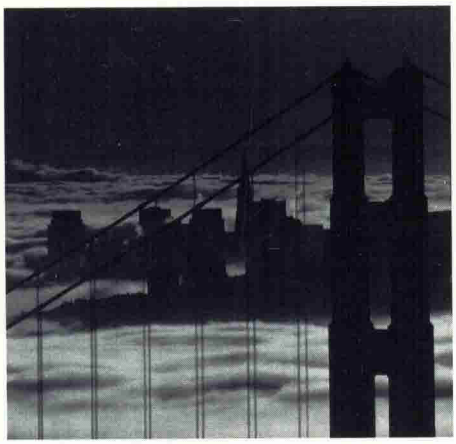
Pena on Oct. 17 said he had determined that 1973-1987 GM C-K pickup trucks present an "unreasonable risk" of fire in side-impact collisions because their fuel tanks are mounted outside the trucks' frames.

At that time, Pena acknowledged that the trucks met federal safety standards. But he said the law also requires that they be safe in "real world conditions." He said 150 people had died in crashes in which the trucks caught fire because of the placement of the fuel tanks.

"Since the secretary has agreed that GM's C-K pickups met the safety standards for fuel system integrity, there is no basis for any further proceeding against these trucks," GM general counsel Thomas Gottschalk said in a news release on the suit.

Transportation spokesman Richard Mintz said the suit was premature. He disputed GM's claims that Pena's actions were illegal.

# WALKUPDATES



**Jeff Holl**, in association with San Francisco attorneys John Davids and Tom Brandi, recently completed work to help pass a bill by Assemblywoman Marguerite Archie-Hudson (D. Los Angeles) which provides a 15 year statute of limitations for all Dalkon Shield claims. Governor Wilson has now signed the bill...**Dan Dell'Osso** has been elected to the ATLA Product Liability Committee Board of Directors. Dan recently spoke at USF Law School and Golden Gate Law School on product liability topics...**Mike Kelly** was selected by C.E.B. to serve as a consulting editor on C.E.B.'s upcoming Third Edition of "California Trial Objections." Earlier in the year, Mike served as a faculty member for the National Institute of Trial Advocacy's Western Regional Trial Skills program in San Diego...**Mary Elliot** was a panelist at the recent "Advanced Settlement Techniques" CLE program sponsored by the San Francisco Trial Lawyers Association, and also participated in a one day seminar sponsored by CTLA entitled "How to Try a Breast Implant Case"...**Dan Kelly** recently returned from Asheville, North Carolina where he attended a Board of Governors Meeting of the International Society of Barristers. In January, Dan will serve as a faculty member in La Jolla for a two day tort and insurance litigation program presented by the California Judges Association and The Rutter Group...**Cynthia Newton** served as co-instructor for an all-day program on preparation and trial of premises liability cases sponsored by the National Business Institute. The course, attended by attorneys from throughout the state, focused on issues including discovery strategies, arbitration, expert retention and final argument...**Richard H. Schoenberger** recently testified before the California Senate Judiciary Committee in opposition to a pending bill to immunity to 9-1-1 dispatchers. Rich also recently taught at an SFTLA seminar on "Handling Auto Accident Cases Effectively and Efficiently"...**Ron Wecht** will speak in December to the newly formed Aviation Section of the San Francisco Bar Association regarding the recently enacted "General Aviation Revitalization Act of 1994" which "revitalizes" the industry by restricting tort claims via a statute of repose.

# Tips on Enforcing Settlement Agreements

Although most clients retain attorneys to prepare cases for trial, the reality is that most cases settle well prior to trial. Whether over the phone, through mediation or in mandatory settlement conference, settlement, rather than trial is the most popular method of case disposition.

In this article, we provide some thoughts on how to make your oral and written settlement agreements enforceable. Code of Civil Procedure §664.6, as amended in 1993, provides the statutory vehicle for resolution of challenged settlement agreements. Under its provisions, a trial court may enter judgment enforcing a settlement upon proof that the settlement agreement is (1) in writing; and (2) the writing is signed by the parties themselves, or (3) is placed on the record while in court.

Whether counsel for the parties can bind their individual clients by signing such a settlement agreement remains an open question. The issue is presently pending before the Supreme Court in Levy v. Superior Court (Gallant) S035538.

When a dispute arises whether a settlement is enforceable pursuant to CCP §664.6, the trial court is empowered to hold a hearing, and decide factual issues based on declarations or live testimony, as well as to rely on the court's own recollection of the parties' agreement. (See, Fiore v. Alvord (1985) 182 Cal. 561; Richardson v. Richardson (1986) 180 Cal.App.3d 91.)

The rules relating to enforcement of settlements that are oral in nature, made outside the presence of a Superior Court Judge, remain somewhat muddled. Datatronic Systems v. Speron (1986) 176 Cal.App.3d 1168, holds that settlements made on the record at a deposition are not enforceable. On the other hand, an oral agreement reached before an arbitrator in a binding arbitration is a settlement agreement of the type that can be enforced per CCP §664.6. (See, In Re: Assemi (1984) 7 Cal.4th, 986).

The enforceability of a strictly oral agreement reached before a retired judge in a pretrial mediation has not been determined. However, reducing the oral agreement to writing is the simplest way to guarantee its enforceability.

# NEW ASSOCIATE JOINS FIRM

Michael Recupero, a 1993 graduate of Loyola Law School, has recently joined our firm.

Mike, who obtained his Bachelor's Degree (with honors) at St. Mary's College in Moraga, had previously worked for Girardi, Keyes and Crane, a mid-sized Los Angeles firm specializing in plaintiff's personal injury work prior to his association with our firm.

While in law school, Mike served as a member of the Loyola Law Review and also garnered multiple awards as the outstanding student in a number of subjects.

Mike has a special interest in medical device litigation, and while in law school, assisted in the briefing of Plenger v. Alza (1992) 11 Cal.App.4th 349.

We are pleased to have Mike join our ranks.

# INSURANCE COMPANY C.E.O.s NOT SUFFERING

*According to a copyrighted story in Business Insurance, "lists of the nation's rich and famous are starting to look an awful lot like a "Who's Who" in the insurance industry."*

Sally Roberts, reporting for the weekly corporate risk/employee benefit publication, noted that "almost half of the CEOs from the leading commercial insurers and reinsurers can be found in Forbes list of the best paid CEOs in America based on base salary, bonus, other compensation and stock gains." Insurance CEOs averaged $1,191,756 in base salary and annual bonus in 1993 according to the study.

Based on data taken from insurers' proxy and annual shareholder statements, the CEOs of Travelers, American International Group, USF&G, CNA, Chubb, and Aetna, all ranked among the top ten highest paid on a national basis.

Of the 37 chief executive officers on this year's list, 16 made more than one million dollars in salary and bonus, up from only 9 in 1992.

The chart below, based on data from the 8/29/94 Business Insurance article, compares 1992 and 1993 compensation for the ten highest paid CEOs in the survey. Although carriers are constantly complaining about narrow profit margins and the need for tort "reform," the salaries paid their chief executives suggest that times are not as lean as they portray.

| Company | 1993 CEO Cash Compensation | 1992 CEO Cash Compensation | Percent Change | Markent Value of Shares Held by CEO |
|---|---|---|---|---|
| Travelers, Inc. | $4,049,063 | $2,561,058 | 58.1% | $128,546,112 |
| American International Group, Inc. | 2,331,731 | 2,247,115 | 3.8 | 647,635,330 |
| USF&G Corp. | 1,658,475 | 1,593,463 | 4.1 | 642,813 |
| CNA Insurance Cos. | 1,482,716 | 808,333 | 83.4 | 61,250 |
| Chubb Corp. | 1,396,545 | 1,377,995 | 1.3 | 4,742,864 |
| Aetna Life & Casualty Co. | 1,325,000 | 775,961 | 70.8 | 938,075 |

## Workplace Harassment

*Continued from front page*

There are two actionable types of sexual harassment: (1) quid pro quo harassment occurs when a term of employment is conditioned upon unwelcome sexual advances (Highlander v. K.F.C.Nat. Management Co. (6th Cir. 1986) 805 F.2d 644); and (2) the creation of a hostile work environment because of the employee's sex. (Chamberlin v. 101 Realty, Inc. (1st Cir. 1990) 915 F.2d 777, 782).

Sexual harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives its victim of his or her statutory right to work in a place free of discrimination. Harassment exists when the sexually harassing conduct sufficiently offends, humiliates, distresses or intrudes upon its victim, so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well-being. (Accardi, supra, at 348.)

It is well-settled that sexual harassment constitutes subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights and therefore supports punitive damage allegations. Restatement of Torts, section 909(d) provides that a principal can be held liable for punitive damages where it ratifies or approves the act(s). Ratification may be established by any circumstantial or direct evidence demonstrating adoption or approval of the employee's actions by a corporate agent. The employer's knowledge can be demonstrated circumstantially by showing the pervasiveness of the harassment, which gives rise to an inference of knowledge or constructive knowledge. (Fisher, at 615.) Ratification may also be inferred from the fact that the employer, after being informed of an offending employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm and punishing or discharging the employee.

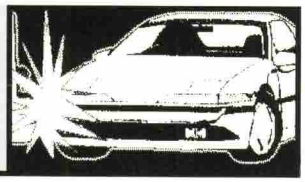
In Doe v. Roe Company, Ann M. Richardson and Mary E. Elliot represented six young women in a sex harassment action against a large finance company. One of the plaintiffs made specific complaints to the employer's Human Resource Department about the harasser, her immediate supervisor. His unlawful harassment included ordering that the plaintiffs wear short skirts to work, pervasive use of derogatory language (i.e. "dumb blondes", "stupid women") and unwanted touching. Because the employees' complaints were persistently ignored, Roe Company had substantial exposure. It recently agreed to settle the claims of the harassed employees for $1,375,000.

In addition to compensatory and punitive damages, Government Code Section 12965(b) authorizes recovery of attorneys' fees and costs to plaintiffs who prevail in these actions.

It is imperative that employers comply with current requirements regarding posting of DFEH/EEO guidelines on harassment and discrimination in the workplace, and that employers create and implement formal policies against work place harassment. The message sent to employers by the Weeks jury is loud and clear: prevent sex harassment or pay. Both Ann Richardson and Mary Elliot of our office have extensive experience and knowledge in this area. Associate counsel who have cases which they are interested in referring, or associating on, should feel free to call Ann or Mary.

# RECENT CASES

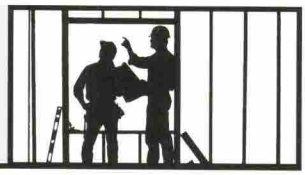
## PRODUCT LIABILITY



Roe Child v. Doe Manufacturers/Doe Public Entities

In Roe Child v. Doe Manufacturers/Doe Public Entities, Daniel Dell'Osso and Michael A. Kelly obtained a cash and structured settlement with a value of $1,450,000 on behalf of a 13 month old boy who sustained significant brain damage when the car in which he was riding was struck by a light truck driven by an intoxicated farm worker. At impact, the defendant's truck intruded into the passenger space of the foreign sedan in which the child was riding. His child seat pivoted towards the intruding truck, and he sustained massive head injuries. Plaintiffs claimed that the vehicle was not crashworthy because it did not provide a proper mechanism for accommodating the child seat; that the child seat itself was defective by reason of its size, dimensions, and lack of tether fastening devices which would have kept it upright; and that the highway/roadway intersection in question was dangerous because of the manner in which it was striped, signed and regulated. The defendants contended that sole fault for the accident was with the offending driver, who was found guilty of felony drunk driving and sentenced to jail. Past medical specials for the child were $200,000. He requires 24 hour a day attendant care. As part of the settlement a special needs trust was created so as to guarantee the child's rights to continued public/government benefits. The annuity portion of the settlement provides that the special needs trust will receive $4,000 per month, compounding annually at 3%, for life, guaranteed for a minimum of 15 years.

## CONSTRUCTION SITE INJURIES



Anonymous Plaintiff v. Thomas Equipment, et al

In Anonymous Plaintiff v. Thomas Equipment, et al., Kevin Domecus obtained a settlement in the amount of $2,277,000 on behalf of a 36-year-old glazier who suffered permanent and disabling injuries in a 45 foot fall at his work place in September of 1991. Plaintiff, working as a glazier at a construction project, was in an elevated work basket being lifted by a forklift when the lift tipped and fell. Defendants in the case were the general contractor at the project and the company which had rented the forklift to the plaintiff's employer. Plaintiff claimed that the equipment rental company had rented a forklift with inadequate load-carrying capacity. The weight of the work basket itself, without workers or material, was claimed to have exceeded the forklift's rated lifting capacity. The claim against the general contractor alleged a failure to provide a safe place to work. Plaintiff's injuries included fractures of his left lower leg, right heel, lumbar vertebrae and right wrist. He also sustained a closed head injury. Because of infection the leg was amputated above the knee roughly eight weeks after the accident. Plaintiff's right heel also became infected. As of the date of the settlement, he was still unable to put all of his weight on the right heel and required a crutch for walking. Plaintiff's doctors testified that he will likely require two, and perhaps three, surgeries in the future. Plaintiff's head injury also interfered with his ability to perform at a pre-accident cognitive level. Past medical expenses totalled $450,000. Plaintiff claimed $1,000,000 in past and future wage loss although this sum was highly disputed by the defendants. As part of the settlement, a substantial worker's compensation lien was waived, and plaintiff was given a credit of $350,000 against future medical expense.

Mendosa v. Peck & Hiller, et al.

In Mendosa v. Peck & Hiller, et al. (Santa Clara Sup.Ct. No. 727132) Cynthia Newton obtained a $90,000 settlement on behalf of a 40 year old building inspector who fell 14 feet from a partially constructed deck at the site of a computer chip manufacturing plant in San Jose. Defendants (the general contractor and framing sub-contractor) claimed that the plaintiff was negligent for walking outside of posted safety barricades, and further, that his claim was barred by worker's compensation and the holding in Privette v. Superior Court. Plaintiff sustained an L-3 anterior wedge fracture for which conservative treatment was given. Medical expenses were approximately $20,000. Under the terms of the settlement, the worker's compensation lien carrier agreed to accept $2,500 in satisfaction of a $29,000 lien.

## MEDICAL NEGLIGENCE

Alfandary v. Kaiser

In Alfandary v. Kaiser (Kaiser Arbitration) Dan Kelly and John Link successfully resolved an obstetrical malpractice claim involving brain damage alleged to have resulted from chronic prenatal hypoxia. The infant's mother testified that she experienced decreased fetal movement during the week prior to her delivery. However, the medical records documenting prenatal care did not reflect any change in the child's movement level. The attending Kaiser obstetrician documented normal movement and good fetal heart tones three days prior to the child's birth. Based on these allegedly normal findings, the obstetrician claimed he exercised his "best judgment" (BAJI 6.02) in deferring a final non-stress test. Plaintiff's experts claimed that non-stress tests should have been performed to determine the child's age prior to the birth so that an early cesarean section could have been performed. Plaintiff's experts claimed that the child's hypoxia was the direct result of diminishing placental function secondary to a post due date delivery. Defense experts claimed that if there was placental dysfunction, it was most likely due to chorionic villitis, a condition which probably existed well before the original due date. A settlement in the amount of $750,000 was agreed upon on the first day of the arbitration hearing. The settlement was later approved by the Superior Court, and the proceeds placed into a special needs trust so as to preserve the infant's entitlement rights to various benefit programs.

Mannshardt v. Kaiser

In Mannshardt v. Kaiser (Kaiser Arbitration) Michael A. Kelly negotiated a $900,000 personal injury/prospective wrongful death settlement on behalf

of a 38 year old fire fighter whose malignant melanoma was misdiagnosed by Kaiser pathologists in 1986, leading to metastatic spread of the disease. Plaintiff claimed that a mole removed from his ear in 1986 should have been identified at biopsy as presenting malignant melanoma. Had such a diagnosis been made, plaintiff claimed complete excision of the lesion and a greater than 50% likelihood of cure would have resulted. Kaiser claimed the tissue samples in question were suggestive of a benign (Spitz) nevus, and not diagnostic of malignant disease. The case settled one day before arbitration was to commence, and included settlement of both injury and prospective wrongful death cases on behalf of the plaintiff and his wife.

Doe v. Krames, M.D., et al.

In Doe v. Krames, M.D., et al., Paul V. Melodia and Kevin L. Domecus obtained a settlement having a present cash value of $2,525,000 on behalf of a 42 year old woman who suffered profound brain injury after an injection of local anesthetic into her neck. At the time of the injury plaintiff was 39. She saw the defendant physician (an anesthesiologist specializing in pain management) for complaints of pain behind her ear. The defendant injected the plaintiff's neck with a combination anesthetic/steroid solution. At the completion of the injection plaintiff was unconscious. She then began to seize. When she regained consciousness she was blind, disoriented and unable to sit or stand. As the symptoms persisted the defendant sought consultation from a neurologist. The two doctors decided plaintiff did not need hospitalization, believing she was undergoing a transient adverse reaction. (The neurologist later claimed that she had told Dr. Krames to hospitalize the plaintiff if the symptoms persisted.) The defendant kept plaintiff in his office for several hours, and then drove her home where he placed her in the custody of her mother. The next morning, plaintiff could not swallow and her condition deteriorated. Despite emergency brain surgery which saved plaintiff's life, she is now confined to a wheelchair and unable to care for herself. She is unable to read because of vision impairment, speaks through a tracheostomy, and is without movement in her extremities. She is, however, cognitively unimpaired.

## PREMISES LIABILITY

Family v. Realty Associates

In Family v. Realty Associates (El Dorado County) Paul V. Melodia obtained a $5,000,000 settlement arising from a propane gas explosion at a ski area condominium. The blast occurred as a family of five (husband, wife, sons 9 and 6, and daughter 3) were enjoying a ski vacation. The explosion killed the husband and the 3 year old daughter. The settlement included cash payments as well as annuities for the surviving children. Plaintiffs alleged negligence in the design and construction of the condominium unit, as well as strict liability under the holding of Becker v. IRM Corporation. Plaintiffs' negligence theory involved poor architectural design in the routing of propane gas supply pipes in an area where large quantities of snow could be expected to slide off of the roof directly above, causing the pipes to fracture. Although little evidence remained following the massive explosion, plaintiffs reconstructed the accident to demonstrate that snow did in fact slide from the roof above, causing an interruption in the propane supply and an accumulation of highly flammable vapors in a sub-basement. Ignition was most probably supplied by the pilot light of a water heater. The case was concluded after two court supervised settlement conferences conducted by the assigned trial judge. The five million dollar settlement was apportioned as follows: $3,200,000 for the death of the head of the household; $1,000,000 for the death of the 3 year old daughter; $100,000 each for the Dillon v. Legg claims of the surviving spouse and 6 year old son; and $600,000 to the 9 year old son who suffered both burn injuries and emotional distress. Following settlement of the plaintiffs' claims, cross-claims remain pending between the real estate developers, contractors, builders, lessors and lessees.

Victim v. Raugh

In Victim v. Raugh (S.F. Sup.Ct. No. 921024) John Echeverria and Cynthia F. Newton obtained a $600,000 settlement on behalf of a 27 year old woman who was sexually assaulted in her apartment in San Francisco. The assailant (a co-tenant in the building and an employee of a co-defendant remodeling company doing on-site renovations) as well as the owners of the building were defendants. The attacker was sentenced to 10 years in state prison for his actions. The defendants claimed that all fault for the assault rested with the convicted assailant. Plaintiff claimed that the defendants were negligent in hiring the assailant, and in renting a unit to him. He gained access to plaintiff's apartment by donning his workman's clothes and claiming a need to enter the unit to make repairs. Plaintiff's medical expenses were approximately $2,000. The case settled after being assigned to a trial department.

Sanchez v. Lennon

In Sanchez v. Lennon (San Mateo Sup.Ct. No. 380352) Ann Richardson negotiated a $145,000 settlement on behalf of 39 year old real estate appraiser who fell while on the premises of a property being appraised. In the course of her work, plaintiff was required to walk the outer perimeter of the dwelling. As she descended along one side of the house, she sensed the stairs becoming unstable. Fearing the stairs would collapse, she jumped to an adjacent sidewalk where she slipped, fell and sustained a cervical disc injury. Plaintiff contended that the owner of the house was under a duty to warn of the dangerous and defective nature of the stairs. Defendant claimed that plaintiff was entirely responsible for acting unreasonably in jumping off of the stairs. Medical bills and lost wages totalled approximately $40,000. Resolution of the case included compromise of a worker's compensation lien.

Tai v. TODCO

In Tai v. TODCO (S.F. Sup.Ct. No. 949989), Daniel J. Kelly and Richard H. Schoenberger settled a premises and strict product liability case on behalf of an 82 year old woman whose neck was impaled as she passed through a closing automatic driveway gate. The gate's latch, which protruded from its leading edge, caught plaintiff as she walked through to enter her residential community, and pinned her for several seconds, causing her to suffer a penetrating injury to the carotid artery and a severe stroke. The stroke left her with severe neurologic damage. She currently resides in a local convalescent hospital where she is visited frequently by her devoted family. Plaintiff claimed that the property manager knew of the inherent dangers in the automatic gate for years, yet never equipped it with a safety device to reverse it upon contact. Defendants strongly disputed liability,

# RECENT CASES

PREMISES LIABILITY *Continued*

claiming to be unaware of the gate's dangers and alleged that plaintiff was herself comparatively negligent for using the vehicle gate for entrance to the property rather than an adjacent pedestrian gate. Plaintiff's medical bills were approximately $75,000. The case settled for $375,000 on the first day of trial.

## VEHICULAR NEGLIGENCE

Burdick v. Bobac, et al

In Burdick v. Bobac, et al. (USDC No. #C-93-0437), Michael A. Kelly negotiated a $1,800,000 settlement on behalf of a 42-year-old San Francisco truck driver whose right (major) arm was severed in a freak accident. While riding as a passenger in the right-front seat of a Samurai Suzuki, on a dark, rainy night,the car's passenger side collided with the protruding steel tongue of a container-trailer chassis that had been parked perpendicular to the curb. The tongue, which extended roughly two feet beyond the container, first struck the "A" pillar of the vehicle, sliced through the sheet metal, and severed the plaintiff's right arm just below the shoulder. Microsurgeons at U.C.S.F. reattached the limb that night, but it has only 10% to 15% of normal function. Suit was brought against the trailer's lessor, the container consignee, the truck operator and the merchants who had allegedly directed positioning of the truck. All defendants (other than the operator) contended that sole and exclusive responsibility for the happening of the incident rested with the hauler, whose total insurance coverage was $250,000. The case was settled through the intercession of JAMS mediator Daniel Weinstein. Medical specials totalled approximately $156,000. Wage loss was highly disputed. Although the plaintiff could not return to truck driving, defendants claimed that he was capable of being re-trained to return to an occupation which paid as well or better.

We are available for association and/or referral in all types of personal injury matters. Fees are shared with referring counsel in accord with Rule of Professional Conduct 2-200. Additionally. if there is a particular subject you would like to see discussed in future issues of ***Focus on Torts*** please contact Michael Kelly or Lisa LaRue.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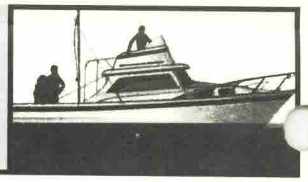
Koertje v. Burgess

In Koertje v. Burgess (Alameda Sup.Ct. H-158021-3) Ann Richardson obtained a $434,000 settlement on behalf of a 27 year old woman who was injured when an auto coming in the opposing direction on Crow Canyon Road struck her head-on. Plaintiff's two minor children, aged 3 and 2, were passengers in her car. Plaintiff's injuries included a fractured patella and ruptured spleen. She subsequently underwent a splenectomy and partial patellectomy. At the time of the injury plaintiff was employed as a part-time bakery clerk and lost only minimal earnings. Medical expenses totalled $35,500. All but $60,000 of the settlement was apportioned to the mother. The balance was apportioned to the 3 year old who had physical injuries as well as symptoms suggestive of post-traumatic stress disorder.

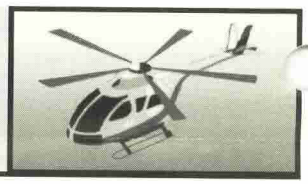
## AQUATIC INJURIES



Humphrey v. Unnamed Boat Owner

A settlement in the amount of $160,000 was achieved by Jeff Holl in Humphrey v. Unnamed Boat Owner. Plaintiff in the case was a 63 year old retiree who was riding as a passenger on a small fishing boat on the Petaluma River. As the boat was passing below a channel bridge, it was struck by a much larger power vessel operated by the defendant. The defendant's vessel actually climbed over the rear of the boat in which the plaintiff was riding, throwing him to the deck and causing him to sustain fractured ribs, pneumothorax and other injuries. Medical expenses were approximately $25,000. There was no wage loss as the plaintiff was retired at the time of the accident.

## AVIATION INJURIES



Heirs v. Anonymous Helicopter

In Heirs v. Anonymous Helicopter, (Confidential Settlement) Ronald H. Wecht obtained a $770,000 cash settlement on behalf of the wife and three children of a 46 year old English national who operated a graphic arts business outside of London. The deceased was killed in the crash of a helicopter while visiting in California. His surviving children brought suit for his death. Because the deceased was divorced at the time of his death, there was no claim asserted by a spouse. However, he maintained a close relationship with his children, visiting them frequently, vacationing with them at least twice a year and assisting with the cost of their schooling. The loss of support claimed by the children was highly disputed. Plaintiffs' economist calculated the present cash value of the loss at roughly $400,000 (U.S.). An economic analysis commissioned by the defense questioned the decedent's ability to support his children based on his lavish lifestyle and the amounts of income he was reporting to English taxing authorities. The case settled three days before trial.