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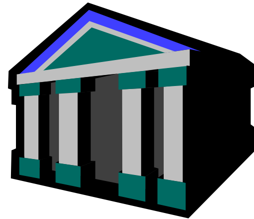
California Case Law Quarterly

Volume 1, Issue 1 **January 2004**

Rats...No Mold Here, Just Attorney Fees & Costs!



Cholakian & Associates successfully defended a landlord-tenant case in San Mateo County, California and recovered $105,000 in attorney's fees and costs from plaintiffs for the carrier.

By Heidi C. Quan

ASSOCIATE ATTORNEY/STAFF WRITER

Plaintiffs Mark Mudge and his wife, Carla Schroer, rented a single-family property in Redwood City from defendant and cross-complainant, Lyle Stinson. Prior to signing the lease, the plaintiffs viewed the property. Stinson's then 15 year old daughter showed the plaintiffs the property. Shortly after moving into the property, Mr. Stinson conducted a walk-through inspection with the plaintiffs. At that time, various repairs were noted.

In 2000 and 2001, plaintiffs signed two more leases. The rent increased each year starting at $3,200 per month in 1999 to $3,400 per month in 2000 to $3,900 per month in 2001.

Plaintiffs claimed that they noticed mold, water intrusion, rot and rodents. They also claimed that the problems were never resolved, despite making complaints to both Mr. Stinson and his daughter. Eventually, the plaintiffs moved out.

The plaintiffs then sued Stinson alleging breach of warranty of habitability. Plaintiffs also contended that they were constructively evicted because the unresolved issues made it impossible for them to remain at the property.

Plaintiffs claimed $50,000 in damages based on a 50% reduction of the rent paid over the three year tenancy. They also sought attorney's fees and costs of approximately $100,000.

Stinson cross-complained against the plaintiffs for breach of contract. Stinson admitted that there were water intrusion issues, but that he was diligently trying to fix the problems. Stinson further alleged that the level of mold was far greater outside of the home than inside. Further, Stinson was not made aware of any rodent problem until after the plaintiffs had moved out of the property.

See *Attorney Fees* on page 2

Carefully crafted policy provision pays off.

Policy Provisions control whether third party beneficiaries are required to reimburse insurer for medical expense benefits absent a direct a contractual relationship.

By Danielle F. O'Bannon

ASSOCIATE ATTORNEY/STAFF WRITER

In *Mercury Cas. Co. v Maloney* 113 Cal.App. 4th 799, an automobile passenger, Sharla Rae Maloney, suffered injuries as a result of an accident. Ms. Maloney did not have medical insurance and within a year of the accident incurred $4,411.35 in medical bills.

Pursuant to the driver's policy, the drivers insurer, Mercury Casualty Company was obligated to pay up to $5,000 in reasonable medical expenses incurred within a year by "any …person who sustains bodily injury, caused by accident, resulting in a collision, while occupying...the owned automobile, if being used by the named insured…"

See *Policy Provision* page 3

Attorney Fees

Continued from page 1

Stinson alleged that plaintiffs breached the lease by not paying the last two months of rent and moving out without notice.

Stinson sought the remaining two months on the lease, as well as attorney's fees and costs of about $100,000.

Ultimately, a San Mateo County jury found in favor of defendant, Lyle Stinson and returned a defense verdict. On the cross-complaint, the jury also found in favor of Mr. Stinson and awarded him the remaining two months rent which amounted to $7,800, plus interested for a total of $8,970.

Plaintiffs rejected a CCP section 998 offer of $3,750 to each plaintiff conditioned on plaintiffs reimbursing Mr. Stinson one month's rent.

After the trial, defense counsel negotiated a settlement of $105,000 in attorney's fees and costs pursuant to the prevailing party fee provision in the lease. That money was paid by plaintiff directly to Stinson's carrier, Farmers Commercial Insurance.

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Trial attorney, Kevin K. Cholakian, tried this case over 10 days in the Superior Court of San Mateo County, California. After deliberating only 2 hours, the jury verdict was unanimous: 12-0 on no breach of habitability and 12-0 on breach of contract on the cross-complaint.

No Bad Faith For Premium Increases

Recent California trend is to limit bad faith lawsuits and not expand them further.

By Danielle O'Bannon
ASSOCAITE ATTORNEY/STAFF WRITER

In *Jonathan Neil & Assoc. v Jones* 98 Cal.App.4th 434 , a collection agency brought a lawsuit against a trucking company to collect premiums that had not been paid. The trucking company brought a cross-complaint for bad faith claiming impropriety in connection with premium increases. A jury returned a $13 million verdict in favor of the trucking company, which was reduced to $7 million by the trial judge.

The Appellate Court reversed and held that no bad faith lawsuit in tort would be permitted as the case did not have to do with claims handling but with premium increases.

The court further stated that even though bad faith lawsuits for premium increases may be permitted in a worker's compensation context, they will not be permitted in other classes of cases.

The trend in California is to limit bad faith recovery and not expand it.

Employers with anti-harassment programs can limit damages

"Prompt employer intervention not only minimizes injury to the victim, but also sends a clear message throughout the workplaces that harassing conduct is not tolerated."

By Heidi C. Quan
ASSOCIATE ATTORNEY/STAFF WRITER

The California Supreme Court reversed a judgment and found that while California employers may be strictly liable for sexual harassment by supervisors, the damages may be limited if the harassed employee has not taken reasonable steps to stop the problem, including reporting the offending employee's conduct to their employer.

In *State Department of Health Services vs. Superior Court* (McGinnis), 03 C.D.O.S. 10088, Theresa McGinnis sued her employer for sexual harassment and sexual discrimination in violation of the Fair Employment and Housing Act.

While McGinnis was employed by the State Department of Health Services (DHS), Cary Hall was her supervisor. Beginning in 1996, Hall allegedly subjected McGinnis to inappropriate comments and inappropriate touching. McGinnis did not report it to management until November 1997. After McGinnis notified her employer of the harassment, DHS initiated disciplinary action and Hall retired.

See *Harassment* on page 3.

Harassment

Continued from pg. 2

McGinnis then sued DHS for sexual harassment and sexual discrimination. DHS moved for summary judgment arguing, among other things, that the failure to use the policies and procedures in place for reporting sexual harassment provided it a complete defense to the sexual harassment claims. The trial court denied the motion and the court of appeal denied the petition for writ of mandate.

While the Supreme Court agreed that an employee's failure to utilize the sexual harassment policies and procedures is not a complete defense, damages can be limited.

"An employee's failure to report harassment to the employer is not a defense on the merits to the employee's action under the FEHA," Justice Joyce Kennard wrote for a unanimous court, "but at most it serves to reduce the damages recoverable."

The Court further noted that such failure to report harassment reduces the damages only if the employee acted unreasonably in not sooner reporting the harassment to the employer and after considering the employer's anti-harassment policies and procedures and its past record of acting on harassment complaints.

Policy Provisions

Continued from pg. 1

Because the medical payments coverage under the policy was "excess" coverage, the policy also included a provision requiring reimbursement of such medical expense payments.

After receiving the medical expense benefits from Mercury, Ms. Maloney settled her claims against the driver who was responsible for the accident for $15,000. Thereafter, Mercury requested reimbursement from Maloney for amounts it paid under the medical payments provision of the driver's policy.

After Ms. Maloney declined to repay Mercury, Mercury filed an action against Ms. Maloney asserting breach of contract and common count. The parties agreed to submit the matter to the court based on stipulated facts and filed cross-motions for summary judgment. The trial court granted Ms. Maloney's motion and Mercury appealed.

The court of appeals reversed the judgment , holding that the passenger, as a third party beneficiary of the insurance policy, is required to comply with the conditions set forth in the insurance policy regarding medical expense benefits and thus is obligated to reimburse the insurer.

The policy provision specifically stated that "if payment is made under this coverage, to or on behalf of any person, such person agrees to reimburse the company to the extent of such payment from the proceeds if: (a) any settlement or judgment that may result from the exercise of any rights of recovery of such person against any party that such person claims is responsible for bodily injury to the person for which payment under medical expense coverage has been made."

The court rejected Ms. Maloney's argument that she was not a party to the contract and thus not obligated to comply with the provisions therein. The court reasoned that Ms. Maloney's rights were based upon the law's recognition that acts of contracting parties created a duty and established privity between the promisor and the third party beneficiary with respect to the obligation on which it was founded and accordingly the beneficiary rights under the contract were subject to the conditions imposed therein.

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Passengers may be responsible for reimbursement obligations to the insurer.

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Punitive Damages—is there a formula?

The Supreme Court handed down a new ruling on punitive damages. Will it change future awards?

By Danielle F. O'Bannon
ASSOCIATE ATTORNEY/STAFF WRITER

In *State Farm v Campbell* 2003 U.S. Lexis 2713 (U.S. Supreme Court, April 7, 2003), the Supreme Court reversed the ruling that the award of punitive damages violates the due process clause of the Fourteenth Amendment and remanded the case to the Utah courts to enter a punitive damage award "at or near" the amount of compensatory damage award.

The Court emphasized three factors discussed in *BMW v Gore* (1996) 517 U.S. 559 and *Cooper Industries v Leatherman Tools, Inc.* (2001) 532 U.S. 424 and stated that these will be the tests that govern this case.

The factors to review are: (1) reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to compensatory ; and (3) the relationship between the fines that the public authorities would impose for this conduct and the amount of the punitive damages.

The most important part of the Court's decision is the fact that the Court acknowledged that in the past it refused to establish a "bright line" fixed ratio or maximum ceiling for punitive damages. The court stated that in most cases, due process will not be afforded if the punitive damages ratio exceeds a single digit figure, which commentators believe signals somewhere between 1 to 9 times compensatory damages. The Court also indicated that if the compensatory damages themselves are substantial, the ratio should be lower or equal to compensatory damages.

However, the overall decision appears to indicate that a higher punitive damage award will be tolerated if the conduct that gives rise to the award is caused by physical injury rather than only economic harm. Thus, for the average individual claim there appears to be a ceiling on punitive damages of nine times the compensatory damages and a much lower multiple when the compensatory award is substantial.

So what does that mean for pending cases? The decision is binding, retroactive and can be applied to pending cases.

Our take: the era of vast unpredictability of awards is coming to an end!

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Punitive damages are intended to punish rather than to redress loss.

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No coverage for faulty workmanship

Be aware of your policy exclusions!

By Danielle F. O'Bannon
ASSOCIATE ATTORNEY/STAFF WRITER

In *Wilson v Farmers Insurance Exchange,* 102 Cal.App.4th 1171, the court of appeal affirmed the trial courts summary judgment in favor of Farmers who denied coverage to an insured for faulty workmanship pursuant to a policy exclusion.

Plaintiff owned a house, sold it and took a second mortgage. The house was insured by Farmers. After plaintiff sold the house, the new owners started renovating the house by tearing off the exterior walls and studs. Plaintiff was aware of the renovation and was told by the new owners that this would enhance the value. When the new owners stopped making payments, and plaintiff discovered that the renovation had not been completed, plaintiff foreclosed and filed a claim against Farmers for damage and loss of value of the house because of the unfinished renovation.

Farmers denied the claim and plaintiff' sued. Farmers summary judgment was granted by the court because its policy excluded damage arising from faulty or inadequate workmanship.

Expert Fees are expunged after first trial.

A new trial can ruin your chances of recovering your C.C.P Section 998 expert fees.

By Danielle F. O'Bannon
ASSOCIATE ATTORNEY/STAFF WRITER

In *Saakyan v Modern Auto, Inc.., 103 Cal.App.App.4th 383,* the first trial resulted in a defense verdict and judgment for defendant, Modern Auto Inc. which were set aside by grant of motion for new trial. After a verdict for plaintiffs in the second trial, the court denied plaintiffs' motions for expert witness feed under CCP §998 and prejudgment interest under Civ. Code §3291 on the ground that the first judgment extinguished any right plaintiffs may have acquired by virtue of their §998 offers.

The Court of Appeals affirmed the judgment and reversed the order. The court held that the effect of the trial court's grant of a new trial was to nullify the first judgment with the result that neither the judgment entered after the first trial, nor the special verdict upon which it was based, existed to extinguish benefits that may have arisen.

Added Terms To CCP §998 Offers Don't Add Up To Costs

Written confirmation with added terms are counteroffers.

By Heidi C. Quan
ASSOCIATE ATTORNEY/STAFF WRITER

In *Bias v. Wright*, 103 Cal.App.4th, 11, the appellate court reversed a trial court's ruling awarding costs to plaintiff when defendant added terms to a CCP §998 offer in a written acceptance after an oral acceptance had already been made.

Plaintiff sent defendant a CCP §998 offer for $15,000 that was silent as to how acceptance was to be carried out. After orally agreeing to the 998 offer, defendant followed up with a confirming letter accepting the offer, but added that each side would pay their own costs. Plaintiff disputed and the trial court ruled in favor for plaintiff and awarded costs to plaintiff.

In reversing the trial court's ruling, the appellate court concluded that the written response by the defendant changed the terms of the offer and was actually a counteroffer. Thus, there was no acceptance of plaintiff's original 998 offer.

While an oral acceptance can exist, it must be unequivocal and not contain any additional or new terms.

Watch confirming letters that change the deal ~ it could mean your costs!

"All Claims" Means Just That

Workers compensation release sufficient to discharge all claims.

By Heidi C. Quan
ASSOCIATE ATTORNEY/STAFF WRITER

In *Kohler v. Interstate Brands Corporation,* 103 Cal.App.4th 1096, a workers compensation release was sufficient to discharge a civil action brought against the plaintiff's employer.

Plaintiff filed a workers compensation claim and a separate civil lawsuit against her employer under the Fair Employment Housing Act (FEHA).

Subsequently, plaintiff entered into a compromise and release which settled her workers compensation claim. The release she signed discharged her employer from "all claims, known or unknown, arising from the injury." Based on this release, the trial court dismissed plaintiff's civil litigation claim.

The appellate court affirmed the trial court's decision noting that the workers compensation release was broad enough to include the FEHA claim. Therefore, the civil lawsuit was properly dismissed.

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Check all lawsuits and releases for language that may apply to your case.
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California Trial Lawyers Association

National Association of Subrogation Professionals (NASP)

Trucking Industry Defense Association (TIDA)

Cholakian & Associates, which has grown to 9 attorneys, is listed in Best's Insurance Directory, is AV rated by Martindale-Hubbell, and is retained defense counsel to a dozen major insurance companies doing business in California. This practice includes, though it is not limited to, the representation of carriers regarding commercial and personal lines claims as well as the defense of insureds involved in serious personal injury catastrophic trucking accident litigation, complex commercial litigation, product liability/fire subrogation matters and coverage litigation. This includes defense of matters involving allegations of construction defects, mold related claims, inter and intrastate trucking, commercial landlord/tenant, environmental liability, professional liability, including insurance agents, labor and employment law, officer's and director's liability, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

UPCOMING EVENTS *

- **San Francisco Defense Seminar Association** — **February 18, 2004**

Speaker: Chief Judge Marilyn Hall Patel — Luncheon at City Club, San Francisco

Introduction by Heidi C. Quan

President: Kevin K. Cholakian

- **NASP Regional Meeting** — **February 26, 2004**

Co-Chair and Panelist: Kevin K. Cholakian — Luncheon at City Club, San Francisco

- **Handling Automobile Personal Injury Claims in California** — **June 30, 2004**

Panelist: Kevin K. Cholakian — Hosted by National Business Institute

- **NASP National Conference** — **November 7 - 10, 2004**

Panelist: Kevin K. Cholakian — Atlanta, Georgia

* For more information on these events, please contact Lori Nichols at (415) 467-8200 ext. 200.

Danielle F. O'Bannon graduated from Santa Clara University with a B.S. in Economics in 1996, and received her J.D. from Pepperdine University School of Law in 1999. While attending Pepperdine University, she interned at the California Department of Justice, Office of the Attorney General, the Counsel's Chambers in London, and various large law firms.

Ms. O'Bannon began her legal career at the insurance defense law firm of Ericksen, Arbuthnot, Kilduff, Day & Lindstrom focusing on complex litigation cases, including construction defect, personal injury, premises liability, and professional malpractice.

Heidi C. Quan graduated from Golden Gate University School of Law in 1998 with Honors and Dean's List 1996-1998, receiving the Golden Gate University Merit Scholarship 1996-1997.

Ms. Quan worked with the U.S. Equal Employment Opportunity Commission as a Law Clerk and assisted Golden Gate University School of Law as a Student Recruiter. She was also a judicial extern for Associate Justice Timothy A. Reardon of the California Courts of Appeal, First District. Most recently, she was a Senior Associate with Ericksen, Arbuthnot, et al., specializing in complex litigation cases, including medical malpractice, business litigation, construction litigation, wrongful death, personal injury and employment law.

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Ms. O'Bannon and Ms. Quan currently specialize in landlord-tenant disputes, environmental torts, personal injury, subrogation, and uninsured/under-insured motorist cases.