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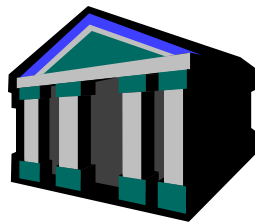
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Fire and Smoke and Vipers... Oh My!



Kevin Cholakian successfully defended a State Farm insured arising out of an auto fire accident case in Santa Clara County Superior Court just months after Cholakian & Associates prevailed in a subrogation case against Daimler-Chrysler arising out of the same fire.

By Colin H. Jewell

ASSOCIATE ATTORNEY/STAFF WRITER

In *Daley v. Ping*, a Santa Clara County jury, following a four day trial, returned a defense

verdict after deliberating only 23 minutes in favor of State Farm insured Michael Ping.

Plaintiff William Daley, a controller for a major Silicon Valley software company, brought a personal injury action against defendant Michael Ping, a bio-tech CEO, arising out of a two vehicle collision that occurred on Christmas Day 2000, on Highway 280 near the Los Altos Hills. Mr. Ping entered the freeway when his then almost brand new 1999 Dodge Viper suddenly caught fire. White smoke engulfed his windshield and flames quickly spread from the engine compartment towards the back of the vehicle. He lost control of the flaming Viper which crossed four lanes of traffic, broadsiding into the side of plaintiff's vehicle. Plaintiff claimed that Mr. Ping's negligence was the legal cause of the accident, which included claims that he lost his position at the software company as the result of medical problems that resulted from the accident.

Although his principal claim was for lost wages and loss of earning capacity, he also made claims for medical expenses and damage to his vehicle.

Ping's defense was that he did not breach any duty of care to plaintiff. Defendant's accident reconstruction expert, William Woodruff, Ph.D., testified that a defective hose connection failed in the Viper, causing power steering fluid to ignite on hot engine components. Resulting smoke obstructed Mr. Ping's view of the roadway and resulted in him losing control of the vehicle.

The jury returned a defense verdict, finding that Mr. Ping was not negligent in the operation of his vehicle.

See *Ping* on page 2

Unambiguous Policy Language Results in Barring Husband's Additional Loss of Consortium Claim

Where automobile insurance policy was unambiguous, per accident coverage limit applied to bar husband's loss of consortium claim.

By Timquin Larsen

ASSOCIATE ATTORNEY/STAFF WRITER

In *Mercury Insurance Company v. Ayala*, Cal. App. 2 Dist.,

2004, Maria Medina was struck by a car driven by an uninsured motorist, in the parking lot of Robinson-May, her employer. Robinson-May, self insured for workers compensation claims, paid Medina expenses in the amount of over \$15,000. Medina and her husband, Francisco Aiello, had insur-

ance with Mercury Insurance Company.

The declarations page listed uninsured motorist bodily injury coverage of \$15,000 per person and \$30,000 per accident.

See *Loss of Consortium* page 4

Ping

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Prior to trial, Cholakian & Associates represented State Farm Mutual against Daimler-Chrysler in a product liability subrogation case in which State Farm recouped the damages that it paid to Mr. Ping for the total loss of his Viper. Although State Farm suggested that Mr. Daley settle reasonably with State Farm's insured prior to the conclusion of that case so that it could be included as part of its subrogation action, Mr. Daley would

not agree to State Farm's offer, seeking damages greater than what State Farm felt were reasonable.

Accordingly, because plaintiff also rejected a C.C.P. Section 998 Offer prior to trial, plaintiff Daley recovers nothing and pursuant to Memorandum of Cost defendant has submitted to the Court, State Farm expects to recover back from Daley close to \$10,000 in costs.



Is there Coverage for Mold?

The insureds have a duty to cooperate with their insurers!

Coverage For Wet And Dry Rot?

Homeowner's policy exclusion for damage caused by wet and dry rot was contradicted by express provision of coverage for collapse warranting resolution of ambiguity in favor of insured.

By Timquin Larsen

ASSOCIATE ATTORNEY/STAFF WRITER

In *Jordan v. Allstate Insurance Company*, Cal. App, 2 Dist. 2004, Mary Jordan purchased a

homeowner's policy from Allstate Insurance Company. The policy expressly excluded any loss caused by wet or dry rot. It also expressly provided additional coverage by any loss resulting from an entire collapse of all or part of the structure due to hidden decay. Sometime thereafter, a window in Jordan's living room fell out and a section of the living room floor collapsed. An inspector advised Jordan that damage to

her home had been caused by water conducting fungus known as *Meruliporia Incrassata* (Poria). The inspector also advised her that the living room was in imminent danger of collapse.

Jordan filed a claim with Allstate, which was denied. She then sued the insurer for breach of contract and related causes of action.

See *Dry Rot* on Page 5

Cooperation Is The Name of The Game

Failure to Submit to Examination Under Oath Bars Action Against Insurer.

By Colin H. Jewell

ASSOCIATE ATTORNEY/STAFF WRITER

In *California Fair Plan Association v. Superior Court (Darwish)* (2004) 115 Cal.App.4th 158, the Court of Appeal held

that a failure of a named insured to submit to an examination under oath pursuant to the terms of the insurance policy barred an action by the insured against the insurer for alleged failure to pay for a covered loss.

Darwish was the trustee of a trust that held real property. She was unable to

obtain insurance from Fair Plan to cover the property. Fair Plan declined to insure real property owned by a trust. Darwish assigned an interest in the property to Rivera, who then applied to Fair Plan for coverage without informing Fair Plan he was an assignee and owned

See *Cooperation* on page 3.

Cooperation

Continued from pg. 2

only a small portion of the property. After the property was vandalized, Rivera filed a claim. Fair Plan asked Rivera to attend an examination under oath as required by the policy and to produce documents and records to adjust the claim. Rivera did not comply. Fair Plan did not cover the loss. Darwish sued, seeking recovery of the vandalism loss.

Fair Plan moved for summary judgment contending that Darwish was not enti-

tled to payment because of Rivera's failure to submit to an examination under oath. The trial court denied the motion and ruled that Rivera could recover the entire amount of the loss, reasoning that Fair Plan never showed it was prejudiced by any delay caused by Rivera's failure to submit to an examination.

The Court of Appeal granted Fair Plan's petition for a writ of mandate directing the trial court to enter summary judgment in favor of Fair Plan. The court held the failure of a

named insured to submit to examination under oath concerning a first-party loss claim under the policy negates the duty of the insurer to pay on the claim and thus bars a suit to compel such payment, without necessity of showing resulting prejudice to the insurer. The court based its decision on the fact that submission to examination was a condition precedent to the duty to pay on the claim.



Cooperation is key in any relationship!

Separate Offers and Allocation-Yes...Conditioned 998 Offers-No.

Where Several Plaintiffs are involved, the Defense Must be Careful When Making CCP §998 Offers

By Timquin Larsen

ASSOCIATE ATTORNEY/STAFF WRITER

Either party may serve on the other a written offer to allow judgment to be entered on specified terms. Such offer can be made as late as 10 days prior to trial.

If accepted, the clerk or court must enter judgment accordingly, upon filing the offer with proof of acceptance.

If not accepted within 30 days after service, or by commencement of trial (which ever occurs first),

the offer is deemed withdrawn and cannot be given in evidence at trial. If plaintiff recovers less at trial than defendant's C.C.P. Section 998 pre-trial offer, defendant may be regarded as the "prevailing party" and entitled to expert witness fees, and attorneys' fees where provided for under statute or contract.

When making offers to settle plaintiffs jointly, you must be sure that it is an effective offer. Section 998 penalties cannot be imposed against plaintiff for failure to accept an offer to several plaintiffs jointly with no indication of how it is to be allocated. Because there is no way to tell how much each plaintiff will receive under the offer,

it cannot be determined whether each plaintiffs' recovery at trial was "more favorable" than the offer: "As a matter of law, only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under Section 998." *Meisner v. Paulson* (1989) 212 CA 3d 785.

Likewise, an offer to several plaintiffs that is conditioned on acceptance by all of them is invalid. *Hutchins v. Waters* (1975) 51CA 3d 69. Accordingly, it is recommended that separate 998s be served upon each plaintiff to avoid any confusion.

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**Watch your
CCP §998
offers closely
when there are
several
plaintiffs.**

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**Supreme
Court OK's
Employers
Favoring
Older
Employees
Over Younger**

~

Win One for the Old Geezers

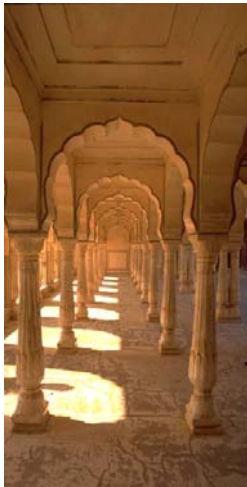
By Colin H. Jewell

ASSOCIATE ATTORNEY/STAFF WRITER

In *General Dynamics Land Systems, Inc. v. Cline* (2004) Cal. Daily Op. Serv. 1515, the United States Supreme Court (Souter, J.) held that the Age Discrimination in Employment Act of 1967, 29 U.S.C. section 623(a)(1) (ADEA) does not bar employers from favoring older employees over younger employees.

A collective-bargaining agreement between petitioner company and a union eliminated the company's obligation to provide health benefits to subsequently retired employees, except as to then-current workers at least 50 years old. Respondent employees, who were then at least 40 and thus protected by the ADEA, but under 50 and so without promise of the benefits, claimed before the Equal Employment Opportunity Commission (EEOC), that the agreement violated the ADEA because it discriminated against them because of their age. The EEOC agreed and invited the company and the union to settle informally with the younger employees. When they failed, the younger employees brought an action under the ADEA and state law. The District Court dismissed, calling the federal claim one of "reverse age discrimination" upon which no court had ever granted relief under the ADEA. The Sixth Circuit reversed, reasoning that the Act's prohibition of discrimination is so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so.

The Supreme Court reversed the circuit court, holding that the ADEA's text, structure, purpose, history, and relationship to other federal statutes show that the statute does not mean to stop an employer from favoring an older employee over a younger one. Congress's interpretive clues speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better. There was no evidence in the record that a social problem required a federal statute to place a younger worker in parity with an older one. The ADEA's restriction of the protected class to those 40 and above confirms this interpretation. If Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40.



Loss of Consortium

Continued from page 1

Both Medina and Aiello made claims.

The policy promised to pay "all funds which the insured shall be legally entitled to cover other damages from the owner, or operator of an uninsured motorist vehicle because of bodily injury, sustained by the insured, caused by the accident, and arising out of the use of such uninsured motorist vehicle."

See *Loss of Consortium* on page 5

Dry Rot

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The trial court granted summary judgment in favor of Allstate, finding that the policy exclusion for wet or dry rot barred coverage for Jordan's loss. The court also ruled that the policy's additional coverage for collapse applied to actual collapse only and did not cover imminent collapse.

The Court of Appeal reversed the trial court's holding. The appellate court found that the wet and dry rot exclusion and additional coverage provisions of the policy directly contradicted each other.

Wet and dry rot is most often, and was in this case, a type of hidden decay. Thus, the policy both expressly excluded and provided additional coverage for the same type of damage. That ambiguity had to be resolved against the insurer.

The appellate court also found that the additional provision of the policy covered only actual, and not imminent collapse. Thus, Jordan would be entitled to coverage under this provision only if her home suffered an *actual* collapse, and not merely the warning of imminent collapse. However, the appellate court

found that this was an issue of fact that remained to be resolved. Jordan merely showed that a window fell out and part of a floor gave way. Whether this constituted an actual collapse of that part of the house was a question of fact that had to be resolved by the trial court.



**Avoid
Ambiguity In
Policy
Language!**

Loss of Consortium

Continued from page 4

The policy also provided that the limits of liability as applicable to each person were the limits of the company's liability for all damages arising out of bodily injury sustained by one person in any one accident, where bodily injury sustained by one person was deemed to include all injury and damages for care, loss of consortium and injury to any inter-personal relationship sustained by others as a consequence of such bodily injury.

Mercury denied the claims, claiming the policy's unambiguous language meant that

the per person limit of \$15,000, not the per accident \$30,000 limit, applied. Mercury sued for declaratory relief citing that both claims were subject to a single \$15,000 per person limit, which was exhausted as reduced by workers compensation benefits paid to Medina. Medina and Aiello cross complained for declaratory relief, breach of contract, and bad faith.

The trial court granted Mercury's motion for summary judgment, ruling that the claims were not covered. Mercury demurred successfully to the cross-complaint on that ground.

The court of appeal affirmed the judgment. The court held that the trial court properly entered the judgment for Mercury based on the unambiguous policy language.



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**Clear Policy
Language
Pays Off!**
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Defense Seminar Association
(President)



Cholakian & Associates, which has grown to 10 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 *

- **Damages in California Litigation- Civil Trial Practice** **September 28, 2004**
Panelist: Kevin K. Cholakian Hosted by National Business Institute
Oakland, CA
- **NASP National Conference** **November 7 - 10, 2004**
Panelist: Kevin K. Cholakian Atlanta, Georgia
- For more information on these events, please contact Maureen Liu at (415) 467-8200 ext. 200.

Kevin K. Cholakian attended North Carolina School of the Arts in Winston-Salem, North Carolina his senior year of high school 1971-72 on a full scholarship. Mr. Cholakian then attended San Francisco Conservatory of Music on a Ford Foundation Scholarship from 1972-1974. He graduated magna cum laude with a B.A. in Philosophy from California State University, Fresno, in 1977. From 1976 to 1978, he served as Chief Administrative Assistant to California State Senator Rose Ann Vuich (first woman elected to the California State Senate). He received his law degree from the University of California, Hastings College of the Law in 1981. At Hastings, he was Executive Editor of the Hastings Communications and Entertainment Law Journal. Mr. Cholakian began his legal career as an employment and product liability defense lawyer, practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy (1981-1983) and McCutchen, Doyle, Brown & Enersen in San Francisco (1983-1987), and managed the defense practice at Kinder, Wuerfel & Cholakian (1988 through 1999). He has continued to specialize in high exposure personal injury defense, bad faith, product liability/fire subrogation matters, construction defect, coverage and employment/housing discrimination matters. Mr. Cholakian regularly defends cases that have exposures in excess of \$1,000,000.00. Mr. Cholakian also specializes in the defense of trademark, advertising injury and ADA cases. He successfully defended Clint Eastwood and the Mission Ranch in a high profile ADA case. He has tried and defended more than 20 cases with verdict exposure greater than \$100,000.

Mr. Cholakian is a member of the following organizations: Defense Research Institute (DRI), the International Association of Defense Counsel, the Northern California Association of Defense Counsel, the American Bar Association, the San Mateo Bar Association, Bar Association of San Francisco, the San Francisco Trial Lawyers Association, the California Trial Lawyers Association, National Association of Subrogation Professionals (San Francisco Chapter President) (NASP), and Trucking Industry Defense Association (TIDA).

Mr. Cholakian is the current President of the San Francisco Defense Seminar Association, a 40 year old organization comprised of defense litigators. Mr. Cholakian sits on the Executive Committee of the Board of Governors of the City Club of San Francisco.

Colin H. Jewell received his A.B. from the University of California Berkeley, and his J.D. from the University of San Francisco School of Law in 1985. He argued and briefed Martinez v. Scott Specialty Gases, Inc. (2000) 83 Cal.App.4th 1236 (mandatory arbitration); and briefed Hejmadi v. Amfac, Inc. (1988) 202 Cal.App.3d 525 (seminal wrongful termination opinion). The majority of Mr. Jewell's career has been spent handling complex insurance defense litigation, with an emphasis on catastrophic and high exposure personal injury, medical malpractice, landlord/tenant, and coverage.

Timquin Larsen received his J.D. in 2000 from the University of San Francisco. Prior to attending law school, he worked for one of the largest insurance carriers as a Complex Claim Specialist. Mr. Larsen began his litigation practice at Presholt & Fidone, an insurance defense firm, where he managed files in litigation involving breach of contract, construction defect, and wrongful death matters. He continues to handle complex insurance defense matters for Cholakian & Associates.

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