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# California Case Law Quarterly

Volume I, Issue 3

Sept. 2004

## **Name that Product: Overcoming the Economic Loss Rule**



**Cholakian & Associates successfully prevailed on a Motion for Summary Judgment, effectively eliminating the risk that State Farm would be left out in the cold as they sought reimbursement for monies paid out to their insured for damages incurred due to another's negligence.**

On February 12, 2003, Ver-dell Baskin was driving his 1999 Pontiac Grand Am in Inglewood, California, when he began to see smoke rising

from around the edges of the engine, hood and fenders of his car. He pulled the vehicle off to the side of the road, where-upon the engine died and a fire immediately broke out under the hood engulfing the entire engine compartment in flames.

A subsequent inspection of the vehicle revealed the cause of the fire to be a failure of the high-pressure power-steering hose connected to the steering rack at the rear of the engine. The defective hose caused power steering fluid to spray over the hot exhaust manifold, whereupon it flashed into flame. Mr. Baskin's insurance carrier, State Farm Mutual Automobile Insurance Company, paid Mr. Baskin \$9,829.55 in damages.

State Farm then sued General Motors in subrogation under

strict products liability and breach of warranty.

General Motors filed a Motion for Summary Judgment based upon the Economic Loss Rule, which holds that, where the product or property itself is solely damaged, a plaintiff's recovery is in contract only, not in tort.

Herein lies the debate: Was the power steering hose a component within the vehicle itself, as General Motors argued, in that they are one and the same?

See *Economic Loss Rule* on page 2

## **"Dude, Where's My Corpse?"**

**Insurance Carrier May Be Held Liable to Pay on \$80 Million Settlement for Criminal Acts by Son of Insured Not Covered Under the Policy.**

It seemed like what happened was straight out of a bad horror movie, only it was real and this was Georgia - not Hollywood. Three hundred thirty-four bodies of loved ones were found

strewn across the grounds of a place where departed loved ones would be sent to be cremated.

Hundreds of families who entrusted the remains of their loved ones to the Tri-State Crematory, or to funeral homes who contracted with this crematory, received startling news in February 2002. For almost 30 years, the Tri-State Crema-

tory of Noble, Georgia, founded by the deceased Ray Marsh and operated by his son Ray "Brent" Marsh, routinely received bodies from funeral homes in Alabama, Georgia and Tennessee for cremation.

See *Crematorium* on page 2

## Economic Loss Rule

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Or, was the defective power steering hose a separate component part, whose defect caused damage to an otherwise non-defective part (ie. the entire engine compartment)? The Los Angeles Superior Court decided in favor of the latter, and rightly so.

Within the last 5 years, there has been much activity in new case law pertaining to the Economic Loss Rule, where for decades prior, courts would rely upon old law, which was generally and broadly applied.

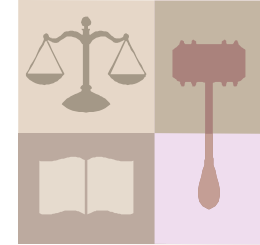
General Motors relied solely upon *Seely v. White Motor Company* (1965) 63 Cal.2d 9, for the proposition that where a product injures only itself, the applicable remedies are in contract and warranty only, and that tort claims are precluded under the Economic Loss Rule. This is simply an inaccurate statement of the current law on this issue. California law is clear that the

Economic Loss Rule does not apply to bar a plaintiff's claim in tort where a defective part causes damage to another, otherwise non-defective part. *Gherna v. Ford Motor Company* (1966) 246 Cal.App.2d 639. This was confirmed more recently in two new decisions: *Jimenez v. Superior Court* (2002) 29 Cal.4th 473; and *Mesa Vista South Townhome Association v. California Portland Cement Company* (2004) 118 Cal.App.4th 308.

In *Jimenez*, homeowners were successful in suing manufacturers of defective windows installed into mass-produced homes, when the defective windows caused damage to the rest of the home. And, in *Mesa Vista*, a cement distributor was held strictly liable in tort when the cement they supplied to the plaintiff homeowner's association for the purposes of building foundations for new condominiums caused a defect in the resulting slabs of cement.

The two most remarkable aspects to *Mesa Vista* are: 1) the cement supplied was not defective; it only became defective when coupled with the purpose for which it was to be used; and 2) at the time of trial, the only physical injury was to the product itself—the cement slabs, and not to the condominiums.

To apply the Economic Loss Rule, one must first determine what the product at issue is. Only then can the actual injury be determined; whether it was to the product itself, in which case recovery would be barred in tort and plaintiff would only be left with a cause of action on a contract theory, or if the injury was to a product other than the defective product itself, where plaintiff would be able to recover in tort. The Los Angeles Superior Court's application of these new cases opens the door for subrogation specialists and insurance carriers alike, who have endured decades of decisions leaving them on the losing end of an Economic Loss Rule argument.



**No bar to plaintiff's tort claim where a defective part causes damage to an otherwise non-defective part.**



## Crematorium

Continued from page 1

However, the crematorium had been foregoing cremations and passing off wood chips, ground cement and other substances as ashes. As if that wasn't disturbing enough, the recovery of 334 bodies from the property by the Georgia Emergency Management Agency created an image so vivid that it made the mourning of a loved one pale in comparison.

On March 18, 2003, the District

Court granted the plaintiff's motion for class certification.

D. Dwayne Lee, the grandson of Alma Sykes, whose remains were one of hundreds entrusted to the crematorium, explained that the filing of a class action was done so thoughtfully, so as to enable other families affected by this disaster to have some time to deal with the news, while at the same time protect their interests in the process.

The Complaint charged (1) breach of contract; (2) negligence; (3) willful interference with remains and intentional mishandling of a corpse; and (4) negligent interference with remains of a corpse.

See *Crematorium* on page 3

## *Crematorium*

### **Continued from page 2**

On March 5, 2004, opening arguments in trial commenced. Many funeral homes had already settled their claims with the plaintiffs in the amount of \$36 million. The few remaining defendants who had not entered into settlement agreements included five funeral homes, Ray "Brent" Marsh and the Estate of Ray Marsh. However, on March 11, 2004, with all of the settlements preliminarily or finally approved by the Court, the Marsh defendants withdrew from the tentatively approved settlement. Instead, on August 26, 2004, the parties reached a new global settlement.

"Under this agreement, Clara Marsh (Brent's mother and Ray Marshes' wife), Brent Marsh and the estate of Ray Marsh are agreeing to the entry of an \$80 million dollar judgment against them. Also, the crematory buildings and other structures of the business will be respectfully dismantled or removed from the property, and the crematory property will be returned to a natural state, as a memorial and place of private repose. In addition, none of the Marshes will ever profit, directly or indirectly, from telling of these events."

Ray "Brent" Marsh still faces 787 criminal charges in an October trial. Therein lies the problem for all.

### **Who is to pay?**

Clara and her husband, founder Ray Marsh, took out an insurance policy for the crematorium from Georgia Farm Bureau.

However, the policy didn't cover their son, Brent Marsh, and didn't cover criminal acts.

In June 2004 and months before the \$80 million settlement was entered into, a Georgia judge put down a consent order, stating that the insurance policy did not cover what happened at the crematorium.

See *Crematorium* on page 5



### **From Crematorium Into Memorial As Part of Settlement**

## ***No Jewels, No Coverage, No Lawsuit!***

### ***False Representations by an Insured's Independent Broker Cannot Be***

### ***Imputed to the Insurer.***

As Araceil Rios' luck would have it, she became the poster-child for the importance of reading the fine print. Upon purchasing a jewelry store in Los Angeles, she contacted her insurance broker, J.C. Whilt & Company, to purchase an insurance policy. She specifically requested coverage for theft, and was told by her broker that the policy she purchased through Scottsdale Insurance Company contained such a provision.

However, it did not and shortly thereafter, the store was burglarized. Much to her surprise and dismay, her carrier denied her claim.

After meeting with Ms. Rios, JC Whilt & Company contacted Scottsdale Insurance to request a policy that covers theft. UCA General Services Insurance Company, through which Scottsdale Insurance provides its policies, advised JC Whilt & Company that they would not quote a policy that covers for theft, unless certain upgrades were made to the building in which the jewelry store was to conduct business. When Whilt informed the insurer that no such upgrades had been made to the building, UCA refused to provide the "special" form coverage, which would provide coverage for theft.

In fact, UCA returned Rios' application, striking out the word, "special" and wrote over it the words "basic coverage," effectively counter-offering with a policy that did not cover for theft. On the same appli-

cation, UCA then provided the policy quote for basic coverage.

Whilt, in turn, requested that UCA provide the basic coverage through Scottsdale Insurance "per [their] quote." In effect, Whilt requested a policy without coverage for theft, and Scottsdale Insurance issued the policy. Whilt then presented the policy binder to Ms. Rios, and represented to her that the policy included "special" form coverage which would cover theft.

See *False Representations* on page 4

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### **Independent Broker's Representations Not Imputed To Carrier**

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## False Representations cont'd.

Continued from page 3

After her store was burglarized, Ms. Rios submitted a claim with Scottsdale Insurance Company, only to have her claim denied due to the lack of coverage for theft.

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**“The Insurance Code specifies that an independent insurance broker is a person who, for compensation and on behalf of another person, transacts insurance...with, but not on behalf of, an insurer.”**

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She then filed a lawsuit against the insurer, alleging breach of contract, breach of implied covenant of good faith and fair dealing and for negligent misrepresentation for their failure to honor their policy and indemnify her for her loss. Summary judgment was granted and she lost on all claims. The decision was affirmed on appeal.

At the hearing on the Motion for Summary Judgment, the court ruled in favor of UCA and stated in pertinent part, “Put quite simply, insurance brokers [such as Whilt], with no binding authority, are not agents of insurance companies, but are rather independent contractors...” *March & McLennan of California, Ins. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 118. “The Insurance Code specifies that an independent insurance broker is a person who, for compensation and on behalf of another person, transacts insurance...with, but not on behalf of, an insurer.” Insurance Code section 1623. The court ruled that Whilt was not an agent of the insurer, per se, but merely an agent for the limited purposes of receiving the premiums and providing a copy of the policy to the insured.

As a last ditch effort, Ms. Rios argued that UCA’s alteration of her application amounted to fraud on the part of UCA. The court disagreed. Instead, it ruled that “an application for insurance is a proposal...it is not a completed contract until it is accepted by the insurer in the same terms in which the offer was made. If the acceptance modifies or alters any of the terms of the proposal, it must then in turn be accepted by the applicant to be effective as a contract.” *Linnastruth v. Mutual Benefit etc. Assn.* (1943) 22 Cal.2d 216, 219.

Unfortunately for Ms. Rios, her application was altered to reflect a counter-offer, which was the only coverage offered by UCA, and she accepted that counter-offer through Whilt. Thus, UCA’s modifications to her application lacked misrepresentation. Ms. Rios relied upon the misrepresentations of Whilt. But, she also failed to read what she was signing, before she signed it.

**Moral of the story: READ EVERYTHING BEFORE YOU SIGN!**

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## *Without express intent, release insufficient to bar civil suit.*

**Injured workers who signed standard workers’ compensation settlement agreement was not foreclosed from asserting causes of action in a civil case that fell outside of the scope of workers’ comp scheme.**

Recently, the California Supreme Court affirmed a judgment of the Court of Appeal holding that an injured worker did not release causes of action which fell outside the scope of the workers’ compensation scheme when she signed a

standard form used to settle workers’ compensation claims.

In *Claxton v. Waters*, 04 C.D.O.S. 7973, Carolyn Claxton filed a workers’ compensation claim against her employer, Pacific Maritime Association, when she slipped and fell. One month later, she filed a separate workers’ compensation claim against PMA for injury due to sexual harassment. Claxton later filed a civil lawsuit against her employer and her supervisor in violation of the Fair Employment and Housing Act.

Claxton thereafter settled her workers’ compensation claim and she executed a standard pre-

printed compromise and release form. This form referenced only the two workers’ compensation claim numbers, but made no reference to the pending civil suit.

After a workers’ compensation judge approved the settlement, Claxton’s employer and supervisor filed an amended answer in the civil case including an affirmative defense that the execution of the workers’ compensation settlement extinguished her claim in the civil suit.

See Release on page 5

***Crematorium cont'd.***

**Continued from page 3**

Therefore, Georgia Farm Bureau would not be liable to pay on any settlement with the plaintiffs. However, that all changed on August 27, 2004, when a different Georgia judge set aside that consent order, giving hope to the hundreds of families seeking to collect on the \$80 million settlement.

Not only do the attorneys for the carrier insist that the policy didn't cover Brent Marsh or cover for criminal acts, but they assert that they weren't involved in the settlement negotiations that led to the \$80 million settlement. As such, attorneys for Georgia Farm Bureau argued that they should not be forced to pay on the \$80 million dollar settlement.

Regardless, because Clara Marsh is "an extremely nice person who is at the age and in the circumstance where she is unable to go out and get a job,"

the carrier agreed to put up \$400,00.00 in trust for Clara Marsh and for her grandchildren. Counsel for the Marsh family in the criminal matter zealously stated that other than Brent Marsh, he did not feel any other Marsh family member had anything to do with the mishandling of the remains.

It was believed that the \$80 million settlement was brought on by a \$3.5 million class action lawsuit filed against Clara Marsh. In it, plaintiffs alleged that Clara Marsh knew or should have known about the mishandling of the bodies, saying she had swept out a room where bodies were stacked, and performed yard work near where more bodies were found. Counsel for Clara Marsh vehemently denied the allegations, stating not only was the \$80 million not brought about by the separate \$3.5 million lawsuit against Mrs. Marsh, but that she had nothing to do with, nor had any knowledge of, the mishandling of the bodies.

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Much litigation is expected to follow in the battle by the plaintiffs to recover the \$80 million judgment, which was entered on August 26, 2004.

***Release cont'd***

**Continued from page 4**

Claxton sought summary adjudication as to the newly asserted defense and her employer and supervisor moved for summary judgment, which the trial court granted. The court of appeal reversed the trial court's granting of the employer's MSJ.

The California Supreme Court affirmed holding that Claxton did not release her sexual harassment claims by executing the standard form release regarding her workers' compensation claims. The Court held that an injured employee's knowledge and intent to release benefits

must be established separately from the standard release language. Not all claims are necessarily released via the standard form unless accompanied by specific findings in support of the release.

The Supreme Court further distinguished this case from matters where the parties expressly intended to release any civil claims. Because there were no express intentions, the Court found that the standard language in the preprinted form used in settling workers' compensation claims releases only those claims that are within the scope of the workers' compensation system.

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Therefore, standard workers' compensation settlement agreements (Compromise and Release) must show the specific intent of the injured employee to release "all claims" including those asserted in civil actions in order to bar the injured worker from continuing to pursue claims in civil court.



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**No Express  
Intent To  
Release  
Claims  
Leaves Open  
Civil Actions**  
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## 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**

“Snatching Victory from the Jaws of Defeat: A Case Study in Auto Fire Subrogation”

Panelist: Kevin K. Cholakian

Atlanta, Georgia

Cholakian & Associates, which has grown to 10 attorneys, is listed in Bests 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, first party coverage and claims matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.