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Cholakian & Associates

A Professional Corporation

*Is pleased to announce its
five year anniversary as a litigation defense firm.*

It is also pleased to announce that

LENORE DEFIESTA

And

ARON DIGUMARTHI

have joined the firm as Associates.

The firm continues to represent carriers, individuals and businesses in serious personal injury / catastrophic accident litigation, landlord-tenant matters, environmental liability, inter and intrastate trucking litigation, complex commercial litigation, product liability / fire subrogation matters, coverage litigation, professional liability, and uninsured / underinsured motorist matters.

Reimbursement Properly Sought from Personal Umbrella Carrier

Under Cal. Ins. Code § 11580.9(g), an insurer of a personal umbrella policy can properly be required to reimburse an automobile insurer for a portion of the defense costs arising from a car accident.

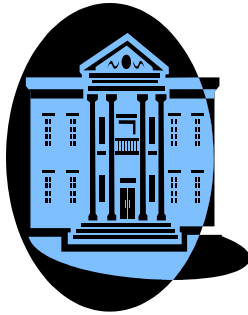
In *Mercury Ins. Co. v. Allstate Ins. Co.*, 23 Cal.App.4th 1392, Mercury Insurance Company issued an automobile liability insurance policy to its insured. Allstate Insurance Company issued a personal umbrella policy to the insured.

The insured's daughter was involved in an accident during the coverage period of both policies and litigation ensued. Mercury incurred defense costs and brought an action against Allstate for contribution for part of the costs of defense.

By Bill Ford

ASSOCIATE ATTORNEY/STAFF
WRITER

See *Policy Provision* page 3



Jury Can Infer Negligence From Failure to Wear Seatbelt Despite Plaintiff Not Driving At Time of Accident

Driving or Sleeping—Better Belt Up

Expert testimony not required to support finding that use of seat belt would have reduced accident victim's injuries.

By Bill Ford

ASSOCIATE ATTORNEY/STAFF WRITER

In *Lara v. Nevitt*, 123 Cal.App.4th 454, the passenger was asleep, without a seat belt, in the sleeper berth of a moving truck when defendant lost control of his car and collided with the truck. The jury found

that the passenger was 50 percent at fault for failing to wear a safety restraint.

On appeal, the passenger contended that it was error to permit an orthopedic expert to testify that if the passenger had been harnessed, it would have been less likely that he would sustain significant neck injuries. When asked to quantify the percentage of difference in risk of injury if the passenger had worn a seat belt, the expert said he would be "totally winging it."

The passenger contends there was no foundation for the expert's opinion that he would have been less injured if he had worn the safety belt, because the expert had no expertise in seat belts, and the defendant offered no expert testimony as to the force generated in the accident, or the effect of such force on a sleeping person who is restrained versus unrestrained, or the mechanics of the passenger's injuries.

See *Belt Up* on pg. 5

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No controversy requiring arbitration exists if policy limits tendered
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Policy Limits Offer Bars Arbitration of UM Claim

No right to arbitration in UM cases if carrier tenders policy limits.

By John Cooke

ASSOCIATE ATTORNEY/STAFF WRITER

In *State Farm Mutual Automobile Insurance Company v. Superior Court (Balén)* (2004) 123 Cal.App.4th 1424, the appellate court granted a petition for a writ of mandate filed by the insurer, and directed the trial court to vacate an order to arbitration. The insured, Balén, was rear ended in a chain reaction accident while she was stopped at a stop light. She carried an uninsured motorist policy with State Farm in the amount of \$100,000 per person with a limit of liability of \$300,000

per accident.

Balén made a claim for the policy limits. When State Farm told her that it could not pay the policy limits, she withdrew the offer and demanded arbitration.

Balén later claimed that since State Farm did not accept her offer to settle for policy limits, and she then withdrew the offer, that State Farm had "opened it's [sic] policy up."

Balén then increased her demand to an amount exceeding the policy limits. She reasoned that the arbitrator in his/her discretion could make a finding as to the total value of the case. Balén further reasoned that if the total value of the case

exceeded the policy limits, she would have a right to sue State Farm for that sum. State Farm later tendered the policy limits, which Balén rejected.

The Los Angeles Superior Court granted Balén's petition to compel arbitration. In granting State Farm's petition for a writ vacating the order, the appellate court concluded that there is no controversy that required arbitration pursuant to Code of Civil Procedure section 1281.2. State Farm tendered the policy limits to Balén. Therefore, the dollar amount of her claimed damages, which exceeds the policy limits, is not relevant.

See *UM Arbitration* on page 4.

Policy Provision

Continued from pg. 2

The court held that Cal. Ins. Code § 11580.9(g) provides that the primary policy referred to therein was an automobile liability policy, and the excess policy was a policy of general liability insurance, as such insurance was defined in Cal. Ins.

Code § 108. It was clear that the legislature intended the share of defense costs to be determined by the proportion that the sums paid under the policies bore to the total damages paid. Allstate's contention that Cal. Ins. Code § 11580.9(g) referred only to automobile liability policies was found

to be without merit as Allstate's umbrella policy satisfied the criteria of § 11580.9(g). The umbrella policy applied to the same vehicle as Mercury's policy and it afforded valid, collectible liability insurance, as the settlement indicated.

To Delegate or Not To Delegate...That is the Question!

Private Motor Carriers Exempt from Nondelegable duty

By John Cooke

ASSOCIATE ATTORNEY/STAFF WRITER

On face value it appears simple. A company hires an independent contractor to transport its goods and the transporting company causes an accident. The hiring company is not responsible for the independent contractor, right? Well, that all depends upon the nature of the hiring company's business.

In *Hill Brothers Chemical Co. v. Superior Court (Lorensten)* 123 Cal. App. 4th 1001 (2004), the court distinguished between a "for hire" carrier as opposed to a "private" carrier for purposes of vicarious liability.

A statutory framework exists that regulates "commercial vehicles." The Motor Carriers of Property

Permit Act ("MCPA") (Veh. Code, § 34600) governs carriers such as Hill Brothers who are designated as a "private carrier" as defined in the MCPA, and operate under a "Motor Carrier Permit" issued by the California Department of Motor Vehicles ("DMV").

In November 2002, Hill Brothers hired MJF to transport materials from one of its suppliers to its processing plant. MJF is a "for-hire motor carrier of property" as defined in the MCPA and operated under a permit issued by the DMV to transport goods for compensation.

A MJF tractor-trailer collided with a vehicle being driven by Jimmie Lorensten and killed Mr. Lorensten. His heirs filed a wrongful death action against MJF and it's driver. Mr. Lorensten's heirs later added Hill Brothers as a defendant on the theory that as a motor carrier of property operating under a permit issued by

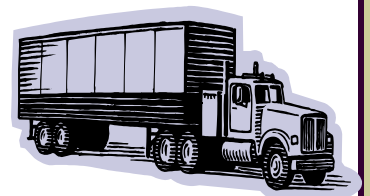
the DMV, it had a nondelegable duty to the public, and was therefore vicariously liable for the negligent acts of MJF and its driver.

Unconvinced that it owed such a duty, Hill Brothers moved for summary judgment on the grounds that it owned no such duty as a matter of law. The trial court disagreed with Hill Brothers, and, relying on *Serna v. Pettey Leach Trucking, Inc.* (2003) 110 Cal.App.4th 1475, held that Hill Brothers was subject to a nondelegable duty and was therefore vicariously liable for the negligent acts of MJF. Hill Brothers sought review of the denial of the motion.

On appeal, Hill Brothers contended that it owed no duty because it was a "private carrier" rather than a "for-hire motor carrier" and thus could not be held vicariously liable for the negligent acts of an independent contractor.

See *Motor Carrier* pg. 5

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**Company
 Escapes
 Liability Based
 Upon "Private"
 Versus "For
 Hire" Motor
 Carrier
 Designation**
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“... (a)
landlord’s
need for
access to the
courts is an
unusually
vital one...”

Litigation Privilege Protects Landlords from Over-reaching Ordinance

Municipal ordinance restricting landlord’s right to take legal action against the tenant violated the litigation privilege stated in Cal. Civ. Code § 47(b).

By Bill Ford

ASSOCIATE ATTORNEY/STAFF
WRITER

In *Action Apartment Assn., Inc. v. City of Santa Monica*, 123 Cal.App.4th 47, an apartment association filed a complaint for declaratory relief and writ of mandate arguing that portions of Santa Monica Municipal Code § 4.56.020(i) and § 4.56.040, which address a landlord’s efforts to terminate a tenancy through legal proceedings, are unconstitutional.

Santa Monica Municipal Code sections 4.56.020 and 4.56.040 were adopted after the City Council took tenants’ testimony and reviewed statistics which showed an increase in the

rates at which rent controlled housing units were vacated after state vacancy decontrol laws took effect. The tenant harassment ordinance prohibited a wide variety of acts by landlords in rent controlled housing such as the following: a landlord could not abuse a tenant with offensive words; threaten a tenant with physical harm; or interfere with a tenant’s right to quiet use and enjoyment.

Only one portion of section 4.56.020 was challenged: “No landlord shall...do any of the following with malice...Take action to terminate any tenancy including service of any notice to quit or other eviction notice...based upon facts which the landlord has no reasonable cause to believe to be true or upon a legal theory which is untenable under the facts known to the landlord...”

The association contended that those provisions abridged their rights to free speech, to petition the government for redress of grievances, and to due process under the federal constitution; violated their civil rights under 42 USC 1983; and were preempted by Cal. Code of Civ. Proc. § 128.7 and Cal. Civ. Code § 47(b).

The court found that the challenged portion of the ordinance was contradictory to Cal. Civ. Code § 47(b) as it prohibits and punishes what the litigation privilege protects. Under the litigation privilege, a landlord serving an eviction notice or filing an unlawful detainer is immune from suit based on those notices or filings, even if the motivation is malicious, the factual allegations known to be untrue, and the legal theory untenable under the true facts. Thus, state law preempted the ordinance.



UM Arbitration

Continued from pg. 2

As to the potential claim for bad faith, the Court explained that such damages were not related to the damages that Balen allegedly sustained from the accident itself. Further, the court found that the dollar amount of the accident damages is not the proper

measure of damages in a suit for an insurer’s bad faith breach of contract.

Finally, the Court concluded that Balen is not entitled to an arbitration in order to evaluate a possible bad faith suit.

Motor Carrier

Continued from Pg. 3

Lorensten's heirs contended that because Hill Brothers operated under a permit issued by the DMV, and was regulated under the MCPPA, it could not delegate its duties to an independent contractor and escape liability for the negligent acts of that contractor.

The MCPPA defines a "private carrier" as a motor carrier "who transports only his or her own property, including, but not limited to the delivery of goods sold by the carrier." (Section 34601(d).) The other type of motor carrier, a "for-hire motor carrier of property," is defined as a motor carrier "who transports property for compensation. (Section 34601(b).)

The court examined the legisla-

tive intent of the MCPPA and concluded that no legislative intent has been shown that private carriers should be subject to the nondelegable duty rule. The Court discussed specific legislative history that applied to the issue. Prior to the passage of the MCPPA, persons or corporations transporting their own property were specifically excluded from the definition of a "highway carrier," and the term "private carrier" was separately defined as a "not-for-hire" motor carrier. Based on a review of the statutory language of the MCPPA, together with the legislative materials, evidence of legislative intent to maintain a distinction between private carriers and for-hire carriers existed. Legislative history did not support the assertion that simply because private carriers are subject to regulatory and permit requirements they should be subject to the nondelegable duty rule.

In examining the cases in which a nondelegable duty has been imposed on a carrier, the court noted that all those cases involved a "for-hire" carrier rather than a private carrier. The court agreed with Hill Brothers' argument that a critical difference existed between those who use the public highways as a business and those who use the highways only to transport their own products incidental to their business.

The Court rejected the assertion that public policy supports an extension of a nondelegable duty to private carriers. Such a rule would impose vicarious liability on the part of a shipper for the negligence of an independent contractor for matters over which it exercises no control.

Belt Up

Continued from pg. 2

The passenger also contended that, in the absence of competent expert testimony, there was no evidentiary basis for the jury finding his own negligence was the cause of 50 percent of his damages.

The court held that the jury could reasonably infer that the seat belt worked since the passenger explained how it worked. The jury could infer that it was negligent not to use the strap when it was available, even

though truckers did not usually wear restraints in the sleeper berth and there was no law requiring use. The court noted that in southern California, where virtually every citizen either drove or rode in a vehicle, no expert testimony was necessary to support the reasonable inference that the passenger would have suffered less injury if he had been wearing a seat belt. The evidence thus supported the giving of an instruction on the seat belt defense.



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(NASP)

Trucking Industry Defense
Association (TIDA)



Cholakian & Associates, which has grown to 11 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** **March / April 2005 TBD**
"A View From Inside The Box: A Juror's Perspective inside the Peterson Trial"

Speaker: Juror Number 4

Luncheon at City Club, San Francisco

President: Kevin K. Cholakian

- **Evaluating Low Impact Accidents and Red Flags of Billings and Records** **March 8, 2005 12:00 p.m.**

Speaker: Kay Stewart, D.C.

Cholakian & Associates, San Francisco

* 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, Wuertel & 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.

John F. Cooke received his B.A. in Psychology in 1987 from the University of California, Berkeley and his J.D. from the University of Maryland in 1991. While at the University of Maryland, he was Managing Editor of the Maryland Journal of International Law & Trade (1990-1991) and a member of the Moot Court Board (1989-1991). Most recently, he has served as a member of the Board of Directors for the Alameda County Bar Association (2001-2003). The majority of Mr. Cooke's career has been spent handling insurance defense litigation with an emphasis on construction defect, premises liability and personal injury. Mr. Cooke also has experience handling complex business litigation and coverage.

Bill Ford graduated from the University of San Francisco in 1995 with a B.S. in Organizational Behavior and received his J.D. from the University of San Francisco School of Law in 2001. While in law school, Mr. Ford maintained a full time position as a Senior Litigation Paralegal for various law firms in the San Francisco Bay Area. He has experience handling civil litigation matters, including personal injury, employment discrimination, landlord-tenant, family law, intellectual property, breach of contract and business litigation cases.

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