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# California Case Law Quarterly



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## *Non-Delegable Duty Doctrine And Private Motor Carriers*

**By Noel Hibbard**  
Associate Attorney/Staff  
Writer

Is your insured trucking company always liable when they hire an independent contractor who is later involved in an accident? California Courts have historically found trucking companies vicariously liable for accidents that occurred when an independent contractor was involved in an accident. Recently, however, a California Court of Appeal case came down limiting the non-delegable duty doctrine and giving defense attorneys a small weapon in their arsenal.

### **Non-Delegable Duty Doctrine**

The general rule in California is that one is not liable for the negligent acts of an independent contractor one hires. *Taylor v. Oakland Scavenger Co.* (1941) 17 Cal. 2<sup>nd</sup> 594. However, California courts have long since applied the "non-delegable" duty doctrine. Essentially, if someone undertakes to carry on an activity involving possible danger to the public under a license or franchise granted by public authority, the original contractor remains subject to liability for public policy reasons. Section 428 of the Restatement of Torts.

The California Supreme Court held this rule of non-delegable duty applicable to a highway common carrier in *Eli v. Murphy* (1952) 39 Cal.2<sup>nd</sup> 598. The court reasoned that a highway common carrier is engaged in a business with a very considerable risk, and the legislature has subjected it and similar carriers to the regulatory power.

A small exception to the non-delegable duty doctrine was just handed down by the Court of Appeal in *Hill Brothers Chemical Co. v. Superior Court of Los Angeles* (2004) 123 Cal.App.4<sup>th</sup> 1001.

### **Factual Background**

Hill Brothers Chemical Company owned a fleet of trucks and other vehicles—all licensed with a Motor Carrier permit from DMV. Hill Brothers was listed as a "private carrier" within the meaning of the Motor Carriers of Property Act (Vehicle Code Section 34600).

Hill Brothers hired MJF Equipment--an independent contractor, to transport materials to its processing plant. While MJF's tractor-trailer was

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## *California Appellate Court Refuses To Allow Restriction On Uninsured Motorist Coverage*

Daun V. USAA Casualty Insurance Company  
125 Cal App 4<sup>th</sup> 599  
Court of Appeal, Fourth Appellate District

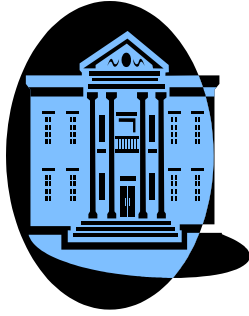
**By Jeff Feinberg**  
Associate Attorney/Staff Writer

In 2005 the Court of Appeals, Fourth Appellate District, gave affirmation to the legislative intent of Insurance Code section 11580.2 (California Uninsured Motorists Statute) by ruling unenforceable an insurance policy exclusion not found among the eight statutory exclusions expressed in the statute. In *Daun v. USAA Casualty Insurance Company* this Court ruled unenforce-

able an exclusion contained in appellant's insurance policy which denied coverage to any insured operating a self-propelled vehicle with less than four wheels.

Robert Daun, appellant, was a Police Officer for the City of San Diego. While riding his police motorcycle in the course and scope of his employment he was struck by what turned out to be an underinsured motorist. After he and his employer (subrogee of his workers' compensation claim) settled with the underinsured motorist for the \$15,000 policy limit he sought to recover additional money under his own

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**The court reasoned that no legislative intent has been shown that private carriers should be subject to the non-delegable duty doctrine.**

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## *Non-Delegable Duty Doctrine And Private Motor Carriers*

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 being driven for the Hill's Brother Company it collided with another vehicle resulting in a fatality. Plaintiff's heirs filed a wrongful death action against MJF and later added Hill Brothers as a defendant.

Plaintiff's theory was that Hill Brothers was operating under a permit issued by DMV, and thus it had a non-delegable duty to the public and was therefore vicariously liable for the acts of the MJF employee.

### **Plaintiff's Contention**

Plaintiff's argument was that because the MCPA classifies all carriers as motor carriers of property, and because "private carrier" are subject to regulatory and permit requirements, it is clear that the legislature intended that all carriers be treated alike with respect to their responsibilities to the public.

### **Defendant's Contention**

Hill Brothers argued that there is a critical difference 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.

Hill Brothers moved for summary judgment. The trial court disagreed and held that Hill Brothers owed a non-delegable duty, and was therefore vicariously liable. Hill Brothers appealed the ruling.

### **Court's Discussion**

The court explained in detail the distinction between a "private carrier" and a "for-hire carrier." Vehicle Code Section 34601 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 that carrier. A "for hire" carrier is one who transports property for compensation.

The court reasoned that no legislative intent has been shown that private carriers should be subject to the non-delegable duty doctrine. The court further noted that all of the cases in which a non-delegable duty had been imposed on a carrier

involved "for hire" carriers rather than "private carriers." The court went on to state, "...that extension of the non-delegable duty rule to a member of the shipping public simply because the shipper is a private carrier and owns commercial vehicles in its own business makes no sense at all. 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."

### **Conclusion**

When can we apply the decision in the Hills Brother's case? Essentially, the exception handed down in the Hills Brother's case will apply to situations in which you have a "private carrier," as opposed to a "for-hire" carrier. Although these situations may be rare, the courts have noted the distinction and have given defense counsel a small, yet significant exception to the non-delegable duty doctrine.

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## *California Appellate Court Refuses To Allow Restriction On Uninsured Motorist Coverage*

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 underinsured motorist policy provision.

The motorcycle Mr. Daun was riding was owned by the City of San Diego and used by Daun as part of his employment as a police officer. The vehicle was permissibly self insured by the City and not listed as an insured vehicle on Mr. Daun's policy under which his UIM claim was made.

Daun's insurer, USAA Casualty Insurance Company, denied his claim citing an exclusion denying UM and UIM coverage where, "[he] or any family member is the operator of any self-propelled vehicle with less than four wheels that is not insured for this coverage under this policy." The trial court, on stipulated facts, found for the insurer. The Appellate Court reversed the trial court's ruling and remanded the case for further proceedings.

In making its decision the Court used basic principles of statutory construction. The Court read the statute giving its words their usual and ordinary meaning and examined them within the context of the statute as a whole. It was undisputed that the insurance policy had a UM and UIM provision pursuant to Insurance Code section 1580.2 (a). The Court noted that this code section states it is to protect

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**California Appellate Court Refuses To Allow Restriction On Uninsured Motorist Coverage**

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 “the insured, the insured’s heirs or legal representatives” and determined this language defined coverage in terms of the insured and not the occupancy of a particular type of vehicle. The Court next turned to whether Mr. Daun was considered an insured under this code section.

Insurance Code section 11580.2 (b) is clear. There are two categories of insureds defined by the statute. First, the named insured and his resident relatives are covered “while occupants of a motor vehicle or otherwise”. The second class of insureds is defined as “any other person” drawing a distinction between resident relatives and permissive users outside of this group. In interpreting this language the court indicated the term ‘or otherwise’ should be interpreted broadly providing coverage for any insured in the first category when they are injured by an uninsured or underinsured motorist’s negligence regardless of the vehicle involved, or even if

no vehicle is involved at all. As the named insured, Mr. Daun, clearly falls into the first category of insureds and, according to the court, was entitled to the broad coverage afforded to persons in this category unless one of the eight statutory exclusions enumerated in Insurance Code section 11580.2 (c) applies.

The court applied the facts to the eight enumerated exclusions and discussed the two that were potentially applicable in this case. After determining none of the exclusions applied, the court focused on the plain language of the exclusion at issue. Daun argued that denying coverage for persons riding on motorcycles was against public policy and the court agreed.

The court determined the purpose of Insurance Code section 11580.2 was to protect the public by ensuring at least a minimum recovery for injuries caused by the negligence of another driver. The court further indicated that the legislature, to ensure this purpose was fulfilled, required

UM and UIM coverage in every policy unless it was specifically waived in a writing complicit with certain statutory requirements. No such waiver existed in this case.

Based on the foregoing, the court found the exclusion denying coverage was contrary to the purpose of the statute and was therefore against public policy. Thus, the Court reversed the trial court’s judgment in favor of USAA and remanded the case back to the trial court for further proceedings.

This case is significant because it reaffirms that Insurance Code section 11580.2 provides broad coverage for the insured and his resident relatives subject only to the eight exclusions expressly permitted by the code. Provisions which otherwise limit or deny coverage for this category of insureds will be considered contrary to public policy, void and unenforceable.

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**Provisions which otherwise limit or deny coverage for this category of insureds will be considered contrary to public policy, void and unenforceable.**  
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**INSURERS’ DUTY TO DEFEND IS CONTINUING**

**By Noel Hibbard**  
 Associate Attorney/Staff Writer

When does the statute of limitations begin to tick on an insurers’ duty to defend their insured?

The Court of Appeal recently came down with a case clarifying this very issue.

**FACTS:**

Eaton Hydraulics Inc filed a lawsuit against its insurers, including Continental Casualty Company and CNA Casualty of California. CNA was one of Eaton’s excess or umbrella insurers. The suit

alleged that Eaton’s primary and umbrella insurers refused to defend and indemnify Eaton in connection with an underlying environmental claim.

CNA demurred to the first amended complaint, contending that the declaratory relief and breach of contract actions were barred by the four-year statute of limitations. Eaton countered that the statute of limitations did not begin to run until August 1998 when the Supreme Court decided, in Foster-Gardner, supra, 18 Cal.4<sup>th</sup> 857, that the duty to defend attached only to “suits,” and not to administrative claims.

Because CNA’s umbrella policy provides coverage where there is no applicable primary insurance coverage under the CNA policy, according to Eaton, was triggered only when Eaton became aware that the primary policies did not provide coverage for pre-suit costs associated with the EPA claims.

The trial court sustained the demurrer based on the statute of limitations. The appellant court overruled the trial court’s decision.

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***INSURERS' DUTY TO DEFEND IS CONTINUING***

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**COURT'S DISCUSSION:**

The court essentially ruled ... "that the duty to defend is continuing, and that the limitations period is equitably tolled from the time the cause of action accrues—upon CNA's refusal to defend—until the underlying lawsuit is terminated by a final judgment."

The court also stated that an excess insurer's obligation to defend the insured does not even arise until the insured's primary coverage is exhausted.

**WHAT DOES THIS MEAN?**

Remember, the statute of limitations in a general liability insurance coverage case accrues when the insurer refuses

to defend the insured in the underlying litigation. The duty to defend is continuing, and as such, the statute is tolled until the underlying action is terminated by final judgment. Even if the insurer brings an action for declaratory relief upon an insurer's denial of a defense under a liability policy, such an action is not necessary to prevent the running of the statute of limitations.

***Recent Trial Update*****ROWLAND V. CASITAS ALAMEDA HOMEOWNERS' ASSOCIATION et al.  
ANOTHER DEFENSE VICTORY FOR CHOLAKIAN & ASSOCIATES****By Colin Hatcher**

Associate Attorney/Staff Writer

This case concerned a toxic mold e-coli claim brought by Plaintiff Deborah Rowland, who experienced sewage spill on May 26, 2002, five days after Ms. Rowland and her two children had moved in to a new townhouse. All property owners of the Casitas Alameda Development belong to Defendant Casitas Alameda Homeowners' Association. The Casitas Alameda Development is managed by Defendant, John Stewart Company, Inc. Cholakian & Associates represented Casitas and John Stewart.

Ms. Rowland and her children filed suit against multiple Defendants; including the previous owners, the Homeowners' Association, the management company, both of her insurance companies, the emergency clean up company that was brought in by the management company to assist her; and against the real estate agent (sellers' agent) who had represented the previous owners.

Plaintiffs' First Amended Complaint was filed on January 27, 2004 alleging the following causes of action against Casitas Alameda HOA and The John Stewart Company: (1) Negligence; (2) Fraud; (3) Breach of contract; (4) Negligent Misrepresentation; (5) Intentional Misrepresentation; and (6) Unfair business practices. Plaintiff ultimately presented evidence of \$909,000.00 in special damages alone, and demanded \$350,000.00 to settle the case. The case was transferred to Cholakian firm by Casitas' carrier three months before trial.



Liability ultimately revolved around the location of the sewage blockage that caused the spill into Ms. Rowland's house, because according to the law and the contract between Ms. Rowland and the HOA, the HOA was responsible for repairing, replacing, or maintaining the common areas, while the homeowner was responsible for repairing, replacing, or maintaining her house and the land beneath it. Thus, if Plaintiffs could prove that the blockage occurred on the common area, it would have been the HOA's responsibility to maintain and repair, and thus the HOA would have been liable for Ms. Rowland's damages.

The original plumber's report identified the blockage as potentially extending into the common area. However, The John Stewart Company Inc.'s representatives, who were managing the Development concluded that the blockage was actually inside the house. The Casitas Board of Directors concurred.

A video inspection conducted by American Leak Detection (ALD) in September of 2002 showed the sewer line to be clogged in the area underneath the kitchen floor. Plaintiff's expert had evidence to support the opposite view.

Plaintiff disclosed 15 experts. Defense countered with eight. All were deposed.

*Recent Trial Update*

On the damages issue, Defense expert Certified Industrial Hygienist, David Kahane, of Forensic Analytical, Plaintiffs exaggerated the extent of the damage caused by the back-up. Plaintiff claimed a sewer explosion, raw sewage and “black water” “spewing” out and flooding her home with piles of feces. Mr. Kahane opined that the house was adequately cleaned up and decontaminated 36 hours later, although the Plaintiff expert testified to a different view.

A long time fibromyalgia sufferer, Ms. Rowland experienced deterioration in her mental health around October 2003, when she was signed off work sick by her psychiatrist. Plaintiffs moved out one month after the spill, never returned and the property was foreclosed upon. She was taking a substantial amount of medication and was in ongoing psychiatric treatment. Illnesses reported by her treating physicians, therapists and psychiatrists included cognitive and mental deterioration, fibromyalgia and irritable bowel syndrome. Plaintiff claimed that the stress caused the spill and the resulting chaos to her life had made her mentally ill. Defendants contended that Plaintiff’s illnesses were largely caused by other issues in her life. In addition, any stress concerning the spill was self-inflicted by Ms., Rowland and inflicted upon her children by Ms. Rowland (who for example decided her son’s toys were “contaminated” and destroyed them all),

Defense expert Neuropsychologist Dr. Carol Walser performed an extensive psychological evaluation of Deborah Rowland, including reviewing extensive psychiatric records and records of family therapy. Dr. Walser did not find that Plaintiff’s mental or emotional problems were caused by the subject incident. These problems were caused by Plaintiff herself in her completely exaggerated response and by non-related internal family stresses with concomitant emotional issues for her children. Dr. Walser also found that the dragging of the children by their mother through extensive litigation had contributed substantially to their emotional concerns. This was in contrast to a number of Plaintiff’s treating mental health experts who had an opposite view, namely, that the spill caused Plaintiff to go over the edge.

In response to a \$350,000.00 settlement demand, which prior defense counsel had indicated they could “recommend” \$100,000, the Cholakian firm offered \$40,000 at a mediation several months before trial that was rejected. Other defendants had been severed, or dismissed. The HOA and the John Stewart Company were the target defendants, in part, because Plaintiff believed they had an easier case because of the defendants’ heightened “fiduciary duty.” In the last month before trial, Defendants offered Plaintiffs no more than a waiver of costs and fees, and held fast to that position right up to the first day of the jury trial. At that time, Plaintiffs agreed to dismiss the matter for a waiver of costs and fees, despite spending well over \$100,000.00 in fees and expert costs.



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Trucking Industry Defense  
Association (TIDA)

San Francisco Defense  
Association  
(President)



Cholakian & Associates 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 \*

### **Defense Seminar Association Luncheon:**

**Guest Speaker, The Honorable James J. Marchiano, Presiding Justice, California Court of Appeals**

March 24, 2006—San Francisco, CA

### **"Fire/Explosion Cause and Origin Investigations: Developing Viable Subrogation Claims and Managing Experts from the Forensic and Legal Perspectives"**

**Panelist: Kevin K. Cholakian**

July 14, 2006

[Indemnity Seminar]

San Francisco

**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, 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 serving Central California). He received his law degree from the University of California, San Francisco 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 practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy (1981-1983) and McCutchen, Doyle, Brown & Enersen (Bingham-McCutchen) in San Francisco (1983-1987). He managed the defense practice at AV rated 30 attorney civil defense firm Kinder, Wuertel & Cholakian (1988 through 1999). He began Cholakian & Associates in January 2000 and has continued to specialize in high exposure personal injury defense, 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 commercial housing/environmental, landlord-tenant and ADA cases. 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.