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# California Case Law Quarterly



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Cholakian & Associates is pleased to announce the opening of two additional offices in Northern & Central California

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## Product Liability Can Survive Primary Assumption of The Risk

By Lin L. Duiven  
Of Counsel/Staff Writer

Primary assumption of the risk has been the subject of evolving case law since *Knight vs. Jewett* (1992) 3 Cal.4th 296. *Knight* and subsequent cases typically involve injuries received during sporting or recreational activities.

In essence, primary assumption of the risk bars recovery when a plaintiff is injured as a result of a risk **inherent** in sport or activity, and is based upon a duty analysis. As to any particular sport, defendants generally have no legal duty to eliminate or protect a plaintiff against risks inherent in the sport itself. However, defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.

The decision in the subject case clarifies what effect a strict product liability theory can have on primary assumption of the risk.

### FACTS

Plaintiff Susan Ford was a guest of the Nakimura family at a Lake Berryessa picnic in September 2001. During the course of the day, Laura Nakimura took Susan for a ride on a personal watercraft (jet ski). The Nakimuras had purchased the jet ski manufactured by Polaris Industries, Inc. several months before, but this was Susan's first-ever experience on such a watercraft. Susan was wearing a one-piece swimsuit and a life jacket.

The ride began uneventfully, with Susan, the passenger, holding onto Laura's waist. After a few minutes, Laura complained that Susan was holding on too tightly, and told her to use the grips behind her instead. All Susan saw were the "grab handles," and she had to lean backwards and could only hook a couple fingers into each handle.

When the jet ski started out again and was bumping up and down, Susan lost her grip, was lifted off

the seat and fell backward off the rear of the jet ski. She sustained severe hernial and rectal injuries. Her internal bleeding required multiple transfusions. Two surgeries were required to prepare and establish a colostomy. Susan has no control over her bowels and must self-catheterize in order to urinate. She is numb from her right knee to her waist as well as her buttocks and pelvic area. The injury is termed an "orifice" injury.

Expert testimony revealed that the ski had a powerful jet nozzle, centrally positioned in the rear of the Polaris, which protruded two and five-eighths inches beyond the rear deck.

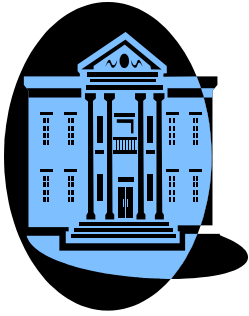
The position of the jet increased the chance of high-pressure exposure if a passenger were to be ejected to the rear of the watercraft.

### DECISION AND RATIONALE

Susan and her husband filed suit against Laura for negligence and

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## Product Liability Can Survive Primary Assumption of The Risk



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**Primary assumption of the risk bars recovery when a plaintiff is injured as a result of a risk inherent in sport or activity.**  
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against Polaris for strict products liability. Laura successfully moved for summary judgment, on a primary assumption of the risk theory. The trial court's conclusion that Laura had no duty to eliminate or protect Susan against the risk of falling while the watercraft was engaging in maneuvers, as that risk is inherent in the sport itself, was upheld by the Appellate Court.

Conversely, the manufacturer's motion for summary judgment was denied, because Polaris did have a duty to provide products free of design defects. The trial jury ultimately awarded Susan \$382,024 in economic damages and \$3,252.500 in non-economic loss, as well as \$115,000 to Susan's husband for his loss of consortium claim.

The Appellate Court acknowledged that primary assumption of the risk may be applied to the activity of jet skiing, but it declined to find that rearward ejection jet thrust injuries were inherent in the activity.

The Court used a general products liability analysis, based on a risk-benefit test for design defects. Under this test, a manufacturer is strictly liable in tort where the plaintiff demonstrates that the product's design proximately caused the injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. Relevant factors include the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

The most important alternative design considered by the Court was the addition of either a seat-rest that would protect the passenger against a rear-ward thrust into the jet stream, or some type of strap that would give the passenger a way to securely hang

on. The Court also found that such changes would not have been expensive.

In addition, the Court discussed the inadequacy of the warnings contained on the jet ski. For example, the manufacturer included labels that stated passengers must wear a wet-suit or equivalent protective clothing to avoid orifice injuries. The owners manual also contained that warning. The Court considered the warning inadequate, stating (1) that there was no evidence that Susan ever saw the caution, (2) that she, as a passenger, would not have had

the opportunity to read the owner's manual, and (3) that it was extremely unlikely that owners of jet skis would have wet-suits on hand for guests.

### SIGNIFICANCE OF DECISION

*Ford vs. Polaris* gives plaintiffs injured during sports or recreational activities another legal theory to consider, along with the potential of including additional parties as defendants in their lawsuits. At the same time, typical tortfeasor defendants can consider utilizing the theory for cross-

## Why Are Expert Fees And Costs So Difficult To Recover?

**By Deborah A. Correll**  
 Associate Attorney/Staff Writer

Anyone who has been in claims and/or litigation for any period of time has come to know, and probably lament, the Code of Civil Procedure section 998 labyrinth of rules leading to the pot of gold at the end of trial--the recovery of expert fees and costs. Recently, after snatching a particularly satisfying victory from the jaws of defeat, we eagerly filed our Memorandum of Costs, believing it inconceivable that any jurist could deny our clients their just recompense in costs, but especially those expert fees, as the case was won through the efforts of the experts. Instead we discovered that the court considered our earlier **OFFER FOR WAIVER OF COSTS AND ATTORNEY'S FEES** not realistic enough to justify an award of expert fees. How could this have happened?

Too often, the first time we assess the 'reasonableness' of the offers we make is long after the offer has been made, when the verdict is in and we are hoping either to get back monies spent to win the trial or looking to avoid having to pay more than the verdict itself. Consider these words of warning: **IF YOU DON'T STOP AND**

**CONSIDER AT THE TIME YOU ARE MAKING YOUR OFFER UNDER C.C.P. § 998 WHETHER OR NOT YOU BELIEVE THE OFFEREE WILL TRULY CONSIDER YOUR OFFER, THEN THE PROBABILITY OF BEING AWARDED EXPERT FEES AND COSTS WILL NOT BE IN YOUR FAVOR.**

Code of Civil Procedure section 998, subd. (c)(1) states, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, ...the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses... actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

Although many of us have read that wording a thousand times, I wonder how often we really sit back and consider, when we make that offer, "When the time

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### *Why Are Expert Fees And Costs So Difficult To Recover?*

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comes for the court or arbitrator to make the decision whether to award us expert fees and costs, will **THEY**, in their discretion, feel our offer was realistically reasonable such that they do award us our costs?" If not, you will be missing an opportunity to better ensure that your offer will be found reasonable.

The courts do provide insight into offers that have been considered and ruled either reasonable or unreasonable. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700 – "...the reasonableness of defendant's offer does not depend on the information actually known to plaintiff but rather on information that was known or reasonably should have been known." (Defendant's offer therein of \$15,001 in the face of a \$1,183,350 jury verdict for plaintiff. Offer found not to be realistically reasonable and recovery of expert fees and costs denied.) (*Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821, "A plaintiff may not reasonably be expected to accept a token or nominal offer from any defendant exposed to this magnitude of liability unless it is absolutely clear that no reasonable possibility exists that the defendant will be held liable. If that truly is the situation, then a plaintiff is likely to dismiss his action without any inducement whatsoever. But, if there is some reasonable possibility, however slight, that a particular defendant will be held liable, there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view of the current cost of preparing a case for trial." (Calderon had made a 998 offer in the amount of \$1.00. The Appellate Court found the offer not to have been given in good faith.)

In *Pineda* Plaintiff Pineda's heirs sought in excess of \$10,000,000 for his wrongful death against the Los Angeles Turf Club and the manufacturer of his jockey's helmet when the horse he was riding reared in the starting gate and he fell hitting his head. The trial court found the manufacturer defendant's offer of \$2,500 unrealistic and disallowed expert fees and costs. "Under the circumstances of this case the trial court had ample reason to find that the offer was not reasonable. Although McHal's liability was tenuous indeed, having in mind the enormous exposure the trial court could find that McHal had no expectation that its offer would be accepted. From this it follows that the sole purpose of the offer was to make McHal eligible for the recovery of large expert witness fees at no real risk." (*Pineda v. Los Angeles Turf Club, Inc., et al.* (1980) 112 Cal.App.3d 53, 63.)

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### *Motor Vehicle Manufacturers Employ A New Legal Argument To Try To Defeat Subrogation Claims For Product Defects*

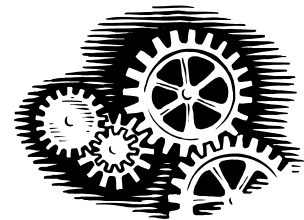
**By Colin R. Hatcher**  
 Associate Attorney/Staff Writer

At Cholakian & Associates, we have a very successful subrogation record, representing insurance carriers in recovery of insurance monies paid to insureds whose motor vehicles have caught fire due to defective design or manufacture. These cases do not involve personal injury. In each case the vehicle catches fire and is destroyed. In other words, the damage is purely property damage.

Over the past year we have been witnessing a new trend in the legal tactics employed by Defendant motor vehicle manufacturers to try to defeat our subrogation actions for product defect. This new trend is a particular Motion for Summary Judgment brought by motor vehicle manufacturers to try to have the case dismissed at an early stage. The basis for these Motions for Summary Judgment is the contention by the Defendant motor vehicle manufacturers that as a matter of law they cannot be held strictly liable in tort for a defective product that only causes property damage, because of the "Economic Loss Rule."

The "Economic Loss Rule" argument can be explained very simply. Under the Economic Loss Rule a manufacturer can be found strictly liable in tort for damage to property caused by a defective product, but only if the defective product causes damage to property other than itself. If the defective product damages only itself, then recovery cannot be obtained in a strict liability tort action by a Plaintiff against the vehicle manufacturer. Instead the Plaintiff can only recover in warranty.

In essence Motor vehicle manufacturers are now arguing to the courts that the Economic Loss Rule applies where a motor vehicle that has a defective design catches fire and is destroyed. Their argument is that the car has damaged only itself, and therefore the manufacturer cannot be held strictly liable in tort for the defect. This argument, if successful, would permit motor vehicle manufacturers to forever escape liability for defectively designed or manufactured vehicles, even if the car burned to the ground, unless the defect caused actual personal injuries.



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## Motor Vehicle Manufacturers Employ A New Legal Argument To Try To Defeat Subrogation Claims For Product Defects

(Continued from page 3)

Needless to say, Cholakian & Associates is fighting this trend vigorously in the courts, so far with a 100% success rate. So far not one of these Motions for Summary Judgment has been successful and Cholakian has prevailed on every hearing – but we have noticed this as a distinct and increasing trend in subrogation litigation at the Superior Court level, and since the merits of this particular argument have not yet been explicitly addressed by any California Appellate court (because so far the Superior Court's repeated denial of these motions has not been appealed), we expect it to continue to be used until such time as the Appellate court rules decisively on it, which may not be for some time.

While there is as yet no Appellate case law directly addressing the Economic Loss Rule as regards car fires caused by defective components, the Appellate courts have addressed the argument in non-vehicle cases, and so far have refused to permit manufacturers to escape strict liability for their defectively designed or manufactured products. In our Opposition papers to these Motions for Summary Judgment we are therefore required to argue the motor vehicle issue with reference to these non motor vehicle cases.

The case law that the motor vehicle manufacturers are attempting to hang their hats on when it comes to Motion for Summary Judgment via the Economic Loss Rule is a line of cases stemming from the and the 1965 California Appellate case *Seeley v. White* and the 1986 U.S. Supreme Court case *East River Steamship v. Transamerica*, an Admiralty case well known to any law student.

In *Seeley* the Plaintiff, *Seeley*, purchased a truck from *White*

Motor Company. The truck had defective brakes and eventually crashed. The driver was not injured, but the vehicle sustained \$5,000 in damage. The court denied strict liability recovery in tort against the manufacturer, because the vehicle damaged only itself. The court held that therefore only recovery in warranty was permitted: "Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone."

In *East River* the manufacturer designed, built, and installed turbine engines in ships that were eventually chartered by the charterers. The turbine engines were defective and required repair. The charterers filed an action in tort against the manufacturer, seeking to recover the costs of the repairs. The district court entered Summary Judgment for the manufacturer based upon the Economic Loss Rule: namely that since the defective turbines had only damaged themselves, no strict liability action in tort was permitted against the turbine manufacturers. The court found that the failure of the turbine engines to properly function was in essence of a breach of warranty action, and that the charterers must pursue a warranty action (not a tort action) to recover. This holding was confirmed by the Appellate court and thereafter by the U.S. Supreme Court, which commented as follows:

*"In the traditional "property damage" cases, the defective product damages other property. In this case, there was no damage to "other" property. Rather, the ... supertanker's defectively designed turbine components damaged only the turbine itself. Since each turbine was supplied ... as an integrated package, ... each is properly regarded as a single unit. Since all but the very simplest of machines have component parts, a contrary holding would require a finding of 'property damage' in virtually every case where a product damages itself. Such a holding would eliminate the distinction between warranty*

*and strict products liability."*

These cases and their progeny form the basis for the vehicle manufacturer's current Motions for Summary Judgment, directed against Plaintiffs in subrogation (insurance carriers) seeking recovery for vehicle fires caused by defective components. To date, however, they have not persuaded the courts in any component defect cases involving vehicle fires causing total loss. At issue is the extent of damage caused by a defective component.

In vehicle fires it is important to distinguish between (1) a vehicle component that fails and damages only itself, and (2) a vehicle component that fails and as a result destroys the entire vehicle. Compare for example a fuel pressure regulator that fails and requires replacement (warranty), with a case where a fuel pressure regulator fails, causing a gasoline spill that results in a vehicle fire that burns the entire vehicle (strict liability in tort).

To oppose Motions for Summary Judgment that try to exploit the Economic Loss Rule to avoid strict liability for product defects, we draw on a series of cases where the courts recognizes that a series of connected components cannot be treated as one unit, and hold that where one component causes further damage, i.e. damages other components, recovery in strict liability will be permitted. This line of cases includes the 1966 case *Gherna v. Ford Motor Company*; the 1980 case *International Knights of Wine, Inc. v. Ball Corp.*; the 1984 case *Sacramento Regional Transit. v. Grumman*; and the 2002 case *Jimenez v. Superior Court*.

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**If the defective product damages only itself, then recovery cannot be obtained in a strict liability tort action.**  
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## *Recent Trial Update*

### **CARRIAGE HOUSE and JOHN C. BEERY, JR. v. LARRY and DELLA MURPHY DEFENSE VICTORY—7 WEEK JURY TRIAL**

**By Deborah Correll**

Associate Attorney/Staff Writer

On July 4, 2000, Larry and Della Murphy accepted an opportunity to run a restaurant in Alameda known as “The Waterfront Café”. The establishment had previously been managed by Commodore Dining Cruises, who were seeking to concentrate their efforts on their Yacht Dining Fleet. Within the first six months’ of tenancy the Murphys encountered threats of closure by the Health Department, the Americans with Disabilities and physical plant failures. However, they rolled up their sleeves, invested a lot of money and sweat equity, which by the end of 2002 had turned into a blossoming jewel of vegan dining and local jazz.

Carriage House had been built by John C. Beery, Jr. and his estranged wife Linda around 1978. The Beerys, longstanding Alameda residents had successfully developed the waterfront area over the years which included this 3 story mixed use building, the Chevy’s structure and another restaurant on the water known as The Rusty Pelican, which was to the west of The Waterfront Café. The first floor of the structure was completely occupied by the Waterfront Café, with its main dining room cantilevered over the Estuary. There was an enclosed outdoor dining area on the west side of the dining room and an open area on the east side of the dining area, where smokers could sit. The second floor was occupied by 2 office suites. The third floor, originally built to accommodate 2 small office spaces had previously been converted into an apartment, which Mr. Beery occasionally used.

The fire was investigated by the Alameda Fire Department, the Arson Investigation arm of the Alameda Police Department, The United States Department of the Treasury Division of Alcohol, Tobacco, and Firearms, Fireman’s Fund Insurance’s investigator Don Alexander of Ad-Hoc, and Farmers Insurance Companies’ investigator Erika Lockhart of Fire Cause and Analysis. Most of the investigators completed their investigation during the first couple of weeks following the incident, concluding that the fire had started in the kitchen “area”, appeared to be suspicious, but what actually started the fire was undetermined. Fire Cause and Analysis, through their investigator Erika Lockhart, undertook extensive investigation in an effort to determine the cause and origin of the fire. She noted that the area approximately 4’ above a stainless steel preparation table in the kitchen, the area all the other investigators felt was where the fire had originated, had undergone a previous repair, and the fire retardant sheetrock required for restaurant kitchens had a hole in it which had been covered with plywood and painted over, thus making the fire’s travel into this area far easier than the other investigators had thought. Furthermore, through a process of digouts and washdowns and testing by a trained canine called “Axe” she found evidence of accelerants in the coffee station area of the kitchen and the east vacant office on the second floor.

Plaintiffs’ hired James F. McMullen, a former California State Fire Marshall as their expert in June 2005. Mr. McMullen was never at the scene and began his investigation in August of 2005. On his first visit to the evidence locker, which was located at Fire Cause & Analysis, he focused on three items, a small microwave, a fluorescent lamp which had been mounted under a wooden shelf above the stainless steel preparation table, and a plastic “blob”, which was stated to be the remains of a plastic “slim Jim” kitchen garbage can, which were found in the kitchen and allegedly were near the area where the fire was to have started.

This matter was originally scheduled for trial in August, 2005, but due to the fact that the defense was transferred to Cholakian & Associates in June, 2005, a continuance was sought and granted. Trial was rescheduled for February 17, 2006.

At court ordered mediation before attorney mediator Orenstil, Plaintiffs’ demand was in excess of \$2,000,000, over and above the amounts Plaintiffs had already recovered from Fireman’s Fund Insurance (\$924,630.46) and The Hartford for personal property (approximately \$34,000) Mr. Beery had maintained in the apartment. Although Defendants were willing to offer \$100,000-\$200,000 to resolve the matter, in view of Plaintiffs’ stance, offering any amount seemed futile and the mediation was concluded without success. In November, 2005, Carriage House retained separate counsel from Mr. Beery and offered to resolve its part of the case for \$1.2 M., which was rejected by Defendants. Also in late November, 2005, Plaintiffs finally dismissed Ward Proescher, individually and Commodore Dining Cruises, in the face of their Motion for Summary Judgment scheduled for December, 2005.

To complicate matters, on January 9, 2006, Fireman’s Fund Insurance sought leave and was granted the right to intervene, seeking compensation for the \$924,630.46 it had paid to Carriage House due to the fire.



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### Recent Trial Update

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Defendants had issued a Code of Civil Procedure Section 998 Offer to Compromise close to their answering the Complaint for a waiver of costs. In early February, 2006, Defendants renewed their C.C.P. § 998 Offer for a waiver of Costs. Both of these offers were rejected by Plaintiffs.

Trial began February 17, 2006, and were assigned to appear before Judge Kenneth Mark Burr. The parties combined witness list named 62 lay and expert witnesses.

Further complicating this case was the fact that both Mr. and Mrs. Murphy had prior felony convictions, which Mr. Merrill, a former prosecutor, wanted to get before the jury. We were successful in suppressing Mrs. Murphy's conviction due to the fact that it had occurred some 9 years before the trial and her record had been clean since. Mr. Murphy's conviction, however, was more troublesome, having been very recent, coupled with the fact that it was a salacious act. After zealous argument the Court ruled that Mr. Murphy's conviction would be admissible for impeachment purposes only.



We were also successful in limiting Plaintiffs' expert Mr. McMullen's testimony to his opinion that the fire was caused by a lit cigarette being placed in the Slim Jim garbage can, which was sitting on top of the stainless steel preparation table in the kitchen. And, in getting before the jury Carriage House's/Mr. Beery's acceptance of the \$924,630.46 from Fireman's Fund Insurance through admission into evidence of the Proof of that Claim which specifically identified each and every payment that was made under that policy.

On March 7, 2006, Plaintiffs dismissed with prejudice their cause of action for breach of contract. Therefore, the case proceeded to trial on the cause of action of negligence only.

Surprisingly, counsel for Fireman's Fund failed to appear at trial. Finally, Judge Burr dismissed their Intervenor on the grounds that they had abandoned their case, by failing to appear at trial.

After 1.5 hours of deliberation the jury returned a 12-0 defense verdict. This was exceedingly sweet as Plaintiffs had successfully argued that a jury instruction on *res ipsa loquitur* would go to the jury. However, this instruction, was modified to clearly state that whether or not the inference of negligence applied was a question of fact for the jury to decide. Fortunately, there was no doubt in their minds after Plaintiffs' expert McMullen testified under cross-examination that it was his opinion that the Slim Jim he felt the fire started in had been sitting on top of the stainless steel preparation table at the time of the fire and that it had so insulated the stainless steel that when the table reached heats of 1000-2000 degrees Fahrenheit, melting the adjoining metal refrigerator to the level of the table, the bottom of the plastic garbage can did not melt as that area of the table did not reach temperatures any greater than 300 degrees Fahrenheit.

Plaintiffs also sought Judgment notwithstanding the verdict or in the alternative new trial based on jury misconduct. Both motions were swiftly denied by the court on June 1, 2006. Costs in excess of \$27,000 were awarded to the Defendants.

#### *Motor Vehicle Manufacturers Employ A New Legal Argument To Try To Defeat Subrogation Claims For Product Defects*

(Continued from page 4)

Our most important case is the 2003 case *K. B. Home v. Superior Court*, where the court specifically addressed the concept of component to component damage, not in a motor vehicle context, but in building construction. In this case a house was built with defective furnaces, provided by manufacturer Consolidated Industries. The Plaintiff, K. B. Home, sought recovery in tort no a strict liability theory. Consolidated argued that pursuant to the Economic Loss Rule no recovery could be had in strict liability, because the defective furnaces had damaged only themselves.

In *K. B. Home* the court defined the Economic Loss Rule succinctly: "The eco-

nomie loss rule bars recovery in tort for economic damages caused by a defective product unless those losses are accompanied by some form of personal injury or damage to property other than the defective product itself." The court further held that a Motion for Summary Judgment could not be sought on such an issue, because "Determining the nature of the product at issue and whether the injury for which recovery is sought is to the product itself or to property other than the defective product, at least in cases involving component-to-component damage, is generally the province of the trier of fact." The court continued: "To apply the economic loss rule we must first determine what the product at issue is. Only then do we find out whether the injury is to the product itself (for which recovery is barred by the eco-

nomie loss rule) or to property other than the defective product (for which plaintiffs may recover in tort)."

Most importantly, the court in *K. B. Home* laid out a standard of review for the issue of component to component property damage:

"Under the rationale for the economic loss rule we believe distinguishing between "other property" and the defective product itself in a case involving component-to-component damage requires a determination whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product.

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*Motor Vehicle Manufacturers Employ A New Legal Argument To Try To Defeat Subrogation Claims For Product Defects*

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If that is the case, permitting tort recovery when the defective part causes physical injury to other components is consistent with the underlying principle recognizing a manufacturer's liability in tort by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm."

So far *K. B. Home* sets the standard for review of Motions for Summary Judgment on this issue. While it is not a case about motor vehicle fires, the language of the court is clearly applicable, and we have argued the

applicability of its holding very successfully to date, defeating all Motions for Summary Judgment that have been filed against us by Defendant motor vehicle manufacturers, on the grounds that the defective component in each case is a "discrete element of a larger product" and that, per *K. B. Home* it is not reasonable to expect its failure invariably to damage other portions of the finished product.

As stated earlier, since no Appellate court in California has ruled on this issue as it applies to defective components causing vehicle fires, motor

vehicle manufacturers are likely to continue to bring what are effectively frivolous and expensive Motions for Summary Judgment based upon manipulation of the Economic Loss Rule, until such time as the Appellate court makes an explicit ruling. Until then, *Cholakian & Associates* will continue to protect its subrogation clients' interests, and will continue to oppose and defeat these meritless Motions.

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*Why Are Expert Fees And Costs So Difficult To Recover?*

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The thread tying all of these decisions together is the two prong test set forth in the matter of *Santantonio v. Westinghouse Broadcasting Company, Inc.* (1994) 25 Cal.App.4th 102. In the first test the trial court must determine all factors which led to the judgment. So in cases like *Elrod* where the judgment makes a party a prevailing party through fortuitous factors not of his own making (in *Elrod* plaintiff's award was reduced to \$0 by prior settlements with other defendants and an offset of workers' compensation benefits) the offer would not be evaluated based on the verdict itself, but rather what the verdict was before the "fortuitous deductions were made". Similarly, the *Dumrichob* trial court was not abusing its discretion in awarding expert fees and costs based on an offer for waiver of costs, as Dr. *Dumrichob* had clearly defended the case on the issue of liability and almost prevailed at summary judgment. **Ergo, even if the verdict is prima facie evidence of reasonableness of the offer, it still must pass the trial court's determination of reasonableness taking into consideration all the factors that went into that verdict.**

The second prong goes to what can easily be called "the offeree's conscious disregard of a reasonable offer", which thereby makes

it reasonable to punish him or her for failing to so accept the offer. Based on information known or reasonably should have been known, the offeree should see the offer as a reasonable one. In *Santantonio*, *Santantonio* knew or should have known that the *Westinghouse* defendants had given him poor performance reviews and that in all probability they would prevail in showing that his termination was due to performance and not age discrimination. Therefore, their pretrial offer of \$100,000 was more than reasonable under the circumstances known to him and he should suffer the consequences of failing to accept the offer, to-wit, paying the expert fees and costs incurred to defend the case against him.

"Thus, if a defendant makes a low offer shortly before trial based upon potent evidence likely to insulate defendant from liability, and if the evidence was reasonably available to plaintiff, defendant's offer may qualify as a valid section 998 offer even though plaintiff did not in fact know of the information because he failed to investigate or pursue discovery." (*Santantonio*, at page 120, citing *Elrod*, at page 699-700)

The moral to the story is that in the end you may have done everything right in making your offer, in ensuring that it meets every technical requirement set forth in

C.C.P. § 998 and its interpreting case law, and still not get the expert fees and costs award because in the eyes of the trial judge or arbitrator, under all the facts to be considered it just wasn't **realistically reasonable**. It should be appealed, you say!!!

Well, maybe so, but before you beat a path to the appellate courthouse steps, you need to remember, "The trial court was in a far better position, having heard the entire case and observed the demeanor of witnesses, to exercise this discretion and determine what was a reasonable amount and what was reasonably necessary.' ...[W]e should not substitute our judgment over the judgment of the trial court in the absence of a clear showing of an abuse of discretion." (*Santantonio*, at page 121). In the end, it is the trial court who will ultimately make the determination whether or not you succeed in recovering expert fees and costs. **Therefore, if your goal in making the offer is to be able to recover costs when you prevail at trial, stop before you offer and consider the factors given above, so your chances of recovery are enhanced.**



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Association

National Association of  
Subrogation Professionals (NASP)  
Chair in California

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 \*

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

**Panelist: Kevin K. Cholakian**

July 14, 2006

[Lorman Education Services]

Crowne Plaza Union Square  
San Francisco, CA

### **Defense Seminar Association**

**Guest Speaker: The Honorable Ronald George, Chief Justice of the California Supreme Court**

August 10, 2006

City Club of San Francisco  
San Francisco, CA

### **National Association of Subrogation Professionals (NASP)**

**Northern California Chapter Meeting—"It's Not All About You."**

**"Black Box Recorders: Big Brother is Watching Over You."**

**Speakers: Kevin K. Cholakian, William H. Woodruff, Ph.D.**

**"Mold Claims - Identifying the Responsible Party"**

**Speaker: John J. Sacco, P.E., CIH, CSP Garrett Engineers**

**"Subrogation: Yesterday, Today and Tomorrow"**

**Speaker: Griff Williams, former President and founding member of NASP**

August 18, 2006

City Club of San Francisco  
San Francisco, CA

For more information about 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, 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 truck accident/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.