

Attorneys

Kevin K. Cholakian
Lin L. Duiven, Of Counsel

Colin R. Hatcher
Courtney M. King

Vivian L. Lerche

Dave Tate

Richard Lin

Lauren Koblitz

Paralegals

Deborah Hatcher

Alexis Winters

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You Gotta Know When (and How) to Fold 'Em

By Lin Duiven
Of Counsel/Staff Writer

From time to time, the Cholakian & Associates is retained to defend a case that cries out for an eventual settlement almost from the moment it comes in the door. The practical questions presented by that kind of case revolve around (1) what the final settlement amount should be, (2) at exactly what point during the course of the litigation process are the parties most likely to agree to a settlement, and (3) what work needs to be done by the law firm to achieve the best result possible in light of all of the facts and legal issues presented by the litigation.

At Cholakian & Associates, the process of evaluating a new case begins the instant it is assigned by the carrier. The goal of the evaluation process is to attempt to resolve the particular case at hand at the earliest opportunity. It is an ever-evolving procedure, which can extend up to the time selection of the jury begins (or, occasionally, even during trial.) The factors that go into a reasoned evaluation are multiple and complex. They include, for example, the strength of the plaintiff's case on liability; availability of appropriate affirmative defenses perhaps leading to a comparative negligence argument; the demeanor of the parties; expert witness potential on both sides; identity and capabilities of opposing

counsel; personal exposure of the insured; venue; jury pool; identity of the trial judge, once assigned; the applicable policy limits; the potential for punitive damages, etc. There are also "intangibles" that can affect value: Will the jury much prefer the parties (or lawyers) on one side over the other? Are there particularly egregious facts that would subtly have an adverse effect on the jury?

A recent San Mateo County case is an example of a wrongful death case that settled the weekend before trial, after nearly a year of discovery, evaluation and hard-fought trial preparation. Plaintiff

was Jane Smith*, the mother of decedent Jill Smith (age 20). Defendants were John and Sara Doe, and their son, Mark. Mark (age 22 at the time of the accident) and Jill had been dating for about three years, and planned to marry, although there was no formal engagement yet. They were both working and/or going to school, and had lived together for some time in the past. At the time of the accident, however, Mark was living with his parents and three siblings at the family home in Hillsborough.

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*names have been changed

Understanding Loss of Consortium Claims

By Courtney M. King
Associate Attorney/Staff Writer

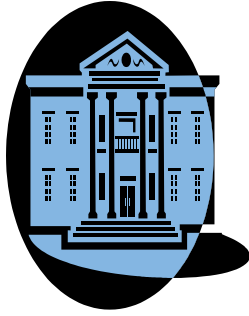
In the case of *Boeken v Philip Morris USA, Inc.*, decided February 11, 2008, plaintiff's husband sued the defendant in March 2000, alleging its cigarettes caused his terminal lung cancer. He prevailed in the suit, and was awarded a large damages judgment. While the husband's lawsuit was pending, plaintiff brought a separate action for loss of consortium in October of 2000. In February 2001, plaintiff voluntarily dismissed her loss of consortium claim with prejudice. In January 2002, plaintiff's husband died.

In June 2006, plaintiff filed a wrongful death action against the defendant. She sought funeral expenses and general damages for loss of companionship, love, comfort, affection, society, solace, and

moral support she suffered as a result of her husband's death. Defendant demurred on the basis that plaintiff's earlier dismissal of her loss of consortium claim resulted in a res judicata bar of her wrongful death claim. The trial court sustained the demurrer without leave to amend.

Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action. (*Mycogen Corp. v Monsanto Co.* (2002) 28 Cal. 4th 888). All claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date.

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Loss of consortium damages compensate a plaintiff for the impairment to his or her marital life resulting from the spouse's injury

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On the evening in question, January 13, 2006, the Doe parents were out of the country, on their first real vacation in 25 years of marriage. As a hobby, Mr. Doe owned a collection of sports cars, which were kept in a separate locked garage a few miles from their residence. The Doe children were not allowed to drive any of the collector cars without specific permission from their father. Before leaving on vacation, Mr. Doe specifically told his children, "Don't touch my cars while I'm gone."

Despite that admonition, Mark went to the garage and drove away in his father's 2003 Dodge Viper. After attending a temple function in the early evening using his own vehicle, Mark called Jill and made arrangements to pick her up at her apartment, planning to make a short "loop" trip from highway 101 to 380 to 280 to 92 in the Viper, and then return to Jill's place. The entire trip would take less than half an hour. Unfortunately, less than five minutes after Mark picked her up, Jill was dead.

Upon entering Highway 101 northbound, Mark immediately maneuvered the Viper into the fast lane, and, according to numerous eye witnesses, was traveling at a very high rate of speed. Witnesses estimated that he was traveling to be between 115 and 150 mph. While attempting to pass a slower-moving car on the right, he lost control of the Viper, which hit the concrete wall, spun, and flipped onto its roof. After sliding a considerable distance on the roof, the car came to a stop, with both the driver and the passenger trapped inside. Emergency help arrived almost immediately, but Jill had received massive blunt trauma injuries to her head and was pronounced dead at the scene. While there was no issue of the driver being under the influence of drugs or alcohol, Mark was nevertheless prosecuted and plead guilty to felony manslaughter for reckless conduct probable to cause death.

Jill's mother filed a wrongful death complaint, which she amended three times. Causes of action, besides negligence against

driver Mark, included negligent entrustment on the part of the parents and a survivorship cause of action, because the coroner determined that Jill had taken at least a few breaths before succumbing to her injuries. The survivorship cause of action exposed the defendants to potential punitive damages.

After depositions of the parties, Sara Doe was voluntarily dismissed by plaintiff. Around the same time, plaintiff made a policy limits settlement demand of \$5,000,000, and indicated that if that demand was not met, any future demand would hold firm at \$10,000,000.

During the course of the litigation, a motion for summary judgment on behalf of Mr. Doe on the negligent entrustment issue was filed and argued. The judge took the motion under submission, but did not rule until the Friday before trial, just after the case settled based on some intense negotiations and expert work.

Other important considerations in evaluating the case for

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Understanding Loss of Consortium Claims

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Res judicata applies if (1) the judgment in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties in the prior proceeding. The doctrine of res judicata not only bars litigation of matters that actually were litigated in the prior action, but also those matters that could have been litigated in that action. (*Busick v Workmen's Comp. Appeals Bd.* (1972) 7 Cal. 3d 967)

Here plaintiff did not dispute that the dismissal with prejudice of her loss of consortium claim operated

as a final adjudication of that claim. Nor did she dispute that the parties in the prior lawsuit were the same. The sole issue is whether the plaintiff's loss of consortium and wrongful death claims constitute the same cause of action.

The primary right theory provides that a cause of action is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most important characteristic of a primary right is that it is indivisible; the violation of a single primary right gives rise to but a single cause of action.

(*Slater v Blackwood* (1975) 15 Cal. 3d 791). A particular injury might be compensable under multiple legal theories and entitle a party to several forms of relief, but it will give rise to only one cause of action. Loss of consortium damages compensate a plaintiff for the impairment to his or her marital life resulting from the spouse's injury. (*Rodriguez v Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382). The concept of consortium includes not only loss of support or services, it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each

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Understanding Loss of Consortium Claims

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spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home. It has been referred to as the loss of the non-economic aspects of the marriage relation, including conjugal society, comfort, affection, and companionship.

A loss of consortium plaintiff may recover damages for the duration of the incapacity giving rise to the loss of consortium; in cases of permanent injury, the plaintiff may recover damage to his or her marital relation for the remainder of his or her married life— that is, from the date of the spouse's injury to the end of the injured spouse's

expected lifespan, as measured from just prior to the spouse's injury.

California law permits a widow or widower, among others, to recover for what amounts to loss of consortium as an element of damages in a wrongful death action arising from the death of the plaintiff's spouse. (*Krouse v Graham* (1977) 19 Cal. 3d 59. Thus, the elements of damage recoverable in a loss of consortium action arising from a nonfatal injury to one's spouse are essentially the same as the elements of non-economic loss recoverable in a wrongful death action arising from a fatal injury.

Here the Second Appellate District found plaintiff's wrongful

death action was an attempt to revive her prior loss of consortium claim. Plaintiff sought to recover against the same defendant for the same injury caused by the same conduct, as in her prior loss of consortium action. Plaintiff's wrongful death action was barred by the doctrine of *res judicata*. However, the Justices did not hold that the final adjudication of a loss of consortium claim arising from a spouse's injury would bar a subsequent wrongful death action to recover economic losses arising from the spouse's death.

The trial court's judgment of dismissal is affirmed. A brief dissenting opinion accompanies the case.

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the state legislature intended to require exhaustion of auto bodily injury liability policies only in order for UIM coverage to apply
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Analysis of the interrelationship between subdivision (p)(3) and subdivision (p)(4) of Insurance Code section 11580.2.

By Vivian L. Lerche
 Associate Attorney/Staff Writer

In the recent case of *Wedemeyer v. Safeco Ins. Co. of Am.*, 160 Cal.App.4th 1297, No. B1979060 (Mar. 13, 2008), the Court of Appeal held that once the tortfeasor's auto policy limits were exhausted, the insurer was required to pay the balance of its UIM coverage.

The facts in that case are as follows: Lowell Wedemeyer, while driving, was hit from behind by a car driven by Bradley Grosco. Wedemeyer sued Grosco to recover for his related injuries, and Grosco tendered his \$15,000 policy limit conditioned on a release of further liability. Wedemeyer's own insurer, Safeco Insurance Co. of America, then denied Wedemeyer's claim for \$485,000, representing his UIM coverage policy limit less the \$15,000 secured from Grosco's insurer. During discovery in his action against Grosco,

Wedemeyer learned that Grosco's employer maintained insurance with the Hartford Insurance Co. under a policy that extended non-owned auto liability coverage in the amount of \$1 million. Wedemeyer reached a settlement with Hartford for \$500,000.

Subsequently, Wedemeyer sued Safeco for breach of contract, unjust enrichment and related claims. A trial court granted summary judgment in Safeco's favor, and Wedemeyer appealed. The court of appeal reversed, concluding that, under subdivision (p)(3) of Insurance Code section 11580.2, Wedemeyer was required to exhaust only Grosco's auto policy before Safeco was required to pay the balance of his UIM coverage. The court of appeal found that the state legislature intended to require exhaustion of auto bodily injury liability policies **only** in order for UIM coverage to apply. As a result, Wedemeyer successfully stated a claim for breach of contract.

The *Wedemeyer* court reached this result by interpreting the term "bodily injury liability policies" in subdivision (p)(3) to mean "motor vehicle or automobile bodily injury liability policies 'applicable to all insured motor vehicles causing the injury.'" *Id.* at 1305. Therefore, under subdivision (p)(3), the insured is required only to exhaust the motor vehicle or automobile bodily injury liability policy ("auto policy") of the underinsured motorist before he/she would be entitled to recover UIM benefits from his/her own policy. *Id.* at 1305-1306. Once the auto policy held by the underinsured motorist is exhausted, the insured is not required to exhaust, or even pursue, potential coverage under any non-auto policy issued to another tortfeasor (or even any non-auto policy issued to the underinsured motorist). *Id.* At this point, the insured



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Analysis of the interrelationship between subdivision (p)(3) and subdivision (p)(4) of Insurance Code section 11580.2.

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need only provide proof to his/her own carrier of the exhaustion of the auto policy to trigger a duty to pay benefits pursuant to the UIM coverage (assuming that the limits of the UIM coverage are greater than that of the total amount of payments received by the insured under the tortfeasor's auto policy).

Under the Wedemeyer rule, the UIM carrier cannot force the insured to pursue a joint tortfeasor before payment is made under the

UIM coverage. However, consistent with subdivision (p)(4), if the insured chose to pursue another tortfeasor (or even the underinsured motorist pursuant to any non-auto policy) and obtained payment under a non-auto policy (such as a business policy or a commercial general liability policy), then the UIM carrier would be entitled to reimbursement for the amount of the payment so received. See, *Wedemeyer*, supra at 1306. In this scenario, it would merely be a timing issue in that the UIM

carrier would have to pay first (after exhaustion of the auto policy) and then seek reimbursement of any amount obtained under a non-auto policy.

As such, the holding in the *Wedemeyer* case dovetails with the holding of the court in *Mercury Insurance Company v. Vanwanseele-Walker* (1996) 41 Cal.App.4th 1093. In *Vanwanseele-Walker*, the court interpreted subdivision (p)(4), in holding that UIM benefits must be

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settlement purposes included sympathy for the plaintiff. She and her husband had tried for nearly ten years to conceive and finally after three years of in vitro treatment, Jill was born, Jill was their only child. The family was a happy one – they camped together almost every weekend, went on family vacations, and had a close day-to-day relationship. A few years before the subject accident, their home, along with most of their possessions, burned to the ground.

In 2003, plaintiff's husband/Jill's father passed away after a long bout with cancer, with treatment that included amputation of his leg. During that illness, and even more so after the death, plaintiff had an exceptionally close relationship with her daughter, since they were the only family each other had. The loss of her husband, although completely unrelated to the subject accident, made plaintiff particularly sympathetic.

Before Jill's death, Plaintiff held a responsible position with an insurance company. She received high marks on her performance, and was given a great deal of responsibility. After the death of her daughter, plaintiff but was unable to maintain her pre-

accident high level work performance, and eventually was unable to work at all due to depression and extreme emotional distress. However, defense counsel was able to convince plaintiff's counsel to drop all of her emotional distress-related claims prior to trial, and obtained a stipulation that would bar all lay and expert testimony on that topic.

Jill Smith, the decedent, was a slim, blond-haired, blue-eyed, very attractive young woman, who had a lot of friends. She had worked part time all through high school and prided herself on buying her own clothes and other personal items. She had plans, according to her mother, to attend junior colleges, transfer to USF, and eventually pursue law as a career. Plaintiff testified that she and her daughter also had a long term goal of "grandma" being the daytime babysitter for the four or more children that Jill saw in her future. Plaintiff was obviously distraught over the fact that she would never have that chance.

In contrast, the defendant driver made only a fair witness and appearance. As his defense

attorney in the criminal trial observed, he "is an immature kid" who "still doesn't get it." However, hours of mock direct and cross-examination done in preparation for his video deposition paid off—he did extremely well. Nevertheless, he had made various statements to investigating police officers, which (if admitted into evidence) would not endear him to a jury. For example, in relating the facts of the accident, he told the officers that he "does not believe it is safe for people to drive in the #1 lane going 60 miles an hour." It was this attitude that made Mark's potential as a witness risky.

Mark's father, defendant John Doe, ran his household with an iron hand. Household rules were laid down and enforced in a no nonsense fashion. Curfews (even for the adult children) were imposed and obeyed. The Doe parents were devastated by Mark's role in the accident.

All of the investigating police, fire department and ambulance personnel were deposed by either plaintiff or defendants, along with the people who were percipient witnesses to the accident itself. In summary, that testimony was unanimous in

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supporting plaintiff's allegation that the defendant driver was in fact exceeding 100 mph. Expert reconstructionists found that the likely speed at the time of the accident ranged from 100 to 110 mph.

The speed was particularly important because driver Mark had had three previous speeding tickets – two of which were citations for driving over 100 mph. These tickets, however, were issued when he was a teenager, and one of them was reduced to driving at 85 mph. Nonetheless, without an evidentiary exclusion of the prior speeding tickets, defendant's driving history would be powerful evidence in front of a jury.

The case was mediated by approximately four months before trial. Plaintiff prepared and showed a "day in the life" type video, that was mostly inadmissible but nevertheless gut-wrenching. At that time, plaintiff's initial demand was still \$10,000,000. The mediation process lowered the demand to \$4,000,000.

Following the mandatory settlement conference, where the demand

remained at \$4,000,000 the Cholakian firm prepared and served approximately twenty motions in limine, most of which plaintiff's attorneys conceded were well-founded and would likely be granted. They resulted in Plaintiff dropping her emotional distress and psychiatric and suicide claims.

The biggest potential problem for the defense was punitive damages and enhancement damages because of speed. The defense had to come up with a way to divert the Plaintiff's focus on speed and reckless conduct. An accident reconstruction with another Viper helped determine that it wasn't speed that caused the loss of control, but letting off the acceleration while changing lanes, a potential design or handling flaw. Basically, the compression was so high on this stock Viper that taking one's foot off the acceleration caused a brake like effect, and any turning movements under such circumstances, made the vehicle impossible to control. The reconstruction showed that the turnover would have happened at 75 mph if he had done the same

thing—a quick lane change while decelerating. This problem was unique to this car and we thought that we could tell the jury yes, there was negligent conduct, the substantial factor for the turnover and death was not speed, but a unique feature of this car only a professional driver would be able to handle.

Jury focus groups were astonished at the video reconstruction and testing that a stock car would do this and that speed really wasn't the issue, it was the handling characteristics of this vehicle. Within days of this expert's deposition, Plaintiff settled for 2.5 million. It was clear this testing with a Viper had paid off.

In summary, this wrongful death case, with the potential of both exposing the insureds' personal assets and punitive damages, required aggressive handling using a deft touch.

The ultimate settlement on the proverbial courthouse steps was an excellent resolution to this tragic case.

Analysis of the interrelationship between subdivision (p)(3) and subdivision (p)(4) of Insurance Code section 11580.2.

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offset by the amount received from a joint tortfeasor pursuant to a products liability claim.

Accordingly, if the insured does not notify the UIM carrier of the exhaustion of the tortfeasor's auto liability policy limits before pursuing a joint tortfeasor (such as the manufacturer of the auto) and obtaining an amount which exceeds the UIM policy limits, under subdivision (p)(4), the UIM carrier would not be obligated to pay any additional amounts to the insured. Vanwanseele-Walker, supra, 41 Cal.App.4th 1093. In this scenario, the total amount of the recovery acts as a set off, extinguishing any

duty to pay under the UIM coverage.

Examples of the various scenarios and an outline of how they work are as follows:

1. Insured exhausts tortfeasor's auto policy and demands the balance of his UIM limits - UIM carrier must pay the balance of the UIM limits;
2. After receiving UIM benefits, insured pursues a joint tortfeasor and obtains an additional amount - UIM carrier is entitled to reimbursement;
3. Before notifying UIM carrier, insured obtains an amount which exceeds the UIM policy

limits - UIM carrier is not obligated to pay any additional amounts.

Thus, the UIM carrier must pay particular attention to the circumstances under which the insured makes his or her claim for UIM benefits in determining its obligations under the UIM coverage.



CHOLAKIAN & ASSOCIATES

5 Thomas Mellon Circle, Ste. 105
San Francisco, California 94134
Phone: 415-467-8200
Fax: :415-467-8206
www.lawyers.com/cholakian

Sacramento Office

Pacific Business Center
770 'L' Street, Suite 950
Sacramento, CA 95814
Telephone (916) 341-7560

Fresno Office

Valley Oak Executive Suites
516 W. Shaw Avenue, Suite 200
Fresno, CA 93704

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(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

June 19, 2008 – San Francisco Superior Court Judge Mary Wiss will be San Francisco Defense Associates President Kevin Cholakian's guest speaker at a SFDA luncheon.

September 18th, 2008 – Alameda County Judges Jon Tigar and Kenneth Burr will be San Francisco Defense Associates President Kevin Cholakian's guest speakers at a SFDA luncheon.

November 13, 2008 – San Francisco Court Judges Julie Tang and Suzanne Bolanos will be San Francisco Defense Associates President Kevin Cholakian's guest speakers at a SFDA luncheon.

For more information about these events, please contact Fanny Lay at (415) 467-8200 ext. 211

*Kevin Cholakian is in his fifth term as President of DSA

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 and McCutchen, Doyle, Brown & Enersen (Bingham-McCutchen) in San Francisco. He became an equity partner and managed the defense practice at the AV rated 25 attorney San Francisco insurance defense firm of Kinder, Wuerfel & 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 liability matters, environmental, 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 25 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.