

# Key Decisions

August, 2007

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## **An Automobile Exclusion In A CGL Policy Did Not Preclude Coverage For Liability For Creating A Dangerous Condition That Led To An Automobile Accident**

### **Essex Insurance Company v. City of Bakersfield**

(Cal. Ct. of App., 5th Dist.), filed August 2, 2007, published August 29, 2007

## KEY FACTS

Gloria Navarro was injured when the car she was driving hit a truck Guillermo Mena was driving. The accident occurred because Mena was trying to avoid another car. The other car had allegedly become an obstacle as the result of an allegedly dangerous condition created by the City of Bakersfield in connection with a charity event it was then hosting.

Essex Insurance Company had issued a general liability insurance policy to the City for the event. It contained an "auto" exclusion for: "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured." An endorsement modified the "auto" exclusion as follows: "This insurance does not apply to 'bodily injury' or 'property damage' arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any 'auto.' Use includes operation and 'loading and unloading.'"

Essex denied coverage, asserting that because the accident arose out of an automobile accident, the exclusion barred coverage. It then filed a declaratory relief action and moved for summary judgment, which the trial court granted.

## HOLDING & REASONING

The Court of Appeal reversed. It held that the exclusion was ambiguous as it could be interpreted as applying to any accident in which an automobile was involved, regardless of who or where, or only to those accidents

where there was some connection between the automobile and the City. It further held that Essex's interpretation "converts those exclusions into unusual and unfair limitations of coverage that defeat the insured's reasonable expectations of coverage." It noted that the changes made by way of the endorsement did not plainly or clearly alert the City that Essex meant that if there was an automobile anywhere around, there would be no coverage.

The court observed:

Here, the City is being sued for creating a dangerous condition that contributed to an automobile accident. According to Essex, it would have provided coverage except that the accident involved automobiles that had no connection to the City. However, no public entity would have reasonably expected that the insurance policy would protect it from liability for negligently creating a dangerous condition of public property in all cases except where the dangerous condition leads to an automobile accident involving vehicles that had no connection to the public entity.

In support of its conclusion that the policy was ambiguous, the court relied on cases such as *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal.3d 94 (1973) [defendant accidentally shot plaintiff with a .357 magnum while operating his own vehicle]; *Safeco Ins. Co. v. Gilstrap*, 141 Cal.App.3d 524 (1983) [auto accident involved the negligent entrustment of defendant's motorcycle]; *Allstate Ins. Co. v. Jones*, 139 Cal.App.3d 271, 277 (1983) [auto accident caused by an insured's employee's negligence and the death of the passenger of the other car was caused by a negligently fastened rebar that was ejected from the insured's car's trunk]; and *State Farm Fire & Cas. Co. v. Camara*, 63 Cal.App.3d 48 (1976) [plaintiff was injured while riding as a passenger in the defendant's modified dune buggy], where coverage turned on whether liability was dependent or independent of the automobile.

In addition, the court supported its conclusion by looking at the nature and purpose of the policy:

A CGL policy is intended to cover every risk that is not excluded. A CGL policy has a very broad insuring clause but also has numerous exclusions. Exclusions can be divided into two categories: "Certain exclusions are designed to avoid coverage for risks the insurer does not wish to

insure at all; e.g., war, flood, intentional injury, environmental pollution, etc. Other exclusions are designed to limit coverage for risks normally covered by other insurance." (Croskey, supra, ¶ 3:128, p. 3-40.) The "auto" exclusion (as well as the aircraft and watercraft exclusions) is an exclusion designed to limit coverage for risks normally covered by other insurance. "To cover these risks, the insured must purchase separate insurance." (Id. ¶ 3:129.1, p. 3-40.)

Thus, auto exclusions in CGL insurances should not be interpreted to apply in cases where the insured can get separate insurance. We are unaware of any automobile insurance covering liability arising from an automobile accident where the insured has no connection to the automobiles involved in the accident. The likely reason is that there is no demand for such insurance.

Finally, the court noted that there was no authority that would have put the City on notice of Essex's interpretation of the policy.

## ANALYSIS

It was more than 40 years ago when the California Supreme Court said "an insured would not expect a defense for an injury involving an automobile under a general comprehensive policy which excluded automobile coverage." *Gray v. Zurich*, 65 Cal.2d 263, 274-75 (1966).

Nevertheless, the court's decision concentrates on whether the insured would expect the automobile exclusion would apply where the insured has no direct connection to the automobile that is involved in an accident. Arguably, this approach differs from the approach the Supreme Court adopted in *Partridge*, where the question was whether or not the insured had done anything to create a danger that was separate and independent from the possible use of a motor vehicle. Here, arguably, the only danger the City created was the danger associated with traffic and possible automobile accidents. This was not a situation where the City's conduct created the likelihood that some instrumentality other than a motor vehicle would cause bodily injury.

Some motor vehicle exclusions limit the scope of the exclusion to the insured's use of the involved motor vehicle. Other exclusions are broader, focusing on the nature of the instrumentality that is ultimately involved in producing the injury, without regard to the user's

identity. Under the broader exclusion, there is a strong argument that conduct that is not directly related to the insured's use of a motor vehicle will still be subject to a motor vehicle exclusion where the insured's conduct merely facilitates a motor vehicle accident. For example, giving a driver the wrong pair of prescription lenses or allowing trees or brush to become overgrown so as to interfere with driver visibility might be the type of conduct that is not directly related to the insured's use of a motor vehicle, but would be subject to the motor vehicle exclusion because the conduct merely creates the conditions that result in the motor vehicle accident. This decision adds some significant uncertainty to this area of the law.

*This opinion appears in the August 29, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 13160.*

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### **Shuttle Driver's Sexual Assault Of Passenger Did Not Arise From The Use Of the Shuttle**

***R.A. Stuchbery & Others Syndicate 1096 v.  
Redlands Insurance Company***

**(Cal. Ct. of App., 1st Dist.), filed August 28,  
2007, published August 30, 2007**

#### **KEY FACTS**

Collie George Dower was a shuttle driver for M & M Luxury Shuttle, Inc. He picked up a teenager girl who was running away from home, drove her to his apartment, and sexually molested her. M & M tendered the defense of the resulting civil suit to Lloyds, which had issued a general liability insurance policy to M & M. Lloyds defended without reservation, and sought contribution from Redlands Insurance Company, which had issued an automobile insurance policy to M & M. In the resulting coverage litigation, the trial court granted a motion for summary judgment in favor of Redlands, finding that its policy only covered liability arising out of the use of an insured motor vehicle and that M & M's liability did not arise out of the use of a motor vehicle. As a result, Redlands had no duty to defend or indemnify.

#### **HOLDING & REASONING**

The Court of Appeal affirmed. It reasoned that under the California cases, "a mere 'but for' connection between the use of the vehicle and the alleged injuries is insufficient to bring the claim within the scope of coverage." As with the existing cases, the court required

that the vehicle be a predominating or substantial factor in the alleged injury.

Among other cases, the court relied on *American Nat. Property & Casualty Co. v. Julie R.*, 76 Cal.App.4th 134 (1999), where the court held there was no coverage under an automobile policy for injuries resulting from a rape that occurred in a parked car where the car was used only to block the victim's exit.

The court rejected Lloyd's argument that cases involving private cars were inapplicable to a situation involving a taxicab or other public conveyance.

#### **ANALYSIS**

California law is now fairly well settled — under "normal" circumstances, sexual assaults do not arise out of the use of a motor vehicle even though the motor vehicle plays an incidental role in facilitating the assault.

*This opinion appears in the August 30, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 13272.*

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### **California Law Applies To Liability Insurance Policy Involving A California Lawsuit**

***Frontier Oil Corporation v. RLI Insurance  
Company***

**(Cal. Ct. of App., 2d Dist.), filed August 6,  
2007, published August 8, 2007**

#### **KEY FACTS**

RLI Insurance company issued a commercial general liability insurance policy to Wainoco Oil Corporation, Frontier's predecessor in interest, in January 1988. The policy's liability insuring clause states: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. ... The 'bodily injury' or 'property damage' must be caused by an 'occurrence'... We will have the right and duty to defend any 'suit' seeking those damages." An "absolute" pollution exclusion states: "This insurance does not apply to: [¶] ... [¶] ... 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants..." An endorsement entitled "Oil and Gas Lease Operators' Pollution Liability Coverage" deletes the "absolute" pollution exclusion and states: "We will pay those sums that the 'insured' becomes legally obligated to pay as

compensatory damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by a 'pollution incident.'" The endorsement, however, does not mention a duty to defend.

Lori Lynn Moss and numerous other plaintiffs filed a complaint against Frontier, Wainoco, and other oil and gas industry defendants in June 2003. The plaintiffs alleged that the defendants' oil and gas operations caused releases of toxic chemicals into the environment resulting in personal injuries and deaths. Other plaintiffs filed similar actions. Frontier and Wainoco tendered the defense of all of these actions to several primary liability insurers, including RLI.

RLI filed an action for declaratory relief in the United States District Court for the Southern District of Texas. Frontier and Wainoco filed their own action in the Los Angeles Superior Court. Because of the Superior Court proceeding, the federal court stayed the action before it. The Superior Court then granted a motion for summary judgment in favor of RLI, finding there was no duty to defend.

## **HOLDING & REASONING**

The Court of Appeal reversed.

The court first held that California law controlled the interpretation of the policy. The underlying action was brought in California based on an injury occurring in California and the contract was to be performed in California.

Having concluded that California law applied, the court next turned to the coverage issues themselves. It held that even though the endorsement did not mention a duty to defend, since the endorsement was a part of the policy and since the policy itself included a duty to defend claims where there was a potential for an award of covered damages, there was a duty to defend the pollution claim.

The court next turned to the question of whether the underlying actions included claims for which there was a potential for an award of covered damages. It found that there was the potential for such an award.

## **ANALYSIS**

Consistent with several other decisions, this case holds that the place where a contract is to be performed will typically have priority for purposes of choice of law analysis.

*This opinion appears in the August 8, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 12031.*

## **A Wife Could Not Recover On A Bystander Emotional Distress Theory For An Injury To Her Husband**

### ***Ra v. Superior Court***

**(Cal. Ct. of App., 2d Dist.), filed August 15, 2007, published August 16, 2007**

## **KEY FACTS**

Michelle Ra and her husband, Dr. Phil Jae Ra, were shopping in an Armani Exchange in Old Town Pasadena. Michelle was looking at merchandise in the women's section while her husband examined the men's sweater display some 10 to 15 feet away. Michelle was not facing her husband when she heard "a loud bang." The sound caused Michelle "to fear for my own safety and that of my husband." In fact, a large, overhead store sign had fallen, striking Phil on the head. After hearing the loud bang, Michelle turned in the direction of the noise and saw Phil with his hand to his head, bending at the knees and apparently in pain. Michelle did not see the sign strike Phil, nor did she notice the sign on the ground after looking at and walking toward him.

The trial court granted the store's motion for summary adjudication as to Michelle's claims for emotional distress.

## **HOLDING & REASONING**

The Court of Appeal noted that in *Thing v. La Chusa*, 48 Cal.3d 644, 667 (1989), the Supreme Court held that only "closely related percipient witnesses" may seek damages for emotional distress caused by observing the negligently inflicted injury of a third person and specifically limited recovery to a plaintiff who "is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim." Thus, it framed the issue as "Does the requirement of contemporary sensory awareness of the causal connection between the negligent conduct and the resulting injury limit recovery on a bystander claim to a plaintiff who clearly and distinctly perceived the injury being inflicted, or is recovery permitted for a plaintiff who was aware a traumatic event was occurring and believed it 'more likely than not' her husband had been injured?"

The court held that because Michelle's awareness of injury to Phil was only "more likely than not," her perception was inadequate to support a claim for emotional distress as a bystander.

In *Fife v. Astenius*, 232 Cal.App.3d 1090 (1991), a family heard the sounds of a car collision, but did not

realize a family member had been injured until they reached the scene of the accident moments later. That was not enough to establish contemporary awareness of the injury. The *Fife* court rejected the plaintiff's contention the element of "contemporaneous" awareness did not require proof of "simultaneous" awareness.

The court distinguished *Wilks v. Hom*, 2 Cal.App.4th 1264 (1992), where the court permitted recovery on a bystander claim asserted by a mother who, although she did not see or hear her daughters being harmed, was nonetheless aware an explosion she experienced (heard and felt) was simultaneously causing injury to her daughters. There, the mother knew her children's exact location in their bedrooms immediately before the explosion and their proximity to the origin of the blast and was personally propelled from the house by the explosion; she felt the walls moving, heard the windows being blown out and saw a bright flash emanate from one of her daughters' bedrooms.

The court also distinguished *Krouse v. Graham*, 19 Cal.3d 59 (1977), where recovery was allowed. The plaintiff was sitting in the front seat of his automobile when another car struck his wife while she was unloading groceries from the back seat, but did not see the accident. The Supreme Court concluded the plaintiff "fully perceived the fact that [his wife] had been so struck" and "realized that defendant's car must have struck her."

The court reasoned that "Although based on non-visual sensory perception, recovery in *Krouse*, as in *Wilks*, was clearly premised on the plaintiffs' reasonable certainty of injury." It then stated that "Ra does not, and cannot, establish a similar degree of certainty regarding her contemporaneous awareness of her husband's injuries."

## ANALYSIS

This decision boldly draws a line between whether a person's awareness that a close relative was sustaining a horrific injury was merely "more likely than not" (in which case, recovery will not be allowed) in situations where the awareness of injury is more certain. Given the unlimited variety of factual circumstances that can rise in such situations, distinguishing between situations where the awareness of injury was likely in situations where the awareness of injury was certain will not always be easy.

*This opinion appears in the August 16, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 12413.*

## A Residential Drug Rehabilitation Center Has No Duty To Prevent Its Inmates From Escaping

*Rice v. Center Point, Inc.*

(Cal. Ct. of App., 1st Dist.), filed August 29, 2007, published August 31, 2007

### KEY FACTS

Jasper Rice and Jennifer Asbury were injured when four inmates who had been placed in Center Point's residential drug rehabilitation facility escaped and attacked them with a knife that the inmates had taken from the facility. Rice and Asbury sued Center Point on a negligence theory.

The trial court granted Center Point's motion for judgment on the pleadings, finding that it owed no duty of care to Rice or Asbury and therefore could not be liable.

### HOLDING & REASONING

The Court of Appeal affirmed.

The court reasoned that "as a general rule, 'one owes no duty to control the conduct of another, nor to warn those endangered by such conduct.'" It noted that "An exception to this rule has been recognized, however, where a special relationship exists between the defendant and either the person whose conduct needs to be controlled or the foreseeable victim of the third party's conduct." However, found that the conduct of the inmates was not foreseeable and that the intended victims' were not identifiable.

After addressing the issue of a general duty of care, the court turned to what it described as the "more difficult question is whether a special relationship existed between defendants and their residents giving rise to a duty owed to the public to exercise reasonable care to control the criminal conduct of their residents."

Relying on cases such as *Beauchene v. Synanon Foundation, Inc.*, 88 Cal.App.3d 342 (1979), the court concluded that "public policy considerations" of "innovative criminal offender release and rehabilitation programs," precluded the imposition of liability on Center Point. Quoting from *Beauchene*, it noted: "Although appellant's injuries may be grievous, '(o)f paramount concern is the detrimental effect a finding of liability would have on prisoner release and rehabilitation programs. Were we to find a cause of action stated we would in effect be encouraging the detention of prisoners in disregard of their rights and society's needs.' Each

member of the general public who chances to come into contact with a parolee or probationer must risk that the rehabilitative effort will fail.”

The court rejected Rice and Asburys’ arguments that public policy does not dictate that a residential treatment facility avoid liability if it is poorly or negligently operated and their assertion “that the court must reasonably draw a line somewhere in a [residential treatment facility’s] continuum of conduct for the purpose of accountability.”

### ANALYSIS

The court’s decision suggests that recovery will only be allowed when the third party who is injured by an escaped inmate was identifiable and particularly likely to be injured if an escape occurred.

*This opinion appears in the August 31, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 13353.*

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## An Unlicensed Contractor Was Not Entitled To Payment

### Opp v. St. Paul Fire & Marine Insurance Company

(Cal. Ct. of App., 5th Dist.), filed August 2, 2007, published August 16, 2007

### KEY FACTS

William Opp was licensed building contractor and also president of Mountain Connection, Inc., a Montana corporation (MCI). MCI did not hold a California building contractor’s license. As president of MCI, Opp executed a subcontract with Mauldin-Dorfmeier, a general contractor. Opp inserted his individual contractor’s license number where the various contract documents called for a license number.

Prior to paying its subcontractors, Mauldin-Dorfmeier filed for bankruptcy. MCI sued St. Paul under the payment bond previously issued for Mauldin-Dorfmeier. When St. Paul asserted that MCI was unlicensed, Opp filed a first amended complaint substituting as plaintiff “William Opp dba Mountain Connection and Mountain Connection, Inc.” Except as it was alleged to be merely a fictitious business name under which appellant did business, MCI, as a separate entity, dropped out of the case.

St. Paul answered the first amended complaint and filed

a motion for summary judgment. The motion was based on documentary evidence that Opp was not a party to the contract and did not have “standing to bring this action.” Opp countered with two basic types of evidence. First, he sought to establish that he supervised most of the work under the subcontract. Second, he tried to show that everyone involved, including Mauldin-Dorfmeier, had treated MCI merely as an alter ego or a fictitious name under which Opp did business. The trial court excluded most of this evidence as hearsay and irrelevant.

The trial court concluded MCI, not Opp, was the party to the contract and had performed the work under the contract. It concluded Opp was not a party to the contract and use of his contractor’s license number on the contract documents did not make him a party to the contract. In addition, the trial court concluded MCI was not entitled to recover on the payment bond because Business and Professions Code section 7031 precluded recovery by the unlicensed corporation. The court granted the motion for summary judgment.

### HOLDING & REASONING

The Court of Appeal affirmed.

The court first rejected Opp’s argument that the trial court erroneously accepted St. Paul’s evidence that MCI “did the work” under the contract and was the sole subcontractor on the contract. It noted that the issue was not who “did the work,” but who was “engaged in the business or acting in the capacity of a contractor.” Since corporations can only act through agents and the fact that Opp actually performance of the work under the contract did not make him a party to it. Further, even Opp’s evidence failed to show MCI was actually just a fictitious name for himself.

The court next rejected Opp’s argument that, even if MCI was the only contractor and even if there was no contractor’s license issued in its name, MCI should be deemed to have been licensed because it substantially complied with section 7031. The court noted that MCI was no longer a party to the action, so its compliance, substantial or otherwise was irrelevant. It also noted that the substantial compliance doctrine was not even available to MCI

### ANALYSIS

This case again demonstrates that courts are willing to enforce statutory prohibitions to recovery by unlicensed contractors.

*This opinion appears in the August 16, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 12380.*

**Unsolicited Advertising By Fax Did Not Violate Telephone Consumer Protection Act Of 1991**

***Catalyst Strategic Design, Inc. v. Kaiser Foundation Health Plan, Inc.***

**(Cal. Ct. of App., 2d Dist.), filed August 2, 2007, published August 6, 2007**

**KEY FACTS**

In August 2001, Catalyst Strategic Design, Inc. called Kaiser to discuss providing health insurance to Catalyst's employees. During the phone call, appellant gave Kaiser its fax number for Kaiser to send written information about Kaiser's health plans. Catalyst elected, however, not to sign up for coverage at that time.

Over the next year and a half, Kaiser contacted Catalyst about a dozen times by phone and in writing, including faxes, to discuss Kaiser's on-going individual coverage of Catalyst's president and in the hope of selling coverage to the company's employees.

In January 2003, Catalyst told Kaiser it did not plan to buy coverage for company employees beyond the president's policy. Catalyst did not, however, tell Kaiser to no longer contact it or to stop sending faxes.

In May 2004, Kaiser faxed to Catalyst without its permission a one-page advertisement for health plans available through Kaiser.

Catalyst sued Kaiser for violation of the Telephone Consumer Protection Act of 1991, which prohibits sending unsolicited fax advertisements, and for unfair competition under *Business & Professions Code* § 17200.

Kaiser moved for summary judgment. It argued federal regulations deemed it to have had Catalyst's consent to send the faxed advertisement because Kaiser and Catalyst had an "established business relationship" arising from their discussions about insurance coverage. The trial court agreed, and dismissed Catalyst's complaint.

**HOLDING & REASONING**

The Court of Appeal affirmed. The court analyzed the Act and the exception for established business relationships. Based on this, the court concluded that there was an established business relationship and that as a result, Kaiser had not violated the Act.

**ANALYSIS**

In 2004, the court decided the case of *Kaufman v. ACS Systems, Inc.*, 110 Cal.App.4th 886 (2003), where the

court held an action could be maintained in state court for violation of the Act. In 2007, the court decided the case of *ACS Systems Inc. v. St. Paul Fire & Marine Ins. Co.*, 147 Cal.App.4th 137 (2007), which held that a commercial general liability insurance policy does not cover an insured's liability for sending junk faxes. Here, the court could have found that the business relationship had ceased such that the faxes sent by Kaiser violated the Act, but it elected not to go that far.

*This opinion appears in the August 6, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 11839.*

**Collateral Estoppel Requires A Full And Fair Opportunity To Litigate The Issues**

***Smith v. Exxon Mobil Oil Corporation***

**(Cal. Ct. of App., 1st Dist.), filed August 3, 2007, published August 7, 2007**

**KEY FACTS**

George R. Smith, a plumber and pipefitter, was exposed to asbestos at numerous jobsites from 1948 to 1982. In September 2000, after he learned he had lung cancer, Smith commenced a personal injury action against numerous parties, including Mobil, whose conduct allegedly contributed to his asbestos-related illness. His wife, Hannah Smith, also sued for loss of consortium. The Smiths prevailed in their action, in no small part due to the fact that during trial, Mobil's expert industrial hygienist became unavailable to testify.

After George Smith died, his wife and children commenced a wrongful death action. Prior to trial, they filed a motion in limine seeking an order precluding Mobil from contesting liability. They argued that Mobil was collaterally estopped from contesting liability.

Mobil opposed the motion, arguing, among other things, that it would be unfair to apply collateral estoppel because its expert's sudden inability to testify at the personal injury trial, for which Mobil was not responsible, prevented it from mounting a complete defense to the liability claim.

The trial court granted the motion. After an adverse verdict, Mobil appealed.

**HOLDING & REASONING**

The Court of Appeal reversed.

The court first discussed the collateral estoppel doctrine. It explained:

“Collateral estoppel is one of two aspects of the doctrine of res judicata. In its narrowest form, res judicata ‘precludes parties or their privies from relitigating a cause of action [finally resolved in a prior proceeding].’” But res judicata also includes a broader principle, commonly termed collateral estoppel, under which an issue ‘necessarily decided in [prior] litigation [may be] conclusively determined as [against] the parties [thereto] or their privies ... in a subsequent lawsuit on a different cause of action.’ [¶] Thus, res judicata does not merely bar relitigation of identical claims or causes of action. Instead, in its collateral estoppel aspect, the doctrine may also preclude a party to prior litigation from redisputing issues therein decided against him, even when those issues bear on different claims raised in a later case. Moreover, because the estoppel need not be mutual, it is not necessary that the earlier and later proceedings involve the identical parties or their privies. Only the party against whom the doctrine is invoked must be bound by the prior proceeding.” (*Vandenberg v. Superior Court*, 21 Cal.4th 815, 828 9 (1999).) Like res judicata, collateral estoppel “has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.” (*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (Parklane).)

“Collateral estoppel applies when (1) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication, (2) there was a final judgment on the merits in the prior action and (3) the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated.” (*Roos v. Red*, 130 Cal.App.4th 870, 879 (2005), citing *Coscia v. McKenna & Cuneo*, 25 Cal.4th 1194, 1201 (2001).) Conceding that all three factors are present in this case, Mobil emphasizes the equitable nature of collateral estoppel and that even where the technical requirements

are all met, the doctrine is to be applied “only where such application comports with fairness and sound public policy.” (*Vandenberg v. Superior Court*, supra, 21 Cal.4th at p. 835; *White Motor Corp. v. Teresinski*, 214 Cal.App.3d 754, 763 (1989); *Sandoval v. Superior Court*, 140 Cal.App.3d 932, 941 (1983).)

The court considered whether it would be fair to bind Mobil with the result of the prior adjudication when that result was due, at least in part, to its inability to present expert testimony.

The court explained: “with respect to the issue this case presents, we know that collateral estoppel does not apply ‘when the party against whom the earlier decision is asserted did not have a ‘full and fair opportunity’ to litigate the claim or issue.’” However, it continued: “The problem is that parties against whom a verdict is returned commonly feel they were denied a ‘full and fair opportunity’ to litigate their claims and, because no trial is perfect, it is usually not difficult for them to find a defect upon which to try to hang their hats.” And: “It is easy to say that the ‘full and fair opportunity’ necessary to collateral estoppel is not that which is perfect, but not so easy to distinguish imperfect proceedings which are nonetheless acceptable from those which are not.”

Finding no specific case addressing the specific problem Mobil faced, the court concluded that since Mobil was precluded, through no fault of its own, from presenting its expert’s testimony, it would be unfair to estop it from litigating its liability for Smith’s death. Thus, it reversed the judgment against Mobil and remanded for further proceedings.

#### ANALYSIS

It is likely that this decision would have gone the other way if Mobil had simply elected not to present expert testimony in the initial case. However, because Mobil had not made any affirmative choice regarding expert testimony, the court decided that Mobil had not fully litigated the issue in the prior case.

*This opinion appears in the August 7, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 11903.*

## OTHER CASES OF INTEREST

### A Seriously Injured Plaintiff Must Have Sustained Pain And Suffering

#### *Dodson v. J. Pacific, Inc.*

(Cal. Ct. of App., 2d Dist.), filed August 28, 2007, published August 29, 2007

The jury in a personal injury case rendered a special verdict finding the defendant, J. Pacific, was negligent and its negligence was a cause of injury to the plaintiff, Major Dodson. The jury found the Dodson, who presented surgical bills as the principal item of economic damages, suffered damages caused by the accident, but suffered no non-economic damages.

Dodson moved for a new trial on the issue of non-economic damages. He argued that, because the jury found he was injured, “there obviously has to be some pain and suffering associated with those injuries.” The trial court responded: “Not necessarily. I thought he was malingering. I was surprised they awarded anything. I think they probably concluded, if not that he was malingering, that he was grossly overstating his injuries.” Dodson’s counsel countered, “And if Your Honor is correct, then ... the jury would have come back and returned a defense verdict finding that he was not injured whatsoever or return a nominal verdict, but that clearly wasn’t the case.” To this, the trial court replied: “This was a nominal verdict.” It then denied Dodson’s motion for a new trial on non-economic damages.

The Court of Appeal held that where a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that the defendant’s negligence was a cause of plaintiff’s injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law.

The appellate court noted:

A plaintiff who is subjected to a serious surgical procedure must necessarily have endured at least some pain and suffering in connection with the surgery. While the extent of the plaintiff’s pain and suffering is for the jury to decide, common experience tells us it cannot be zero.

In short, this is not a case where the jury concluded that the “medical expenses paid

were not occasioned by the fault of the defendants.”

It thus held the trial court’s failure to grant a new trial on the non-economic damages was an abuse of discretion and reversed.

*This opinion appears in the August 29, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 13199.*

### Trial By Declaration Was Error In A Marital Dissolution Proceeding

#### *Elkins v. Superior Court*

(Cal. Sup. Ct.), filed August 6, 2007, published August 7, 2007

Jeffrey Elkins represented himself during a trial conducted in marital dissolution proceedings instituted by his wife, Marilyn Elkins. A local superior court rule and a trial scheduling order in the family law court provided that in dissolution trials, parties must present their case by means of written declarations. The testimony of witnesses under direct examination was not allowed except in “unusual circumstances,” although upon request parties were permitted to cross-examine declarants. In addition, parties were required to establish in their pretrial declarations the admissibility of all exhibits they sought to introduce at trial.

Elkins’ pretrial declaration apparently failed to establish the evidentiary foundation for all but two of his exhibits. Accordingly, the court excluded the 34 remaining exhibits. Without the exhibits, and without the ability through oral testimony to present his case or establish a foundation for his exhibits, Elkins rested his case. The trial proceeded “quasi by default,” and the court’s disposition of the parties’ property claims demonstrated that it divided the marital property substantially in the manner requested by Elkins’ former spouse.

Elkins challenged the local court rule and trial scheduling order on the grounds that they are inconsistent with the guarantee of due process of law, and that they conflict with various provisions of the Evidence Code and the Code of Civil Procedure.

The California Supreme Court held that because, pursuant to state law, marital dissolution trials proceed under the same general rules of procedure that govern

other civil trials, the trial court's handling of the trial was improper. The Court observed:

Although we are sympathetic to the need of trial courts to process the heavy case load of dissolution matters in a timely manner, a fair and full adjudication on the merits is at least as important in family law trials as in other civil matters, in light of the importance of the issues presented such as the custody and well-being of children and the disposition of a family's entire net worth. Although respondent court evidently sought to improve the administration of justice by adopting and enforcing its rule and order, in doing so it improperly deviated from state law.

The Court noted that "Written testimony in the form of a declaration constitutes hearsay and is subject to statutory provisions governing the introduction of such evidence." As such, by conducting a trial based on declarations, the trial court was considering inadmissible evidence. Moreover, the trial court abused its discretion by excluding all of Elkins' evidence based on his failure to establish admissibility by way of declarations.

*This opinion appears in the August 7, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 11939.*

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### **Reinsurance Agreements Were Not Discoverable**

#### ***Catholic Mutual Relief Society v. Superior Court***

**(Cal. Sup. Ct.), filed August 27, 2007, published August 28, 2007**

The California Supreme Court held that *Code of Civil Procedure* § 2017.210, which authorizes limited discovery of a defendant's insurance coverage information, does not authorize pretrial discovery of a nonparty liability insurer's reinsurance agreements for purposes of facilitating settlement of an underlying tort action.

The Court noted that "there may be unusual circumstances in which a reinsurance agreement is functioning in the same way as a liability policy ("fronting" arrangement), or where the reinsurance agreement is itself the subject matter of the litigation at

hand (e.g., coverage action between liability insurer and its reinsurer)" and that "[I]n such instances, discovery of such agreements would be appropriate.

*This opinion appears in the August 28, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 13037.*

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### **A Lawyer's Duties Of Loyalty Makes Suits Against Former Clients A Last Resort**

#### ***Philipson & Simon v. Gulsvig***

**(Cal. Ct. of App., 4th Dist.), filed July 30, 2007, published August 22, 2007**

Lori Gulsvig sued her former lawyers, Philipson & Simon. They filed a cross-complaint. Gulsvig filed a special motion to strike (an anti-SLAPP motion) under *Code of Civil Procedure* § 425.16, asserting the cross-complaint was a SLAPP suit. The trial court denied the motion. On appeal, the Court of Appeal held that each of the law firm's causes of action fell within the protection of the anti-SLAPP statute, because each of them is based substantially upon a Gulsvig's petitioning activity – first her initiation of a fee arbitration proceeding, and then her initiation of a cross-complaint against the law firm in action under consideration. The court further held that the law firm did not demonstrate a probability of success.

The facts of the case and its holding are not, however, particularly important. What is significant, is the court's opening paragraph, which should serve as a reminder to all lawyers and clients:

Sometimes lawyers seem to forget that, in their professional capacities, they owe a duty of loyalty to their clients – even when they no longer like them. And when a lawyer becomes convinced his client is on the wrong side of a particular legal dispute, the lawyer generally has the option of staying out of that dispute. He does not, however, have the option of switching sides and suing a client on behalf of a third party, alleging that the very settlement he obtained for the client in prior litigation actually belongs to the third party. And when the client objects to such an attempt, and sues the lawyer for breach of his professional obligations, the lawyer probably shouldn't cross-

complain back against her, apparently outraged that she has dragged him into the controversy and caused him to expend money to defend himself.

*This opinion appears in the August 22, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 12692.*

**The Primary Assumption Of The Risk Doctrine Applies To Non-Contact Sports And Did Not Bar An Action By A Golfer Who Was Hit By A Tee Shot**

***Shin v. Ahn***

**(Cal. Sup. Ct.), filed August 30, 2007,  
published August 31, 2007**

This case was summarized in the *Key Decisions* for July, 2006. It has now been ruled upon by the California Supreme Court. The Supreme Court held that the doctrine of implied assumption of the risk applies to non-contact sports, such as golf and that “being struck by a carelessly hit ball is an inherent risk of the sport.” However, it also held that in the case before it, there was a triable issue as to whether the defendant’s conduct was “so reckless as to be totally outside the range of the ordinary activity involved in [golf].”

*This opinion appears in the August 31, 2007 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 13411.*

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IF YOU HAVE ANY QUESTIONS REGARDING THE CASES discussed in this newsletter, please contact the attorney with whom you regularly work, or one of the Berger Kahn attorneys listed below:

## Orange County

Lance A. LaBelle, (949) 474-1880;  
[llabelle@bergerkahn.com](mailto:llabelle@bergerkahn.com)

David B. Ezra, (949) 474-1880;  
[dezra@bergerkahn.com](mailto:dezra@bergerkahn.com)

## Los Angeles

Allen L. Michel, (310) 821-9000;  
[amichel@bergerkahn.com](mailto:amichel@bergerkahn.com)

Leon J. Gladstone, (310) 821-9000;  
[lgladstone@bergerkahn.com](mailto:lgladstone@bergerkahn.com)

## San Diego

Roberta S. Winston, (858) 547-0075;  
[rwinston@bergerkahn.com](mailto:rwinston@bergerkahn.com)

## Marin County

Ann K. Johnston, (415) 899-1770;  
[ajohnston@bergerkahn.com](mailto:ajohnston@bergerkahn.com)

## Berger Kahn

A Law Corporation

<b>L.A. County Office</b> 4551 Glencoe Ave., Suite 300 Marina del Rey, CA 90292 310-821-9000 FAX: 310-775-8775	<b>Orange County Office</b> 2 Park Plaza, Suite 650 Irvine, CA 92614 949-474-1880 FAX: 949-474-7265	<b>San Diego County Office</b> 10085 Carroll Canyon Road, Suite 210 San Diego, CA 92131 858-547-0075 FAX: 858-547-0175	<b>Marin County Office</b> 7200 Redwood Blvd., Suite 325 Novato, CA 94945 415-899-1770 FAX: 415-899-1769
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