

# Key Decisions

AUGUST 2010

*Welcome to the August 2010 edition of Key Decisions, Berger Kahn's monthly e-newsletter summarizing the most important California and federal court decisions.*

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## Purposeful Acts Undertaken In Self-Defense Are Not Covered “Accidents”

*L.A. Checker Cab Cooperative, Inc. v. First Specialty Insurance Company*  
(Cal. Ct. of App., 2d Dist.), published July 15, 2010

### KEY FACTS

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Alexander Terminassian was a taxicab driver for L.A. Checker Cab Cooperative. One evening, while operating his taxicab, he got into a dispute with a would-be passenger, Marco Cifuentes. The dispute resulted in Cifuentes allegedly attacking Terminassian. Terminassian shot Cifuentes.

L.A. Checker Cab Cooperative had a liability insurance policy that covered its liability for “bodily injury” if it was caused by an “occurrence.” The policy defined “occurrence” as an “accident.”

The liability insurance First Specialty Insurance Company — refused to defend or indemnify. In the ensuing coverage litigation, the trial court granted First Specialty’s summary judgment motion.

### HOLDING & REASONING

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The Court of Appeal affirmed. It held that L.A. Checker Cab Cooperative was not covered for an assault and battery by its employee under the “bodily injury” provision of its commercial general liability policy regardless of whether the employee acted in unreasonable self-defense or it was negligent in training or supervising the employee.

The court relied on *Delgado v. Interinsurance Exchange of Automobile Club of Southern California*, 47 Cal.4th 302 (2009), for the proposition that: “An injury-producing event is not an ‘accident’ within the policy’s coverage language when all of the acts, the manner in which they were done, and the objective accomplished occurred as intended by the actor.”

The court rejected L.A. Checker Cab Cooperative’s argument that Cifuentes’s unforeseen and unexpected acts of spitting at, assaulting and threatening Terminassian were negligent acts on Cifuentes’s part and provoked a response that was also negligent on Terminassian’s part. It reasoned: “This argument fails because, as the court held in *Delgado*, ‘[t]he term “accident” in the policy’s coverage clause refers to the injury-producing acts of the insured, not those of the injured party.’”

The court also rejected L.A. Checker Cab Cooperative’s argument that there was coverage for negligent supervision because there is an ambiguity as to whether the policy applies to negligent supervision resulting in a battery. The court reasoned that the term “accident” unambiguously refers to the event causing damage, not the earlier event creating the potential for future injury. It noted: “Checker’s alleged negligence in not adequately supervising Terminassian was not the direct cause of Cifuentes’s injury but, if anything, only a remote antecedent cause which does not qualify as an ‘occurrence’ under the policy.”

### ANALYSIS

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One of the more interesting aspects of this case was the court’s determination that the cab company itself was not potentially covered because its driver had not accidentally injured the would-be passenger. Depending on the policy language, certain courts have separately analyzed questions surrounding accidental or intentional conduct for each insured who might be involved in a particular matter. See, e.g., *Minkler v. Safeco Ins. Co. of America*, 49 Cal.4th 315

(2010) and *American Empire Surplus Lines Ins. Co. v. Bay Area Cab Lease, Inc.*, 756 F.Supp. 1287 (1991). There is considerable complexity involved when several different insureds are sued in connection with conduct undertaken by a particular insured. It will be interesting to see how the issue develops as more courts are forced to grapple with it.

## **Alleged Theft Of Confidential Business Information Was Not “Advertising Injury” Or “Personal Injury”**

*S.B.C.C. v. St. Paul Fire & Marine Insurance Company*  
(*Cal. Ct. of App., 6th Dist.*), published July 6, 2010

### **KEY FACTS**

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San Jose Construction, Inc. (“SJC”) sued South Bay Construction Company, Inc. (“SBCC”) and one of its employees, Richard Foust for misappropriation of trade secrets, intentional interference with prospective economic advantage, common-law unfair competition, violation of Business and Professions Code section 17200, et. seq. (the unfair competition law), and interference with contract. SJC alleged that Foust, who had been employed by it, took valuable confidential information about SJC’s existing customers, when he went to work for SBCC, and that he had used the information to solicit those customers for the benefit of SBCC.

SBCC had liability insurance through St. Paul Fire & Marine Insurance Company. The policy covered certain “advertising injury” and “personal injury,” subject to various exclusions.

St. Paul refused to defend SBCC. It asserted that coverage did not exist because (a) SJC was not alleging personal injury, advertising injury, property damage, or bodily injury within the meaning of SBCC’s policy, and (b) the policy excluded claims related to breach of contract or infringement of intellectual property.

SBCC sued St. Paul for refusing to defend it. Both SBCC and St. Paul moved for summary judgments based on the coverage issue. The trial court granted St. Paul’s motion. It found no potential coverage under the “personal injury” provisions of the policy. It also found there was no coverage for “advertising injury,” because the policy excluded claims resulting from intellectual property infringement.

### **HOLDING & REASONING**

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The Court of Appeal affirmed.

The court noted that there were many cases holding that the misappropriation of trade secrets, such as customer lists, did not constitute “advertising injuries.” However, those cases did not involve policies that defined as many terms as did St. Paul’s policy. Moreover, the definitions in St. Paul’s policy were broader than the definitions adopted by the cases.

Although St. Paul’s definitions were broader than those used by some of the courts that had considered “advertising injury” coverage, St. Paul’s policy nonetheless required the insured to have been “attracting the attention of others” with a purpose of “seeking customers or supporters” or “increasing sales or business.”

The court found that this did not happen because Foust, the primary culprit in the alleged misconduct, had no need to “attract the attention” of the customers he was soliciting. The court reasoned the customers were already doing business with him, and he merely sought to transfer their association from SJC to SBCC. Thus, “[a] conclusion that this activity constituted advertising would be unreasonable and beyond the likely intent of the contracting parties.”

The court also found that SBCC, even if it was soliciting customers, did not use SJC’s “advertising material.” It reasoned that to be “advertising material,” it had to be material that is both “subject to copyright law” and used by others “to attract attention in their advertising.” Since there was no evidence the materials were subject to copyright law or that SJC was using the materials in its own advertising, the materials were not “advertising materials.”

The court rejected SBCC’s argument that it was being sued for using SJC’s “advertising ideas.”

As to “personal injury” coverage, the court concluded that the violation of a “person’s” right to privacy did not include an organization’s comparable right.

Finally, the court held that an “intellectual property” exclusion would have negated coverage.

## **ANALYSIS**

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Since 1992, when *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (1992) was decided, it seems that the scope of “advertising injury coverage” has been consistently narrowed. However, because different insurance policies can still define terms in very different ways, the particular provisions of each policy must be carefully reviewed in connection with each claim. While certain general rules relating to advertising injury coverage exist, St. Paul’s use of broad definitions shows the need to carefully analyze the terms of each contract on an individualized basis.

## **“Calderon Notice” Is A “Suit” That An Insurer May Have To Defend**

*Clarendon America Insurance Co. v. StarNet Insurance Co.*  
(Cal. Ct. of App., 4th Dist.), published July 29, 2010

## **KEY FACTS**

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Centex Homes was the developer of a residential development. After Centex completed the development, the Homeowners Association served Centex with a “Calderon Notice.” Such a notice is required by Civil Code section 1375, et seq. as a prerequisite to any legal proceedings based on alleged construction defects. It must provide the builder with a list of alleged defects so as to give the builder the opportunity to correct them. The Calderon Act’s purpose is to encourage settlement of construction and design defect disputes and to discourage unnecessary litigation.

Centex was an additional insured under two policies StarNet Insurance Company issued to one of the subcontractors on the project. The StarNet policies’ insuring agreement provided:

[StarNet] 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 StarNet policies' defense agreement provided:

We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

The StarNet policies define the word "suit" as:

[A] civil proceeding in which damages because of "bodily injury[;]" "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes: [9] a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or [9] b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

Centex was also an additional insured under a policy Clarendon America Insurance Company issued to another sub-contractor.

In coverage litigation between the various insurers, StarNet moved for summary judgment asserting the Calderon Notice and the Calderon Process did not constitute a "suit" within the meaning of the defense agreement in the StarNet policies and that as a result, it was not obligated to pay any legal fees or costs Centex incurred before the actual filing of suit.

The trial court denied StarNet's motion. It reasoned that the Calderon Process is a civil proceeding in which damages are alleged and therefore falls within the StarNet policies' definition of "suit."

## **HOLDING & REASONING**

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The Court of Appeal affirmed.

After addressing the proper way to interpret an insurance policy and the purpose of the Calderon Act, the court turned to the question of whether the Calderon Process constitutes a "suit."

The court noted that:

In *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 887, the court took a bright-line, literal approach to a provision in a CGL policy imposing on the insurer the duty to defend the insured in a "suit" seeking damages. The court concluded a "suit" is "a court proceeding initiated by the filing of a complaint." Thus, the court held, the insurer had no duty to defend the insured in a proceeding conducted before an administrative agency, the Department of Toxic Substances Control, pursuant to the Carpenter-Presley-Tanner Hazardous Substance Account Act (Health & Saf. Code § 25300, et seq.)

However, the policies at issue in *Foster-Gardner* predated the StarNet policies and did not define the word “suit” as did the StarNet policies.

The definition of “suit” in the StarNet policies, which included “a civil proceeding,” is broader than an action or lawsuit initiated by a complaint filed in court, which is how the *Foster-Gardner* court defined it.

Looking to StarNet’s policy, the court ruled that the term “civil proceeding” encompasses the Calderon Process because it is a proceeding the Civil Code requires before a common interest development association may file a complaint alleging construction or design defect damages. It noted: “The Calderon Process is more than a pre-litigation alternative dispute resolution requirement: It is part and parcel of construction or design defect litigation initiated by an association and, as such, cannot be divorced from a subsequent complaint.”

## ANALYSIS

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This decision arguably blurs the bright line rule *Foster-Gardner* had created. Many practitioners previously understood that in the absence of a court proceeding that could result in an award of damages against the insured, there was probably no “suit,” and, depending on the policy language, no corresponding duty to defend or indemnify prior to the initiation of a formal suit. Here, the court seems to avoid a bright line analysis and concludes that required pre-suit activities can constitute a “suit.” Undoubtedly, this decision will create more room for argument in terms of whether or not an insurer’s duty to defend a “suit” has been triggered.

## Claims For Unpaid Minimum Wages Or Overtime Does Not Prevent A Prevailing Defendant From Recovering Attorney’s Fees For Other Claims

*Kirby v. Immoos Fire Protection, Inc.*

(*Cal. Ct. of App., 3d Dist.*), published July 28, 2010

## KEY FACTS

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Anthony Kirby sued his former employer and 750 Doe defendants. The first cause of action alleged that Immoos engaged in 12 enumerated instances of unlawful and unfair business practices in violation of the unfair competition law. These instances had to do with wage and hours claims Kirby made in his other causes of action. The second cause of action alleged that Immoos failed to pay Kirby all wages at each pay period and at Kirby’s discharge. The third cause of action alleged that Immoos failed to pay overtime compensation. The fourth cause of action alleged that Immoos secretly paid Kirby wages less than that required by statute, regulation, and contract. The fifth cause of action alleged that Immoos failed to provide accurate itemized wage statements to Kirby. The sixth cause of action alleged that Immoos failed to provide Kirby with rest periods. The seventh cause of action alleged that 750 Doe defendants violated the Labor Code by entering into contracts with Immoos while knowing that the contracts did not provide sufficient funds to allow Immoos to comply with all applicable labor and wage laws. Kirby later amended this cause of action to identify specific defendants with whom he subsequently settled.

Kirby moved for certification of class action. The trial court denied his motion. Kirby then dismissed with prejudice his complaint as to all causes of action and all parties.

After Kirby dismissed, Immoos moved to recover attorney's fees from Kirby pursuant to California Labor Code section 218.5. Kirby opposed the motion. The trial court granted Immoos' motion and awarded it \$49,846.05.

## ***HOLDING & REASONING***

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The Court of Appeal reversed with directions to the trial court as to what it should do on remand.

The court rejected Kirby's argument that under Labor Code section 1194, attorney's fees could only be awarded in favor of a prevailing plaintiff. It held:

We harmonize [Labor Code] sections 218.5 and 1194 by holding that section 218.5 applies to causes of action alleging nonpayment of wages, fringe benefits, or contributions to health, welfare and pension funds. If, in the same case, a plaintiff adds a cause of action for nonpayment of minimum wages or overtime, a defendant cannot recover attorney's fees for work in defending against the minimum wage or overtime claims. Nonetheless, the addition of a claim for unpaid minimum wages or overtime does not preclude recovery by a prevailing defendant for a cause of action unrelated to the minimum wage or overtime claim so long as a statute or contract provides for fee shifting in favor of the defendant.

The court then reasoned that Kirby's sixth cause of action, based on Immoos' failure to provide proper rest periods amounted to a claim that Immoos did not pay Kirby for all of the time he worked. Thus, Immoos was entitled to its attorney's fees for that cause of action.

Although Immoos was entitled to attorney's fees for the work it did in defending the sixth cause of action, it was not entitled to its fees relative to the other causes of action. Thus, the trial court would have to determine what work was attributable to the sixth cause of action as compared to the others.

## ***ANALYSIS***

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As a practical matter, practitioners rarely expect Labor Code section 218.5 to result in an award of attorney's fees in favor of the employer. While this court does allow for the possibility of a fee award in favor of a defendant who successfully defeated class certification and then saw the plaintiff voluntarily dismiss, the appellate court was careful to direct the trial court to limit fees and expenses to those that were attributable to the employer's defense of the cause of action alleging a failure to provide rest periods.

## **SIR Applicable On A “Per Claim” Basis Was Ambiguous When Construction Defect Suit Included Numerous Homes**

*Clarendon America Insurance Co. v. North American Casualty Insurance Co.*  
(Cal. Ct. of App., 4th Dist.), published July 9, 2010

### **KEY FACTS**

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Tanamera Homes and Resort Communities, LLC constructed a residential. Clarendon America Insurance Company and North American Capacity Insurance Company insured Tanamera under separate and consecutive general commercial liability policies.

The North American policy had a self-insured retention of \$25,000 per claim. It stated in pertinent part:

1. The Self-Insured Retention, shown above, applies to each and every claim made against any insured, to which this insurance applies, regardless of how many claims arise from a single “occurrence” or are combined in a single “suit.”
2. . . . The Limits of Insurance will apply only in excess of the Self-Insured Retention, hereinafter referred to as the “Retained Limit.” We have no duty to defend or indemnify unless and until the amount of the “Retained Limit” is exhausted by payment of settlements, judgments, or “Claims Expense” by you.
3. Should any claim under this policy result in a settlement or judgment not exceeding the “Retained Limit,” including “Claims Expense,” then no “Claims Expense,” damages or indemnity will be payable by us.
4. Should any claim arising under this policy result in a settlement or judgment, including “Claims Expense” incurred by the insured or on the insured’s behalf, in excess of the “Retained Limit,” we will pay those amounts in excess of the “Retained Limit” to which this insurance applies subject to the Limits of Insurance as specified in the Declarations.
5. The “Retained Limit” will only be reduced by payments made by the insured.

Owners of 43 homes in the development sued Tanamera for construction defects. Clarendon defended Tanamera and eventually settled the action. Tanamera spent in excess of \$25,000 in defending the case, but did not spend in excess of \$25,000 as to any one house that had been built during North American’s policy period.

Clarendon sued North American for declaratory relief, equitable contribution, and partial equitable indemnity, seeking a proportionate or equitable share of sums Clarendon expended to defend Tanamera. North American moved for summary judgment on the ground its duty to defend Tanamera never arose because Tanamera never paid a \$25,000 “per claim” self-insured retention for each home involved in the action and completed after the effective date of the North American policy. The trial court granted North American’s motion.

## ***HOLDING & REASONING***

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The Court of Appeal reversed. It held North American did not meet its burden of showing there was no potential for coverage under the terms of its policy

The court held that the term “claim” as used in the “per claim” self-insured retention provisions was ambiguous. On the one hand, it could mean that each involved house constituted a separate claim and that coverage was not triggered for any one house until Tanamera had spent \$25,000 relative to that one house. On the other hand it could mean the entire suit was a single claim and that a duty to defend arose by virtue of Tanamera’s payment of a total of \$25,000 in defense costs and expenses.

The court noted that the policy did not define “claim” and that given the way “claim” was used at different places in the policy, it was unclear just what it meant.

North American presented no evidence showing that a reasonable insured would have understood the self-insured retention provisions to mean that a separate self-insured retention applied to each house that was part of a single lawsuit. Therefore, it failed to prove it was entitled to a summary judgment.

## ***ANALYSIS***

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North American Casualty had collected a \$404,000 premium. If applicable to each home, the policy’s self-insured retention for the entire project would have been \$11,250,000, while the maximum payout under the policy was a mere \$2,000,000. Under the circumstances, the court seemed to believe that North American Casualty would have had to be much more explicit in order to impose a per home self-insured retention.

## **Expert’s Declaration Failed To Lay A Foundation For The Ultimate Opinion**

*Bozzi v. Nordstrom, Inc.*

*(Cal. Ct. of App., 2d Dist.), published July 14, 2010*

## ***KEY FACTS***

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Katya Bozzi was injured when the escalator on which she was riding at the Nordstrom store, stopped abruptly due to a power outage connected to a nearby traffic accident. The power was out for about one minute and was then restored. The lights went on, the escalator descended to the first floor, and Bozzi walked out of the store.

Bozzi sued Nordstrom. She alleged it was a business that invited her to shop and therefore owed a duty not to create an unreasonably dangerous condition in the store. She alleged Nordstrom violated the duty to inspect and maintain the safety of the escalator and to warn of the danger of a jolt in the event of a power outage.

Bozzi sued Kone, Inc. the successor to the escalator manufacturer. She alleged it violated the duty to provide a safe escalator or warn of inherent defects and to take reasonable steps to prevent reasonably foreseeable harm.

Bozzi alleged all the defendants had a duty to either supply an alternate power supply or design and maintain the escalator so that it would slow to a gradual stop when the power went out.

The various defendants moved for summary judgment. They relied on declarations by experts to show that they were not negligent and that there was nothing wrong with the escalator.

The defense expert's declaration set forth his credentials in great detail. It then set forth that he inspected the escalator and that he rode on it while a service technician started and stopped the escalator several times. He found the escalator traveled at a speed and stopped at a distance that met state requirements and industry standards. In addition to inspecting the escalator, he reviewed extensive records, including Bozzi's deposition, the entire file of inspections of the escalator kept by the California Department of Industrial Relations, Division of Occupational Safety and Health (DOSH), the manufacturing blueprints, Kone's maintenance contract with Nordstrom, Kone's maintenance technician's guide, and all of Kone's records of examination, maintenance and repair of the escalator from a year before the power outage until a month afterward.

The expert explained a back-up generator would not have prevented a sudden stop of the escalator, as Bozzi alleged in her complaint. Whether or not there was a back-up generator, the escalator would still stop when the electric power was cut off, and it would take several seconds for a back-up generator to activate. Neither state code nor industry standards required the use of a back-up generator for escalators. Indeed, when the electricity is cut off, the safest thing is for moving escalators to come to a stop, rather than to continue transporting passengers in the dark by means of a back-up generator. The expert concluded Bozzi was not injured by any defect in design or manufacture of the escalator, or by any negligence in the design, manufacture, installation or maintenance of the escalator.

Bozzi opposed the motion. She relied on her own expert declaration. Her expert did not inspect the escalator. He testified it was impossible to determine the travel speed or stopping distance of the escalator on the day of the power outage, and it was impossible to determine what design or manufacturing defect caused the escalator to stop abruptly. Despite the impossibility of knowing what defect in manufacture or deficiency in maintenance there may have been, and the impossibility of knowing what happened on the day of the power outage, he opined that "certain technology that was available in 1985 would have prevented the abrupt stop that caused the injuries claimed by the Bozzi. He concluded Bozzi's testimony that the escalator came to a jolting stop proves there was a defect, because a properly designed and maintained escalator should not stop abruptly.

The trial court found Bozzi did not show there was a triable issue of fact that defendants breached any duty of care or that the escalator was defective. It did so after sustaining the various defendants' objections to Bozzi's expert's declaration. It granted the motion for summary judgment.

## ***HOLDING & REASONING***

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The Court of Appeal affirmed. It found that Bozzi's expert had not submitted a declaration that showed a triable issue of material fact because it did not provide a foundation for its conclusion that there was something wrong with the escalator.

The court started by noting:

The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion.

An expert declaration is admissible to support or defeat summary judgment if the expert's testimony would be admissible at trial in accordance with California Evidence Code section 720.

Turning to Bozzi's expert's declaration, the court ruled that he showed he was qualified to render an opinion. However, "he stated no facts to support his opinions, and his opinions were conclusory and speculative." The court reasoned:

[Bozzi's expert] had never seen, ridden or inspected the escalator. He could not determine whether the escalator was properly maintained between the time it was installed in February 1985 until July 2005. He acknowledged that DOSH inspected and approved the escalator in 2005 and 2007. He found it "impossible to determine" what design or manufacturer's defect caused the escalator to stop abruptly in 2006. [The expert] relied on nothing more than syllogistic reasoning to conclude that if an escalator stops abruptly, it must have been defectively designed or maintained.

Based on this, the court found that the trial court had not abused its discretion in sustaining the defendants' objections to the expert's conclusions. It noted: "An opinion is only as good as the facts and reasons on which it is based."

Because the trial court had not abused its discretion in sustaining the defendants' objections to the expert's conclusions, there was no triable issue of material fact and the defendants were entitled to a summary judgment.

## **ANALYSIS**

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Any declaration that is overly conclusory is potentially problematic. Where a party is relying on an expert's opinion to defeat a summary judgment motion, it is imperative that the particular basis for the opinion be developed properly within the context of the declaration.

## **OTHER CASES OF INTEREST**

### **Arbitrators Are Immune From Suit Even If They Fail To Disclose A Conflict Of Interest**

*La Serena Properties v. Weisbach*

*(Cal. Ct. of App., 1st Dist.), published July 16, 2010*

Gerald Weisbach was an arbitrator with the American Arbitration Association. He served as the arbitrator in a dispute between La Serena Properties, LLC, Casa Margaritaville, Inc., and Steven Yates on the one hand and Merchant Builders, Inc. on the other. Weisbach did not disclose that he was the "boyfriend" of the sister of one of Merchant Builders' attorneys.

Weisbach rendered an award in favor of Merchant Builders. When La Serena Properties, Casa Margaritaville and Yates learned of the conflict, they sought to overturn Weisbach's award. They also sued him for having failed to disclose the conflict of interest created by his relationship.

The trial court sustained Weisbach and the American Arbitration Association's demurrer without leave to amend. It did so on the grounds that an arbitrator is immune from suit.

The Court of Appeal affirmed. It ruled that the alleged claims of misconduct, no matter how pleaded, all arise out of the conflict of interest disclosure procedure that is integrally part of the arbitration process. Thus, Weisbach and the American Arbitration Association were protected from liability by the common law arbitral immunity for quasi-judicial acts.

## **Civil Code Section 846 Does Not Relieve A Land Owner Of The Duty To Avoid Vehicular Negligence**

*Klein v. United States of America*

(*Cal. Sup. Ct.*), published July 27, 2010

Alan Richard Klein was riding a bicycle for recreation on a two-lane paved road in Angeles National Forest in Southern California. While riding, he was struck head-on by an automobile driven by a part-time volunteer working for the United States Fish and Wildlife Service. Klein suffered catastrophic injuries. Klein sued the United States government (the owner of the national forest land) and its volunteer worker. Klein brought his action in federal court.

The United States defended on the ground that Civil Code section 846 shielded it, as owner of the United States Forest Service land on which the accident had occurred, from any negligence liability to a person, such as plaintiff, who was injured while using that land for recreation.

The District Court granted a summary judgment in favor of the United States. Klein appealed.

The Ninth Circuit Court of Appeals asked the California Supreme Court to rule on the applicability of section 846. It did so in part because it recognized that because the federal government owns so much recreational land in California, “[s]hielding the United States from liability for the negligent driving, and possibly for other negligent acts, of its employees on all of these lands may have substantial and negative consequences for the many residents of and visitors to California who make use of federal lands for recreational purposes.” The Ninth Circuit noted that although there was case law in California that extended the protections of section 846 to land owners when their employees drove negligently, other cases led it to be concerned that the California Supreme Court might not agree.

The California Supreme Court ruled that section 846 does not relieve landowners of the duty to avoid vehicular negligence. In making this ruling, the Court disapproved of *Shipman v. Boething Treeland Farms, Inc.*, 77 Cal.App.4th 1424 (2000), to the extent it was inconsistent with this ruling.

## **An Employer May Not Fire An Employee Because Of A Prior Noncompetition Agreement**

*Silguero v. Creteguard Inc.*

(*Cal. Ct. of App., 2d Dist.*), published August 2, 2010

Rosemary Silguero began working for Floor Seal Technology as an in-house sales representative in 2003. In August, 2007, Floor Seal threatened to terminate Silguero unless she signed a confidentiality agreement. As a result, she signed an agreement which prohibited her “from all sales activities for 18 months following either departure or termination.” In October, 2007, Floor Seal terminated Silguero.

Shortly after Floor Seal terminated Silguero, she went to work for Creteguard.

Floor Seal contacted Creteguard and “requested the cooperation and participation of [Creteguard] in enforcing the confidentiality agreement, including those provisions prohibiting Silguero from all sales activities for 18 months following Silguero’s departure or termination from [Floor Seal].” In November 2007, Creteguard’s chief executive officer, Thomas Nucum, informed Silguero in writing that “it has been brought to my attention . . . that you have signed a confidentiality/non-compete agreement with your past employer[.] [W]e regret to inform you that [Creteguard] is unable to continue your employment effective today 11/14/07[.] [A]lthough we believe that non-compete clauses are not legally enforceable here in California, [Creteguard] would like to keep the same respect and understanding with colleagues in the same industry.”

Silguero sued Creteguard and Floor Seal. She sued Creteguard for wrongful termination. She alleged that Creteguard had engaged in an “illegal conspiracy against trade.” She sued Floor Seal for, among other things, interference with contract.

Creteguard responded by filing a demurrer. It asserted that Silguero could not state a viable cause of action against it. It argued: “there was no clearly-delineated public policy prohibiting a subsequent employer from honoring a putatively valid non-compete/confidentiality agreement entered into by an employee and a former employer,” and that any restraint of trade in this instance was committed by [Floor Seal] Creteguard concluded that its conduct, “in an abundance of caution,” was designed not to invite a lawsuit by [Floor Seal] “for a then-unsettled issue of whether such an agreement was enforceable,” and does not give rise to a claim for wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167 (1980).

The trial court sustained Creteguard’s demurrer. Silguero appealed.

The Court of Appeal reversed. It held that if Creteguard terminated Silguero based on a noncompetition agreement that was void as against public policy, it could be liable for wrongful termination.

## Attorneys May Be Sanctioned For Coaching Witnesses During Depositions

*Tucker v. Pacific Bell Mobile Services*

(Cal. Ct. of App., 1st Dist.), published August 2, 2010

Diane Tucker and others filed what she proposed as a class action against cellular telephone providers, Pacific Bell Mobile Services and Cingular Wireless. She asserted they violated the Unfair Competition Law (Bus. & Prof. Code section 17200, et seq.) by selling “bucket plans” without informing consumers how the length of each telephone call would be calculated.

The defendants deposed one of the plaintiffs, Julia Knapp. During the deposition, her counsel wrote on a legal pad and showed it to Knapp. Her counsel also instructed her not to answer questions related to her standing to bring the action and refused to permit defense counsel to question her about the notes on the legal pad. After the deposition, her counsel threw away the notes.

Defendants moved for sanctions against Knapp and her counsel. They asserted counsel improperly coached Knapp during her deposition and improperly refused to permit her to answer questions.

The trial court granted the motion and imposed sanctions of \$7,500. These included the cost for defendant to re-depose Knapp. In granting the motion, the trial court determined that Knapp’s counsel had coached her on the “very critical issue [of] standing” and therefore abused the discovery process during the deposition.

Plaintiffs’ appealed the sanction award.

The Court of Appeal concluded that the trial court did not have the authority to award sanctions for “further deposing Plaintiff Julie Knapp” because defendants had not “incurred” those expenses within the meaning of Code of Civil Procedure section 2023.030 (a). It reversed the portion of the trial court’s order that awards monetary sanctions related to anticipated costs of a future deposition, but otherwise affirmed.

Interestingly, the court did not discuss statutory or case authority that would authorize the trial court to sanction an attorney for coaching a witness during a deposition. Nor did it discuss statutory or case authority that might enable a party to inquire into the substance of confidential communications between another party and his or her attorney even if made in the context of coaching. The court took those as givens.

## **An Aggrieved Party Has Standing To Seek Attorney Disqualification**

*Great Lakes Construction, Inc. v. Burman*

*(Cal. Ct. of App., 2d Dist.), published July 28, 2010*

The Burmans undertook to remodel their home. They engaged designers to prepare plans and specifications. They engaged a contractor to do the work. The contractor engaged a subcontractor. The subcontract contained an indemnification provision.

As the result of issues that arose during the project, the contractor sued the Burmans. The Burmans responded by filing a cross-complaint against the contractor and the designers. The subcontractor, who was represented by the same lawyer as the Burmans also asserted a cause of action against the contractor.

During his deposition, the subcontractor answered certain questions in a manner that was inconsistent with what he had said in response to written discovery. This led the contractor’s counsel to believe that the subcontractor had not been informed about the potential conflict arising from being represented by the same attorney as the Burmans.

The contractor filed a motion to disqualify the attorney who was representing the Burmans and the subcontractor. The trial court granted the motion.

The Court of Appeal reversed.

The court acknowledged that attorneys who jointly represent clients in the same action owe a duty of undivided loyalty to each of their clients and are subject to disqualification if an unwaivable conflict exists arising from the joint representation. However, one who is not a present client, former client, or prospective client, and who has had no prior confidential relationship with opposing counsel does not have standing to seek disqualification.

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