MURCHISON & CUMMING LLP

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CELEBRATING 83 YEARS

in brief

WINTER 2013

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Murchison & Cumming Celebrates Ten Years in Northern California

Murchison & Cumming, LLP opened the doors to its Northern California office in Pleasanton in December 2002. Ten years later, with its office now located in the heart of downtown San Francisco's Financial District, the firm continues to grow and expand its Northern California presence. With a diverse team of attorneys, a decade-long presence in Northern California, the addition of two partners in 2011 and the elevation of two attorneys to partner in 2013, Murchison & Cumming's San Francisco office has much to celebrate as it looks to the future.

Kasey C. Townsend, who has been with the firm since 1996, continues to serve as Partner-in-Charge of the San Francisco office, having moved to Northern California from the firm's San Diego office in 2003 to take that position. Senior Partner Michael B. Lawler, who spearheaded the office's opening along with other of the firm's partners, also continues to handle matters venued in Northern California.

With more than 20 years of experience in property, marine, fine art and specie insurance, Partner Valarie H. Jonas brought a unique specialty to the firm and the San Francisco office when she joined the firm in 2011. Ms. Jonas has been handling jeweler's block and fine art work for the London market since 1990. She serves as Co-Chair of Murchison & Cumming's Insurance Law practice group, also handling general liability, medical malpractice, environmental coverage, and fidelity and transportation litigation.

"I was drawn to the firm by its well known reputation in the insurance market," said Ms. Jonas. "I have now come to know first-hand the basis of that reputation in the fine attorneys who work here and in the service they provide our clients. I am very pleased to say I have found a home at Murchison & Cumming."

Fellow San Francisco Partner John H. Podesta also joined the firm in 2011. He is licensed in both California and Nevada, and also focuses his practice on insurance law, coverage matters and litigation. Mr. Podesta is Co-Chair of the American Bar Association's Construction Subcommittee, has published numerous works and speaks regularly on insurance and construction law topics.

Melissa Wood Eisenberg and Heidi C. Quan, who joined the Northern California office as associates over eight years ago, were named partners this year. Ms. Eisenberg and Ms. Quan defend clients against litigation involving general liability, product liability, employment law, health law and long-term care facilities for the elderly.

Partner and Insurance Law practice group Co-Chair Bryan M. Weiss will be moving to San Francisco from the firm's Los Angeles office in the fall of 2013. Mr. Weiss has been with the firm since 1991, handling appeals, providing coverage advice and representing insurers in declaratory relief actions, bad faith actions and insurance-related appeals.

If the attorneys in Murchison & Cumming's San Francisco office can assist you in any way, we are prepared to do so and welcome your calls and emails. You may contact Ms. Townsend at 415-524-4305 or ktownsend@murchisonlaw.com or any of the office's partners, whose information can be found online at www.murchisonlaw.com.

Murchison & Cumming Names Three Partners and Associate Partner

Murchison & Cumming, LLP is pleased to announce that Melissa Wood Eisenberg, Heidi C. Quan and Michael D. McEvoy have been named Partners and that Daniel G. Pezold has been named Associate Partner.

Ms. Eisenberg joined the firm's San Francisco office almost a decade ago. She focuses her practice in the areas of general liability, premises liability, product liability, personal injury and wrongful death, habitability, construction injury and defect litigation, and employment law. Ms. Eisenberg has obtained successful results for clients in all aspects of litigation, including mediations, arbitrations, summary judgment motions and successful trial results. Her clients include individuals, corporations, contractors, developers, small business owners, restaurants and nightclubs, taxi companies and rental car companies.

Ms. Quan, also of the firm's San Francisco office, practices in the areas of employment law, general liability, trucking and vertical transportation, and products liability. A Martindale-Hubbell AV-rated attorney, she handles matters involving wrongful termination, sexual harassment, defense of employers in uninsurable claims in the worker's compensation arena and premises liability, to name a few. Her clients include individuals, corporations, small business owners, security companies, restaurants, trucking companies and commercial property owners and managers. Ms. Quan is a member of the Defense Research Institute, the Association of Defense Counsel of Northern California and the Asian American Bar Association.

Mr. McEvoy practices in Murchison & Cumming's Los Angeles office, where he is a member of the Wildland Fire Litigation practice group. He focuses his practice on complex wildland fire litigation and the defense of utility companies and is also experienced in matters involving general liability, product liability, and toxic tort and environmental litigation claims. Mr. McEvoy attended the International Association of Defense Counsel's 2011 Trial Academy and is a member of the Litigation and Environmental sections of the Los Angeles County Bar Association.

Mr. Pezold also practices out of Murchison & Cumming's Los Angeles office and is a member of the firm's Construction Law and Insurance Law practice groups. He focuses his practice in the area of construction defect defense, representing sub-contractors and general contractors in all fields of construction. Mr. Pezold also has experience in insurance litigation, including bringing and defending declaratory relief and contribution actions, and defending bad faith actions. He is a member of the Association of Southern California Defense Counsel and previously served on the American Bar Association, Law Student's Division National Board of Governors, as a law student representative in the House of Delegates as well as a Liaison to Section of Legal Education and Admissions to the Bar.

Six Murchison & Cumming Attorneys Recognized as 2013 Super Lawyers

Murchison & Cumming, LLP is pleased to announce that six of its attorneys have earned the distinction of having been chosen by their peers as 2013 Southern California Super Lawyers®. The annual listing, based on peer evaluations, was recently released by Thomson Reuters and will be published in *Super Lawyers* magazines and in leading city and regional magazines across the country.

The Murchison & Cumming attorneys selected for the 2013 list are:

Jean M. Lawler, Managing Partner of the firm, Past Chair of the Insurance Law practice group and Co-Chair of the International Law practice group. This marks Ms. Lawler's eighth consecutive year on the list. A specialist in insurance law, she is a member of the College of Coverage & Extra Contractual Coverage Counsel. Ms. Lawler is a Past President of the Federation of Defense & Corporate Counsel (FDCC) and has served as a Director on the Boards of the Defense Research Institute, Lawyers for Civil Justice and the Association of Southern California Defense Counsel (ASCDC). She presently serves as Secretary-Treasurer of the FDCC Foundation and is listed in Martindale-Hubbell's Bar Register of Preeminent Women Lawyers.

Friedrich W. Seitz, the firm's former Managing Partner, Chair of the firm's Wildland Fire Litigation practice group, and Co-Chair of its Business Litigation, Product Liability/Utilities and International Law practice groups. This is his tenth consecutive Super Lawyer mention. A respected trial lawyer and member of the Los Angeles Chapter of the American Board of Trial Advocates, Diplomat rank, Mr. Seitz is also a member of the IADC and FDCC and is a former Chair of the FDCC Product Liability Substantive Law Section.

Michael B. Lawler, Co-Chair of the firm's Employment Law practice group. A Past President of the Association of Southern California Defense Counsel, this marks the ninth consecutive year that he has been named to the list. Mr. Lawler, a respected trial lawyer, has been recognized as one of the "Best Lawyers in America" and a "Leading Employment Lawyer in California." He has served on the national board of the American Board of Trial Advocates, is a member of its Los Angeles Chapter and a member of the FDCC and IADC.

Dan L. Longo, Partner-In-Charge of the firm's Orange County office and Co-Chair of the Health Law and Professional Liability practice groups. A veteran trial lawyer, Mr. Longo was a contributing writer for Aspatore Books' *Inside the Minds* series on "Elder Law Health Care Client Strategies." This is his second consecutive Super Lawyers mention. Mr. Longo is a member of the IADC, the ASCDC, and the Defense Research Institute, and serves as Chair of USLAW Network's Professional Liability practice group.

Guy R. Gruppie, Chair of the firm's Vertical Transportation practice group, Co-Chair of the Emerging Risks & Specialty Tort Litigation practice group and immediate Past Chair of the General Liability & Casualty practice group. This is Mr. Gruppie's fifth consecutive year as a Southern California Super Lawyer. He is a member of the Los Angeles Chapter of the American Board of Trial Advocates and the FDCC, having served as Co-Chair of the FDCC Trial Tactics Substantive Law Section from 2004-2008. Mr. Gruppie has served as an adjunct professor at Southwestern Law School, teaching California Civil Procedure.

James P. Collins, Jr., eight-time Super Lawyer and respected Orange County trial lawyer, handling professional liability defense, employment law, defense of first party insurance claims and business litigation. Mr. Collins is a Past President of the Association of Southern California Defense Counsel and was a Founding Partner of the former firm of Cotkin & Collins. He is a member of the American Board of Trial Advocates and the FDCC.

Murchison & Cumming Joins Insuralex as California Member

Insuralex President Bill Perry has announced that Murchison & Cumming, LLP has been elected as the California Member of the expanding Insuralex group of firms dedicated to insurance and reinsurance coverage, defense and litigation. Murchison & Cumming is one of thirty firms to be selected internationally.

Insuralex is a world-wide network of independent insurance and reinsurance lawyers who provide legal services to the insurance and risk management communities in the areas of coverage, defense, litigation and other related legal services. Insuralex member firms are located in Europe, North America and the Middle East.

Mr. Perry welcomed Murchison & Cumming to Insuralex and commented, "We are extremely pleased that we have our friends at Murchison

& Cumming join Insuralex as Members for California. Their practice and range of international instructions and contacts is enviable and we look forward to working closely with them over the coming years."

Managing Partner of Murchison & Cumming, Jean Lawler, said, "We are pleased for the firm to be elected to membership. For many years we have provided services to clients in the international insurance market. Working with the team at Insuralex will be a terrific opportunity to offer the full range of our services in our own area, as well as contributing to the worldwide standing and reputation of this excellent group of lawyers."

Murchison & Cumming regularly represents international insurers, particularly in the London market, and serves as national and regional coordinating counsel in multijurisdictional cases.

Jean Lawler a Founding Board Member of the American College of Coverage and Extracontractual Counsel

Murchison & Cumming, LLP is pleased to announce that Jean M. Lawler, the firm's Managing Partner, was selected to be a founding member of the Board of Regents of the American College of Coverage and Extracontractual Counsel (ACCEC). The newly formed organization was created by leading insurance lawyers in the United States and Canada who represent the interests of both insurers and policyholders.

"The time seemed right to bring together the finest lawyers from the United States and Canada, who represent some of the best minds practicing in a wide range of legal and insurance disciplines," said Thomas F. Segalla, President of the College. "While our goals include providing education for the bench and bar as well as the insurance industry, we believe it's the dialogue among our diverse members that will lead to creative resolutions and improved representation for all parties in a dispute."

Ms. Lawler presently serves as Secretary-Treasurer of the Federation of Defense and Corporate Counsel Foundation. She is a Past President of the FDCC and has served as a Director for the Defense Research Institute (DRI), Lawyers for Civil Justice (LCJ) and the Association of Southern California Defense Counsel. Ms. Lawler is Past Chair of Murchison & Cumming's Insurance Law practice group, which she led for 25 years, and is Co-Chair of its International Law practice group.

Ms. Lawler's insurance practice includes representing and defending insurers, agents and brokers in insurance, bad faith and professional liability litigation, at trial and on appeal; providing insurers with coverage, underwriting and risk management advice; and providing risk management consultations. Her insurance practice and experience encompasses most types and lines of insurance and most industries, at all levels of insurance, for domestic and international insurers, including the London Market.

Four from Murchison & Cumming Pass California Bar Exam

Murchison & Cumming, LLP is pleased to announce that Claudia Borsutzki, Kelsey C. Starn, Dustun H. Holmes and Alyssa K. Chrystal passed the California Bar Exam. Ms. Starn and Ms. Chrystal have become Associates with the firm and Ms. Borsutzki is a Rechtsanwältin, or German attorney.

Ms. Borsutzki joined the firm in 2006 as an intern with its German Legal Trainee Program. She currently assists with the legal needs of the firm's German and European clients involved in U.S. litigation and business transactions. Ms. Borsutzki is able to represent all German clients within the European Union.

Ms. Starn, Mr. Holmes and Ms. Chrystal first joined the firm as summer law clerks. Ms. Starn's practice includes general liability and business litigation. Mr. Holmes is a member of the General Liability & Casualty and Employment Law practice groups. Ms. Chrystal assists in various civil litigation matters; she has experience in law and motion.

California Supreme Court Affirms Trial Court's Duty to Scrutinize Expert Testimony

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After remaining in the shadows of the nationwide debate over the appropriate standards governing the admissibility of expert testimony for over 35 years, the California Supreme Court recently entered the fray and clarified the law in California in the case of *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (212 DJDAR 15846 (November 26, 2012)). In *Sargon Enterprises*, the Supreme Court sent a clear message to trial courts that they should act as a "gatekeeper" and preclude the admission of expert testimony that, broadly speaking, lacks adequate scientific foundation. At the same time, the Supreme Court clarified the legal criteria that trial courts should employ in evaluating the admissibility of expert testimony (and, of lesser importance, the law regarding evidence of lost profits). For those aiming to exclude ill-conceived expert testimony from litigation, this is welcome news.

The *Sargon Enterprises* decision focused on the admissibility of expert testimony regarding the alleged lost profits of a dental implant manufacturer that retained a group of scientists at the University of Southern California ("USC") to conduct a clinical trial on an innovative new dental implant. Prior to trial, the trial court excluded the plaintiff's evidence of lost profits on the ground that they were not foreseeable. At trial, Sargon Enterprises ("Sargon") persuaded the jury that USC breached its contract with the company by failing to prepare proper reports after initial success with the clinical trials. The jury awarded Sargon $433,000 in compensatory damages.

Sargon appealed. The Court of Appeal then reversed the trial court's exclusion of the evidence of lost profits on the ground of lack of foreseeability and remanded the case for retrial.

On remand, USC moved to exclude the evidence of lost profits on the ground that the damages were speculative. During an eight-day evidentiary hearing before the trial judge, Sargon's primary damages expert testified that Sargon's lost profits were in the range of $220 million to nearly $1.2 billion. In reaching this conclusion, the expert opined that Sargon would have achieved a market share in the dental implant manufacturing industry equal to one of the six companies that combined had 80% of global sales in the market. Looking at four of those six companies in particular, the expert estimated that Sargon would have attained between roughly 5-23% of the share of the market over time. Had they achieved 5% market share, they would have made profits of $220 million. Had they attained about 23% of market share, their profits would have been nearly $1.2 billion.

In a 33-page opinion, the trial court ruled that the evidence of Sargon's alleged lost profits should be excluded as speculative. Once again, Sargon appealed. By a 2-1 vote, the Court of Appeal reversed the trial court a second time. USC then successfully petitioned the Supreme Court for review.

The California Supreme Court affirmed the trial court's exclusion of Sargon's evidence of lost profits. In reaching this result, the Supreme Court reviewed the law pertaining to the admissibility of expert testimony in general, focusing primarily on *California Evidence Code* §§ 801(b) and 802 (although the law regarding evidence of lost profits was also discussed). The tremendous import of *Sargon* derives from the court's analysis of *Evidence Code* §§ 801(b) and 802.

Evidence Code § 801(b) provides that expert testimony that is not based on matter "that is of a *type* that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates…" (Emphasis added.) The *Sargon* court quoted with approval the statement in the *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558 that "…the matter relied upon must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." Accordingly, the *Sargon* court concluded that "under *Evidence Code* § 801, the trial court acts a gatekeeper to exclude speculative or irrelevant expert opinion."

Evidence Code § 802 provides that an expert "may state… the reasons for his opinion and the matter…upon which it is based, unless he is precluded by law from using such reasons as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based." Thus, the *reasons* for an expert's opinion are part of the matter on which an opinion is based, just as is the type of the matter. Hence, the court held that under *Evidence Code* § 801(b) and 802, "the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (In a footnote, the court noted that expert testimony based on new scientific techniques may also be excluded on the basis that they are not generally accepted, citing the rule in *People v. Kelly* (1976) 17 Cal.3d 24.)

The full import of the *Sargon* decision cannot be appreciated without a firm understanding of the court's analysis of the scope of a trial court's duty to exclude expert testimony "that is based on reasons unsupported by the material on which the expert relies." Undoubtedly, the court's amplification of the language of *Evidence Code* § 802 provides a powerful springboard for motions to exclude expert testimony that lacks an adequate scientific basis. However, the *Sargon* court clearly signaled that it was not sanctioning the exclusion of expert opinion on the nebulous ground that the opinion is based on inadequate science. Rather, the court signaled it had something far more specific in mind.

In the next issue of *In Brief*, the *Sargon* court's somewhat subtle discussion of the legal bases for excluding expert testimony will be discussed in greater detail.

A Primer on the Taxes Embedded in the Healthcare Reform Act

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The following was originally published in the November 2012 issue of the International Association of Defense Counsel's Professional Liability Committee Newsletter.

We are now all aware that the United States Supreme Court has upheld most of the provisions contained in the Healthcare Reform Act, aka the Patient Protection and Affordable Care Act ("The Act"). Many of us, however, are not aware of several of the new taxes contained in The Act, which may have a significant impact on our clients in the Healthcare Industry for many years to come.

One such tax is a 2.3% excise tax on the sale of "medical devices." Importantly, this is a tax on sales, not on profits. The tax is paid by the manufacturer or importer, not the ultimate consumer. Of course, it is anticipated that the cost will be passed along to hospitals, patients, and health insurers in the form of higher costs for the taxable items. Included are "big ticket" items such as MRI and X-ray machines and other hospital equipment. The tax also applies to smaller items for individual patients such as hip and knee joint replacements, other prosthetics, dental implants, pacemakers, etc. Excluded from the tax are items generally purchased by the public at retail for individual use. This would include such items as eyeglasses and other items commonly purchased at a local drug store.

Budget committees estimate that this tax will generate approximately $2 billion in 2013, increasing to more than $3 billion by 2022, with a total ten year impact in excess of $20 billion. Although the long term impact on the medical device industry is uncertain, one concern is that manufacturing jobs in the U.S. may be sent overseas to supply markets where this excise tax does not exist.

A $23 billion tax will also be imposed on the pharmaceutical industry at the rate of $2.3 billion annually, to be paid based on market share. As with the tax on medical device manufacturers, the ultimate impact of this tax is still to be determined. Keep in mind that the United States is the largest prescription drug market in the world. If, as some analysts project, prescription drug sales balloon over the next ten years, from $350 billion in 2012 to more than $700 billion by 2022, then the impact of the tax increase will be blunted. However, if cost pressures under The Act continue to mount, we can expect that the big pharmaceutical manufacturers may well cut back on research and development, focusing more on cost savings than innovation. Such a shift undoubtedly would lead to job reductions in the pharmaceutical industry.

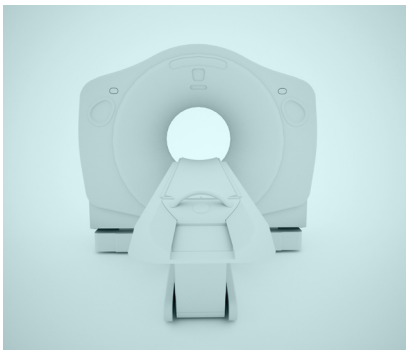
A third new tax will impact the health insurance industry beginning in 2014. Health insurers will be assessed a $60.1 billion tax, payable over ten years, based on premium market share. The tax has gradual increases from 2014 through 2018, at which point it will be fully implemented. After 2018, the tax will increase at the rate of inflation. Of course, we must not forget that one of the intended consequences of The Act is that there will be millions more Americans covered by health insurance, and therefore paying the premiums which will help cover the tax increase.

At the same time, health insurers will be monitored to make certain that at least 85% of premium dollars are spent on direct healthcare costs, with no more than 15% for administration and profit.

There is one additional provision in The Act that may have a significant revenue impact on hospitals, but which also has the most potential for positively impacting patient care. In October 2012, Medicare began reducing reimbursements to hospitals with high 30 day readmission rates.

The penalties range from 1% in 2012 to 3% in 2014. More than 2,000 hospitals nationwide may be subject to the penalties.

The purpose of the penalties is to cause the hospitals to focus on overall quality of care, with the benchmark being a reduction in the number of patients being readmitted to the hospital within 30 days. Approximately two million Medicare patients are readmitted each year within 30 days of discharge with an estimated cost of $17.5 billion. This provision places the burden for the cost of readmission squarely on the hospitals, and should encourage facilities to develop better procedures to ensure that patients are following discharge instructions, taking medications, and following up with their physicians.



Obviously, there are many other revenue components contained in the Patient Protection And Affordable Care Act (including those that directly affect individuals and families). The provisions summarized above create the most direct impact on health insurers, medical device manufacturers, pharmaceutical companies, and hospitals. Together, these provisions account for more than $100 billion in revenue, yet make up only about 10 percent of the anticipated cost of The Act.

Superior Court Grants Summary Judgment in Personal Injury Action against City

William T. DelHagen, Paul R. Flaherty and Adrian J. Barrio successfully represented the City of Moreno Valley and one of its employees, Mosallam Almasri, in a personal injury action brought by the employee of independent contractor Riverside Construction Company.

The city hired Riverside to perform storm drain improvements and street lane widening. The plaintiff, the superintendent of construction for Riverside, suffered debilitating injuries when he was struck by a truck operated by Cesar Rosales, an employee of the defendant and cross-complainant Pipeline Carriers, Inc. At the time of the accident, the plaintiff was standing in the middle of the street, engaged in the task of performing pre-construction measurements. Mr. Almasri was on the scene at the time of the accident, but he did not direct the plaintiff's activities in any way and was essentially an onlooker.

The plaintiff argued that the city and Mr. Almasri failed to ensure that Riverside and its employees, including the plaintiff, complied with applicable Cal-OSHA regulations pertaining to traffic control at or near the job site.

The Superior Court for the County of San Bernardino granted the city and Mr. Almasri's Motion for Summary Judgment on the basis of the "Privette" doctrine and the California Supreme Court's recent decision in Seabright v. US Airways, Inc., 52 Cal.4th 590 (2011). The court found that, under Seabright, neither the city nor Mr. Almasri owed the plaintiff a duty of care to ensure workplace safety. The court noted that, by hiring an independent contractor, the city implicitly delegated to the contractor any tort law duty it owed to the contractor's employee, the plaintiff, to ensure workplace safety. That implicit delegation included any tort law duty the city owed to the plaintiff to comply with applicable statutory or regulatory safety requirements.

In addition, the court found that the city did not "affirmatively contribute" to the plaintiff's injuries and, further, that Mr. Almasri was immune from personal liability by virtue of his status as a public employee.

Defense Verdict in Personal Injury Case

The Los Angeles Superior Court returned a defense verdict in a personal injury case handled by Benjamin H. Seal, II. Plaintiff Mose Hart, III sued defendant Kevin Kissinger and his employer, alleging that Mr. Kissinger was negligent in the operation of his vehicle, an 18-wheeler truck.

On July 7, 2009, Mr. Hart was driving on Artesia Boulevard in Compton when an accident occurred where the front left corner of Mr. Hart's vehicle hit the right-side cab of Mr. Kissinger's truck. Mr. Hart argued that he was traveling in the curb lane of a two-lane, one-way side street when Mr. Kissinger attempted a sudden, wide right turn into a commercial driveway. Mr. Hart claimed that Mr. Kissinger made an illegal and dangerous maneuver from the left lane, causing the accident. Mr. Kissinger argued that he was traveling in the curb lane of the street, and that Mr. Hart had been traveling in the left, fast lane. As Mr. Kissinger slowed down to five to 10 miles per hour and turned on his right-turn signal, he swung into the left lane to attempt a wide turn. Mr. Hart then moved from the left lane into the right lane in an attempt to pass around the turning truck, causing the collision.

Mr. Hart was diagnosed with strains and sprains to his neck and lower back and underwent chiropractic treatment for over two months. He claimed $12,000 in past medical costs, and sought $20,000 to $350,000 in future medical expenses. The original demand was set at over $152,000, and was later reduced to $50,000. The offer was set at $6,875. After a five-day jury trial and 30-minute deliberation, the jury returned a unanimous defense verdict on liability.

San Diego Superior Court Grants Summary Judgment in Lemon Law Case

The San Diego Superior Court granted summary judgment in a lemon law case handled by Robert M. Scherk and Scott J. Loeding. The case involved an Arctic Cat all-terrain vehicle sold by Sette Sports Center, Inc. Mr. Scherk and Mr. Loeding represented both Arctic Cat, Inc. and Sette.

Plaintiff Kevin Schaefer filed suit in San Diego Superior Court for violation of the Song-Beverly Consumer Warranty Act, which provides that when a manufacturer cannot repair consumer goods after a reasonable number of attempts, it must either replace the defective product or refund the consumer's money. He named as defendants Arctic Cat, Inc., the manufacturer of the ATV; Sette Sports Center, Inc., the retail seller of the ATV, and Cornerstone United, Inc., a company that issued an extended service contract to the original buyer.

In June of 2009, Sette listed the slightly used 2009 Arctic Cat ATV on E-Bay Motors which Sette had taken in trade from the original owner. The E-Bay listing stated "Buyer responsible for vehicle pick-up or shipping" and that the Arctic Cat ATV was located in Owatonna, Minnesota. Mr. Schaefer submitted the winning bid on or about June 11, 2009, and a Bill of Sale was prepared by Sette to reflect the sale of the Arctic Cat ATV to the plaintiff. The Bill of Sale did not contain any provision requiring Sette to deliver the ATV to the plaintiff in California. Nor did the Bill of Sale contain any freight or shipping charge by Sette. Sette did not pay any shipping charges for the ATV; those charges were paid by Mr. Schaefer. He arranged for a trucking company to pick up the ATV from Sette in Minnesota and transport it to San Diego County.

Mr. Schaefer claimed that after several months of use of the ATV, he had problems with it and brought it to an Arctic Cat authorized repair facility in San Diego County, but that the ATV could not be and was not properly repaired.

After significant written discovery and a number of depositions, Arctic Cat and Sette filed a Motion for Summary Judgment, arguing that, despite Mr. Schaefer taking possession of the ATV in San Diego County, the Bill of Sale and the fact that the plaintiff had the ATV picked up in Minnesota, established that he had actually purchased the ATV in Minnesota, and because the Song-Beverly Act applies only to vehicles purchased in California, the defendants were entitled to summary judgment.

The plaintiff opposed the defendants' Motion for Summary Judgment, arguing that there were questions of fact as to whether the ATV was sold or purchased in California. He also argued that as an active member of the U.S. Navy, he was entitled to the benefit of a statute amending the Song-Beverly Act to provide additional protections to military personnel stationed in California at the time of purchase of the vehicle in question. The court granted the defendants' Motion for Summary Judgment, agreeing with their arguments that to determine whether the ATV was sold in Minnesota or California for purposes of the Song-Beverly Consumer Act, the court must follow the Uniform Commercial Code, which governs when and where the title passes between a seller and buyer.

The court also agreed that the contract between the plaintiff and the retailer, Sette Sports Center, did not require Sette to deliver the ATV to a destination in California, and that because the plaintiff was responsible for shipping, pursuant to the UCC and applicable case law, the ATV was, as a matter of law, sold in Minnesota and not California, making the Song-Beverly Consumer Warranty Act inapplicable, and the defendants thereby entitled to summary judgment.

LASC Grants Summary Judgment in Breach of Contract and Bad Faith Case

The Los Angeles Superior Court granted summary judgment to an insurer in a breach of contract and bad faith case handled by Nancy N. Potter. The plaintiffs, apartment owners, sued the insurer after their 100 year-old Los Angeles apartment building suffered a major sewage leak. The insurer retained a mechanical engineer who inspected the pipe and concluded that it was old and completely corroded. The insurer denied coverage for the sewer line repairs and replacement based on the exclusions applicable to underground pipe, excavation, lack of maintenance, wear and tear, and pollution.

The apartment owners sued the insurer, primarily arguing that the loss was "sudden and accidental" and should have been covered. Ms. Potter filed a Motion for Summary Judgment showing that the loss was to non-covered pipes and land, and that pollution was excluded from coverage. She also presented the mechanical engineer's opinion as to the age of the pipe, and excerpts of the deposition of a tenant who had been complaining about the sewer odor for four months, before the plaintiffs claimed the loss occurred, to demonstrate that the issue was caused by an ongoing lack of maintenance.

The court found that the plaintiffs' opposition evidence of a sudden and accidental loss was insufficient, that the loss was not covered and, therefore, the denial of the claim did not breach the insurance contract and was not in bad faith.

LASC Grants Summary Judgment to Insurance Brokerage Corporation and its CEO

On June 12, 2012, Los Angeles Superior Court Judge David L. Minning granted the defendants' summary judgment in a breach of contract and general negligence case handled by Dan L. Longo and Lisa D. Angelo.

The case arose from the purchase of several insurance policies for coverage concerning a new construction project located in Los Angeles, California. In August 2006, the plaintiff purchased the policies through the defendant's brokerage company. According to the complaint, the plaintiff specifically asked one of the defendant's brokers to purchase a policy that covered construction defects. The plaintiff further alleged he was repeatedly assured by the defendant's broker that one of the policies purchased for the project included extra coverage for construction defects. In June 2007, the construction project began to show signs of construction defects. The plaintiff filed a claim for defects coverage. The claim was denied because the policy did not cover construction defects. On March 24, 2010, the plaintiff sued the insurance brokerage firm and its Chief Executive Officer for breach of oral contract and general negligence. Both causes of action have two-year statutes of limitation.

During discovery, the plaintiff produced numerous documents including the original claim denial letter and emails between himself and his insurance broker discussing the denial letter. The claim denial letter was dated January 28, 2008. The emails between the plaintiff and his broker, concerning the denial letter, were dated February 4-5, 2008 and March 24, 2008.

The defendants filed a Motion for Summary Judgment on several grounds including statute of limitations. In opposition, the plaintiff argued that according to California's "discovery rule," the two-year statutes of limitation did not start to accrue until he received the March 24, 2008 email because that was the email "unequivocally" informing him that the claim was denied because it did not cover construction defects. In a three-page ruling granting summary judgment, the court held that the plaintiff's claims were time-barred under the "discovery rule," by virtue of the February 2008 emails wherein the plaintiff wrote to the defendant's insurance broker, "this is not the policy I thought I was buying." The court reasoned, "the statute of limitations begins to run when the plaintiff suspects or should suspect that his or her injury was caused by wrongdoing..."

Defense Verdict for Insurance Company in Breach of Contract and Bad Faith Case

Michael J. Nunez represented Nevada Direct Insurance Company in a suit brought by a claimant after she was involved in an automobile accident with one of Nevada Direct's insureds. After a two day bench trial, the District Court found for the defense on all counts.

Following the accident, the claimant had engaged in pre-suit negotiations with Nevada Direct and then ultimately filed a personal injury suit. After initiation of the personal injury suit, Nevada Direct filed and prevailed in a declaratory relief action based on lack of cooperation from its insureds. Nevada Direct was also represented by Murchison & Cumming in the declaratory relief action. The plaintiff then proceeded to obtain default judgments against the insureds in the personal injury lawsuit and initiated the current lawsuit under theories of breach of contract, promissory estoppel and third party bad faith.

The basis for the claims were that Nevada Direct did not disclose to the claimant that it was not receiving cooperation from its insureds and that it did not disclose that it had any reservations of rights. The claimant asserted that the pre-suit negotiations misled the claimant and gave rise to the various claims. The claimant also asserted she was a judgment creditor of Nevada Direct after obtaining default judgments against the insureds based on the recent Nevada Supreme Court case of Gallegos v. Malco Enterprises of Nevada.

The third party bad faith claim was dismissed prior to trial by way of a Motion to Dismiss and a defense verdict was obtained on the remaining claims at trial.other things, that she had been denied her Constitutional right to a trial by jury with respect to her legal claims and that the judgment should be reversed. The Court of Appeal disagreed and affirmed the judgment in full.

M&C Welcomes

M&C is Pleased to Introduce

Alyssa K. Chrystal is an Associate in the Los Angeles office of Murchison & Cumming where she practices general civil litigation and has experience in law and motion.
Point of Interest: Ms. Chrystal speaks conversational Spanish and lived with a family in Spain while in college.

Diane P. Cragg is a Senior Associate in the San Francisco office of Murchison & Cumming where she focuses her practice in the areas of general liability, employment law, commercial liability and business litigation.
Point of Interest: Ms. Cragg works *pro bono* on animal-related cases for the Animal Legal Defense Fund.

Dustun H. Holmes is an Associate in the Las Vegas office of Murchison & Cumming where he is a member of the General Liability/Casualty and Employment Law practice groups.
Point of Interest: Mr. Holmes volunteered as a Foreclosure Mediation Instructor in law school.

James N. Kahn is a Senior Associate in the Los Angeles office of Murchison & Cumming where he focuses his practice in the areas of general liability and business and commercial law.
Point of Interest: Mr. Kahn has a background in media law, having served as an Associate/Fellow of the Donald E. Biederman Entertainment & Media Law Institute.

Katelyn M. Knight is an Associate in the San Francisco office of Murchison & Cumming where she is a member of the Law & Motion practice group.
Point of Interest: Before becoming a lawyer, Ms. Knight was an accountant for the Zac Posen fashion house in New York.

Chantel E. Lafrades is an Associate in the San Francisco office of Murchison & Cumming where she practices general civil litigation.
Point of Interest: Ms. Lafrades began her career at Murchison & Cumming as a file clerk.

Georgiana A. Nikias is an Associate in the Los Angeles office of Murchison & Cumming where she works on a variety of civil litigation matters, including general liability and product liability cases.
Point of Interest: Ms. Nikias was the first undergraduate to be published in the *Journal of Egyptian Archaeology*.

Kelsey C. Starn is an Associate in the Los Angeles office of Murchison & Cumming where she practices general civil litigation.
Point of Interest: Ms. Starn joins her sister, Maria A. Starn, also a Murchison & Cumming attorney.

Murchison & Cumming's Annual Year in Review

On April 16, 2013 Murchison & Cumming, LLP will present its annual "Year in Review: California Case Law Update," taking a look back at the significant Supreme Court and Appellate Court decisions during 2012. As in prior years, the program will take place at the Walt Disney Concert Hall in Los Angeles. During the spring of 2013, the program will also be presented in private client seminars across the country.

If you have not previously attended our Year in Review program and would like to receive an invitation to the April 16th program in Los Angeles and/or would like to schedule a local presentation for your company, please contact Arleen Milian, Director of Client Relations, at (213) 630-1071 or amilian@murchisonlaw.com, or Edmund G. Farrell, III, Program Chair, at (213) 630-1020 or efarrell@murchisonlaw.com.

You may also register for the seminar on the firm's website at www.murchisonlaw.com.

Training/Education & Other Client Services

2013 Insurance Roundtable Series

Join us for these informative and interactive roundtable discussions on "cutting edge" topics affecting insurers, risk managers, brokers and agents.

Insurance Roundtable Series

March 26	Who's On First? How Deductibles and SIRs Affect Allocation and Priority of Coverage
June 11	Coverage Issues Related to Directors & Officers and Professional Liability Policies
September 24	Mediating a Case Driven by Coverage Issues and Avoiding Bad Faith
November 19	Important Court Decisions in 2013 for the Insurance Industry

Attendance Details

Participation by Webinar, Phone & In-Person

Time	In-Person: 11:30 a.m. – 1:00 p.m. Lunch will be served Webinar & Phone: 12 p.m. Pacific 1 p.m. Mountain 2 p.m. Central 3 p.m. Eastern
Location	Murchison & Cumming, LLP 801 South Grand Avenue, 9th Floor Los Angeles, CA 90017
Cost	No charge; Limited seating
Registration	amilian@murchisonlaw.com
Parking	Grand Avenue entrance Parking will be validated

For more information, please contact Arleen Milian, Director of Client Relations at 213.630.1071 or amilian@murchisonlaw.com.

This program is approved for MCLE and RPA continuing education credits. CPCU and California Department of Insurance credits pending.

Upcoming Speaking Engagements

John H. Podesta, "Recent Developments in Insurance Law and Their Impact on Construction Risks," ABA 2013 Insurance Coverage CLE Seminar, February 28-March 2, 2013, Tucson, AZ

Valarie H. Jonas, "Idol 2013--Jury Selection in State and Federal Courts," ABA 2013 Insurance Coverage CLE Seminar, February 28-March 2, 2013, Tucson, AZ

Jean A. Dalmore, "Ten-Minute Construction Law Drill: Contractor Controlled Insurance Programs and Owner Controlled Insurance Programs," Associated General Contractors of America Annual Convention, March 6-9, 2013, Palm Springs, CA

Jean M. Lawler, "Developing the Next Generation of Lawyers –Ethical Issues in Law Firm Management,"ADTA 72nd Annual Meeting, April 17-21, 2013, White Sulfur Springs, WV

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- Arbitration & Mediation
- Auditing Services
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- Pre-Appellate Trial Related Services
- Professional Education, Claims Handling and Fraud Training & Certification
- Sexual Harassment and other Employment Training

For assistance with these or any other services offered by M&C, including formulation of special programs to serve your company's specific needs, please contact Jean M. Lawler at jlawler@murchisonlaw.com or (213) 630-1019.

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