MURCHISON & CUMMING LLP

IN BRIEF

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CONTENTS

TRANSPORTATION PRACTICE GROUP CHAIR, RICHARD C. MORENO, ELEVATED TO SENIOR PARTNER

As a successful litigation partner, with a busy caseload and clients with whom he forges a deep personal connection, Richard C. Moreno knows that there's no time like the present.

Yet, the counselor, Murchison & Cumming's newest senior partner whose practice focuses on catastrophic injury cases, is occasionally wistful for an earlier time.

"The opportunity to try cases is the reason I became a lawyer," said Mr. Moreno. "Sometimes I wish I was an attorney practicing 30 years ago. There were a lot more trials then, compared to today."

While he might not appear before juries quite as often as he likes, Mr. Moreno has a natural default setting--"trial." This means that clients benefit from his trial readiness and thorough preparation of each case as if it was heading before a judge and jury.

A Firm Veteran Schooled in the Art of Case Management

Mr. Moreno has spent his entire legal career with Murchison & Cumming. One privilege of this, he feels, was learning the art of conducting a trial from his colleague, Friedrich W. Seitz.

"Every young attorney should have the opportunity to observe seasoned trial lawyers, such as Friedrich Seitz, in action," advised Mr. Moreno.

Today, more than 12 years after joining the firm, Mr. Moreno practices alongside Mr. Seitz as they serve as defense counsel for Southern California Edison on wildland fire cases.

The high exposure nature of these wildland losses --necessitating thorough evaluations and accurate damage assessment--are well-served by Mr. Moreno's organizational and case management talents.

From his perspective, there are four critical components of handling a case that clients should expect from their attorney. These are: aggressive and strategic defense of the matter, timely reporting, providing accurate assessments of liability and judgment potential throughout the course of the matter, and only billing for necessary services.

Driving the Firm's Transportation Liability Practice Group

Mr. Moreno's practice strengths are also an enormous resource for the firm's transportation industry clients, motor carriers and truck drivers whom he defends in a wide range of lawsuits, including those involving catastrophic injury and wrongful death.

Mr. Moreno also has extensive experience with product liability, warranty and "lemon law" issues. His clients include numerous automotive, chassis and truck manufacturers and dealerships. He is particularly proud of the defense verdict that was obtained for Freightliner Custom Chassis, which was the company's first case to go to verdict.

Product liability and warranty matters are a particular favorite of Mr. Moreno because of the sophisticated technical and mechanical knowledge these cases require.

In assuming his new position as Senior Partner, this alumnus of Whittier College of Law and University of Southern California, is pleased to follow the firm's tradition of service to clients. In particular, he appreciates that clients benefit from Murchison & Cumming's stability and continuity of counsel.

Looking ahead, Mr. Moreno is excited about deepening his close ties with clients and further expanding the firm's transportation practice, which he plans to accomplish, in part, the old-fashioned way: earning clients' trust by understanding their needs and goals and being a committed advocate for their interests.

MEET PAUL FLAHERTY--M&C'S NEWEST ASSOCIATE PARTNER

Paul R. Flaherty is another M&C trial attorney, with outstanding skills in the use of technical evidence to successfully defend product liability, aviation and general liability matters. Most recently, Mr. Flaherty and William DelHagen spent six weeks in a high-demand, wrongful death trial involving a private plane crash, which resulted in the jury returning an 11-1 defense verdict after just 70 minutes of deliberations. Mr. Flaherty is a graduate of Loyola Law School and California State University, Northridge.

M&C EXPANDS WITH ADDITION OF ORANGE COUNTY ATTORNEYS

M&C is pleased to announce that nine attorneys have joined the firm, in its Orange County office, eight attorneys formerly from the OC office of Cotkin & Collins ("C&C"), joining M&C as partners, associates, and of counsel.

"This acquisition is consistent with the firm's business plan that calls for steady, focused growth, seizing opportunities to expand and add depth to the firm's existing areas of practice, which we believe will allow the firm to better serve the needs of our clients," said Jean Lawler, M&C's Managing Partner.

Joining M&C are former C&C founding partner and Harvard Law alum, James ("Phil") Collins, along with former C&C shareholders William D. Naeve and David A. Winkle and member Ellen M. Tipping, each of whom have joined the firm as a Partner. Former C&C associates Terry L. Kesinger and Gregory A. Sargenti have joined the firm as Associate Partners, along with Cooper W. Collins and Kristie M. Mackey, joining as Senior Associates.

Phil Collins has long been a leader in the defense bar, serving as former president of the Association of Southern California Defense Counsel and Federal Bar Association of Orange County. In addition Collins is a member of the American Board of Trial Advocates, and Federation of Defense & Corporate Counsel. He specializes in insurance defense, insurance coverage, professional liability, life and disability, employer liability, and business litigation.

Naeve, a recipient of Corpus Juris Secundum Award for corporation law, Tipping, past panel judge for the "National Civil Trial Competition," and Winkle, Case Contributor for the National Health Lawyers Association's Health Law Digest, all have "AV" ratings from Martindale Hubbell. Associates Collins, Sargenti, Kesinger and Mackey focus on a variety of practices including, but not limited to, corporate law, hospital and professional liability defense, civil writs and appeals and employment law.

"We are very pleased to have our Orange County neighbors of more than 20 years join the firm. We have the utmost respect for their legal abilities and know them to be individuals of character, with whom we share similar values, backgrounds, legal experience and a culture of client service," said Lawler.

Brian S. Mizell has joined the firm as Of Counsel. Mizell brings with him 20 years of experience in private practice, including 17 years of practice with a prominent civil litigation defense firm where he served as partner in charge of its Inland Empire office.

Collectively, the new M&C attorneys bring with them years of experience in defending general business and tort litigation in California and Nevada. Their expertise will be a great asset to the OC office, according to Partner in Charge, Dan L. Longo.

MEET THE ATTORNEYS

M&C is pleased to introduce the newest attorneys in its Orange County office:

James ("Phil") Collins is a Partner at M&C, focusing his practice in the areas of professional liability, life and disability, employer liability, insurance coverage, and business litigation. Mr. Collins is a graduate of Occidental College (A.B.), Johns Hopkins University (M.A.), and Harvard University Law School (J.D.).

William Naeve is a Partner at M&C, focusing his practice in the areas of healthcare, employment and first and third party bad faith, defense of business contracting, employment termination and discrimination, ERISA, wage & hour, healthcare, and life & disability bad faith claims and litigation. Mr. Naeve is a graduate of the University of California, Los Angeles (B.A.) and Western State University College of Law (J.D.).

David Winkle is a Partner at M&C, focusing his practice in the areas of health law and related litigation, staff privileges and disputes, professional liability defense, and employment law. Mr. Winkle is a graduate of Franklin and Marshall College (B.A.) and the University of San Diego School of Law (J.D.).

Ellen Tipping is a Partner at M&C, focusing her practice in the area of employment law, providing advice and counsel, and representation of employers in litigation through trial and appeal. Ms. Tipping is a graduate of California State University, Northridge (B.A.) and Loyola University Chicago School of Law (J.D.).

Terry Kesinger is an Associate Partner at M&C, focusing his practice in the areas of law and motion, and civil writs and appeals. Mr. Kesinger is a graduate of California State University, Long Beach (B.M. and M.A.) and Western State University College of Law (J.D.).

Gregory Sargenti is an Associate Partner at M&C, focusing his practice in the areas of insurance coverage and bad faith litigation, product liability defense, hospital and professional liability defense, and general business litigation. Mr. Sargenti is a graduate of San Diego State University (B.S.) and the University of San Diego School of Law (J.D.).

Cooper Collins is a Senior Associate at M&C, focusing his practice in the areas of business, corporate, and professional liability litigation. Mr. Collins is a graduate of the University of Colorado (B.A.) and the University of Colorado School of Law (J.D.).

Kristie Mackey is a Senior Associate at M&C, focusing her practice on general civil litigation, employment law, and medical malpractice defense. Ms. Mackey is a graduate of the University of California, Irvine (B.A.) and Southwestern University School of Law (J.D.).

Brian Mizell is Of Counsel at M&C, focusing his practice in the areas of bad faith, insurance fraud, employment matters and construction law. Mr. Mizell is a graduate of San Jose State University (B.A.) and Pepperdine School of Law (J.D.).

SNYDER LEADS FIGHT TO RECLAIM FRENCH FIELD FOR LITTLE LEAGUERS

William J. Snyder recently won a grant from the California Integrated Waste Management Board ("CIWMB"), on behalf of the City of Oceanside, that may help reopen a Little League gem, French Field, by 2011. The $730,000 grant was, by far, the largest CIWMB has granted this year.

The site is a former burn dump landfill, where garbage was burned and then buried in trenches. In 1944, when the site was first operated by the County of San Diego, it was not known that burning garbage can turn the waste into hard metals capable of contaminating groundwater, surface water and the soil, which is a threat to both human health and the environment.

On April 23, 2009, Mayor Jim Wood, who has publicly stated that cleaning up the site is a City priority, accepted a symbolic $730,000 check from CIWMB on the steps of Oceanside City Hall in celebration of Earth Day.

In 2002, the Regional Water Quality Control Board ("RWQCB") issued an Order to the County of San Diego, the City of Vista, and the City of Oceanside to conduct an environmental investigation of 10-acre French Field, a public park consisting of three little league baseball fields.

In 2004, the City of Oceanside retained Snyder, upon recommendation by their outside insurance coverage attorney.

In response to the 2002 Order, the County of San Diego filed a lawsuit against Vista and Oceanside in the San Diego Superior Court after settlement discussions broke down. That same year, the County retained an environmental consultant to conduct the environmental investigation.

Initial testing found lead levels at an adjacent creek at more than 32 times the maximum allowable hazardous limit for a public park in California, and the investigation also revealed exposed and potentially hazardous burn ash, physical hazards such as broken glass and other sharp objects on top of, and within, the soil, visible waste from the former landfill, and drainage and erosion problems.

As a result of initial testing, the site was closed to the public in February 2005. Since that time, the comprehensive environmental testing has been completed for the purpose of conducting a human health risk and ecological risk assessment.

On Oceanside's behalf, Snyder is working towards obtaining approval from the State of California Department of Toxic Substances Control ("DTSC") for a remediation plan that will make the site both environmentally sound and safe for public use.

The cost estimate for the remediation plan is $1.46 million. In 2008, Snyder began the competitive and time-consuming process of applying for the CIWMB grant. Oceanside was awarded matching funds up to $730,000 after a hearing before the agency in Sacramento on February 17, 2009.

The City of Oceanside is awaiting DTSC's approval of the remediation. Meanwhile, Snyder is preparing applications to both DTSC and the United States Environmental Protection Agency ("US-EPA") in an effort to receive additional funding to help with the

cost of rebuilding baseball diamonds, fences and grandstands, reinstalling the electric light poles, and building a new concession stand.

Due to statewide financial budget crises, obtaining the $730,000 from CIWMB, and possible additional grant awards from DTSC and/or US-EPA, is absolutely critical if this public park is to be cleaned up and reopened for safe use by the children and other citizens of North San Diego County.

"This project is very important to the citizens of North San Diego County," Snyder stated. "[French Field], was literally used each year by hundreds of little league children in the area and, because of its extensive improvements, these fields were the pride and joy of the Little League which, in 2004, progressed all the way to the finals of the Little League World Series in Williamsport, Pennsylvania."

This August, Snyder made presentations to members from DTSC and US-EPA and was told that the City of Oceanside may be awarded another $800,000 in grant funding for these rebuilding efforts.

William J. Snyder is a Partner, resident in M&C's San Diego office, where he focuses his practice in the areas of labor and employment law, general liability, environmental law and toxic torts. Mr. Snyder can be reached at 619-544-6838 or wsnyder@murchisonlaw.com.

GUY GRUPPIE AND MHARE MOURADIAN SELECTED TOP ATTORNEYS BY PASADENA MAGAZINE

Senior Partner Guy R. Gruppie and SeniorAssociate Mhare O. Mharadian have been named Top Attorneys in the San Gabriel Valley by Pasadena Magazine in a vote of peers who either practice law, or live, in the area.

A reception honoring the attorneys listed in the magazine's current edition was held Nov. 11. It marked the first time that either Gruppie, an Arcadia resident, or Mouradian, who lives in Pasadena, were so honored.

Gruppie, chair of M&C's Complex Litigation Department and senior member of the firm's General Liablity and Product Liability practice groups, was selected in the Personal Injury/Defense category. Mouradian was selected in the Civil Litigation category. He is a member of M&C's Complex Litigation, Product Liability and General Liability practice groups.

Both attorneys are members of the Pasadena Bar Association. Gruppie participated in the 2009 Law Day sponsored by the City of Arcadia, and is a sponsor and coach in the Arcadia American Little League.

Guy R. Gruppie is a Senior Partner, resident in M&C's Los Angeles office, where he serves as Chair of the Complex Litigation Practice Group. Mr. Gruppie can be reached at 213-630-1089 or ggruppie@murchisonlaw.com.

Mhare O. Mouradian is a Senior Associate, resident in M&C's Los Angeles office, where he is a member of the Complex Litigation, Product Liability and General Liability Practice Groups. Mr. Mouradian can be reached at 213-630-1061 or mmouradian@murchisonlaw.com.

M&C PARTICIPATES IN ALA COMMUNITY CHALLENGE WEEKEND

JOGGING FOR CHARITY: Justice Jog 2009 participants race toward the finish line, in support of A Place Called Home.

Recently, M&C sponsored, and participated in, Justice Jog 2009, held by the Greater Los Angeles Chapter of the Association of Legal Administrators ("GLAALA") at Warner Center Park in Woodland Hills. The five kilometer walk or run event was part of ALA's Community Challenge Weekend.

M&C Executive Director, and ALA member, Jasmine Young, Atttorney Claudia Borsutzki and staff member, Mary DeLeon represented the firm, participating in the jog. Jagdish Jaganath, Vice President of M&C banking vendor American Business Bank, also joined in to benefit the charity.

In celebration of the 11th Anniversary of Community Challenge Weekend and Professional Legal Management Week, all net proceeds from the event benefited the charity, A Place Called Home ("APCH"), a South Central Los Angeles non-profit youth center, which provides educational programs, counseling, mentoring, music, dance and art classes.

M&C JOINS THE RACE: M&C Attorney Claudia Borsutzki (left) and Executive Director, Jasmine Young jogged for *justice.*

GLAALA invited members, families and business partners to participate in the jog as runners, walkers and volunteers. APCH youth members--and potential prospective law school students--also made the 5k walk.

The Justice Jog's activities included a pancake breakfast, live music, and warm-ups and photo opportunities with the Laker Girls but, according to both Borsutzki and Young, the highlight of the event was simply supporting the charity.

"I was proud to represent the firm for a good cause. It was really a lot of fun," Borsutzki said.

Young observed a high level of teamwork and community pride exhibited by all Justice Jog participants. The sense of community was particularly welcome when members of the M&C team had to stay home due to the flu, and last minute volunteers came to the firm's rescue by jogging in their place.

One such volunteer, Jorge Lopez, spouse of M&C business partner, SunMi Kim (Robert Half Legal), placed seventh in the race.

Joggers maintained the spirit of teamwork by encouraging one of the children from APCH to continue to the finish line when he was ready to give up.

Justice Jog provided M&C with an opportunity to participate in a good cause, Young said.

"The firm thought [Justice Jog] would be a great opportunity to give something back to the community," she added. "It felt extremely good to support APCH when so many organizations are going through budget cuts and a drastic drop in sponsors."

CALIFORNIA'S APPLICATION OF STRICT PRODUCTS LIABILITY TO THE HYBRID ENTERPRISE

Reprinted by permission from "California's Application of Strict Products Liability to the Hybrid Enterprise," Friedrich W. Seitz and Maria A. Starn, *IADC Committee Newsletter, Product Liability*, July 2009.

In a recently published opinion of the California Court of Appeals, *Ontiveros v. 24 Hour Fitness USA, Inc.,* 169 Cal.App.4th 424 (2008), the court reiterated and further clarified the application of strict products liability to "hybrid enterprises"; those enterprises that provide both products and services.

Extension of the Strict Product Liability Doctrine

As announced in *Greenman v. Yuba Power Products, Inc.,* 59 Cal.2d 57 (1963), it is the general rule that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.*, at 62. Over the years, the progeny of cases following *Greenman* have extended the doctrine of strict products liability to almost anyone identifiable as "an integral part of the overall producing and marketing enterprise." *Vandermark v. Ford Motor Co.,* 61 Cal.2d 256, 262 (1964). Traditionally, a defendant has been considered a sufficient participant in the overall producing and marketing enterprise when: "(1) The defendant received a direct financial benefit from its activities and from the sale of the product;(2) The defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (2) The defendant had control over, or a substantial ability to influence the manufacturing or distribution process." *Bay Summit Community Association v. Shell Oil Co.*, 451 Cal. App.4th 762, 775 (1996).

With these principals in mind, California courts have applied the doctrine of strict products liability to others involved in the vertical distribution of consumer goods, including, lessors of personal property, wholesale and retail distributors, and licensors. *Price v. Shell Oil Co.*, 2 Cal.3d 245, 252 (1970). Although not directly involved in the manufacture or design of the final product, these defendants have been deemed instrumental in distributing the product to the consuming public. *Id.*

The extension of products liability is not, however, without limit and various well-recognized exemptions have been created. For example, defendants engaged in supplying a service, as opposed to a product, are not considered within the chain of distribution and, thus, not subject to strict products liability. *Pierson v. Sharp Memorial Hospital, Inc.*, 216 Cal.App.3d 340, 344 (1989) (a hospital, as a provider of professional medical services, is not strictly liable for defective carpet in a hospital room). While it is generally recognized that the doctrine is inapplicable to service providers, uncertainties arise where the defendant is a "hybrid enterprise"; an enterprise that furnishes both products and services. In such a scenario, liability will generally depend upon the dominant purpose of the enterprise.

Application of Strict Products Liability to Mixed Purpose Transactions

A. The Dominant Purpose Approach

Presented with the question of whether to hold a pharmacist strictly liable for the sale of a prescription drug, the California Supreme Court was made to decide whether the role of the pharmacist is more akin to a retailer or a service provider. *Murphy v. E.R. Squib & Sons,* 40 Cal.3d 672 (1985). In analyzing this issue, the court expressed approval of the distinction drawn in *Magrine v. Kransnica*, 94 N.J. Super. 228 (1967) wherein the court stated:

> "The essence of the transaction between the retail seller and the consumer relates to the article sold. The seller is in the business of supplying the product to the consumer. It is that, and that alone, for which he is paid. A dentist or physician offers, and is paid for, his professional services and skill. That is the essence of the relationship between him and his patient."

Recognizing that a pharmacist is clearly engaged in a "hybrid enterprise," combining the sale of prescription drugs with the performance of a service, the California Supreme Court found that a critical distinction between a pharmacist and an ordinary retailer is that only a licensed pharmacist may dispense prescription drugs. Moreover, as defined by the California Legislature at Business & Professions Code § 4046, "the practice of pharmacy is not only a profession (subd. (a)), but also a '*dynamic patient-oriented health service* that applices a scientific body of knowledge to improve and promote patient health by means of appropriate drug use and drug related therapy.'" *Id*., at 679 (emphasis added).

Finally, a pharmacist "cannot offer a prescription for sale except by order of the doctor." *Id.* In essence, the pharmacist "is providing a service to the doctor and acting as an extension of the doctor in the same sense as a technician who takes an x-ray or analyzes a blood sample on a doctor's order." *Id.* Hence, in *Murphy*, the transaction between the phaarmacist and the plaintiff was deemed to be a service, effectively immunizing the pharmacist from strict liability for defects in the drug.

Subsequently, the Third District Court of Appeal was asked to apply this rationale in a less obvious context, the non-professional transaction. *Ferrari v. Grand Canyon Dories,* 32 Cal.App.4th 248 (1995). In *Ferrari*, plaintiff was injured on a raft while participating in a five-day rafting trip sponsored by defendant. Plaintiff sought to impose strict products liability on the rafting company claiming that defendant was a "lessor" of the raft. In support, plaintiff relied upon *Garcia v. Halsett,* 3 Cal.App.3d 319 (1970) wherein a laundromat owner was found strictly liable for injuries caused by a defective washing machine. There, although the defendant was not involved in the distribution of the product, the court found it significant that similar to a manufacturer, retailer or lessor, the owner did make the product available for use by the consuming public. Consequently, the court reasoned that defendant played "more than a random and accidental role in the overall marketing enterprise of the product in question." *Id*., at 326. For this reason, strict products liability was deemed appropriate.

In distinguishing *Garcia*, the *Ferrari* court noted that unlike the defendant in *Garcia*, defendant rafting company provided more than a raft; they provided a service, i.e., recreational raft transportation on the Colorado river. *Ferrari*, *supra*, 32 Cal.App.4th at 259. Guided by the dominant purpose approach, the *Ferrari* court declined to impose strict liability on defendant rafting company finding that use of the raft was merely an incident to the overall services provided by defendant. *Id*. In this regard, defendant "provided all materials for the trip, instructions on rafting safety, and guides to perform the labor and conduct the activities." *Id*.

Most recently, in *Ontiveros v. 24 Hour Fitness USA, Inc.*, 169 Cal.App.4th 424 (2008), the Second District Court of Appeal relied upon the dominant purpose test in granting summary judgment for defendant fitness

center on plaintiff's strict products liability claims for injuries sustained while exercising on a stair step machine. Conceding that the facts before it were less compelling than in *Ferrari*, the court found that no triable issues of fact existed and that the dominant purpose of plaintiff's membership agreement with defendant fitness center was the provision of fitness services and not the provision of a product, i.e., the allegedly defective exercise equipment. Id., at 434. Specifically, the undisputed evidence demonstrated that plaintiff's membership agreement entitled her to the use of exercise equipment in addition to other fitness activities, including, aerobics, dance classes, and yoga. *Id*. Her membership also gave her access to testing centers where she could check her blood pressure and weight. *Id*. On appeal, plaintiff argued that triable issues of fact existed concerning the dominant purpose of plaintiff's transaction with plaintiff. In particular, plaintiff claimed that she obtained her membership with defendant for the sole purpose of using defendant's exercise equipment and that plaintiff did not utilize any of plaintiff's other fitness services. In rejecting this argument, the reviewing court stated:

> "that plaintiff chose not to avail herself of the services provided under her membership agreement does not change the essential nature and purpose of that agreement because it is the terms of her agreement, rather than her subjective intentions, that define the dominant purpose of her transaction with defendant. There is no evidence that plaintiff ever explained to defendant that she only wanted to use its exercise machines, not its services, or that the mutual intention of the parties was to exclude such services. Her uncommunicated subjective intent in that regard is therefore irrelevant." *Id*.

Conclusion

As illustrated above, the string of cases following *Garcia* have declined to extend the court's ruling beyond the specific facts therein and instead have consistently found strict products liability inapplicable to the hybrid enterprise. These cases, stamped by the most recent decision in *Ontiveros*, provide persuasive authority for defending a claim of products liability in the mixed purpose transaction.

Friedrich W. Seitz is a Senior Partner, resident in M&C's Los Angeles office, where he serves as Chair of the Products Liability Practice Group. Mr. Seitz can be reached at 213-630-1000 or fseitz@murchisonlaw.com.

Maria A. Starn is a Senior Associate, resident in M&C's Los Angeles office, where she is a member of the Law & Motion Practice Group. Ms. Starn can be reached at 213-630-1046 or mstarn@murchisonlaw.com.

INSURERS CAN BE SUED UNDER CA B&P 17200 FOR UNFAIR BUSINESS PRACTICES

By Bryan M. Weiss

On October 29, 2009, the California Court of Appeal for the 4th Appellate District (serving Orange County and San Diego) decided the case of *Zhang v. Superior Court*. Generally speaking, the case holds that insurers can be sued under California Business & Professions Code § 17200, the California Statute which prohibits "unfair business practices" and provides for a broad range of remedies.

In *Zhang*, the insured sustained a fire at its premises and submitted a claim for benefits with its insurer. A dispute arose over the payment under the policy for the repair and restoration of the premises. The insured sued for breach of contract and bad faith, based on the insurer's alleged failure to pay the claim and misconduct in handling the claim. The complaint included a third cause of action for violation of § 17200, alleging that the insurer "engaged in unfair, deceptive, untrue, and/or misleading advertising" regarding its intent to pay covered losses.

The insurer filed a demurrer to that complaint, arguing that under prior case law, an insured cannot use statutory violations to seek civil damages against an insurer. The trial court agreed and dismissed the case. The Court of Appeal reversed. It held that although an action based purely on improper claims handlings cannot be brought under §17200, false advertising claims can be. An insurer is like any other business, and if it falsely advertises its services and products, it can be held liable under § 17200. At trial, the insured will have the burden of proving this false advertising claim.

Clearly, this case has far-reaching implications from a pleadings standpoint. If an insured, in a bad faith case, simply pleads facts going beyond mere claims handling and alleging "false advertising", it will likely survive a demurrer because of this case. However, the court was clear that allegations in a pleading are a far cry from what has to be proven at trial. At trial, the insured would have the burden of establishing the truth of its false advertising claim, a burden which may be harder to sustain.

Notwithstanding this burden, the difficulty with the holding in *Zhang* is that it opens up a wide range of discovery, as well as draconian remedies such as injunctive relief, restitution, civil penalties, and perhaps attorneys fees under a "private attorney general" theory, all of which may be used by insured's counsel to exert pressure on insurers to settle, and most certainly will increase the costs of litigation. Counsel representing insurers should consider propounding discovery early on in the action, designed at flushing out facts supporting the "false advertising" claim, with an eye towards filing an early summary adjudication motion.

Bryan M. Weiss is a Partner, resident in M&C's Los Angeles office, where he serves as Chair of the Insurance Coverage & Appeals section of the Insurance Law Practice Group. Mr. Weiss can be reached at 213-630-1087 or bweiss@murchisonlaw.com.

2010 INSURANCE ROUNDTABLES

M&C's Insurance Roundtables are returning for another year of lively and informative discussions. The series will again be presented by these leaders in Insurance Law:

Jean M. Lawler is Managing Partner and Chair of the Bad Faith & Insurance Litigation section of the Insurance Law Practice Group. Contact (213) 630-1019, or jlawler@murchisonlaw.com.

Bryan M. Weiss is a Partner and Chair of the Insurance Coverage & Appeals section of the Insurance Law Practice Group. Contact: (213) 630-1087 or bweiss@murchisonlaw.com.

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ARTICLE CO-AUTHORED BY GUY GRUPPIE REPRINTED IN PLI COURSE HANDBOOK

A legal article co-authored by M&C Senior Partner Guy R. Gruppie has been selected for re-publication by the Practising Law Institute ("PLI") of New York as part of the materials for its popular "Trial by Jury" seminar in New York Dec. 2, 2009. The article, "Ethical Issues in Use of Trial Consultants" was co-written with Gilbert Perez III of Zuber & Taiilleu and originally published by the Federation of Defense & Corporate Counsel in 2006.

PLI is one of the nation's foremost providers of Continuing Legal Education and was founded by the Regents of the State University of New York in 1933. The article will not ony be part of the seminar coursework/materials but also be made available as a permanent stand-alone reference by PLI.

VICTORIES: AVIATION INDUSTRY

M&C WINS BY DEMURRER IN INTERNATIONAL KIDNAPPING CASE

Patrick Braden and Melissa Braden v. All Nippon Airways Co., Ltd.

Guy R. Gruppie, Eric P. Weiss, and Corine Zygleman won a Demurrer in a case that addressed the responsibilities of an airline in instances of the kidnapping of a minor. Plaintiff, Patrick Braden, is the father of four year-old Melissa Hinako Braden. Melissa's mother, Ryoko Uchiyama, is a dual citizen of the United States and Japan. Although the parents were never married, Braden obtained joint legal and joint physical custody of Melissa, pursuant to a court order dated March 6, 2006. As a result of Braden's concern that Uchiyama would take Melissa to Japan, he also obtained a court order requiring Uchiyama to surrender her passport and an order preventing her from traveling outside the state. Ten days later, Uchiyama allegedly flew on an All Nippon Airways ("ANA") flight from Los Angeles, California, to Tokyo, Japan, with Melissa. Uchiyama did not obtain Braden's consent and intentionally violated the court order. Braden has not seen Melissa since the flight. The Federal Bureau of Investigations and various California law enforcement agencies have issued arrest warrants against Uchiyama for international kidnapping.

On March 14, 2008, Braden filed a lawsuit against ANA, alleging that ANA should have had a policy requiring joint parental consent when minors travel abroad with only one parent. On December 17, 2008, the Honorable Judge William F. Fahey granted ANA's Motion for Judgment on the grounds that ANA did not have a duty to obtain joint parental consent. However, The Court granted plaintiff leave to amend the complaint, to add more specific facts showing that Uchiyama's conduct was foreseeable.

The First Amended Complaint alleged that Japan is the only G-9 country that is not a signatory to The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which seeks to curb international abductions of children by providing judicial remedies to those seeking the return of a child who has been wrongfully removed or retained. It also alleged that the government of Japan has instituted a policy promoting international child abduction of Japanese children born abroad, and that airlines like ANA were complicit in this policy. Lastly, it added Melissa as a plaintiff and asserted three causes of action on her behalf (Negligence, Intentional Interference with Custodial Relations, and False Imprisonment).

On February 9, 2009, Judge Fahey sustained, without leave to amend, ANA's Demurrer to the First Amended Complaint. The judge adopted ANA's argument that the additional facts alleged did not give rise to a duty by ANA to require joint parental consent. Furthermore, the judge agreed with ANA that all of the claims in the First Amended Complaint are preempted by the Federal Airline Deregulation Act of 1978. As a result, the Court dismissed the action. ANA expects plaintiffs to appeal.

Guy R. Gruppie is a Senior Partner, resident in M&C's Los Angeles office, where he serves as Chair of the Complex Litigation Practice Group. Mr. Gruppie can be reached at 213-630-1089 or ggruppie@murchisonlaw.com.

Corine Zygelman is a Partner, resident in M&C's Los Angeles office, where she is a member of the Business Litigation and General Liability Practice Groups. Ms. Zygelman can be reached at 213-630-1080 or czygleman@murchisonlaw.com.

Eric P. Weiss is a Partner, resident in M&C's Los Angeles office, where he serves as Co-Chairs of the Toxic Tort & Environmental Law Practice Group. Mr. Weiss can be reached at 213-630-1057 or eweiss@murchisonlaw.com.

M&C WINS DISMISSAL AT TRIAL FOR MAJOR AIRCRAFT SUPPLIER CLIENT

**Case Name Confidential*

William T. DelHagen, Paul R. Flaherty, and Lisa D. Angelo obtained a dismissal on behalf of their client, a major supplier of private aricraft in the U.S., on claims of breach of warranty and fraud at trial.

Plaintiff's corporate businesses bought a single engine aircraft for personal use. The aircraft had a series of engine problems and was also subject to a special service program to strengthen a sheet metal component in the wing. At the conclusion of this warranty work, plaintiff signed releases of all claims. Several years later, the engine shuddered and experienced increased oil consumption. Plaintiff and his corporations sued the aircraft manufacturer and the engine manufacturer for breach of warranty and fraud, attempting to apply state and federal "lemon law" statutes to an aircraft transaction.

After contentious discovery proceedings revealed that plaintiffs' tax treatment of the aircraft was incompatible with personal use of the aircraft, plaintiffs dismissed their state law warranty claim. The aircraft manufacturer brought a Motion for Summary Judgment on the federal warranty and fraud causes of action, arguing the federal statutory warranty claim could stand absent a state law warranty claim and seeking to enforce the releases signed by plaintiffs at the conclusion of the prior warranty work. The Court denied this motion, as it did for a subsequent writ on these issues. The case proceeded to trial.

Nevertheless, the trial judge granted Motions in Limine excluding all evidence of the prior warranty work; thus, enforcing the releases. The judge also narrowed plaintiffs' warranty case to the single issue of whether either defendant had guaranteed that the aircraft engine would operate for 2,000 hours, which was the recommended Time Between Overhaul interval. After these rulings, plaintiffs dismissed their case against M&C's client for a waiver of costs.

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EVIDENCE OF BOTCHED LANDING ENDS WRONGFUL DEATH ACTION

**Case Name Confidential*

William DelHagen, Adrian J. Barrio, and Paul R. Flaherty recently won a Motion for Summary Judgment for their client, a major supplier of aircraft in the U.S., in a wrongful death action arising out of a plane crash that occurred on January 24, 2006, in which two pilots and two passengers died. The case was venued in the United States District Court, Southern District of California, before the Honorable Dana M. Sabraw.

The evidence revealed that two trained and qualified pilots botched a routine, good-weather landing to an uncontrolled airport, and then further botched the attempted go-around. These mistakes caused them to fly into an antenna array at the end of the runway and, ultimately, crash the plane into a concrete commercial building. M&C's client filed a Motion for Summary Judgment, supported by various admissions of fact made by plaintiffs.

The Court found no evidence of negligence, or of product failure on the part of the aircraft manufacturer. Therefore, the Court entered judgment in favor of M&C's client.

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M&C'S SIGNATURE EVENT: 2009 YEAR IN REVIEW

Mark your calendar for M&C's annual signature event, Year In Review, being held on April 12, 2010 at the Walt Disney Concert Hall in the heart of Downtown Los Angeles.

M&C's Year In Review features case review highlights and hot topics in 2009 law, presented by the firm's industry experts.

Contact Arleen S. Milian, Director of Client Relations, at 213-630-1071 or amilian@murchisonlaw.com for further information.

HIGHLIGHT: M&C'S PROFESSIONAL LIABILITY PRACTICE GROUP

The Professional Liability Practice Group of Murchison & Cumming, LLP defends lawyers, accountants, real estate brokers, insurance brokers, court reporters, and other professionals. We offer experienced, aggressive and discreet representation in professional liability cases, and fully recognize the responsibility of defending the reputations and livelihoods of our professional colleagues not only within the legal arena, but also before the various professional licensing agencies.

We provide expert defense in the following areas:

Legal malpractice; Accounting malpractice; Insurance brokers ; Real estate brokers ; Architects; Engineers; Fraud and misrepresentation claims; Disciplinary proceedings; Legal ethics and loss prevention consulting; Intra-firm disputes, withdrawals and dissolutions

We have represented prominent lawyers and law firms of all sizes in matters involving legal malpractice claims, allegations of employment discrimination, investigations by government agencies, and law firm dissolutions. We also represent clients in bar disciplinary proceedings and advise practicing lawyers on ethical issues that arise during legal representation. Murchison & Cumming, LLP has represented accountants and accounting firms relating to malpractice actions, tax and other advice, as well as cases concerning a variety of other matters.

The attorneys of the Professional Liability Practice Group of Murchison & Cumming, LLP are seasoned professionals, who offer the expertise, know-how and advice of many years of practical applied experience to the defense of their clients, whether a corporation, a partnership, or an individual.

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SUMMARY JUDGMENT GRANTED IN LANDMARK PUNCH PRESS CASE

**Case Name Confidential*

In a landmark punch press case, the Court granted the Motion for Summary Judgment filed on behalf of a confidential law firm client by B. Casey Yim and Adrian J. Barrio.

Client law firm represented a Worker's Compensation claimant in underlying amputation of fingers by a punch press. The firm filed a suit against their client's employer, under California Labor Code, § 4558, which allows an injured worker to file a civil lawsuit against the employer if he or she is injured on a "punch press." The employee settled with his employer, but the employee's non-injured wife then retained an attorney and filed a legal malpractice case against client law firm. Plaintiff sued for defendant's failure to file a Loss of Compensation claim on her behalf.

M&C filed a Motion for Summary Judgment, arguing that the § 4558 exception to Workers Compensation exclusivity applied only to the injured employee, not to the non-injured spouse.

No other case has so held in a "punch press" lawsuit.

B. Casey Yim is Of Counsel, resident in M&C's Santa Ana office, where he is a member of the firm's Professional Liability Practice Group. Mr. Yim can be reached at 714-972-9977 or cyim@murchisonlaw.com.

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GENERAL LIABILITY

UNANIMOUS VERDICT REACHED IN FAVOR OF M&C GOLF COURSE CLIENT AND HOMEOWNERS

Kagy v. Sterling Hills Golf Club
Kagy v. Tackett

After a 45-minute deliberation, a jury returned a unanimous verdict in favor of Sterling Hills Golf Club, represented by Edmund G. Farrell, in a case alleging nuisance, slander and civil rights violations. Plaintiff, Kagy, brought this action on his own behalf, and on behalf of his family.

Tom Kagy, an attorney, and his family resided at a residential development adjoining the golf club. He alleged that the club, along with some neighbors, harassed his family because they were of Asian descent. The harassment allegations consisted of continuous noise from golfers, balls being hit purposely at his home, night time harassment with noise and lights, and attacks on the family by the use of microwave radiation.

Following the first week and a half of trial, the Court granted the individual homeowners non-suits. Richard C. Moreno represented one of the homeowners. The trial continued for another week against the Golf Club before the jury ruled in favor of the Sterling Hills Golf Club.

Edmund G. Farrell is a Senior Partner, resident in M&C's Los Angeles office, where he serves as Chair of the Appellate Law Practice Group and Co-Chair of the Professional Liability Practice Group. Mr. Farrell can be reached at 213-630-1020 or efarrell@murchisonlaw.com,

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SUMMARY JUDGMENT GRANTED IN CASE INVOLVING ASSAULT

**Case Name Confidential*

Russell S. Wollman and Maria A. Starn won a Motion for Summary Judgment in a premises liability case involving assault. Plaintiff, a professional truck driver, filed a suit against defendant, the owner and operator of a truck stop, for the alleged failure to provide adequate security on the premises to prevent his being assaulted. Plaintiff claimed that while walking his dog on the property, he was struck on the back of the head by unknown assailant(s) and knocked unconscious. Plaintiff claimed significant personal injuries, including brain injury and resultant loss of earnings in excess of $200,000.

In support of plaintiff's claim that the alleged assault was reasonably foreseeable, thereby imposing a duty on defendant to provide additional security measures, plaintiff produced police records evidencing numerous reports of prior criminal activity on the premises and officer testimony that truck stops, in general, are known for being high crime facilities.

Defendant filed a Motion for Summary Judgment on grounds that: (1) there was insufficient evidence to establish that plaintiff was assaulted on the premises; (2) assuming assault, defendant did not owe a duty to provide additional security measures in the absence of prior similar incidents of assault; and (3) plaintiff could not prove what, if any, additional security measures would have prevented the alleged assault from occurring.

On July 17, 2009, the Kern County Superior Court granted defendant's Motion for Summary Judgment, finding that: (1) there was insufficient evidence to establish that plaintiff was injured by violent assault and battery; (2) assuming assault, the admissible evidence did not support reasonable foreseeability so as to give rise to a duty to provide additional security; and (3) plaintiff could not establish causation of injury as a result of an alleged lack of security.

Russell S. Wollman is a Partner, resident in M&C's Los Angeles office, where he is a member of the General Liability Practice Group. Mr. Wollman can be reached at 213-630-1037 or rwollman@murchisonlaw.com.

Maria A. Starn is a Senior Associate, resident in M&C's Los Angeles office, where she is a member of the Law & Motion Practice Group. Ms. Starn can be reached at 213-630-1046 or mstarn@murchisonlaw.com.

PRODUCTS LIABILITY & APPELLATE LAW

CASE ARISING FROM COTTON GIN ACCIDENT DISMISSED IN COURT OF APPEAL

Jimenez v. J.G. Boswell

Edmund G. Farrell and Michael J. Nuñez defended J.G. Boswell from the initial suit to the Court of Appeal, where the claim was dismissed.

J.G. Boswell purchased a cotton gin from the manufacturer, and the cotton gin later injured plaintiff. Under the terms of the sale, J.G. Boswell agreed to indemnify the manufacturer for claims arising out of use of the machine. Plaintiff, Jimenez, was an employee of J.G. Boswell and suffered severe injuries in an on-the-job accident. She sued the manufacturer for products liability. The manufacturer declared bankruptcy. Plaintiff then cross-complained in her action, claiming she was a third party beneficiary of the sales agreement between her employer J.G. Boswell and the manufacturer.

Nuñez successfully argued a Motion for Summary Judgment, and Farrell handled the subsequent appeal. The Court of Appeal affirmed, holding there was no third party beneficiary of the purchase agreement.

Edmund G. Farrell is a Senior Partner, resident in M&C's Los Angeles office, where he serves as Chair of the Appellate Law Practice Group and Co-Chair of the Professional Liability Practice Group. Mr. Farrell can be reached at 213-630-1020 or efarrell@murchisonlaw.com.

Michael J. Nuñez is Partner in Charge of M&C's Las Vegas office, where he serves as the senior trial attorney. He is licensed in both NV and CA. Mr. Nuñez can be reached at 702-360-3956 or mnunez@murchisonlaw.com.

SUMMARY JUDGMENT GRANTED BASED ON LANGUAGE OF LIABILITY AGREEMENT

Stout v. Motorcycle Safety Foundation

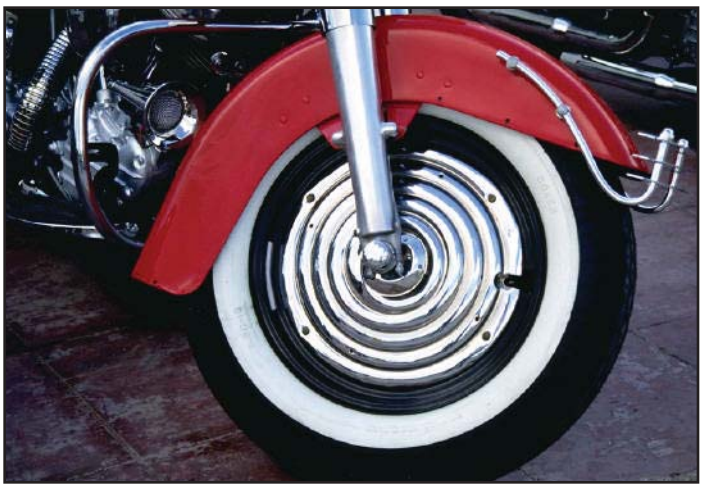
Gina E. Och and Edmund G. Farrell successfully defended client, Motorcycle Safety Foundation ("MSF") up to the Court of Appeal.

Plaintiff, Mary Stout, signed up for a motorcycle riding training course with MSF. Prior to taking the course, she signed an agreement, which contained a release of all claims arising out of injuries that may occur during the training. After injuring herself following a crash during the class, she sued MSF.

Ms. Och brought a Motion for Summary Judgment, based on the language of the release. The Court granted the motion, and plaintiff appealed the case. Mr. Farrell represented MSF in the Court of Appeal, which unanimously held that the release barred all claims.

Edmund G. Farrell is a Senior Partner, resident in M&C's Los Angeles office, where he serves as Chair of the Appellate Law Practice Group and Co-Chair of the Professional Liability Practice Group. Mr. Farrell can be reached at 213-630-1020 or efarrell@murchisonlaw.com.

Gina E. Och is a Partner, resident in M&C's Los Angeles office, where she serves as Chair of the Law & Motion and Class Action Practice Groups. Ms. Och can be reached at 213-630-1027 or goch@murchisonlaw.com.



M&C WELCOMES

Wendy Anderson is a Senior Associate in the San Diego office of M&C where she focuses her practice on general liability. Ms. Anderson is a graduate of Seattle University (B.A.) and University of Washington School of Law (J.D.).

Abraham Berger is a Senior Associate, in the Los Angeles office of M&C where he focuses his practice on general liability premises liability, and business litigation. Mr. Berger is a graduate of California State University, Northridge (B.A.) and New York Law School (J.D.).

Scott Jackman is an Associate in the Santa Ana office of M&C where he focuses his practice in the defense of healthcare providers and medical professionals. Mr. Jackman is a graduate of the University of California, Irvine (B.A) and Whittier Law School (J.D.).

German Marcucci is a Senior Associate in the Los Angeles office of M&C where he focuses his practice on advising insurers regarding coverage issues and representing insurers in bad faith and declaratory relief actions. Mr. Marcucci is a graduate of Occidental College (B.S.) and Whittier Law School (J.D.).

Edward Seo is an Associate in the Los Angeles office of M&C where he focuses his practice in the areas of general civil litigation, business and transactional law, commercial litigation, commercial real estate, premises liability and products liability issues. Mr. Seo is a graduate of the University of California, Irvine (B.A.) and Whittier Law School (J.D.).

Anita Singh is an Associate in the Los Angeles office of M&C where she focuses her practice in the area of general liability. Ms. Singh is a graduate of the University of California, San Diego (B.S.) and Loyola Law School (J.D.).

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Maria Toto is an Associate in the Nevada office of M&C where she focuses her practice in the areas of employment and construction law. Ms. Toto is a graduate of Purdue University (B.S.) and Michigan State University College of Law (J.D.).

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