# Murchison & Cumming
-Lawyers-

M&C IN BRIEF Spring/Summer 2005

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## FRIEDRICH SEITZ AND MICHAEL LAWLER NAMED SOUTHERN CALIFORNIA SUPERLAWYERS

Murchison & Cumming, LLP is proud to announce that Friedrich Seitz, the firm's Managing Partner, and Michael Lawler, Senior Partner, have been named Southern California Super Lawyers for 2005. Produced by Los Angeles Magazine, the list of Super Lawyers® is based on surveys of more than 65,000 lawyers across Los Angeles and Orange County and honors the top 3% of licensed attorneys in Southern California.

**Friedrich W. Seitz** serves as Chair of the firm's Product Liability Practice Group. He is a seasoned trial attorney and frequent speaker and author on product liability and international law issues. He currently serves as the Chair of the Products Liability Section for the Federation of Defense and Corporate Counsel. Mr. Seitz is a graduate of the University of Southern California (B.A.) and Southwestern University (J.D.).

**Michael B. Lawler** is the Chair of the Health Law and Co-Chair of the Employment Law Practice Groups. Mr. Lawler focuses his practice on complex litigation involving nursing homes, elder care abuse, medical malpractice, and employment. He is a member of numerous professional organizations including the Association of Southern California Defense Counsel, for which he served as President in 1994. Mr. Lawler is a graduate of Loyola University of Los Angeles (B.B.A.) and Southwestern University (J.D.).

## CONTINGENT FEES PAID TO ATTORNEYS IS TAXABLE INCOME

On January 24, 2005, the U.S. Supreme Court, ruled that all damages recovered in litigation are taxable income, including contingent fees paid directly to attorneys. Commissioner of Internal Revenue vs. Banks, 2005 U.S. Lexis 1370, 73 U.S.L.W. 4117 (2005)

The Supreme Court concluded that attorney's fees paid out of a judgment or settlement under a contingent fee agreement are includable in a claimant's gross income for federal tax purposes.

This ruling effectively ends a conflict among the federal appeals courts over whether the position taken by the Internal Revenue Service regarding the tax treatment of such contingency fees was correct.The unanimous decision held that the attorney's fees portion of any judgment or settlement is taxable income to the recipient whether the fees have been paid directly to the claimant or to the attorney, and whether the fees are pursuant to a contingent fee or different arrangement.

The court upheld the government's position on the strength of a doctrine that says, "A taxpayer cannot exclude economic gain from gross income by assigning the gain in advance to another party."

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# M&C CASE REVIEW

## SUB-CONTRACTOR'S LIABILITY INSURER WINS SUMMARY JUDGMENT

National Union Insurance et. al. v. Employers Fire Insurance, et. al.

**Todd Chamberlain** and **Dan Pezold** successfully filed a motion for summary judgment on behalf of Employers Fire Insurance Company in an insurance contribution action.

Employers Fire insured a HVAC sub-contractor whose employee was seriously injured in a fall from a two- story construction site ladder when a shipping bracket camouflaged as a ladder rung gave way. The employee settled the liability case for $2.1 million.

The insurers who funded the settlement, including Evanston Insurance, then brought claims for implied indemnity and contribution against Employers and others for reimbursement of the settlement monies. The theories advanced by the insurers included claims that the general contractor was an additional insured under Employers policy. The defense filed a motion for summary judgment on behalf of Employers, asserting that the additional insured certificate and endorsement was issued the day after the accident and thus provided no coverage for the additional insured, or standing for Evanston against Employers.

After a hotly contested hearing, the court granted the motion for summary judgment finding as a matter of law that the general contractor was not an insured under the policy at the time of the accident barring any coverage under the HVAC sub-contractor's liability policy.

Todd A. Chamberlain and Daniel J. Pezold
Los Angeles, CA

## ALLEGED BRAIN INJURY CASE RESOLVES WITH CLIENT RECOVERING DEFENSE AND INDEMNITY COSTS

Senior Partner, **Guy Gruppie**, and associates **Robert Clayton** and **Tina Varjian,** recently obtained a very favorable result for a general contractor client in a major injury case that went to trial in the Orange County Superior Court.

The lead plaintiff, a local banker earning a six-figure income, claims to have hit a bump while on a bike ride near his home. Plaintiff allegedly was thrown over his handlebars, landing so hard on his head that his helmet was "crushed."

There were no witnesses to the accident, and the helmet was discarded by plaintiff's wife, who also joined the lawsuit on a loss of consortium claim. The lead plaintiff claimed several orthopedic injuries plus a traumatic injury to his brain that left him cognitively and emotionally impaired, and returned to work only briefly before going on permanent disability. At trial, he claimed more than $3 million in lost future earnings among other damages.

Plaintiff claimed that the bump, at the transition of a bike lane and bus deceleration pad, constituted a dangerous condition. He and his wife brought suit against the city, the county, and the general contractor, who was retained to oversee a slurry seal project that was completed two years before the accident, the subcontractor that performed the slurry seal job, and the project engineers.

Summary adjudiction was granted on the subcontractor's defense obligation, and 100% of the indemnity costs were reimbursed, along with 95% of the attorney fees. The client paid approximately $6,000 out of the total $200,000 in fees and costs occurred in defense.

Guy R. Gruppie, Robert R. Clayton and Tina D. Varjian
Los Angeles, CA

# M&C CASE REVIEW



## SUCCESSFUL MOTION IN ELDER ABUSE CASE

### SNF Management v. Caradine

**Dan Longo, Michelle Hancock** and **Robert Ackley** recently won a successful motion for summary judgment on an elder abuse case.

Plaintiff was a resident of Windsor Gardens Hawthorne on and off throughout 2001 and 2002. In early December 2002, she died at another skilled nursing facility nearly six months after leaving Windsor Gardens. At the time of her death, plaintiff was 92 and had experienced numerous serious pre-existing medical conditions.

Plaintiff's family sued Windsor Gardens alleging elder abuse contributed to her death. The defense propounded contention interrogatories to determine the nature and basis of the contentions against Windsor Gardens. The discovery responses revealed a lack of support for the allegations. Based on these responses, defense filed a Motion for Summary Adjudication on the Elder Abuse, Fraud, and Willful Misconduct causes of action, and to get rid of the Punitive Damages claim.

The Court granted the defense's Motion for Summary Adjudication. The Motion resulted in a significant reduction in the damages that plaintiff can recover, assuming that plaintiff can meet the burden of proof at trial. The Medical Injury Compensation Reform Act (MICRA) limits cap the damages at $250,000. This ruling was also affirmed by the Court of Appeal. This successful motion puts the defense in an excellent bargaining position for settlement negotiations.

Dan L. Longo, Michelle A. Hancock, Robert S. Ackley
Orange County, CA

**Edmund G. Farrell**

## DEFENSE VERDICT ON TWO APPEALS

### Century Surety v. Rio Vista

**Bryan M. Weiss**

The Law & Appellate practice group won two separate appeals on behalf of Century Surety. The Plaintiff claimed that it was an additional insured under the Century Surety insurance policy. However, due to a clerical error unknown to Century Surety, the wrong entity was named on the additional insured endorsement. Plaintiff sought to have the policy reformed so as to name the correct entity as an additional insured. The trial court ruled in favor of Century Surety and the court of appeal affirmed the decision.

Plaintiff filed a second appeal, which was based on the trial court awarding costs to Century Surety following the judgment in its favor. Century Surety had made a CCP section 998 offer in the amount of $100 plus a waiver of costs. Plaintiff argued that it was not a "good faith" settlement offer and that costs should not have been awarded. Again, the trial court ruled in favor of Century Surety and was affirmed on appeal.

Edmund G. Farrell and Bryan M. Weiss
Los Angeles, CA

# M&C CASE REVIEW

## DEFENSE VERDICT IN SUITE AGAINST HOA

Curlett, et al. v. San Lorenzo Villages Homes Association

**Jim Williams** and **Tina Varjian** successfully defended a homeowners association against a suit attacking the validity of the annexations of thousands of homes into the association over a period of more than 50 years. The plaintiffs challenged the annexations and contended that the changes were made without authority under the By-Laws. The plaintiffs contended that the annexations violated the Non-Profit Mutual Benefit Corporations Law and California's Davis-Stirling Common Interest Development Act. Although some of the challenged actions of the HOA had occurred nearly half a century before the suit had been filed, plaintiffs contended that the statute of limits did not apply because the HOA's acts were *ultra vires* – that is, utterly beyond the authority of the By-Laws of the HOA. Among other things, plaintiffs contended that the HOA was without authority to make them pay monthly assessments above the amounts originally set in 1945.

In the bench trial, the court held that the HOA and the plaintiff-homeowners were subject to both the Davis-Stirling Act and to the Non-Profit Mutual Benefit Corporations Law and that plaintiffs' monthly assessments could be increased above 1945 levels to comport with current HOA operating costs. The court ruled that challenged annexations were proper, that the thousands of homes annexed were rightful members of the HOA and that the statute of limitations and laches barred many of plaintiffs' claims, including those alleged to have undertaken by the HOA without any authority under the By-Laws.

James S. Williams and Tina D. Varjian
Los Angeles, CA

## MOTION FOR SUMMARY JUDGMENT GRANTED IN MEDICAL MALPRACTICE CASE

Chin adv. Fulkerson

**Dan Longo** and **Aileen Rodriguez** successfully filed a motion for summary judgment on behalf of a surgeon accused of a medical malpractice.

Plaintiff underwent hernia repair surgery in December 2000, and again in September 2002. During the second surgery, the surgeon discovered that the first surgery was completed incorrectly. The plaintiff brought a complaint against the surgeon who first performed the hernia surgery for medical negligence and lack of informed consent in September 2003.

The defense moved for summary judgment arguing that plaintiff's claim was barred by the one year statute of limitations of C.C.P. § 340; and plaintiff had admitted in his response to the Request for Admissions, that he had signed a written consent form, which explained the risks/benefits of the surgery. The defense presented evidence that from May 2001, through July 2002, plaintiff complained to other physicians of chronic pain in the same surgical area since the first surgery, complained that the defendant did "not do a good job" in the surgery; verbally informed his health insurance company and the State of California Bureau of Managed Healthcare that he would not see the defendant again; was diagnosed by subsequent physicians with hernia recurrence; and had even scheduled a second hernia surgery with a different surgeon to treat the same pain in the same area .

The court granted summary judgment, even after the court granted the plaintiff additional time to file opposition. The court held that the plaintiff had a reasonable suspicion of wrongdoing before September 2002, such that his claim was barred by the one year statute of limitations.

Dan L. Longo and Aileen U. Rodriguez
Orange County, CA

# M&C CASE REVIEW

## COMPLAINT AGAINST MOLD REMOVAL COMPANY DISMISSED

Aladdin Companies, Inc. adv. Sharif

**Tom Mei** and **Michelle Hancoc**k successfully defended a negligence and breach of contract case brought against a company that removes mold from buildings.

Plaintiff hired Aladdin Companies, Inc. to perform mold remediation work, after several other contractors had already done work there. Plaintiff was unhappy with all work performed by each contractor, and sued, claiming property damage and personal injury due to alleged mold contamination throughout her house. Plaintiff also sued Aladdin on a breach of contract theory.

The case went through extensive discovery and depositions over a period of two years, which included extensive investigation into the Plaintiff's prior medical and psychological history. Due to the length and complexity of the case, a substantial "cost of defense" offer was made to the Plaintiff, who pulled out of the settlement at the last minute. The Plaintiff had also rejected the defense's statutory offer to compromise. The matter proceeded to Trial, and several pre-trial motions were made by the defendants. It became clear during pre-trial motions that the Plaintiff did not have the necessary experts and percipient witnesses to establish a prima facie case for personal injuries due to mold, as specific requirements must be met to prove such a claim. The defendants capitalized on this weakness and made several pre-trial requests and motions, one of which was to dismiss the case. Ultimately the Court agreed and dismissed the complaint in its entirety before the jury was empaneled.

Tom Y. Mei and Michelle A. Hancock
Orange County, CA

# M&C TRANSACTIONS

## M&C ADVISES BIO-PHARMACEUTICAL FIRM ON APPOINTMENT OF NEW CEO

James S. Williams

On February 28, 2005, Australian-based Bone Medical Limited (ASX: BNE) announced the appointment of its new Chief Executive Officer, Michael Redman. Mr. Redman will lead Bone Medical's operations from the U.S. M&C Los Angeles partner James S. Williams was tapped to structure and negotiate the executive transaction.

## M&C REPRESENTS TELEMATICS COMPANY ON STRATEGIC INTERNATIONAL CONSOLIDATION

WirelessWERX, Inc., a leading U.S. developer and manufacturer of cellular/satellite based asset management and monitoring devices has consolidated its operations together with Operadora de Sistemas de Localizacion Ltda and Transtech Technology, S.A, both Colombian companies. By means of the consolidation, the three companies will become subsidiary operations of WirelessWERX International, Inc., a Panamanian corporation.

The transaction was consummated through a four-way share exchange involving $40 million in convertible debt and equity instruments. The WirelessWERX, Inc. deal team was lead by Los Angeles partner, James S. Williams.

# M&C CASE REVIEW

## ALARM MONITORING COMPANY WINS ON SUMMARY JUDGMENT

Counterforce U.S.A. adv. Centre Insurance Company

**Daniel Robyn** and **Adrian Barrio** won a motion for summary judgment on behalf of an alarm system installation company in a property damage/tort case.

Plaintiff's home was damaged by flooding allegedly caused by the installation of an alarm system by Security Services Nationwide, Inc. (SSNI). SSNI had a contract with Counterforce U.S.A, an alarm monitoring company, to sell subscriptions to their monitoring service. While installing an alarm system at plaintiff's house, SSNI caused flooding damage to occur. Plaintiffs filed suit against both SSNI and Counterforce U.S.A for negligence. The question in this suit was whether or not Counterforce U.S.A. was responsible for the damage caused by SSNI. The defense filed a motion for summary judgment on the ground that SSNI was an independent installation contractor. The court granted the motion, concluding that SSNI was an independent contractor with respect to installation and that Counterforce had no control over the manner and means by which SSNI performed the installation of the alarm system.

Daniel K. Robyn and Adrian J. Barrio
Los Angeles, CA

## CLASS ACTION REFORM LEGISLATION PASSED BY CONGRESS

**Edmund G. Farrell**

The Class Action Fairness Act of 2005 has overcome its last Congressional hurdle and will shortly be sent to the President for his signature. On February 17, 2005, the House took up the Senate's version of the class action reform bill, Senate Bill 5, and passed it by a vote of 279 - 149. Under a previous agreement with Senate leaders, House leadership had promised to fast track the bill if it was received unamended from the Senate. After the Senate fulfilled its part of the agreement, House supporters of class action reform defeated a substitute bill offered by reform opponents and passed Senate Bill 5 without amendments. Relentless lobbying from class action reform advocates and favorable political conditions - strong Republican backing in Congress and from the White House, bipartisan support in both chambers, and cooperation between the House and Senate - formed the right combination during this session to enact reform.

The amendments in the substitute bill mirrored some of the amendments that were defeated by the Senate last week, including a carve-out for civil rights and wage-and-hour class actions, a carve-out for cases brought by state Attorneys General, and a prohibition against denying certification because the law of more than one state applies to the class. Other amendments would have excluded mass torts from the bill, prohibited domestic corporations that reincorporated abroad for the purpose of avoiding taxes and liability from benefiting from the bill, and limited the court's ability to seal records.

Now that the bill has been passed by both chambers and lacks only the President's signature before becoming law, it is expected that the number of class action filings in state courts will surge slightly, as plaintiffs' attorneys wishing to avoid federal jurisdiction will act quickly to file in state court. Any class actions filed after the bill has been signed into law will be subject to the provisions of the new law.

For further information about this law, please contact **Edmund G. Farrell III**, Chair of the firm's Law & Appellate Practice Group at (213) 630-1020 or efarrell@murchison-cumming.com.

## CALIFORNIA LAW UPDATE

# CALIFORNIA'S UNFAIR COMPETITION LAW AFTER PROPOSITION 64

**Gina E. Och**

California's Unfair Competition Law (UCL), codified at Business and Professions Code section 17200, prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising...."[1] Any person could sue under section 17200; thus, a plaintiff did not have to have "standing" to sue.[2] Unfortunately, legislation originally meant to protect consumers and competitors began plaguing businesses, serving as a cash cow for some attorneys, and creating a surge in UCL litigation.

No case symbolized the fallout from UCL lawsuits more than the Trevor Law Group scandal in 2003.[3] Specifically, the Trevor Law Group, a law firm, created and funded an alter ego, "consumer" organization called, Consumer Enforcement Watch Corp. (CEW).[4] On behalf of CEW, it filed 24 lawsuits against thousands of mostly minority-owned and small businesses, namely automobile repair shops and restaurants, for violations already cited by regulatory agencies.[5] The firm then sent letters to these businesses demanding settlement monies.[6] The fee arrangement between the firm and CEW granted the firm up to 90 percent of any financial recovery.[7] Because these businesses were small, most businesses decided to settle instead of going through the expense of litigation.[8]

Eventually, the Trevor Law Group came to the attention of state authorities. The State Bar petitioned to disbar three attorneys in the Trevor Law Group.[9] Faced with disbarment, in July, 2003, the three attorneys resigned with 36 counts of misconduct.[10] In an ironic twist of fate, the State's Attorney General's Office filed a complaint against these attorneys pursuant to section 17200.[11] The State seeks to recover a $1 million fine and restitution on behalf of the businesses that settled with the law firm.[12]

Prompted by this scandal,[13] on November 2, 2004, California voters passed Proposition 64.[14] This initiative amended the UCL in two significant ways: (1) it prohibited plaintiffs from filing UCL lawsuits without demonstrating their standing to sue; and (2) it prohibited the filing of "representative actions" as a substitute for the class action process. Now, in order to meet the new standing requirement, a plaintiff must show he "has suffered injury in fact ***and*** has lost money or property as a result of such unfair competition."[15] Moreover, a plaintiff can only file a representative lawsuit as a "private attorney general" on behalf of the people of California if he meets the new standing requirement ***and*** complies with the procedures governing class actions.[16]

Although Proposition 64 became effective on November 3, 2004, it is unclear whether Proposition 64 applies to cases filed before November 3, 2004. By the end of February, 2005, one appellate court held that Proposition 64 did not apply retroactively.[17] Four other opinions found Proposition 64 applied retroactively.[18] One case stated that the plaintiff should be able to substitute in the lawsuit an affected plaintiff with standing.[19] Another case stated that if, after a hearing, no affected plaintiff could be found, a substitution could not be made.[20] Still yet, another case, determined that the plaintiff should have leave to amend the complaint to meet the Proposition 64 requirements.[21] The California Supreme Court has, thus far, accepted only one of these cases for review.

It is also unclear whether the standard of pleading and proof of the "false" business practice or act prong under section 17200 will need to be revised. Before Proposition 64, a business practice was "fraudulent" if "members of the public are likely to be deceived."[22] Thus, a plaintiff did not have to establish intent, scienter, actual reliance, or damage; even actual deception was not necessary. Yet, after Proposition 64, courts may have to decide whether the current "fraudulent" standard can be reconciled with the standing requirement.

In all, the defense attorney and client should evaluate any pending or new UCL cases, and determine whether a demurrer, motion for judgment, or motion to strike should be filed. In the appropriate cases, until the California Supreme Court concludes otherwise, one should argue that Proposition 64 applies retroactively. Moreover, one should attack the complaint where the plaintiff lacks the standing to sue; paying particular attention where the "fraudulent" business practice and act prong is alleged. Finally, where the plaintiff is suing in representative capacity and fails to meet section 17203, those private attorney general allegations should be stricken from the complaint.

Accordingly, gone are the days when a plaintiff could sue without having to see the advertisement, to purchase the product, or to be injured by the business act.

Gina E. Och,
Los Angeles, CA

***For a copy of the complete article, including footnotes, please visit our website at www.murchison-cumming.com***

# M&C ARTICLES

## DISAPARATE IMPACT LIABILITY EXTENDED TO AGE DISCRIMINATION

Employees seeking relief from age discrimination have a new weapon: Disparate impact liability. Originally applied to race, gender, religion, and ethnicity, disparate impact law allows employers to be held civilly liable for practices or policies that have an adverse impact on a statutorily protected group. If plaintiffs can show that a practice or policy creates a numerical disparity on a protected class, the employer is liable, even if the employer never meant to discriminate or if the practice is neutral on its face.

Now, the United States Supreme Court has extended disparate impact liability to age. In *Smith v. City of Jackson*, the Court interpreted the Age Discrimination in Employment Act (ADEA) to include disparate impact liability. Though the ruling could potentially create a litigation rush, the Court created three barriers to plaintiffs seeking to recover under this theory. First, plaintiffs will have to "isolate and identify" the specific employment practices that allegedly caused statistical disparities. Plaintiffs may not "simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." This presents a heavier burden on plaintiffs seeking to recover for age discrimination than those seeking to recover under race or gender.

Second, even if plaintiffs are able to point to the specific practices that created the disparity, the employer can defend these practices by merely showing that "the adverse impact was attributable to a non-age based factor that was reasonable." This is a much lower threshold than the "business necessity" showing that employers must make in race and gender cases.

Finally, once the employer has presented a reasonable basis for the practice/policy, the burden of proof shifts back to the plaintiff to disprove the reasonableness of the employer's basis. This is another major deviation from the disparate impact scheme in race and gender cases. In those cases, employers retain the burden of proof.

In sum, the culmination of these obstacles creates a significant burden on plaintiffs. This burden is highlighted by the Court's refusal to allow the plaintiffs in *Smith* to state a claim—the same claim that produced the rule. So while employees over 40 will have a new protection against their employers, several obstacles will likely limit the employees' chances of success.

Looking to the future, many critics contend that the Court's ruling actually raises more questions than it answers. For example, what about layoff policies that favor releasing employees with higher pay levels? Most of these employees will have been with the employer for many years, and many will be over 40. Is the economic justification of the lay-off policy reasonable?

What about employment applicants? Does disparate impact liability apply to older applicants that are denied employment because employers favor hiring those with less experience that can be justifiably paid less. Though some lower courts have held that economic considerations may be reasonable, such everyday practices may now be under attack.

Kasey Swisher, Law Clerk
Los Angeles, CA

## M&C JOINS CALIFORNIA ASSOCATION OF HEALTH FACILITIES

Murchison & Cumming, LLP has joined the California Association of Health Facilities ("CAHF"). CAHF is a state-wide, non-profit professional organization, formed in 1950, to serve and education long-term health care providers. The Association's 1,400 members are dedicated to improving the quality of long-term care in California through educational programs and proactive advocacy through the Legislature and administrative agencies.

As an Associate Member of CAHF, Murchison & Cumming, LLP is an approved vendor, providing legal services to long care health facilities, including skilled nursing facilities, sub-acute care facilities, intermediate care facilities, institutes for mental health, and care facilities for the developmentally disabled.

The firm is pleased to be an approved service provider for the long care health industry and would be happy to discuss how our attorneys can be of assistance with long term care issues. Please contact either Michelle A. Hancock or Dan L. Longo for further information. They can be reached at (714) 972-9977 in the Orange County office.

## SPOTLIGHT ON...

# INSURANCE LAW & RISK MANAGEMENT PRACTICE GROUP

**Bryan M. Weiss**

The Insurance Law & Risk Management Practice Group is responsible for handling litigation involving insurance contracts, claims handling practices and subrogation and indemnification agreements, including appeals, filed in the state and federal courts of California and Nevada. This includes defense of bad faith and errors and omissions claims against insurance companies, adjusters, brokers and agents; handling complex declaratory relief actions and arbitrations regarding policy disputes; negotiating with and/or monitoring Cumis counsel; negotiating and preparing policyholder releases; handling additional insured, insurer allocation, Montrose, excess/primary and other insurance-related issues.

In addition to litigated matters, our attorneys provide coverage opinions, prepare reservation of rights and/or denial letters and otherwise analyze, evaluate and provide advice regarding insurance issues under primary and excess policies of all kinds, including general and professional liability, directors and officers, health, life and disability, commercial and personal automobile, trucking, cargo and homeowner coverages. The attorneys of this practice group pride themselves on their reputation for approaching matters in a practical, creative and expeditious manner, recognizing the sensitivity needed with respect to issues for which they are retained.

For more information about the Insurance Law & Risk Management Practice Group of Murchison & Cumming, LLP, its attorneys and services, please contact:

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## Event Calendar

**July 14 - 27**
**FDCC Annual Meeting**
**La Costa, CA**
M&C Attendees Jean Lawler, Guy Gruppie, Friedrich Seitz, Michael Lawler

**September 8 - 9**
**DRI Construction Law Seminar**
**Las Vegas, NV**
M&C Attendees Jean Dalmore, Victor Lee

**August 10**
**PLUS Intellectual Property/Personal Injury**
**Costa Mesa, CA**

**Septmeber 15 - 16**
**DRI Nursing Home Seminar**
**San Francisco, CA**
M&C Attendee: Dan Longo, Michelle Hancock

**September 15 - 17**
**USLAW**
**Broomfield, CO**
M&C Attendee: Russell Wollman, Thomas Dias, Jean Lawler

**September 21**
**PLUS Conference**
**Los Angeles, CA**

**September 29**
**FDCC Corporate Counsel Symposium**
**Chicago, IL**

**October 12**
**Murchison & Cumming Fall Symposium**
**Los Angeles, CA**

## EXPERT TESTIMONY UPDATE

# NEW NEWS ON EXCLUDING UNRELIABLE EXPERT TESTIMONY

Scott L. Hengesbach

On January 31, 2005, the Second District Court of Appeals concluded the Lockheed litigation cases, which had been ongoing for two decades, affirming the trial court's exclusion of the opinions of the plaintiffs' expert toxicologist regarding medical causation. The Second District's decision reinforced the trial court's conclusion that plaintiffs' expert's opinions should be excluded under California Evidence Code Section 801(b). Section 801(b) states that in order to be admitted into evidence, an expert's opinion must be based on matters that are of a type that, "reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates..." The trial court found that the studies and other materials provided by the expert did not meet this threshold requirement for admissibility. The appellate court agreed with the trial court's finding that the expert's opinion that various solvents caused the plaintiffs' chronic injuries lacked a reasonable basis.

The Lockheed Litigation Cases (*LLC*) decision signifies a shift in the method for exclusion of unreliable expert testimony. Prior to the LLC decision, litigants and courts coping with allegedly unreliable expert testimony primarily focused their attention on the question of whether the expert's opinion was admissible under People v. Kelly (1976) 17 Cal.3d 24 (otherwise known as the Kelly-Frye rule). The Kelly-Frye rule dictates that the admissibility of a new scientific technique depends on whether the technique has become "generally accepted" in the scientific community. This rule was routinely applied to exclude a wide variety of scientific evidence over the past 25 years. However, in Roberti v. Andy's Termite & Pest Control, Inc. (2003) 113 Cal.App.4th 893, the court held that the application of the Kelly-Frye test should be limited to new scientific techniques and, therefore, generally was not a proper basis for exclusion of medical causation testimony. The Roberti decision forced a renewed emphasis on Evidence Code Section 801(b) as a means of determining the admissibility of expert opinion testimony.

The LLC decision is the first published opinion to broadly address the admissibility of expert opinion testimony since Roberti. The decision invites trial courts to carefully scrutinize the basis of an expert's opinion to determine whether the testimony should be admitted. In this respect, the decision reemphasizes the gate-keeping role of trial courts faced with arguably unreliable expert testimony.

The relevance of the LLC decision is in no way limited to toxic tort cases. Evidence Code Section 801(b) applies to expert opinion testimony in all civil and criminal cases. While the majority of the court's opinion in LLC discuss scientific issues frequently arising in toxic tort cases, the court's call for strict scrutiny of expert testimony under Section 801(b) applies equally to all cases. Thus, while "junk science" surely is more prevalent in toxic tort cases than other cases, the LLC decision will be the focus of future motions to exclude expert testimony in any case where the basis for an expert's opinion appears unreliable.

# CONTINGENT FEES PAID TO ATTORNEY IS TAXABLE INCOME

**Continued from Page 1**

The opinion addresses two consolidated cases. In the first case, John W. Banks, worked as an educational consultant for the California Department of Education from 1972 to 1986, when he was terminated. After his termination, he sued the state for employment discrimination and eventually agreed to a $464,000 settlement. The settlement characterized the entire amount as payment for personal injury damages, which are excluded from gross income under the tax code. Banks paid $150,000 of the settlement amount to his attorney, pursuant to their contingency fee arrangement. Banks did not include any of the $464,000 as gross income on his 1990 Federal Income Tax return.

In the second case, plaintiff Sigitas Banaitis was a Vice President and Loan Officer with the Bank of California and Mitsubishi Bank. During his employment Banaitis developed stress-related medical problems and alleged that he was pressured to resign. He sued Bank of California for wrongful discharge in violation of public policy and Mitsubishi Bank for intentional interference with employment and economic expectations.

In 1991, a jury awarded Banaitis compensatory and punitive damages. After resolution of all appeals, the parties settled. The defendants paid approximately $8.7 million in damages. Following the formula set out in the contingency fee arrangement, the defendants paid an approximately $4.8 million to Banaitis and an additional $3.8 directly to Banaitis' attorney. The plaintiff excluded the $8.7 Million settlement from gross income on his Federal Income Tax return, attaching a statement of explanation to his return.

The Court's decision reaffirms one of the oldest principles in income tax juris-prudence, namely, that income is taxed to the one who earned it regardless of any attempts at anticipatory assignment of the income or damages to someone else. The Court stated that a contingent fee agreement constituted an anticipatory assignment to the attorney of a portion of the client's income from the litigation recovery.

Thus, as a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee.

Pamela J. Marantz
Los Angeles, CA

## M&C PROVIDES SEXUAL HARASSMENT TRAINING

Murchison & Cumming provides employers in California with the required training for the prevention of sexual harassment and discrimination.

The training seminars include information and practical guidance regarding statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and discrimination. The training also includes practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation.

To scheduling an interactive training seminar, or for any other questions regarding employment practices, please contact Ms. Pamela J. Marantz at (213) 630-1070.

## M&C PRACTICE AREAS

- **Business & Intellectual Property Litigation**
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- **Directors & Officers Liability**
- **Employment Law**
- **General Liability & Casualty**
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