MURCHISON & CUMMING LLP
defined by...relationships and results
CELEBRATING 80 YEARS

in brief

SUMMER 2010

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M&C Celebrates 80th Anniversary

When he established the firm in 1930, R. Bruce Murchison began a tradition of client service and professional integrity that stays with Murchison & Cumming, LLP to this very day.

Over the years, the firm has experienced and accommodated many developments in litigation and handled all manner of lawsuits, from one of Michael B. Lawler's early trials, defending the Church of Scientology in a million dollar lawsuit, to William T. DelHagen's recent defense verdict for an aircraft company in the $77 million dollar lawsuit described in the "Results" section of this newsletter.

Though theories of liability practices and the legal industry have changed since 1930, our core values remain as clear and viable as ever.

As we enter our ninth decade, we thank the many people who have contributed to the success of the firm. In particular, we thank our clients for their loyalty and support and are grateful for the client relationships and friendships we have developed over the years. We thank you for allowing us the opportunity to represent you, your companies and your insureds, and look forward to doing so for many years to come.

Taking a phrase from Sir Isaac Newton, if we have come a little further "it is by standing on the shoulders of giants."

New Website Unveiled

M&C has revamped its website, now offering enhanced online services to clients.

Visit www.murchisonlaw.com for legal alerts, industry news and legal links, among other services. Check the website periodically for upcoming events, announcements and firm victories.

Website-related comments or suggestions can be directed to Arleen S. Milian, Director of Client Relations, at amilian@murchisonlaw.com.

M&C's San Diego Office Celebrates 20th Anniversary

M&C is pleased to announce that its San Diego office is celebrating its 20th Anniversary this month. Opened on August 1, 1990 with three attorneys, Kenneth H. Moreno as the Partner-in-Charge, attorney J. Lynn Feldner and former senior partner Ronald McQuoid, the office quickly grew, adding Robert M. Scherk from the firm's Los Angeles office and additional attorneys, paralegals and staff over time. The firm has become a fixture in the local San Diego legal community and through the services of the fine attorneys, paralegals and staff in the San Diego office has been successfully representing clients in the courts of the most southern counties of California for these past 20 years.

M&C Expands Practices

M&C has expanded its practice areas to include Emerging Risks & Specialty Tort Litigation, and Real Estate Transactions, as part of the firm's Business Transactions practice group.

Members of the Emerging Risks & Specialty Tort Litigation practice group focus on litigation arising out of newly developing areas of tort liability and other areas of industry-specific and specialty tort litigation.

Real Estate Transactions matters handled by the Business Transactions practice group include purchase and sale transactions, leasing, development and construction.

Please visit www.murchisonlaw.com to view the full list of practice areas and descriptions.

Clash of the Courts: Are Witness Statements Privileged Information?

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For the first time in 14 years, one of California's six appellate districts has challenged the frequently cited [Nacht & Lewis Architects, Inc. v. McCormick], 47 Cal. App. 4th 214 (1996) ruling, and urged the Supreme Court to "weigh in" on the issue.

The [Coito] case revisits the question: "Whether the statement of a witness, taken in writing or otherwise recorded verbatim by an attorney or the attorney's representative, is entitled to the protection of the California work product privilege." According to the Court of Appeal for the 5th Appellate District (Fresno), such statements are not so protected. This ruling, favoring disclosure, confronts the 3rd District Court of Appeal (Sacramento) contrary ruling in [Nacht & Lewis], head on.

The facts of the [Coito] case are simple: In March of 2007, six teenagers were engaging in conduct, possibly criminal, near a local river in Modesto. At some point, one of the teens drowned in the city river. A lawsuit against the state of California et al., filed on behalf of the deceased teen's parents, promptly followed.

During discovery, one of the defendants, city of Modesto, noticed that depositions of all five teenagers indicated they were with the decedent on the day he drowned and had witnessed the entire occurrence. Anticipating the teens' testimony, the Attorney General for the state of California sent two "special agents" from the California Department of Justice, Bureau of Investigation, to interview and take recorded statements from four of the five teen witnesses. The Attorney General provided the agents with particular questions for the interviews.

The first of the five depositions of the teens began two months after the interviews. During cross-examination, the Attorney General used some of the information gathered by the agents, against the witness. This exposure naturally raised eyebrows.

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New California Supreme Court Decision: Minkler vs. Safeco

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In a new decision by the California Supreme Court, *Minkler v. Safeco Ins. Co.* (2009) 561 F.3d 1033, wherein contrary to previously established California law on the application of policy exclusions referring to "an" or "any" insured, as opposed to "the" insured (which the court acknowledged), the court decided that the distinction should not apply in this matter involving an intentional acts exclusion due to the separation of insureds clause in the Conditions section of the policy at issue. As a result, the court found that insureds other than the actual molester would have coverage for the damages flowing from those intentional acts of the co-insured, finding that each insured was entitled to have his/her coverage evaluated separately as if he/she was the only insured, the net effect rendering the "an" qualification without any impact.

The court does note that there are exclusions using "an" or "any" to which this separation of insureds analysis would not necessarily apply, and, importantly, commented that the insurance company could have limited the wording of the Separation of Insureds clause so that it clearly indicated that it was meant to only apply to liability limits - providing its own suggested re-wording.

The Clause from the CG 0001 10 01 form, for example, is quoted below. Based on this wording for example, under the Minkler decision, 7.b. would appear to be given the effect of having the policy coverages apply to each person, without regard to any other, and without application of the "any" or "an" limitations that are common in various exclusions and applied to all insureds, not just the one seeking coverage.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

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M&C Named AmLaw 500 "Go-To Law Firm" for Litigation

Corporate Counsel's annual survey of Fortune 500 Companies has identified M&C a Go-To Law Firm® in the Litigation category. Nominated by Avis Budget Group, Inc., which operates two of the major brands in the global vehicle rental industry, the attorneys of M&C have an 80-year track record of securing excellent results when defending clients in civil litigation.

Daily Journal Names Michael Lawler Leading Employment Lawyer in California

The *Daily Journal* named M&C Employment practice group co-chair, Michael B. Lawler, a "Leading Employment Lawyer in California." Mr. Lawler's practice, which is focused on defending employers in civil litigation, was discussed in the July 14, 2010, *Daily Journal*, Labor & Employment supplement.

Mr. Lawler, who has previously been recognized as one of the Best Lawyers in America, is an AV-rated attorney who has successfully tried over one hundred jury trials in the federal and state courts. He is a Past-President of the Association of Southern California Defense Counsel and is an active member of numerous other professional organizations. He regularly speaks on employment related issues at national conferences and has published numerous articles on the subject.

The *Daily Journal's* list honors attorney achievements for the top 50 lawyers in the field of employment law and the top five in labor law. In making their selection, *Daily Journal* editors considered how the attorney's work impacted the organization he or she is with, the client, the legal profession, and society.

M&C's Annual Year In Review

On April 12, 2010 M&C presented its annual "Year in Review: California Case Law Update," taking a look back at the significant Supreme Court and Appellate Court decisions during 2009.

Held at the Walt Disney Concert Hall, the firm was honored by the attendance of Judge Charles W. "Tim" McCoy, Presiding Judge of the Los Angeles County Superior Courts, who presented the more than 100 attendees with the sobering reality of the effect of California's budget crisis on the California courts and justice system.

This program is held each Spring in Los Angeles and is presented in private client seminars across the country. The date for 2011 has not yet been scheduled, but will be announced on the firm's website at www.murchisonlaw.com once the date is finalized.

If you have not previously attended M&C's Year in Review Program and are interested in being invited to the 2011 Year In Review Program in Los Angeles and/or would like to have a special presentation scheduled for your company, please contact Arleen Milian, Director of Client Relations, at amilian@murchisonlaw.com or Edmund G. Farrell, III, Program Chair, at efarrell@murchisonlaw.com.

Sluggers Take the Field

Firm attorneys and staff teamed up, as the "M&C Sluggers," to compete against law firms participating in softball games organized by the Landau Lawyers League ("LLL"). The Sluggers were guided by the expertise of Coach Douglas A. Rochen. Mr. Rochen credited all involved for assistance with coaching responsibilities.

"The games provided an opportunity to bridge the gap between staff and attorneys," said Mr. Rochen. "It provided an outlet for everyone to work together, become acquainted on a personal level, and participate in a team-building exercise."

The Sluggers were cheered on by the firm when M&C's first annual company picnic was held at Stoner Park, during one of the final games of the season.

The season ended with success when the M&C team and players from Loeb & Loeb claimed victory in their division's All-Star game.

Ken Moreno Elected to Membership in FDCC

M&C congratulates senior partner Kenneth H. Moreno on being elected to membership in the Federation of Defense & Corporate Counsel on July 30, 2010, at the FDCC's annual meeting in Munich, Germany. Mr. Moreno is Partner-in Charge of the firm's San Diego office and serves as co-chair of the firm's Employment Law practice group.

M&C's 2010 Super Lawyers and Rising Star

M&C is pleased to announce that six of its attorneys have earned the distinction of being named 2010 Southern California *Super Lawyers*®, and that another was selected as a 2010 *Rising Star*®. The annual listings, based on peer evaluations, was released by *Law & Politics* and published in *Los Angeles Magazine* and *The New York Times*.

The M&C partners selected for the 2010 *Super Lawyers* list are:

Jean M. Lawler, co-chair of the Insurance Law practice group and managing partner of the firm. This marks Ms. Lawler's fifth consecutive year on the list. An expert on insurance law, Ms. Lawler is a past president of the Federation of Defense & Corporate Counsel ("FDCC"), an international legal organization. She has also served as a director of DRI, Lawyers for Civil Justice and Association of Southern California Defense Counsel.

Friedrich W. Seitz, chair of the firm's Product Liability practice group and the firm's former managing partner. This is his seventh 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 FDCC and former chair of its Product Liability Substantive Law Section.

Michael B. Lawler, co-chair of both the firm's Health Law and Employment Law practice groups. A past president of the Association of Southern California Defense Counsel, this marks the sixth consecutive year that he has been named to the list. Mr. Lawler, a seasoned trial lawyer, has been recognized as one of the Best Lawyers in America and was just recognized as a leading California Employment Lawyer. He has served on the National Board of the American Board of Trial Advocates, is a member of its Los Angeles chapter and is a member of the FDCC.

Guy R. Gruppie, chair of the firm's Emerging Risks and Specialty Tort practice group and immediate past chair of the firm's General Liability practice group. This is Mr. Gruppie's second 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.

James P. Collins, Jr., respected Orange County trial lawyer. Mr. Collins is a past president of the Association of Southern California Defense Counsel and was a founding partner of the firm, Cotkin & Collins. He is a member of the American Board of Trial Advocates and the FDCC. A five-time *Super Lawyer*, Mr. Collins joined M&C in 2009.

Heather L. Mills, member of the firm's Emerging Risks and Specialty Tort, Product Liability and Professional Liability practice groups. Ms. Mills is a versatile trial attorney who enjoys the challenges of defending cases involving complex legal issues and significant damages. She is a member of the Justice Carlos Moreno Chapter of the American Inns of Court and the American Bar Association.

Selected for the 2010 *Rising Stars* list was senior associate Kristie M. Mackey. Ms. Mackey focuses her practice on general civil litigation, employment law, and medical malpractice defense. She was published by the *Los Angeles Daily Journal* for her writing in the area of medical malpractice. Ms. Mackey is a member of the Association of Southern California Defense Counsel.

Clash of the Courts: Are Witness Statements Privileged Information?

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Nine days after the first teen's deposition, plaintiff served the state with a form interrogatory 12.3 (which asks for the names and information about witnesses from whom a written or recorded statement is obtained) and sought production of the recorded interviews. The state objected to disclosure on work product grounds citing [Nacht & Lewis.] A motion to compel was soon filed by plaintiff and denied by the trial court.The plaintiff then filed a writ of mandate, which was granted by the 5th Appellate District.

In the majority's view, prior to [Nacht & Lewis], both case law and public policy underlying the Civil Discovery Act favored disclosure. Thus, the majority declined to follow [Nacht & Lewis], which favored non-disclosure. In fact, both the majority and dissenting justices criticized [Nacht & Lewis] in their respective opinions. While the majority argued that [Nacht & Lewis] failed to provide any analysis for a decision that flew in the face of a "long line of contrary precedent," the concurring and dissenting opinion argued that both [Coito] and [Nacht & Lewis] got it wrong when they rendered absolute opinions that failed to consider if the evidence could be ["qualified"] work product that may or may not be discoverable depending upon a case-by-case ruling by a trial court judge.

What rings true, throughout the majority opinion, is a desire for judges to return to the original policies underlying the privilege when it was first implemented: preservation of the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of their cases; and prevention of attorneys from taking undue advantage of their adversary's industry and efforts.

In order to accomplish these original policies, the majority argued, "The Civil Discovery Act must be construed liberally in favor of disclosure." As to "witness statements" taken by an attorney or an attorney's representative, the majority cited a series of pre-[Nacht & Lewis] cases that it viewed collectively to stand for the proposition that "in such situations, the witness statement is in part the product of the attorney's work […but] that is not to say, however, that the witness statement is entitled to work-product protection."

With this pre-[Nacht & Lewis] "weight of authority" in mind, the 5th Appellate District majority held: ["written and recorded witness statements, including not only those produced by the witness and turned over to counsel but also those taken by counsel, are not attorney work product. And, because such statements are not work product, neither is a list of witnesses from whom statements have been obtained (the list requested by form interrogatory No. 12.3)."]

It is clear that this holding lies in direct conflict with the 3rd Appellate District's [Nacht & Lewis] opinion, which holds: ["compelled production of a list of potential witnesses interviewed by opposing counsel violates the work product doctrine, since production of the information necessarily reflects counsel's evaluation of the case by revealing which witness or persons who claimed knowledge of the incident counsel deemed important enough to interview; and, notes that counsel takes during such interviews are further protected by the work product doctrine."]

Despite the foregoing, until such time the Supreme Court is afforded the opportunity to take these issues up on appeal and resolve the conflict, [Nacht & Lewis] may still be cited in favor of non-disclosure while [Coito] will undoubtedly begin to be cited in zealous opposition.

The majority opinion in [Coito] is questioned by an equally lengthy concurring and dissenting opinion by relatively

new appointee Justice Stephen Kane. According to Justice Kane, he would like to see the legislative loophole afforded in said section of the Act, considered and implemented. He also argued that unless an objection to form interrogatory 12.3 is accompanied by a "foundational showing that a response would actually disclose matters protected by the work product privilege (i.e., significant tactical information about the case) the objection should be overruled.

As to [Nacht & Lewis], Justice Kane agreed with the majority to the extent the 3rd Appellate District's opinion holds "whenever an attorney records the substance of a witness's statement, all of the written notes or recorded statements are protected by the absolute work product privilege." Justice Kane's dual problem with [Nacht & Lewis] and the majority in [Coito] is that both opinions create absolute resolutions and do not consider the happy "case-by-case" medium afforded in section 2018.030(b) of the Act.

After a lengthy analysis of the work-product privilege, which also included guidance on the difference between "qualified" and "absolute" protection, Justice Kane concluded by recommending that the approach noted by the Supreme Court in [Rico v. Mitsubishi Motors Corp.], 42 Cal. 4th 807 (2007) be implemented. Interestingly, in [Rico], the Court cited [Nacht & Lewis] with "apparent approval" when it noted "when a witness's statement and the attorney's impressions are 'inextricably intertwined, 'the absolute work product protection extends to all portions of the written or recorded statement." In my humble view, neither determining whether something is "inextricably intertwined" and/or permitting a trial court the continued discretion to arbitrarily rule upon the doctrine on a "case by case" basis, are good alternatives. There should be rules where everyone, including pro se litigants as Justice Kane acknowledged in his dissent, can easily locate, review and follow.

Should the Supreme Court take the [Coito] court up on its suggestion to get involved in the issue and should the Court like the direction the majority took – a return to the "pre-[Nacht & Lewis]" years - I would urge the Court to look even farther back and implement the foundational strategy afforded by the Supreme Court in [Hinkman v. Taylor] (which both the [Coito] majority and Justice Kane cited favorably in their respective opinions). Why reinvent a wheel that has been thoroughly briefed and appears to be working quite nicely in federal courts nationwide?

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New California Supreme Court Decision: Minkler vs. Safeco

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a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

That said, each policy is unique based on its terms and conditions and each loss is unique based on its facts.

We have seen that this decision has underwriters working on endorsements to modify, limit or delete their Separation of Insureds clauses, and anticipate that claims departments can expect to have prior denials of coverage re-tendered for reevaluation as happened when *Montrose*, *Presley* and other significant decisions were handed down. For open matters with coverage analysis pending, this decision needs to be considered and applied to the facts of the loss and particular policy language.

If you or your underwriters have any questions, please feel free to contact me or my partner, Bryan M. Weiss. Just as we have worked with underwriters in the past to draft Montrose, terrorism and other endorsements responsive to developing law or events, so are we doing the same with this issue, given the far-reaching potential impact of this decision.

Results

Defense Verdict: $77 Million Wrongful Death Claim Against Aircraft Company

M&C is proud to announce the recent trial victory – an 11-1 defense verdict reached by the jury after only 70 minutes of deliberations following a six-week trial – that exonerated the manufacturer, owner, and second pilot of a turbine-powered single-engine utility airplane that crashed in the Banning Pass (between Los Angeles and Palm Springs) in March of 2006. Lead trial attorney was William T. DelHagen, who tried the case in the Superior Court, Riverside, California along with Don G. Rushing of Morrison & Foerster in San Diego. He was assisted during pre-trial and the trial by Paul R.Flaherty and Lisa D. Angelo.

"The plaintiffs thought they had a beautiful theory of liability, but at trial it was mugged by a gang of ugly facts all pointing to the pilot error of the plaintiff's decedent," said Mr. DelHagen. Representing the plaintiffs was noted personal injury attorney Lawrence P. Grassini.

The decedent, flying the plane from the left seat, was an outside sales representative specializing in the type of plane involved. In the right seat was the company pilot, a regional sales manager who had brought the plane to the west coast for the salesman to demonstrate to a series of customers. The client manufacturer owned, maintained and operated the aircraft. The two pilots were the only occupants and both were killed instantly in the accident.

The lawsuit, heard before Judge Gloria Trask in Superior Court of California in the County of Riverside, alleged that inability to handle icing conditions caused the aircraft to stall, spin and plummet to the ground. The plaintiffs, the pilot's surviving widow and adult son, claimed the company pilot was completely responsible for the flight's failure because he filed the flight plan. At the end of the trial, they asked the jury to award $37 million in economic damages and $40 million in non-economic damages.

In the course of trial, the defense argued and decisively proved that there was no ice accumulation and skillfully presented evidence of pilot error. The defense team demonstrated that the decedent over-reacted to danger warnings of approaching rising terrain from an onboard system and from air traffic controllers. Mr. DelHagen and his co-counsel showed how the pilot became overcome by panic, rolled the aircraft over, became disoriented in instrument weather conditions and flew into the ground, killing himself and his colleague.

While the trial involved highly technical and complex fact patterns, the strength of the defense team's evidentiary presentation is underscored by the jury's 11-1 verdict, which was reached in just over an hour.

Appellate Win in CLRA Anti-Waiver Provision Argument

Michael B. Lawler and James S. Williams successfully argued against a motion for attorney fees through California's Consumers Legal Remedies Act ("CLRA") in the Appellate Court. The CLRA is a consumer-protection law that prohibits deceptive sales practices such as false advertising, misrepresentations regarding the nature of goods sold, and inclusion of unconscionable terms in sales contracts. The CLRA provides for "prevailing plaintiff" attorney fees in litigation. To ensure that consumers do not bargain away protections of the CLRA, it expressly provides – without exception: "Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void."

The plaintiff, the purchaser of a car, sued the car dealer and the finance company under the CLRA, claiming that misrepresentations had been made with respect to the terms of the transaction and that there were errors in the sales contract. The defendants made a settlement offer under Code of Civil Procedure section 998 pursuant to which the plaintiff was to waive "any claim to attorneys' fees or costs." The plaintiff accepted the 998 offer and then, despite the attorney-fee waiver provision, made a motion for $270,000 in attorney fees, claiming to be the "prevailing plaintiff" because he obtained a net recovery in the settlement. The plaintiff asserted that the above-quoted provision of the CLRA rendered the attorney-fee waiver void. The court denied the plaintiff's attorney-fee motion, and the plaintiff appealed.

On appeal, the plaintiff again claimed to be the "prevailing plaintiff" and again argued that the attorney-fee waiver was void under the CLRA. The defendants argued that the plaintiff's receipt of positive relief in settlement did not render him the "prevailing plaintiff" and contended that the anti-waiver provision of the CLRA, despite the absence of any stated exceptions, was never intended to apply to agreements to resolve litigation. Ultimately the Court of Appeal sided with the defendants, holding that the 998 settlement offer was "precisely drafted" with respect to the attorney-fee waiver and that the plaintiff's acceptance of that offer bound him to the waiver. The appellate justices agreed that the anti-waiver provision was not intended to apply to settlement agreements.

Defense Verdict Won Against Claim by Former Attorney

In *G. Bruce Spence v. Jessica Ann Burton, Umpqua Bank*, Melissa Wood Eisenberg successfully defended Umpqua Bank against claims of premises negligence brought by a former attorney. The plaintiff claimed that the alleged negligent maintenance of the bank premises caused him personal injuries. The plaintiff was injured as he was riding his bicycle on the sidewalk in front of the Umpqua Bank location. There was a dispute as to whether he ran into the side of a vehicle exiting the bank's parking lot, or if the vehicle struck the plaintiff. Prior to trial, the driver of the vehicle reached a settlement with the plaintiff.

In his premises liability cause of action against Umpqua Bank, the plaintiff alleged that the condition of the bank's premises obstructed the exiting driver's view of oncoming traffic and pedestrians. The plaintiff also alleged that the bank should have provided a warning sign on the property to alert drivers to the possible presence of pedestrians. Defendant Umpqua Bank denied that the property was not properly maintained, or that the condition of the premises was a factor in the plaintiff's accident. After a four day trial and five minutes of deliberation, the jury determined that Umpqua Bank was not negligent in the maintenance of its premises and entered a defense verdict in favor of Umpqua Bank.

Summary Judgment Granted in Favor of Insurer on Assault and Battery Exclusion in Declaratory Relief/Bad Faith Action

Jean M. Lawler, German A. Marcucci and Bryan M. Weiss won summary judgment for their client, Essex Insurance Company, in an insurance coverage Declaratory Relief Action in which the insured had cross-complained for breach of contract, bad faith, violation of the business and professions code section 17200 and declaratory relief action. The case was venued in the San Francisco Superior Court – Civic Center Courthouse and the motion was heard by the Honorable Peter J. Busch.

The insureds were owners of a property leased to a nightclub operator and were sued when one nightclub patron was struck by the stray bullet fired by another patron. The insured was sued based on allegations of intentional tort, premises liability and negligent failure to provide adequate security and tendered the defense of the case to Essex. Essex denied coverage based on, among other things, the assault and/or battery exclusion endorsement contained in their policy.

A Declaratory Relief Action was filed by Essex regarding the coverage issues, and the insured cross-complained. A successful Demurrer was filed on behalf of the insurer in response to the insured's causes of action for bad faith and violation of business and professions code section 17200. Essex then filed a Motion for Summary Judgment ("MSJ") on the applicability of the policy's assault and battery exclusion to preclude coverage for the claim.

The Court granted Essex's MSJ on the grounds that the assault and battery exclusion applied to the allegations in the underlying action, finding the denial of coverage to have been proper.

Defense Verdict Reached in Bench Trial Against Major Clothing Retailer

A defense verdict was reached on a premises liability case handled by Pamela J. Marantz, who represented a major clothing retailer.

The plaintiff, a woman in her late 30s, fell down a flight of stairs in one of the defendant's clothing stores. She was not holding the handrail prior to the fall, and wore flip-flop sandals at the time of the incident. The plaintiff claimed that the handrails violated a building code because they were too far apart.

At the conclusion of the bench trial, the judge held that the plaintiff did not meet burden of proof, and that no code violation existed (no negligence per se).

Summary Judgment Granted in ERISA Case

In an ERISA case by a Kaiser Foundation Health Plan, Inc. member against Kaiser, handled by Casey Yim and Nancy N. Potter in Federal Court, the plaintiff sought recovery of $350,000 in medical services rendered by "out of plan" provider, Providence Hospital. Defendant Kaiser paid Providence only $31,000, representing the "self pay discount," which was actually billed by Providence to the plaintiff.

Kaiser was granted a Motion for Summary Judgment because, under California law, Providence could not seek the "balance" from the plaintiff.

"Balance Billing" to the patient is prohibited under a recent California Supreme Court case law (*Prospect Medical Group v. Northridge*). This is probably the first "Balance Billing" case in California since the Supreme Court's decision in the Prospect Medical Group case.

Defense Verdict for Major Supermarket Chain The Vons Companies

An East County San Diego Superior Court jury reached a unanimous verdict declaring that The Vons Companies, Inc. were reasonable in the maintenance of their Spring Valley store property, in response to allegations of safety-related negligence by Plaintiff Robbyn Kuykendall. The case concluded victoriously for both the major supermarket chain, and Jefferson S. Smith, representing the defense.

On May 23, 2008, a day of scattered showers, Kuykendall entered the Spring Valley supermarket wearing flip-flop sandals. She walked past an orange cone located just outside the store's entrance doors, and over a six-foot mat, before slipping and falling almost four feet from where the mat lay.

Kuykendall, who eventually underwent surgery for total knee replacement, contended the store should have placed a warning cone inside the lobby, that the floor mat was worn and saturated, and that the floor was unreasonably slippery.

The defense responded that the store had taken reasonable precautions with the safety measures in place during the time of the incident, and had made repeated inspections throughout the day. A member of the store crew inspected and cleaned the area 10 minutes prior to the incident. The defense also argued that the cone was not necessary because it was obvious foot traffic could cause tracking of rainwater into the lobby entrance, and that the floor was reasonably safe under such conditions.

A key witness providing evidence favorable to the defense came from store customer, Richard Jameson, who witnessed the store conditions shortly after the incident and acted as a Good Samaritan by comforting Kuykendall after her fall. In a somewhat tragic twist, Jameson appeared on February 25th to testify on the conditions of the store's lobby and then died only three days later, due to unrelated causes.

"I was flabbergasted when I learned Mr. Jameson had died. He was an honest man who presented his observations in an articulate manner," said Mr. Smith.

Store Manager Tim Bottenberg and Claims Manager Rhonda Naugle played major roles in the proceedings, providing testimony as to the procedures followed in an effort to keep the store safe for customers.

"In speaking with the jurors post verdict, the critical evaluation came down to the integrity of the store manager. In the end, the jury was convinced that [Bottenberg] ran a safe store," said Mr. Smith.

Smith described the verdict as providing a well-deserved spotlight on The Vons Companies' thorough implementation of policies and procedures in regards to customer safety.

Scott J. Loeding handled law and motion for the defense.

Summary Judgment Granted in Favor of Jons

A Los Angeles Superior Court judge granted summary judgment in favor of Jons Marketplace in a matter, where an 11 year-old girl suffered a serious ankle fracture while leaving a Jons store in Van Nuys with her mother. Guy R. Gruppie and Marieanne Zakarian successfully represented Jons.

The Hon. Michael Latin ruled that Jons could not be liable as a matter of law because the injury occurred on the sidewalk of a shopping center where the market was situated but not owned or controlled by Jons.

Plaintiff alleged that the sidewalk was a dangerous condition that caused her to "trip/slip/fall." The court agreed with Jons that plaintiff could not establish claims for negligence or premises liability because Jons did not owe plaintiff any duty of care as a non-owner of the property in question.

M&C Welcomes

M&C is Pleased to Introduce...

Tim M. Agajanian is Of Counsel in the Los Angeles office of M&C where he focuses his practice on matters involving business law and commercial litigation, construction defect litigation, environmental law, general liability and casualty litigation, insurance, municipal contracting and government affairs, and business transactions and real estate. Mr. Agajanian is a Southwestern University School of Law graduate. Point of Interest: Prior to joining M&C, Mr. Agajanian headed his own law firm, Agajanian Law Group, P.C., which he founded in 1988.

Suzette P. Ang is an Associate in the Las Vegas office of M&C where she focuses her practice in the defense of construction, personal injury, general liability, and premises liability litigation. Ms. Ang is a Thomas M. Cooley Law School graduate. Point of Interest: Ms. Ang is fluent in both the Fukienese and Taiwanese Chinese dialects.

Molly E. Healy is an Associate in the Los Angeles office of M&C where she focuses her practice primarily in the field of insurance coverage and declaratory relief actions, but also assists in matters involving general liability and product liability. Ms. Healy is a Santa Clara University School of Law graduate. Point of Interest: A past member and captain of Georgetown University's varsity volleyball team, Ms. Healy was a Big East Academic All-Star from 2000 to 2003.

Carlos E. Needham is Of Counsel in the Los Angeles office of M&C where he focuses his practice on insurance coverage and complex litigation matters involving product liability, science-related issues, mass tort claims, consumer class actions and environmental matters. Mr. Needham is a Harvard Law School graduate. Point of Interest: As part of his pro bono work, Mr. Needham has taken disability litigation matters before the Court of Veteran Appeals, on behalf of veterans.

Melanie C. Polk is a Senior Associate in the Las Vegas office of M&C where she focuses her practice on construction defect litigation. Ms. Polk is a McGeorge School of Law graduate. Point of Interest: Ms. Polk's focus on construction keeps with family tradition as her father was a Las Vegas subcontractor.

Steven C. Spronz is Of Counsel in the Los Angeles office of M&C where he focuses his practice on corporate and real estate transactional and financing matters. Mr. Spronz is a Hofstra University School of Law graduate. Point of Interest: Mr. Spronz spends part of each year teaching a Commercial Law Practicum in South Africa for a program jointly sponsored by the American Bar Association, the Black Lawyers Association of South Africa and the International Senior Lawyers Project.

Attorney Profiles: Tim Agajanian

A Personal Style Defines New M&C Of Counsel

For Tim Agajanian, M&C's new of counsel, spending face time with clients is not only one of his favorite aspects of being a lawyer, it is also one of the most effective ways he serves clients' interests.

"In one case, I was touring a client's chrome plating facility that was charged with environmental contamination. During my visit I determined that the prior business was responsible for the problem and I was quickly able to remove the liability claim against my client," said Mr. Agajanian.

The veteran Southern California transactional and litigation attorney, who is AV-rated by Martindale-Hubbell, has been representing corporations, entrepreneurs and government entities for the past three decades. Mr. Agajanian focuses on resolving disputes and closing deals in several areas of the law. These include business, environmental law, general liability and litigation, municipal contracting and government affairs, real estate and administrative law.

Southern California Business Deal Maker and Litigator

As an active counselor to leading Southland industries and business owners, Mr. Agajanian has visited quite a few factories, workplace sites and businesses. His clients, past and present, include major insurers, such as First Mercury and Cigna, and the energy companies Valero and Ultramar Diamond Shamrock.

One area of his extensive experience is representing the waste management industry. His clients have included Laidlaw Waste Services and American Waste Industries. His practice background also includes advising and counseling such financial services clients as the Ford Motor Credit Company, Freemont General Corporation and Honda Finance Corporation.

Problem Solving and Expanding Client Service

Prior to joining M&C earlier this year, Mr. Agajanian headed his own downtown Los Angeles firm, Agajanian Law Group, P.C., which he founded in 1988.

He views his transition from running his own successful firm to joining a well-established firm as a tremendous opportunity, "Having high-caliber team support and the chance to share my skills are ideal for expanding my services to the business community and insurance industry."

During thirty years of practicing law, Mr. Agajanian remains proud of the practical solutions he devises to seemingly intractable problems. He was involved in settling one of the few Cartwright Act actions, and artfully managed high-stakes lease negotiations with the Los Angeles DWP for above-ground storage tanks on behalf of oil and gas clients.

In another example, Mr. Agajanian points to the area of Superfund claims. He creatively structured numerous clean-up plans that allocated costs economically for his waste management and manufacturing clients that also addressed the concerns of the Environmental Protection Agency and regulatory authorities.

Skilled Negotiator in Transactions and Litigation

Whether in pivotal business transactions or during litigation settlement talks, Mr. Agajanian views his skill as a negotiator who can push through roadblocks as a strength that clients value.

"I became a lawyer because I love finding solutions to problems and finding an efficient way to resolve those problems," he said. "It's all about achieving the best result for the client."

Resolving problems and conflicts requires an ability to identify and manage the political and financial sensitivities for all parties involved. Mr. Agajanian's talent in balancing competing concerns, especially in high-visibility situations, includes representing several public figures in Southern California. These include former Los Angeles City Councilman Nate Holden and U.S. Marshal Sam Chechinao during his bid for sheriff in San Bernardino.

Today, it is more important than ever to understand and know clients, and to Mr. Aganjanian, that makes business personal, in the best possible way.

Attorney Profiles: Molly Healy

Keeping the Spirit of Community Alive

Molly E. Healy is as dedicated to her work as an active community member as she is to her work as a civil litigation attorney.

Prior to joining M&C, Ms. Healy interned for the Northern California Innocence Project, which seeks to create a more just and humane world through working to exonerate innocent prisoners and pursue legal reforms that address the causes and consequences of wrongful convictions.

Ms. Healy, who was honored with a Public Interest and Social Justice Law Certificate, has also been active in community and Pro Bono volunteerism. She received a Pro Bono Recognition award from the Santa Clara School of Law (2007-2009), and served as the Student Body Association's Project Community Chair (2006-2008).

Ms. Healy also volunteered with New Orleans Legal Aid, and was a mentor with Fresh Lifelines for Youth, which works to reduce juvenile crime by providing at-risk and disadvantaged youth with vital information regarding the decisions they make in their lives.

"It is important in any firm to have some sense of giving back, and to not lose sight of how you can use your abilities to help the community," she said of the connection between community service and corporate social responsibility.

Attorney Profiles: Melanie Polk

Working With the Tribes of Nevada

Not every attorney is given the opportunity to venture outside of the traditional court system and experience the world of tribal courts. M&C attorney Melanie Polk, on the other hand, did just that.

Ms. Polk, who recently became a member of M&C's Las Vegas office, is a native Nevadan who found herself involved with the tribal court system while working as a contracted public defender in Douglas County. Through word of mouth, the Washoe Housing Authority ("WHA") became aware of her work.

"They don't just hear your name – they see you in the grocery store," said Ms. Polk, recalling life in a tight-knit town and her earliest associations with the tribe.

Ms. Polk began to work for the WHA serving as their liaison, communicating with the Bureau of Land Management and the Federal Government, and serving as business counsel. She advised them on housing, construction and personnel issues, handling much the same type of work she eventually performed for large conglomerates. Ms. Polk particularly enjoyed attending the tribal board meetings.

"During the board meetings, it was evident that everyone in the tribe was considered family to some level," she said. "The dedication tribal members had to the goals of their business was also inspiring."

The biggest task Ms. Polk undertook during her time serving the tribes was to completely revamp the Washoe Tribal Code. She had to be familiar with federal, local and tribal codes, performing a jurisdictional tap-dance in order to maintain consistency and smooth over any conflict that may arise between the jurisdictions. Within a year, Ms. Polk and her committee rewrote, revised and reinvented new code for the tribe.

Though Ms. Polk no longer works with the tribal courts, she maintains fond memories of her experience, and carries with her the lessons she learned from their system.

"What I remember most is the fact that their overriding concern was far-sighted, and they never lost sight of the idea that they were all part of an extended family. When times were tough, knowing the end goal got them through. A lot can be learned from their business model."

Training/Education & Other Client Services

Client Services

Auditing Services

M&C attorneys assist insurers and reinsurers in conducting audits of claim files and providing evaluation regarding liability and damage exposure, as well as advice on coverage, defense and settlement strategy.

Coordinating, National, Regional and Local Counsel Services

Over the years the firm has served in each of these roles for clients facing multi-jurisdictional matters. The services provided are determined by the issues in dispute and the needs of the clients, but often include work related to discovery, pleadings, motion work and trial assistance.

Expert Witness Services

Several of our more senior-level attorneys have served as expert witnesses regarding issues pertinent to their particular practice areas, and are available to provide expert consultation or testimony.

Monitoring Counsel

Experienced M&C attorneys are available to monitor litigation and trials, providing businesses and insurers with attorney-client privileged advice and assisting with defense, trial and/or settlement evaluation and strategy.

Pre-Appellate Trial Related Services

M&C's appellate and law and motion specialists assist clients and their trial counsel in implementing law and motion strategy in the pre- and post-trial stages, working with trial counsel during trial to identify and prepare trial motions and objections needed to preserve appellate rights, and providing independent evaluations of appellate issues and the chances of prevailing on appeal.

Professional Education, Claims Handling and Fraud Training & Certification

Our attorneys are certified providers of continuing professional education by the State of California and the CA Department of Insurance. We provide annual California Fair Claims Settlement Practices certification and Fraud Training/Certification. We regularly provide seminars of interest to clients and are able to tailor educational programs to meet client needs.

Sexual Harassment and other Employment Training

Our employment lawyers provide employers with California's required sexual harassment training and other training on employment issues as may be requested.

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.

Insurance Roundtables

Save the dates for the final sessions of M&C's 2010 Insurance Roundtables, presented by the firm's Insurance Law Chairs, Jean M. Lawler and Bryan M. Weiss.

September 21

Bad Faith & Claims Handling for Insurers

November 16

Important Court Decisions This Year for the Insurance Industry

Telephonic participation is available for non-local attendees. This program is approved for MCLE, RPA, CPCU and CA Department of Insurance continuing education credits. Register online at www.murchisonlaw.com.

Speaking Engagements

"When Is Independent Counsel Needed?" 2010 Regional Adjusters Conferences, Property Loss Research Bureau, Bryan M. Weiss

Columbus, Ohio: September 14-15, 2010

Anaheim, California: November 2-3, 2010

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