ACCTLA ALAMEDA-CONTRA COSTA TRIAL LAWYERS' ASSOCIATION

2013 Dues Notice

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contents | winter 2012/2013

departments

features

FROM THE PRESIDENT

Lyle C. Cavin, Jr.

AS WE BEGIN 2013, the crisis in funding the judicial branch of our government continues. Sadly, there is no end in sight for this dilemma nor is a quick fix at hand. Indeed, Governor Brown recently announced his 2013-14 budget that offered no new funding for the judiciary. This coupled with the accelerated cuts going back to 2011 threaten to virtually close the civil courts. It appears that the austere operating budgets are likely to be permanent, at least for the indefinite future.

These cutbacks and closures are close to home for us as trial attorneys representing injured victims but it goes well beyond that group of citizens. It also impacts people relying on our civil courts for divorces, custody disputes, foster children, domestic violence and mental illness victims as well as juveniles. Even small claims will be affected.

There are many advocates attempting to return our court system to a semblance of normality, including our California Supreme Court Chief Justice, former Chief Justices, former Governors and our Attorney General. Unfortunately, their pleas appear to fall on deaf ears given the dire economics. Governor Brown was successful at the polls for our public school system with the passage of Proposition 30 in November. Perhaps it's time to move in the same direction for our court system.

Many of us provide pro bono work and volunteer our time to the courts to alleviate some of the time consuming tasks the system can no longer bear. We must renew and increase our efforts this year to help weather the economic storm. Apparently the long term forecast for California's economy is much better than the present economic climate. In the meantime, however, we must be ever vigilant to protect our court system and those we represent.

Last year was a challenging year as president of this organization, but in many respects rewarding. I remain confident that with continued hard work of ACCTLA and the united efforts by our membership and colleagues we can return our judicial system to a standard worthy of our Golden State heritage. ◆

— Lyle Cavin has practiced law for 42 years in California, specializing in the representation of injured maritime workers. While representing clients from across the nation, he has litigated cases in most major U.S. port cities.

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Sidewalk Trip and Falls

by Matthew D. Haley

Sidewalk trip and falls are common events, especially in urban areas. With City budgets declining, the ability of municipalities to keep up with decaying sidewalks is limited as any walk through many of our neighborhoods reveal. A trip and fall, especially by an elderly client, can result in serious injuries to the head, face, teeth and upper extremities. Wrist and elbow fractures resulting in permanent disabilities are common. While the municipality should always be a defendant, consider also the liability of the owner or lessor of the private property adjacent to the defective sidewalk. Finding a responsible, private, insured defendant can help resolve these cases in a favorable manner. This article first discusses the basics of City liability and two defenses typically raised by the City. We then turn to theories where a plaintiff injured on a defective sidewalk may make a claim against the adjacent landowner or possessor.

THE CITY IS PRIMARILY RESPONSIBLE FOR SIDEWALK DEFECTS

Historically, the primary duty to keep sidewalks in repair rests with the City that owns the sidewalk. Schaefer v. Lenahan (1990) 63 Cal.App.2d 324, 327. [T]he municipality has the primary responsibility for maintaining the public sidewalks…" *Segler v. Steven Brothers, Inc.* (1990) 222 Cal.App. 3d. 1585, 1590-1591.

Subject to certain statutory defenses and immunities, a public entity is liable for an injury caused by a dangerous condition of its property if a risk of that kind of injury was reasonably foreseeable and either the entity's employee negligently or wrongly created the dangerous condition or the entity had actual or constructive notice of the condition in time to have taken protective measures. Cal. Gov't Code §835. *Bonanno v. Central Contra Costa Transit Auth*. (2003) 30 Cal.4th 139, 146. Cal. Gov't Code §830 (a).

The first defense commonly raised is that the claimed defect does not constitute a "dangerous condition" under Gov't Code §830(a) because it is a trivial, not a substantial defect.

The second defense commonly raised is the City did not have notice of the defect. *To be a "dangerous condition" the defect must be substantial, not trivial.* The most frequently raised defense is that the sidewalk defect does not constitute a "dangerous condition" because the defect is trivial, not substantial.

The question of dangerous condition is one of fact and the analysis includes the wide variety of circumstances presented to the fact finder. "As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts." *Fackrell v. City of San Diego* (1945) 26 Cal.2d 196, 206. Furthermore, "… all of the conditions surrounding the defect must be considered in the light of the facts of the particular case … if reasonable minds can differ on the question it is one of fact … it is only when reasonable minds must come to the conclusion that the defect is so trivial that a reasonable inspection would not have disclosed it, that the question becomes one of law." *Gentekos v. City & County of S.F.* (1958) 163 Cal.App.2d 691, 700 See also *Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261.

While courts uniformly hold the question of defective condition is one of fact for the jury, where the nature of the defect is not in dispute, the question of whether or not a defect is trivial or substantial becomes one of law. *Stahoulis v. City of Montebello* (2008) 164 Cal.App.34th 559, 569. In this way, the trial court has become something of a "dangerous condition" gatekeeper. The court will determine whether, as a matter of law, the defect is trivial, deciding these issues typically on a Motion for Summary Judgment, Motion for Non-Suit or Motion for Judgment Notwithstanding a Verdict.

Indeed, at least one case holds that even expert opinion has limited value in determining a dangerous condition and that "It is well within the common knowledge of judges and jurors just what type of defect in a sidewalk is dangerous." *Caloroso v. Hathaway* (2008) 122 Cal.App. 4th 922, 928.

With the issue to be decided by a judge or jury, careful gathering of the evidence needed to prove a substantial defect is important. Plaintiff should obtain photographs and a video of the specific site of the fall and the surrounding area, highlighting not only the site itself but surrounding gaps, cuts, defects or maintenance issues. Mapping or measurements of the defect itself should be obtained. Anything that might obscure the visibility of the defect such as leaves, plants, trees etc. should be documented.

Typically, the size of the defect receives the most attention in the court's analysis. This is true even though case law indicates size is not determinative but is just one of many factors to be considered. "The court should not rely solely on the size of the particular defect in making that determination. "While size may be one of the most relevant factors to the decision, it is not always the sole criterion." *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734.

While size matters, the inquiry should include circumstances surrounding the accident which might have rendered the defects more dangerous than its mere abstract size would indicate. (Id. at pp. 731-732.) The court should consider in this regard 'whether the walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect, such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a pedestrian's view of the defect." *Caloroso v. Hathaway* (2008) 122 Cal.App.4th 922, 927.

Again, the court will consider the totality of circumstances leading to the fall, including the size of the defect, traffic patterns, likely victims, and anything impacting the pedestrian's ability to see the defect. Two cases illustrate different conclusions.

In *Johnson v. City of Palo Alto* (1962) 199 Cal. App.2d 148, the court held a differential of one-half to five-eighths inch over which plaintiff tripped was not trivial as a matter of law and reasonable minds could differ on the question of whether or not the condition was defective. The court identified other conditions leading to their conclusion including the fall occurred at night, the plaintiff had never been there before, trees made the area shadowy, and the plaintiff was walking slowly and deliberatively.

However, in *Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, plaintiff had fallen on a walkway between her driveway and the front door at her new townhouse. The court held that the defect was trivial and thus not a dangerous condition as a matter of law.

Photographs of the defect were part of the record, and the court relied heavily on those. Those photographs are not part of the opinion, and the description of the defect is certainly lacking and unclear. Overall, it appears to be a rather benign irregularity. The defect is described as a "separation" three-fourths to seven-eighths inches deep. This was a new walkway and it the defect did not seem to be the result of poor maintenance. There was no jagged separation, shadows or debris obscuring the separation. There were no protrusion, and the separation was not on a slant. While the opinion describes the depth of the defect, there is no description of the width.

It appears that the defect was clearly visible to the plaintiff. Perhaps most significantly, the plaintiff testified the reason she did not see the defect is because she "wasn't looking at it." In addition, plaintiff testified she did not know where on the walkway she had fallen.

{More helpful testimony would be that the plaintiff did not notice the separation because she usually went in through the garage, so she was paying attention and looking toward the front door when she unexpectedly tripped over something and fell. After she fell, she looked to see what had caused her to stumble and saw the defect.}

Concluding, the defense that the condition is not dangerous because it is trivial can usually be defeated. Evidence estab- ▶

lishing the size of the defect, the extent of travel in the area, overall problems with the sidewalk in the area, including breaks and jagged edges, and anything that limits a pedestrian's ability to see the defect all are considerations that should be explored.

The defendant must have notice of the dangerous condition. A second common defense is the claim that the municipality did not have notice of the dangerous condition. Because sidewalk defects of any significance typically take some time to develop, plaintiff can usually develop evidence of notice, but handling this defense also requires preparation.

The issue of notice is a question of fact. *Stanford v. City of Ontario* (1972) 6 Cal.3d 870, 870.

As to the public entity notice is shown where the public entity had actual notice of the dangerous condition. Gov't Code §835.2(a). It is difficult typically to find actual notice. Neighbors may be able to identify a City employee with actual notice. Some large cities have "sidewalk surveys" which specifically identify problems in their own City. Prior accidents, also difficult to find, may provide the identity of a City employee who actually knew about the problem in the sidewalk. Prior repairs to the site, or maintenance on nearby sidewalk trees or lawns may provide actual notice. In a rare recent case, a City employee actually walked by a substantial defect and reported it, but nothing was done until after a pedestrian tripped over it, sustaining a serious injury. Typically, actual notice is difficult to prove.

More often, plaintiff can establish constructive notice. Here, notice is proved where the defendant has constructive notice of the dangerous condition. This is satisfied where there is evidence the dangerous condition was there for a sufficient period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. *Gentekos v. City and County of San Francisco* (1958) 163 Cal.App.2d 691, 697. Typically, sidewalk defects take some years to develop and as such, they can be seen. Evidence that police, fire or other municipal employees regularly traverse the area can be used to establish constructive notice.

THE ADJACENT LANDOWNER MAY ALSO BE RESPONSIBLE

Generally, an abutting landowner is not responsible for injuries to pedestrians on city sidewalks. *Williams v. Foster* (1989) 216 Cal.App.3d. 510, 522-523. "Under common law the owner or occupant of land abutting a public sidewalk had no duty to keep the sidewalk in a safe condition and was not liable to travelers injured as a result of defects in the sidewalk which were not created by the owner or occupant." *Segler v. Steven Brothers, Inc.* (1990) 222 Cal.App. 3d. 1585, 1590-1591.

An adjacent landowner or possessor is subject to General Negligence principals under Civil Code §1714. That common law rule of no liability was abrogated in favor of a general reasonable person standard under California Civil Code §1714(a). *Sprecher v. Adamson Companies* (1981) 30 Cal. 3d 358. Here, the California Supreme Court held that a landowner may be responsible for injuries or damage sustained by a neighbor from a landslide if it could be shown the landowner was negligent in his management of the natural condition that existed on his property. "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." Id at 372.

Thus, liability may be imposed on the adjacent property owner where he alters or changes the sidewalk for the benefit of his own property and causes a dangerous and defective condition which results in injury to persons using the sidewalk. *Holdridge v. Drewes* (1968) 257 Cal.App.2d 626. Liability may be imposed on the adjacent landowner if trees or limbs fall from his tree onto the public right of way causing injury. *Coates v. Chinn* (1958) 51 Cal.2d 304, 306-309. And, most commonly, the owner of a tree on adjacent property that causes uplifts in the sidewalk is responsible for injuries caused when pedestrians trip over it. *Moeller v. Fleming* (1982) 136 Cal.App.3d 241, 243.

Thus, general negligence principles involving the management of property apply and the adjacent landowner may be held responsible for injuries on the sidewalk if he or she negligently managed a condition on their own property that caused the injury on the sidewalk.

Liability is imposed by a "Sidewalk Ordinance. Many municipalities have passed "sidewalk ordinances." Bay Area cities that have adopted this type of ordinance include San Francisco, San Jose, Orinda and Albany. You should always check to see if the City where your injury occurred has such an ordinance because they simply impose liability on the adjacent landowner.

The sidewalk ordinance enacted by the City of Albany is typical and has two prongs. First, the ordinance imposes on the landowner and possessor of property adjacent to the sidewalk the duty to "repair and maintain" the sidewalk area. City of Albany Municipal Code §14-1.5 b. The ordinance then defines that to include *"grinding, removal and replacement of sidewalks, repair and maintenance of curb and gutters, removal and filling or replacement of parking strips, removal of weeds and/or debris, tree root pruning and installing root barriers, trimming shrubs and/or ground cover and trimming shrubs within the area between the property line of the adjacent property and the street pavement line, including parking strips and curbs, so that the sidewalk area will remain in a condition that is not dangerous to property or to persons using the sidewalk in a reasonable manner and will be in a condition which will not interfere with the public convenience in the use of said sidewalk area."* City of Albany Municipal Code §14-1.5 c.

The language of the statute thus imposes on the adjacent landowner the broadest obligation to maintain the entire area in front of their property and to ensure it is not dangerous to any person or property.

The second prong of the sidewalk ordinance then provides that, if this duty is not met, and any person suffers injury or damage, "the property owner shall be liable to such person for the resulting damages and injury." City of Albany Municipal Code §14-1.6 c (Ord. #98-03, §1).

These statutes have been held to be constitutional and are not pre-empted by state law. *Gonsalves v. City of San Jose* (2004) 125 Cal.App.4th 1127, 1132. The Gonsalves court made it clear that the ordinance does not absolve the City from responsibility. Rather, the landowner's liability runs "concurrently" with that of the City. Finally, that court noted that the ordinance serves the important public policy of providing an incentive for landowners to maintain sidewalks adjacent to their property in a safe condition. Id at 1139.

Thus, sidewalk ordinance provide a plaintiff with a powerful tool with which to obtain a full recovery.

CONCLUSION

Sidewalk trips and falls are common and they can cause serious injury. In addition to the liability of the City, you should consider the potential liability of the adjacent landlord or lessor. ◆

— Matthew Haley has developed a reputation as a skilled litigator and is rated AV by Martindale Hubbell. His practice areas include personal injury, workers' compensation, contested wills; medical malpractice, nursing home liability, automobile accidents and injuries and wrongful death. He can be reached at 510.444.1881.

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Trick or Trap?

Debtor-Defendants and the Mires of Bankruptcy

By Caroline M. Reebs

Attorneys know that though obtaining a sizable judgment may bring their clients at least passing satisfaction, the real battle is still to come — in collections. Collecting your clients' damages, and often your fees, can seem daunting, particularly when your defendant files for bankruptcy. In addition, the United States Bankruptcy Code ("Code") is oriented towards assisting secured creditors, as opposed to unsecured or pre-judgment parties. ■ Even though plaintiffs with secured claims are more comfortably situated, there are still many hurdles to overcome when bankruptcy proceedings are initiated. The following sections review basic bankruptcy principles that may constitute traps for the unwary or tricks for those with favorable facts.

THE AUTOMATIC STAY

Section 362(a) of the United States Bankruptcy Code provides powerful protections to debtors. As soon as a bankruptcy petition is filed, even if it is filed on the eve of a hearing or a trial, assets comprising the "bankruptcy estate[1]" are shielded from the majority of creditor, or potential creditor, behaviors. The list of generally verboten activities includes attempts to seize property, *continue litigation*, enforce a judgment, or perfect a lien. See 11 U.S.C. §362(a). A key purpose of the stay is to avoid an inequitable distribution of assets to creditors.

Trial attorneys beware: no court order is needed to bring the stay into effect. *In re Mellor*, 734 F.2d 1396, 1398 (9th Cir. 1984).

Creditors may attempt to combat the stay by filing a "Motion for Relief from the Automatic Stay." 11 U.S.C. §362. The court is required to grant relief from the stay when there is "cause." 11 U.S.C. 362(d)(1). The Code, however, provides only one example of what constitutes "cause" — it is explained to include a "lack of adequate protection," but is not otherwise defined. *Id.* To determine if there is "cause" the courts review the facts on a case-by-case basis. *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

Establishing a lack of adequate protection, or other grounds for relief from stay, can be challenging for a trial attorney. The most common candidates for relief from stay are mortgage holders, automobile creditors, or other actors with secured claims. Thus, a personal injury attorney may be better served by attempting to pursue the debtor through another route.

One such possibility is to try to avoid the stay altogether. The list of banned creditor actions is expansive, but this list is partially countered by the exceptions listed in subsection (b).[2] Again, for a trial lawyer, many of these exceptions are inapplicable, or even dangerous, to pursue. If the stay is inadvertently violated, the bankruptcy court is authorized to award damages, including costs and attorneys' fees. Instead, the list of exceptions to *discharge*, discussed next, is where a trial lawyer will find the most value.

THE DISCHARGE INJUNCTION

The stay generally expires at the conclusion of the bankruptcy proceeding, when the debtor is discharged. A discharge is where the debtor is released from personal liability for certain debts and where the court issues a permanent order prohibiting creditors from pursuing the discharged debts. *In re Heilman*, 430 BR 213, 218 (9th Cir. 2010).

The practical effect is that the discharge operates like a permanent automatic stay. If your client was not provided for through the bankruptcy, attempting to enforce your claims post-discharge will be a violation of the discharge order. Any act to "collect, recover or offset any (discharged) debt as a personal liability of the debtor," is restricted. 11 U.S.C. §524(a)(2). If you violate the discharge injunction, you may find yourself subject to civil contempt proceedings. *Walls v. Wells Fargo Bank, N.A.,* 276 F3d 502, 503 (9th Cir. 2002).

NONDISCHARGEABLE DEBTS

Probably the most effective route to collecting your damages would be to argue that your debt is nondischargeable. Certain exceptions to discharge may be particularly salient to a personal injury attorney. For instance, §523(a)(6) prohibits the discharge of debts incurred through "willful and malicious injury by the debtor to another entity or to the property of another entity." See also, *Papadakis v. Zelis*, (*In re Zelis*), 66 F.3d 205.

There is lack of consensus between the courts regarding the standards for "willful and malicious." In the Ninth Circuit, an act is considered "willful and malicious" when it is performed intentionally, when it necessarily produces harm, and when it is without just cause or excuse. *In re Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986). The act may be "willful and malicious" even absent proof of specific intent to injure. *Id.* For example, in *Wiggins v. Sanders*, (*In re Sanders*)(1998, BC MD Ala) 234 BR 818, the court found that a Chapter 7 debtor's conduct, hitting another party-goer with his fist, constituted willful and malicious conduct. This section 523(a)(6) exception rendered a state-court assault and battery judgment nondischargeable. Non-intentional torts, however, such as those involving reckless or negligent behavior, do not fall within the meaning of 523(a)(6). *Carrillo v. Su* (*In re Su*), 290 F.3d 1145-6 (9th Cir. 2002).

COLLATERAL ESTOPPEL

A trial attorney may attempt to use principles of civil procedure, such as collateral estoppel, to enforce a claim by combining a success in an earlier non-bankruptcy suit with a nondischargeability action under section 523(a). In *Grogan v. Garner*, the United States Supreme Court held that collateral estoppel[3] principles apply in bankruptcy cases and can be applied in nondischargeability actions to prevent the re-litigation of issues already decided. 498 U.S. 279, 284-85 n.11 (1991).

For example, if the earlier action involved any court determinations of fraud, another exception 523(a) exception to discharge, then it is possible that the court will deny the debtor discharge regarding the fraudulently-incurred debt. In *Grogan* the court provided that a creditor who successfully obtains a fraud judgment in state court, could then invoke collateral estoppel in a bankruptcy action under section 523(a). *Id.*

Because a requirement of collateral estoppel is that the issue at hand be "fully litigated," this strategy will not assist plaintiffs in the midst of litigation that have not yet reached judgment.

PURSUING THIRD PARTIES

It may simply be unlikely that you will be successful in pursuing the defendant post-petition. However, because the most lucrative source of judgment satisfaction is usually not the tortfeasor themselves, but instead the insurance carrier, then bankruptcy may not slow you down. The discharge injunction of 11 USCS §524(a) does not prohibit creditors from pursuing personal injury claims against insurers and other third parties. *In re Doar* (1999, BC ND Ga) 234 BR 203. The debt itself still exists despite the fact that the debtor's personal liability gets extinguished.

Moreover, creditors in such cases may also retain the debtor as a nominal defendant in a state court action for the sole purpose of establishing the debtor's liability to recover from the debtor's insurer. This is the case so long as the insurer pays the costs of the debtor's defense. *Edgeworth*, 993 F.2d at 54.

Additionally, in suits involving multiple defendants, a bankruptcy filing will only bar collection actions against the filing debtor-defendant — non-filing defendants are still possible subjects and are not protected by the automatic stay. This principle applies to non-filing joint tortfeasors.

CONCLUSION

There are more simple traps for plaintiffs seeking to collect from debtor-defendants than there are complex tricks. With unfavorable facts, there is little a plaintiff-creditor can do to recover their damages. If you are able to identify a cause for a relief from the stay, however, cite an exception to the relief from stay, or apply an exception to discharge, your journey through the bankruptcy mires will be manageable. ◆

— Ms. Reebs is an associate attorney at the Mlnarik Law Group, Inc. She practices bankruptcy and business law.

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[1]The bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)

[2]1) Actions to enforce domestic support obligations; 2) child custody or visitation hearings; 3) dissolution of marriages; 4) wage garnishment proceedings; 5) criminal proceedings; 6) certain acts to perfect previously unperfected liens as permitted under 11 U.S.C. §546(b); and 7) proceedings of certain governmental regulatory agencies. 11 U.S.C. §362(b).

[3]The requirements for collateral estoppel are that there was actual litigation of the issue and a determination in a prior action of those elements of the claim that are the same as the elements required for nondischargeability; also sometimes referred to as "issue preclusion."

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Are you funny? witty? The legal equivalent to Will Durst or Stephen Cobert? If so . . . *The Verdict* wants you for a new segment adding humor to the magazine through funny, witty commentary on current legal issues. Contact Pat Parson at 510.538.8286 or triallawyersacc@aol.com.

Truck Accident Litigation

by R. Lewis Van Blois

More than 5,000 men, women and children die each year in accidents involving large trucks. When an 80,000 pound tractor trailer collides with a 4,000 pound car, the car occupants will suffer catastrophic consequences. A truck accident case cannot be treated like a simple car crash case. Often important issues in trucking cases are not addressed and the real deficiency of the trucking company is not discovered or remedied. A truck accident lawyer must know the state and federal safety regulations that apply, must know what documents to obtain, must know where to find all of the insurance coverage, not just the obvious coverage, and must know industry jargon. Much of the increased value in trucking cases comes from finding evidence of corporate misconduct. Truck accident lawyers must act quickly to preserve, obtain and analyze the evidence to successfully represent their clients. This article only touches upon the important knowledge a truck accident lawyer should have to be able to competently represent a seriously injured person in a truck accident case.

THE DEFENSE STARTS OUT AHEAD

Insurance companies that insure trucking companies throughout the U.S. have created crash response teams to immediately investigate the accident within minutes after the accident occurs. The first thing that a truck driver does after the dust settles from a collision is to notify his dispatch center. A defense crash response team is called and usually gets to the accident scene before the police investigation is completed. The defense team identifies, accumulates and preserves evidence that is helpful to the defense. They download and review the data from the truck's on-board technology including the Engine Control Module (ECM), remove unfavorable evidence, rectify the driver's log, delete calls from the driver's cell phone and take statements from witnesses at the scene to support the defense trial strategy. They purchase the plaintiff's vehicle and analyze data from the Event Data Recorder. Often unfavorable and incriminating evidence becomes "lost" or deleted. The plaintiff starts from way behind unless the plaintiff's expert can quickly respond to an accident scene and have access to the accident vehicles before crucial evidence is lost or destroyed. When a lawyer is contacted by a client seriously injured in a collision with a truck, he/she should take immediate action to get the case handled by an experienced truck accident lawyer who has truck accident reconstruction experts and investigators available to immediately go to the scene of the accident and inspect all vehicles. In one of our firm's cases, our accident reconstruction expert discovered that an air brake hose to the trailer was unattached. The defense claimed the hose came off in the collision. The accident photographs showed there were no skid marks attributed to the trailer, indicating the air hose had not been properly connected by the driver. All witnesses should be contacted and favorable statements taken as soon as possible. In another of our firm's cases, the CHP officer found our decedent was the cause of the accident, based on the truck's position off the road, when he arrived at the scene. We found eye witnesses who saw the truck driver move the truck from the number 2 lane of I-5 before the officer arrived at the scene and were able to change the officer's initial opinion of causation.

THE PRESERVATION LETTER

It is important that the truck accident lawyer force the trucking companies to save and preserve electronic data and all documents. A spoliation letter must be sent immediately upon retention. The letter must demand preservation of all electronic data and reports from all prior downloads. Some of the categories the request should include are retention of all documents, leases, brokerage agreements, maintenance and inspection records, documents of the trip from the originating yard through each pickup and delivery point, driver's log, time cards, audits, driver's personnel file, company policies and other items. The letter should request that no repairs, removal, destruction, alteration or cleaning should occur to the accident vehicles and that they should be removed from service until they can be inspected, photographed and documented by plaintiff's attorney. The letter should be sent by Certified Mail.

In certain cases where the destruction of evidence is likely, a lawsuit should be filed immediately and include a request for a temporary order to preserve vital evidence. Federal regulations require certain records to be saved for only a limited time. For example, drivers' logs are allowed to be destroyed after six months and vehicle inspection reports need to be kept for a minimum of only ninety days.

Regulations

The Federal Motor Carrier Safety Regulations (FMCSR) contain a set of safety rules that trucking companies must follow. These regulations include alcohol and drug testing, preservation of records, driver qualifications and disqualifications, hours of service rules, inspection and maintenance rules, driving rules and other important rules. The truck accident lawyer must become familiar with these regulations and get all records required by the regulations. Truck accident lawyers should get the FMCSR Pocketbook to have on their desk for easy reference.

ELECTRONIC DATA

Most modern tractors are equipped with an ECM device which generates data including average speed, percentage of time truck is driven over 65 MPH and 71 MPH, and highest speed of the truck. Many trucking companies download the data on a regular basis but do nothing about obvious safety violations. The QUALCOMM is like an email in the truck and GPS systems keep track of vehicle movements and often its speed. The dispatch of the company communicates with the driver with this computer system. Companies maintain these records for only a short period of time so the Preservation of Evidence letter must be sent early in the case or a temporary court order obtained to prevent destruction of pertinent electronic data.

HOURS OF SERVICE AND DRIVER FATIGUE

A driver must take time off to rest after driving certain periods of time. The driver must record what he is doing in a log book. Many drivers falsify their records to be able to drive more hours. Many times a driver can't physically complete his haul on time unless he violates hours of service rules. This results in driver fatigue which is a primary cause of truck accidents. Fatigue problems are made worse because of pressure on motor carriers from shippers and receivers to make deliveries quickly rather than safely.

The lawyer needs to establish the details of the trip and map out where the drivers were on the Google Map. You are looking for proof of driver fatigue and what the driver was doing that he did not share data with the company safety department. The driver gets paid by the mile and does not get paid for loading and unloading or doing safety checks.

It is important to determine if the driver has prior log book falsifications. If the company has not addressed them with the driver, it is a good argument to prove corporate wrongdoing. Lawyers should be familiar with the 11 Hour Rule, the 14 Hour Rule, the 60-70 Hour Rule and the 34 Hour Reset Rule (all contained in FMCSR §395.3) and then determine whether logs are consistent with requirements of other regulations. Take into consideration time for the pre-trip inspection, the post-trip inspection and the cargo inspections.

OTHER RECORDS TO OBTAIN

In addition to the above records, drivers create other records which are important to obtain. These records include fuel purchase receipts, bills of lading describing the loads and when they were picked up and dropped off, toll receipts, scale tickets, driver call in records, driver inspection reports, phone records and other records.

The written application of the driver submitted to the company must be kept along with the company's driver qualification file. Federal rules require certain information submitted under oath. The information should be investigated to find out if the driver provided false information or if the company failed to follow the Federal regulations for driver investigation and qualification. The trucking company must keep investigation of the driver's safety performance history in the driver qualification file. The motor carrier must check the driving record every 12 months and keep a copy of the record in the driver qualification file. You should also get the driver's record from the State that issued his driver's license.

Truckers regularly undergo roadside inspections and these records are main- ▶

tained. These records may reveal patterns of violations and knowledge of dangerous driving or equipment. The trucking company is made aware of these violations and has a duty to address them. These records should be obtained. In reviewing data on the FMCSA website, look beyond the ratings because a company may meet the rating threshold, yet have a serious pattern of violations.

After getting all relevant and required records of the driver, the lawyer must evaluate the information to determine if he is legally disqualified from operating a commercial vehicle. The driver's record may show negligence if he is not disqualified by Federal regulations. Here the company rules and guidelines should be obtained to see if all guidelines have been met.

HAVE ALL POTENTIAL DEFENDANTS BEEN SUED?

The obvious defendants are the owners/operators of the tractor and trailer. Often trailers are leased to the trucking company and liability of the trailer owner can be based on lease violations or negligent entrustment. The shipper and/or loader of the trailer's freight can be held liable if the freight is improperly loaded. A property broker for the load will claim it is not liable because they do not own or lease the vehicle used to transport the load. However, the broker can be held liable if it also has motor carrier authority, was acting as a motor carrier for the shipment, and guarantees delivery of the load. A broker may also be liable if it is engaged in a joint venture or for negligent selection of an historically unsafe carrier.

The general rule in most cases is that the employer has no liability for torts of its independent contractor. However, in cases involving interstate motor carriers, the motor carrier is vicariously liable for the negligence of the driver under the statutory employment doctrine regardless of whether the driver is an employee or an independent contractor. Where the owner-operator leases his truck and driver to an ICC certified carrier the provisions of the Federal Leasing Regulations are incorporated. The regulations require that every lease entered into by a motor carrier must contain a provision that the motor carrier maintain exclusive possession, control and use of the equipment and complete responsibility for the operation of the equipment for the duration of the lease. The lease must be in writing and carried in the vehicle and the carrier's insignia must be placed on the truck. The effect is that the owner-operator and his employees are deemed to be statutory employees of the carrier, making it vicariously liable for their wrongful acts without regard to whether they were acting within the scope of employment at the time of the accident. A truck displaying the placard or identifying sign of a carrier is presumptively under the control and lease of that carrier.

Federal Safety Regulations impose a non-delegable duty on the carrier to secure the load safely. There is shipper liability when the truck is improperly loaded. A third party may be liable if it is involved in loading.

PRODUCTS LIABILITY IN TRUCKING CASES

The complexities inherent in the make-up of a heavy duty truck, the modifications, frequency of use and number of manufacturers involved in providing component parts and assembling the finished product make a product liability case difficult. Some of the more common product defects may include failure to install backup alarms, failure to provide safe ingress and egress to the top of a truck, mismatched tires, failure to properly illuminate the sides and rears of tractor-trailers and failure to install underride protection to the rear and sides of a trailer. Because of the height of most tractor-trailers, a passenger car can underride them in a collision. The energy absorption capability of the car is greatly reduced and underride cases result in decapitation, traumatic brain injury and facial disfiguration. Our firm has handled several of these cases where workers traveling to work in the dark fail to see the tractor-trailer blocking the road because of lack of conspicuity tape and inadequate lighting on the big rig. Gradually, regulations have been enacted that require the use of reflex reflectors or retroreflective materials. The rear of the trailer must have an alternating red and white stripe at required locations. Rear underride bars are required and the truck lawyer must be familiar with issues involving lighting and reflection.

SPECIAL DRIVING SITUATIONS

Nighttime driving can cause truck driver errors in judging safe stopping and turning distances. Winter driving, mountain driving and driving in the fog require a driver to be more cautious and follow the rules for safe driving in these conditions. Our firm has been successful in several underride collision cases occurring in the dark or in the fog. We showed driver negligence in a fog accident case by providing evidence of the extent of the fog that made it unsafe for a truck driver to operate his vehicle with limited visibility. In several nighttime cases, we have used human factors experts as well as photo engineering experts to show a driver did not have adequate vision for a distance necessary to complete a safe turning maneuver.

MCS-90 ENDORSEMENTS

Interstate carriers must have a bond or insurance policy sufficient to pay any judgment for injury or death arising out of the operation or use of its vehicles (49 U.S.C. §13906(a)(1)). If the carrier elects to provide this coverage by an insurance policy, the policy must contain an MCS-90 (Motor Carrier Safety-90) endorsement which becomes part of the policy. The carrier's insurer must pay final judgments against its insured, whether or not the insurance policy provides such coverage. There are, however, limitations to the application of MCS-90 that should be familiar to a truck accident lawyer.

MCS-90 endorsements only come into play when the carrier's insurance policy does not cover the loss. But the endorsement does not have the usual obligations of an insurance company, such as duty to defend a claim. Once the MCS-90 insurer has paid a judgment, it has the right to recover the amount from its insured. The limits of MCS-90 are no less than $750,000 and it does not act as an umbrella policy. Federal law determines the operation and effect of this coverage.

TRIAL OF THE TRUCK ACCIDENT CASE

A trucking case must be prepared from the beginning as though it is going to trial. Before any depositions are taken, all important documents must be obtained, compared and evaluated. Documents previously mentioned as well as all policies and procedures of the company, employment handbooks and manuals, maintenance and repair records should be reviewed. It is important to take a video deposition of the driver because by the time of trial, the defense will be sure the driver has new clothes and looks like a professional responsible person. Often the truck driver appears at his deposition early in the case and is evasive, unprofessional and appears to be incompetent. In a deposition taken in Oregon in one of our firm's cases, the negligent truck driver appeared at his deposition with a dark navy watch cap covering much of his face, was slouched down, was evasive and acted crazy. Often the trucking company's safety director is also vulnerable, based on past performances of the companies' drivers. Video depositions of key company persons can help prove a case of corporate wrongdoing.

If the truck driver has a bad driving history, has falsified his logs or inspections or is otherwise untruthful, this conduct can increase the damages at trial by getting a jury mad. Jurors know the rules of the road and get upset when a safe driving rule is violated. The "Reptile" key to jurors' hearts and minds arises when trucking companies allow fatigued drivers to drive, hire dangerous drivers, tolerate drug or alcohol use or allow drivers to falsify records. Trial themes related to safety will resonate with the jury and maximize the damages in the case. Sometimes a CB handle like "Captain Crunch" or "The Grim Reaper" can increase damages. In one of our firm's cases, the truck driver fell asleep and caused a collision and the words written in the tractor window were "I swerve and hit people at random." In another case a photograph at the accident scene showed our client's crushed vehicle underriding the side of the trailer and directly above it on the side of the trailer were the words, "We deliver your future." Finding items in the truck such as beer cans, pornography or evidence of drug use can maximize damages at trial.

CONCLUSION

Accidents involving tractor-trailers require a command of the special rules and regulations that apply to the case and the ability to discover the violations and apply them to the case. Investigation and accident reconstruction must be done at the first opportunity and be thorough and complete before crucial evidence is lost. The case will be defended by experienced defense attorneys who specialize in truck accidents and are thoroughly prepared. Juries, however, often find for the plaintiff if the case is well prepared and violations of safety rules by the truck driver can be demonstrated. Then juries are willing to reinforce safety rules with a substantial verdict. ◆

— R. Lewis Van Blois is an Oakland lawyer representing consumers with catastrophic injuries for over 40 years. He specializes in motor vehicle accidents, including rollover, roof crush, and ESC cases; defective products; truck accidents; dangerous roads; construction accidents; and medical malpractice. Mr. Van Blois is also certified by the National Board of Trial Advocacy as a Civil Trial Specialist.

MEMBER *news*

Jim W. Yu has joined Housing & Economic Rights Advocates (HERA), a statewide legal service and advocacy organization based in Oakland. Jim's primary focus involves the representation of homeowners in mortgage modification disputes. He is also involved in policy work and administrative advocacy. If your client is facing foreclosure, is trying to modify her mortgage, or is a victim of predatory lending, HERA may be able to provide free legal representation or counseling.

Charles Dell'Ario served as special motion and appellate counsel on the San Bruno Fire Case with lead trial counsel Frank Pitre. PG&E's motion for summary adjudication of punitive damages was denied.

The San Bruno plaintiffs sought punitive damages from PG&E under a theory of despicable conduct in willful and conscious disregard of public safety. Ever since the fatal pipeline was installed in 1956, PG&E ignored testing requirements and its lack of records, claiming the pipe was safe when they knew such a claim could not be made. Proper testing would have uncovered the defective weld that failed causing the 2010 catastrophic explosion. The trial court denied PG&E's punitive damages summary adjudication motion, rejecting PG&E's argument that the entire history of its pipeline management may have been negligent but not malicious. It found numerous issues of fact from which a jury could infer the requisite malice to a clear-and-convincing standard of proof and sustained objections to large portions of PG&E's evidence.

Charles Dell'Ario also served as post trial and appellate counsel for trial counsel Brian Panish and Thomas Schultz in the matter of *Sheth v. Scheider National Carriers* in Riverside County. Defendant's motion for a new trial following plaintiff wife's verdict of $33,476,820 and plaintiff husband's verdict of $3,005,478 was denied.

Plaintiffs, residents of India, were driving on Interstate 10 in Riverside County during early morning hours when an 18-wheel truck owned by the defendant attempted to pass them. The truck pulled back into plaintiffs' lane without clearing them causing an accident that left the wife permanently paralyzed as a result of a spine injury at C2 through C7. After a 14-day trial, the jury assigned 100% liability to the trucking company/driver and awarded $36.5M in damages. The trial court denied defendants' motion for new trial over claims of excessive damages, erroneous exclusion of sub-rosa evidence, improper closing argument, reduction of damages due to disparity of India-US purchasing pose and an improper "punishment" element of damages due to the defense counsel's misconduct. An appeal is pending. ◆

got news?

If you have some member news that you'd like to share, please email it to one of the following:

Pat Parson
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Matthew Haley
matt@haleylaw.com

ALAMEDA-CONTRA COSTA TRIAL LAWYERS' ASSOCIATION
presents

Speaker: **Marjorie Heinrich** Esq.
The Dolan Law Firm
Topic: Learn Proven Methods of Obtaining Pre-filing Settlements.
Handling Spine Injury Claims and Obtaining Physician Perspective and Pain Management Techniques.

Speaker: **Michael E. Gatto** Esq.
The Veen Firm
Topic: Spinal Anatomy Imaging Studies.
Diagnostic Testing and Common Defense Arguments and Rebuttal.

Speaker: **Ruben Kaira** M.D.
Topic: Dr. Kaira is a board certified anesthesiologist specializing in pain management.
Dr. Kaira will discuss pain management intervention procedures and
will role-play for a mock trial examination of a defense expert.

Tuesday, March 12, 2013
Check-in and Dinner: 5pm
Seminar: 6pm - 8pm

Scott's Seafood Restaurant
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Two hours of MCLE credit will be given.
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