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Statement of Editorial Policy

This magazine presents a forum for the various authors of matters published herein. Therefore, it does not necessarily represent the views of ACCTLA, which publishes this magazine as a public service without charge to members and judges. Materials submitted may be subject to review and editing.

FROM THE PRESIDENT

Jim Yu

Welcome! ACCTLA has had another incredible year.

Our Membership Chair extraordinaire Erika Jacobsen-White led our expansion campaign and increased our membership by over 20%. Our New Lawyers Chair Nick Casper organized and co-hosted events with Consumer Attorneys of California at the Oakland Coliseum and at The District. Nick, by the way, will be the President of the Contra Costa County Bar Association in 2015.

ACCTLA partnered up with Public Justice and screened the documentary Hot Coffee at Boalt Hall to introduce plaintiff's advocacy to law students. We also participated in the De Anza Law Academy, a program spearheaded by the State Bar's Council on Access & Fairness.

My goal this year was to not only expand our membership, but to show our new and existing members the value of our organization. Our annual Judges Night and Spring and Fall Socials provide our members with opportunities to get to know our local judges in a more personal, less formal, setting. Our seasoned members have lots of knowledge to share, whether it be at MCLE seminars, on our listserv, or during one-on-one interactions.

Our newer members, from varied and diverse backgrounds, bring a lot to the table as well. The injection of new ideas and perspectives on long-standing issues is always welcome and useful. These different perspectives will not only improve our litigation and trial skills (e.g. insight on how jurors think, how to better persuade in an era of short attention spans), but will also give us ideas on how to better manage our practices (e.g. technologies for secure data storage, case management apps, etc.).

We need your help. PERSUADE that colleague who never got around to joining our great organization. MENTOR a younger attorney-member. SHARE your experiences on the listserv. Your participation will make ACCTLA membership a richer and more fulfilling experience for everyone.

It was an honor and privilege to serve this incredible community of trial lawyers. I could not have done it without the support of our Executive Director Pat Parson, our Executive Committee, and our Board. Thank you.

Finally, let us all welcome our incoming 2015 President, Matt Haley. Matt is an incredible lawyer and all-around great guy. He will do a fantastic job. ◆

— Jim W. Yu specializes in personal injury and wrongful death cases. He can be reached in his Walnut Creek office at 925.472.6633.

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Securing a Restraining Order to Stop a Trustee Sale or Eviction

by Glen L. Moss

Clients often face loss of their home as a consequence of a serious accident. The home is lost at a non-judicial trustee sale which is held pursuant to Civil Code §2924. After the sale, the foreclosure trustee records a deed in favor of the foreclosing beneficiary of the deed of trust or third party that submitted the high bid at the sale. This new owner is then required to bring an unlawful detainer action to recover possession of the property [CCP §1161(a)]. ■ Counsel can stop the trustee sale by securing a TRO and Preliminary Injunction [CCP §527]. If the sale takes place, counsel will be required to defend the eviction action. This defense generally includes a collateral claim for wrongful foreclosure. The two lawsuits should be consolidated, with the wrongful foreclosure case serving as the primary case [*Asuncion v. Sup. Ct. (WC Financial)* (1980) 108 Cal.App. 3d 141, 166 Cal. Rptr 306; *Martin-Bragg v. Moore* (2013) 219 Cal.App. 4th 367. This article summarizes the primary grounds for stopping the trustee sale or pursuing the wrongful foreclosure claim.

LENDER NON-COMPLIANCE WITH TERMS OF THE DEEDS OF TRUST

Between 14% and 20% of the bank loans in California are on the FHA form. Paragraph 9 in this form limits the right of the lender to foreclose, despite the default of the borrower. In particular, foreclosure is permitted only pursuant to the regulations promulgated by HUD. These regulations include providing the borrower a "face to face meeting" to discuss loss mitigation alternatives. [*Pfeifer v. Countrywide Mortgage* (2012) 211 Cal.App. 4th 1250]. The borrower is entitled to restrain the trustee sale without tendering payments, and without posting any bond [*Pfeifer*, supra].

Foreclosure is an equitable remedy. Thus, the lender and court are required to seek a fair and reasonable result under the circumstances [*Bisno v. Sax* (1959) 346 Pac. 2d 814]. Also, homeowners may be eligible for a special forbearance if a hardship causes a verifiable loss of income. The lender can make the modification or grant the forbearance without the prior approval of HUD [24 C.F.R. §203.614]. Moreover, the Freddie Mac servicing guide encourages modifications or forbearance when the borrower experiences an involuntary loss of income or increase in expense [2 Freddie Mac Single Family Seller/Servicer Guide §65.42].

At present, this remedy is available only before the trustee sale. However, the Court of Appeal is considering expanding the remedy to post-trustee sale cases in which the foreclosing beneficiary acquired the property [*Fonteno v. Wells Fargo Bank* Ct. of Appeal First Dist. Div 2 Case No. A135577 and A136359.[1] The briefing was completed in September 2013 and argument was heard in 2014. The governing regulation prior to *Fonteno* provides:

It is the intent of the Department that no mortgage shall commence foreclosure or acquire title until the retirements of this subpart have been followed. [24 CFR §203.500] (emphasis added)

Pfeifer, supra involved the first portion of the regulation which prohibited the mortgagee from "commencing foreclosure." *Fonteno, supra*, involves the second portion of the regulation. It is unclear whether the Court of Appeal will grant borrowers the benefit of the entire regulation. The California Attorney General filed an *Amicus* brief supporting our position in *Pfeifer, supra*. However, the Attorney General's office refused to file an *Amicus* brief to support *Fonteno*.

EQUAL CREDIT OPPORTUNITY ACT [15 U. S. C. §1691]

The ECOA requires lenders to provide a Notice of Adverse Action when denying an application for credit. This Notice must provide a non-discriminatory basis for denying the application. Applications for a loan modification are included within the scope of the ECOA. The borrower is entitled to injunctive relief [15 U.S.C. §1691e] as well as damages and attorney fees when the lender breaches its obligations under the ECOA. [*Schlegel v. Wells Fargo Bank* (9th Cir 2013) 2013 WL 3336727, 2013 U.S.App. LEXIS 13595].

FAIR DEBT COLLECTION PRACTICES ACTS (FDCPA 15 U.S.C. §1692) AND ROSENTHAL ACT (CIV. CODE §1788))

Each of these acts prohibits unfair and deceptive debt collection practices. In addition, the FDCPA requires the debt collector to provide a Debt Validation Notice. The borrower is granted 30 days to challenge the amount of the claimed default, and the debt collector must investigate the claims. *Pfeifer, supra*, concluded that the FDCPA Debt Validation Notice provisions did not apply in California.

Since *Pfeifer, supra*, was decided, the Sixth Circuit published a strong opinion concluding that the FDCPA did apply to non judicial trustee sales [*Glazer v. Chase Home Finance* (2013) 704 Fed 3d 453]. In 2013, the District Courts in Northern California have concluded the Debt Validation provisions of the FDCPA do not apply to foreclosure trustees. However, other provisions of the FDCPA do apply [e.g.: *Tyson v. Chevy Chase Bank* (Sept 30 2013 N.D. Cal. No. 12-03766 endorsing *Natividad v. Wells Fargo* (N.D. Cal. May 24 2013 No. 12-03646, 2013 WL 229960].

Also, on August 8, 2013, the Ninth Circuit concluded that Wells Fargo Bank was a debt collector engaged in debt collection [*Corvello v. Wells Fargo* (9th Cir. 2013 No. 11-16234, 2013 U.S. App. LEXIS 16415, 2013 WL 4017279].

Both the FDCPA and Rosenthal Acts arguably provide for equitable relief such as injunctions. In addition, both acts provide for damages and attorney fees. The allowable damages include emotional distress as well as statutory and actual damages.

IMPROPER SECURITIZATION OF LOAN

Many loans made from 2001 through the present are placed into a trust. The trustee then issues notes, which are securities. The deeds of trust are collateral for the notes. Your client, as a borrower, has standing to challenge this process and whether the loan was properly transferred into the trust [*Glaski v. Bank of America* (Aug 8 2013 No. F064556 2013 Cal. App. LEXIS 633].

UNFAIR BUSINESS PRACTICES [BUS. & PROF. CODE §17200]

California recently passed a "Homeowners Bill of Rights." Different parts of the legislation take place over the next five years. However, some courts are using this legislation to support claims made today. For example, may lenders engaged in the practice of "dual tracking." This practice involves sending the borrower letters soliciting documentation for a possible loan modification. Simultaneously, the lender records the Notice of Default and proceeds to sell the property at a trustee sale. *Jolly v. Chase Home Finance* (2013) 213 Cal. App. At 872 held "dual tracking" supports claim of unfair business practice under §17200 *now* even though not specifically illegal until January 2018.

Also, California will enforce violations of federal law as "unfair business practices." This is true even when the federal law provides no private right of action [*Rose v. Bank of America* (2013) 57 Cal. 4th 390, 159 Cal. Rptr. 3d 693].

CONCLUSION

In addition to the above claims, counsel may uncover breach of contract, fraud, or other violations of law. These claims can support the wrongful foreclosures theories needed to save the home of your client.

Also, there are organizations such as HomeLiberty in Walnut Creek that will buy the property at a trustee sale and flip it to your client. HomeLiberty will insist on a down payment in escrow. However, the borrower may still be better off if the home can be captured for substantially less than the existing loans that encumber it. Moreover, HomeLiberty will not charge any pre-payment penalty when the proceeds of the personal injury settlement are used to repay the loan.

The bottom line: creative lawyering will often save your client's home. Moreover, many of these claims provide for attorney fees to a successful plaintiff. However, fees are not available to a successful defendant unless the claim was filed or pursued in bad faith or was frivolous as determined by FRCP Rule 11.

— Glen Moss was admitted to the California State Bar in 1969 and has been an actively practicing attorney ever since. He has successfully handled a wide variety of cases including insurance coverage disputes, contract problems, real estate, tax, probate, trust preparation, administration and litigation.

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[1]Editor's Note: The First District's opinion was released August 18, 2014. It expanded this remedy post-trustee sale holding, "We conclude that plaintiffs have pled viable causes of action for the equitable cancellation of the trustee's deed obtained by Wells Fargo based on their allegation that Wells Fargo did not comply with the NHA requirements incorporated into the deed of trust. Because compliance is a condition precedent to the accrual of Wells Fargo's contractual authority to foreclose on the property, if, as plaintiffs allege, the sale was conducted without such authority, it is either void or voidable by a court sitting in equity."

Why "ADA" Lawsuits are still Necessary to Enforce "Full and Equal Access" for Disabled Persons

By Paul Rein

Disabled Persons are a Large and Growing "Minority" in California and America. California estimates that 6.2 million disabled individuals live in California. Approximately one million are mobility impaired.[1] 51.2 million Americans live with some level of disability. Of these, 1.8 million are blind, 2.7 use wheelchairs, and 9.1 million use an ambulatory aid such as a cane, crutches or walker. This significant portion of our populace is growing daily as people live longer and the "Baby Boomer" generation approaches retirement. Both California civil rights laws and the Americans with Disabilities Act of 1990 ("ADA") provide a basis for private lawsuits to enforce disabled access rights.

PUBLIC POLICY SUPPORTS DISABLED ACCESS LAWSUITS

Unlike discrimination on the basis of race or gender, discrimination against the disabled may involve the failure to make necessary accommodations to meet disabled needs: Just treating everyone "equally" does not always fit the bill. As recognized satyrically by 19th century writer Anatole France, "The law, in its majesty, equally forbids both the rich and the poor from sleeping under bridges and begging in the streets."

Access denial to wheelchair users has clearly been recognized as a civil rights issue: "As clearly as *'no irish allowed'* and *'white only'* the stairways, narrow doors and sidewalk curbs of our society indicate to handicapped persons their exclusion from the centers of our social life."[2]

Yet 45 years after California enacted laws requiring "full and equal access" at public facilities, and 23 years after enactment of the historic ADA, disabled persons *still* encounter many access problems. The owners of many large facilities still resist providing "full and equal" access for the disabled, a large but politically underrepresented minority. Access barriers deny many employment, social, cultural and recreational opportunities, and are reminders to the disabled that they are still treated as "second class" citizens.

The California Supreme Court recognized that discrimination against physically disabled persons is as destructive and humiliating as racial discrimination is to persons of color:

Disability discrimination is indistinguishable in many ways from race and sex discrimination. Specifically, it can "attack the individual's sense of self-worth in much the same fashion as race or sex discrimination.[3]

Employment opportunities depend upon being able to enter a business: if entry is blocked by stairs, neither disabled patrons, prospective employees or customers can get in. With proper planning, disabled access in the design of a new building can cost less than 1 to 2% of the total cost.

MULTIPLE CALIFORNIA AND FEDERAL STATUTES SEEK THE GOAL OF "FULL AND EQUAL ACCESS"

California leads the nation in statutory and case law precedents protecting disabled rights. Discrimination against the "handicapped" was addressed by the California Legislature in the late 1960s, including the Disabled Rights Acts, Civil Code §§54, 54.1, 54.3, and 55, which went into effect in 1970, and requirements for accessible new construction or alterations, "Access to Public Accommodations for Physically Handicapped Persons," Health & Safety Code §§19955-19959 (effective July 1, 1970). "Physically disabled persons" were added to the categories protected by the Unruh Civil Rights Act (Civil Code §51-52) in 1987.

Per *Donald v. Café Royale*, 218 Cal.App. 3d 168, 179-190 (1990) the *purpose* of California's disability *rights* statutes allowing damages and attorney fees to "prevailing party" plaintiffs is to *enforce the law*, not to "punish."

The Legislature's purpose in imposing increased penalties and additional enforcement methods is to guarantee compliance with equal access requirements. The impediments to the physically handicapped's interaction in community life is the inequality which section 54 et seq. and section 19955 et seq. seek to prevent.

By adopting the "ASA" (American Standard Association) regulations incorporated into California law in 1968 (Government Code §4456) as to governmental buildings, and in 1970 (Health & Safety Code §§19955 *et seq.*) as to privately owned public accommodations, California adopted ASA §1.2's "purpose", "To make all buildings and facilities used by the public accessible to and functional for the physically handicapped, to, through and within their doors..." Later statutes substituted the word "disabled" for the now archaic "handicapped," and this term was used to frame the landmark federal "ADA."

PRIVATE LAWSUITS ARE THE PRIMARY MEANS TO ENFORCE ACCESS RIGHTS

Due to the lack of full governmental enforcement of building codes, many public facilities were erroneously granted building permits for construction or alterations desire their inaccessibility. California building officials are also *not authorized to enforce the federal ADA* and its "readily achievable" barrier removal requirements. Unless the ADA is enforced by private lawsuits, inaccessible facilities will continue in perpetuity to exclude disabled persons.

In recent years publicity about private ADA lawsuits has awakened public consciousness. Private lawsuits are the main means of enforcing the ADA Title III requirements against businesses that fail to self-police themselves. Enforcement is needed to ensure (1) provision of reasonable accommodations for disabled persons; (2) adjustment of policies to maximize access; and (3) removal of physical barriers to access which are "readily achievable." The *threat* of damages and attorney fees may encourage "voluntary" compliance without any lawsuit — actually a win-win situation for the business and disabled community — a "community" comprised of persons who may become customers of the business once it becomes accessible. Although the ADA, Title III, does not have its own damages remedy — offering only injunctive relief and

statutory attorney fees — an ADA violation may trigger the damages remedies of Civil Code §§ 52 and 54.3 under state law: §§ 51(f), 54(c) and 54.1(d) incorporate any violation of the ADA. This adds the potential of a damages award to the other enforcement mechanisms of the ADA.

Private lawsuits are the instrument chose by Congress and the California legislature for enforcing laws protecting the disabled.[4] Private lawsuit to enforce the *state* regulations that the building department "missed." Without private lawsuits, the burden of enforcing the law would have to be shifted to major bureaucratic agencies paid for by tax-payers, rather than paid by the business owners whose refusal to "voluntary" comply makes enforcement by lawsuits necessary.

THE ADA REQUIRES BARRIER REMOVAL UNLESS DEFENDANTS CAN PROVE "NOT READILY ACHIEVABLE"

The "readily achievable" provisions of Title III of the ADA (§12182 *et seq.*) require access when it is "not very expensive" to provide access to a building, regardless of the building's age or the dates of a facility's construction and alteration history, so long as the cost can reasonably be absorbed by the owners, operators, lessors and lessees of a public accommodation based on the factors listed in ADA §301(9) (42 USC §12181(9)). These factors include a comparison of each defendant's "overall financial resources" against the costs for removal of each of the access barriers.[5] Such "resources" should be "discoverable" during litigation. Liability for access and for (California law) damages and statutory attorney fees are all "joint and several."[6] Title III is enforced only by private lawsuits; there is no federal bureaucratic agency enforcement of Title III's "readily achievable" barrier removal requirements. Enforcement of the ADA was designed by Congress to be the responsibility only of the United States Department of Justice and by private lawsuits.

Once a lawsuit is filed, all defendant owners, operators, lessors and lessees have *joint and several liability*, and *must show* that it is "too expensive" to provide access, for example, by *comparisons* of the cost of a ramp or lift or accessible restroom with the owners' and operators' "overall financial resources."[7] Most often this "not readily achievable" affirmative defense burden cannot be met, and access will be required. The *burden of proof* should be on the defendant owner.[8] However, "not readily achievable is *not* a defense to California access requirements triggered by the construction or alternation history of a building. Defendants *may* see a "hardship" exception per California Health & Safety Code § 19957, *provided* they supply "equivalent facilitation" and have the "hardship exception" formally granted by the building department, per California "Title 24" standards, including specific written findings.

California Civil Code §55.56 now defines what is required for proof of *damages*, including proof that an access barrier caused "difficulty, discomfort or embarrassment." Section 55.55 allows "written settlement offers, and rejection by the parties" to be considered during attorney fees litigation, "along with other relevant information." These sections, applicable in both state and federal court, encourage early and reasonable settlement.

NEW ATTACKS ON DISABLED RIGHTS FROM CALIFORNIA LEGISLATION AND CASE LAW MAY ENCOURAGE FILING IN FEDERAL COURT

In late 2012 the California legislature and California Supreme Court hit the disabled with a one-two punch with *may discourage* use of the California courts to enforce laws which have protected disabled access rights for the past 43 years. Under political pressure in the 2012 election year, the legislature made findings that a "very small number of plaintiffs' attorneys have been abusing the right of petition under Sections 52 and 54.3 of the Civil Code." (Section 24 of SB 1186.) The "evil" that SB 1186 was enacted to counter was that some lawyers were sending letters or brining lawsuits seeking only statutory minimum damages ($4,000 for violation of Civil Code §§ 51-52) or were "stacking" multiple visits and seeking statutory attorney fees without obtaining improved access. SB 1186 including 40 pages of new laws intended to make bringing actions for damages more difficult, including prohibitions on pre-litigation monetary demand letters and requirements for including various notices of defendants' rights and tactical alternatives, with the service of any Complaint, effective January 1, 2013. Lawyers who "violate" new requirements such as having to file *verified* complaints, and including specified "rights" notices to defendants – requirements for the disabled not imposed upon other civil rights plaintiffs – now face having their complaints stricken and being referred to the State Bar.

The new SB 1608 and SB 1168 *state court* provisions also require specific notice to be served on defendants along with complaint and summons, advising them of their right to certain new procedures, under specified circumstances, including where they have hired and received a report from a "Certified Access Consultant" (CASp Certified) before being sued. As noted by *O'Campo v. Chio Mall*, 758 F.Supp.2d 976 (E.D. Cal., 2010), the *procedural* requirements of state law changes *may not be applicable in federal court*. Any attorney practicing in this field, whether representing plaintiffs or defendants, in either state or federal court should become familiar with the statutes enacted by SP 160 in 2009 and SB 1168 in 2012.

"SB 1186" creates major requirements for disability rights attorneys sending letters or filing complaints in state courts. If the *purpose* of the new laws were to encourage suits for injunctive relief rather than *just for* damages, a subsequent California Supreme Court decision ensured the *opposite* result: on December 17, 2012 (a date that may "live in infamy" for the rights of disabled persons!), a unanimous Court held that the attorney fees provisions of Civil Code §55 — the primary California code used to seek injunctive relief to access — were entirely *reciprocal, even against "good faith" disabled plaintiffs*. *Jankey v. Song Koo Lee*, 55 Cal.4th 1038 (2012). If the plaintiff south injunctive relief in the public interest under §55 and lost — *at least in state court litigation* — he or she now faces a 'mandatory' requirement to pay a "prevailing party" defendant's attorney fees and costs. However, if the lawsuit seeks *only damages* under Civil Code §§54.1 and 54.3, statutory damages and attorney fees are available only to a prevailing *plaintiff*. The result may be to *encourage lawsuits seeking only damages*, and *discourage* public interest lawsuits seeking barrier removal under California law, directly *opposite* to the purported objective of the recent SB 1186 legislation!

In deciding *Jankey*, the California Supreme Court unanimously *rejected* the 9th Circuit's 2009 *contrary* decision in *Hubbard v. Sobreck, LLC*, 554 F.3d 742 (9th Cir. 2009), which found that the ADA *preempted* such a result when Civil Code §55 in junctive relief was paralleling enforcement of the ADA incorporated into California law by Civil Code §§54(c) and 54.1(d). The 9th Circuit had upheld that federal ADA law *preempted* state law and protected against fees being awarded against a "good faith" civil rights plaintiff, to avoid a "chilling" effect on the motivation of lawyers to prosecute civil rights cases and enforce Congressional policy. (Cf. *Christianburg Garmet Co. v Equal Employment Opportunity Comm.*, 434 U.S. 412 (1978).) Instead, the California Supreme Court purported to interpret only the California statute, Civil Code §55, and "disagreed" with the *Hubbard* Court's finding that allowing attorney fees against a "good faith" plaintiff would cause a necessary entanglement with the objectives of the ADA. As *Christianburg* pointed out, a civil rights plaintiff seeks to enforce Congressional policy, but a defendant business does not. Apparently the California Supreme Court did not consider the policy concerns of *Christianburg*, that such attorney fees threat would "chill" disabled rights actions.

However, on May 10, 2013, a District Court decision, *Oliver v. In-N-Out Burgers*, __ F.Supp.2d __ 2013), 2013 WL 1927121 (S.D.Cal.) at *5, held that *federal trial courts should* continue to follow the 9th Circuit *Hubbard* rather than *Jankey*:

The Ninth Circuit in *Hubbard v. SoBreck, LLC* held that federal law preempts section 55. 553 F.3d 742, 745-47 (9th Cir. 2009). Specifically, the Ninth Circuit

continued on page 16 ▶

2014 Fall Cocktail Reception

Lafayette Park Hotel • October 16, 2014

~ Honoring ~

Contra Costa County Trial Judge of the Year

Jill Fannin

Justice Maria Rivera

Justice Terence Bruiniers

ACCTLA President Jim Yu and Executive Director Pat Parson

Cat Cabalo, Brian Evans, and Paul Rein

Scott Sumner, Brian Kim and Hon. Richard Flier (Ret.)

Steve Derby, President-Elect Matt Haley, Fulvio Cajina

Hon. Jill Fannin, Hon. Suzanne Fensteramacher Justice Maria Rivera and Hon. Joni Hiramoto

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Continued from page 13

held, "to the extent that Section 55 does not authorize the award of fees to a prevailing defendant on nonfrivolous CDPA state claims that parallel nonfrivolous ADA claims, there is a conflict and the ADA preempts Section 55 of the CDPA." *Id.* At 747. Therefore, a federal district court may not impose fees pursuant to section 55 unless the court determines that the plaintiff's action was frivolous. See *id.* At 747.

California Civil Code §55 may be a state statute, but whether a state statute is preempted by federal law is a question of federal law... Therefore, the Court is bound by the Ninth Circuit's decision in *Hubbard*.

The *Oliver* decision *should* protect good faith plaintiffs from the threat of "prevailing party" defendants' attorney fees against plaintiffs *if they sue in federal court*.

CHOOSING FEDERAL OR STATE COURT

A lawsuit under the ADA may be filed in either state court or federal court. Because the ADA is a federal statute, any state court defendant may remove any "ADA" action to federal court within 30 days of service of the complaint. 28 USC 1441. In the Northern District of California, adoption of General Order 56 mediation procedures may lead to an earlier and often cooperative statement, a feature to *encourage* federal court venue.

There is still the possibility of seeking injunctive relief solely under the ADA, which would effectively require all suits to be brought in federal court, as many defendants will remove "state cases" to federal court. "Artful pleading" using such vehicles as Business and Professions Code §§17200 *et seq.* for injunctive relief, combined with Civil Code of Procedure §1021.5 request for "public interest" attorney fees, may still be used to enforce the public interest goals without subjecting plaintiffs to the draconian threat of facing defense attorney fees *if they lose*. However, the net effect of SP 1186 and the *Jankey* "reverse attorney fees" order may be to discourage many meritorious disability rights lawsuits from ever being filed.

It has been said that the measure of a society is how it treats its weakest and most venerable citizens. The recent laws and decisions attacking the rights of physically disabled persons are a sad chapter in the history of Civil Rights in California. Disabled persons are often low income or impecunious, and as a group have the highest unemployment rate of any discernable class of persons. How can California lawyers represent disabled persons in "good faith" lawsuits seeking to obtain access to businesses which have been subject to state law access requirements for the law 40 years, if losing the case would mean driving the disabled into bankruptcy?

OPPOSING DISABLED ACCESS: MONEY, PREJUDICE AND IGNORANCE

Most people cheer the courage of disabled persons who strive to carry on full public lives despite physical limitations. Most people support maximizing public access for those whose physical disabilities require accommodations. However, others oppose expansion of disabled access *because this might cost money*. For some businesses, money trumps human rights.

Ironically, most businesses will financially *benefit* from architectural renovations that improve access. Business that fear the "cost" of installing a ramp, widening a doorway, or installing an accessible toilet will actually reap benefits from increased patronage by disabled persons — and their companions, friends and relatives. "Crocodile tears" shed because of fear of the "high costs" of ADA compliance should be balanced by satisfaction from attracting new paying customers.

If the prospect of new business is not sufficient, there are other reasons to provide access: (1) it is the right thing to do; and (2) disabled access has been legally required since 1970 in California, and violating the law can prove expensive. "Access lawsuits" will require defendants to pay damages and fees to plaintiff's attorneys and to their own attorneys.

There is another good opponent to access that we must reluctantly recognize: prejudice. There are those who dislike social encounters with disabled persons because of that old demon, simple prejudice. Prejudice has not disappeared from our society, even though out laws fully support the freedom to enter and use all public accommodations and not be held back by racial, religious or gender discrimination.

Although social acceptance of prejudice has significantly lessened in recent years, there are still those among us who suffer the personality defect of actual prejudice against other human beings, including disabled persons. As was recognized in hearings leading up to passage of the ADA in 1990:

> [O]ur society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other persons as a matter of right. The result is massive, society wide discrimination.[9]

Fortunately (or *unfortunately*), most discrimination against the disabled is due to "carelessness" rather than viciousness; to neglect rather than hatred; to ignorance rather than intentionality. At least that's what I'd like to believe.

Lawsuits to remove architectural barrier discrimination that blocks access do not require proof of any bad "intention" by owners or operators.[10] Focus is on barrier removal, not "punishment." Disabled rights attorneys may earn statutory attorney fees without the need to prove "actual" damages or a defendant's bad intent. Statutory damages may be proven for each Unruh Act violation (*Wilson v. Haria*, 479 F.Supp.2d 1127 (2007)), but one violation per visit even if multiple code violations. *Id.*

PROVIDING ACCESS CAN BE A "WIN-WIN" SITUATION

The ADA was enacted as compromise legislation, signed by a Republican President, George H. Bush in 1990, to: provide an opportunity for disabled persons to enforce access in government facilities (Title II), and in privately owned public accommodations (Title III); encourage lawyers to handle public interest cases and seek injunctive relief to improve access by providing the opportunity to earn statutory attorney fees, litigation expense and costs (ADA §505); save taxpayers' money by *not* setting up a nationwide enforcement bureaucracy but instead relying on private lawsuits for enforcement; and not provide a damages remedy under Title III and limit damages under Title II to instances of "intentional" discrimination. (California's legislature later provided a damages remedy by incorporating ADA violations as also constituting violations of California law [Civil Code §§ 51(f), 54(c) and 54.1(d)].

The primary purpose of "disabled access" lawsuits should remain removal of barriers to access. ADA Title III does not directly offer damages as an incentive, only injunctive relief and attorney fees. Plaintiffs' lawyers should join defendants in opposing suits that seek only damages and fees *without* removal of barriers.

Both California laws and the ADA have significanty improved public access. Fortunately it can be a "win-win" situation: The more access barriers removed, the more businesses that disabled persons (and their companions) can patronize. Voluntary compliance will result in less need for litigation and less need for paying attorney fees to plaintiff attorneys.

CONCLUSION

Our society has decided that the benefits of disabled access are so important that businesses *must* be required to make their premises accessible, *even if it costs money*. Disabled persons should not have to apologize for the cost of this public benefit, any more than we expect an apology from anyone else who enjoys "full and equal" access under the law. Northern District Chief Judge Thelton Henderson has noted that plaintiffs "who bring suit pursuant to the ADA do so in the role of 'private attorneys general' who seek to vindicate 'a policy of the highest priority'" and "confer a tremendous benefit upon our society at large..."[11]

Lawsuits remain necessary for enforcement of state and federal access laws. Each action's "ripple effects" will benefit other disabled persons ability to use the improved facilities, and will motivate "voluntary" access by other building owners. When all businesses and governmental agencies recognize that access enforcement is essential to disabled persons being able to function on an equal level, and that access cannot be denied based on disability any more than on race or gender, the movement toward "full and equal access" will be greatly accelerated. Taking proactive steps to provide proper access before any lawsuit is need would be a win-win situation for businesses and for their new disabled customers.

Most disabled rights attorneys are working for the day when our society is fully accessible and litigation is no longer necessary. But until that day, disabled access litigation will remain an essential tool in the fight to achieve an "accessible" society. ◆

— The Law Offices of Paul L. Rein are in Oakland. He has represented physically disabled persons in disability access civil rights cases for the last 38 years of his 45 years as a lawyer. He is the author of "Full and Access: Disability Rights Litigation in California" (2013), Word Publishers, available through Amazon.com.

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[1] *Molski v. Gleich* (9th Cir. 2003) 318 F.3d 937, at 954, FN 23.

[2] 1967 Report of the National Commission on Architectural barriers to Rehabilitation of the Handicapped.

[3] *City of Moorpark v. Sup. Ct.*, (1998) 18 Cal.4th 1143, 1160.

[4] *Kittok v. Leslie's Poolmart, Inc.*, 687 F.Supp.2d 953 (C.D.Cal. 2009).

[5] *Botosan v. McNally Realty*, (9th Cir. 2000) 216 F.3d 827, 836.

[6] *Blackwell v. Foley*, 724 F.Supp.2d 1068 (N.D.Cal.2010).

[7] *Botosan, supra.*

[8] *Wilson v. Haria*, 479 F.Supp.2d 1127 (2007); *Molski v. Foley Estates Vineyards* (2008) 531 F.3d 1043, 1048; *Rodriguez v. Barrita, Inc.*, C09-04057 RS, 2012 WL 3538014 (N.D. Cal. Mar. 1, 2012).

[9] S. Rep. No. 101-116, at 8-9 (1989) as quoted by attorney Lawrence Paradis in his comprehensive 2003 article in the Stanford Law and Policy Review, "Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services and Activities Accessible to All."

[10] *Donald v. Café Royale*, 218 Cal.App. 3d 168 (1990) (no intent needed re Cal. Civ. Code § 54.1); *Crowder v. Kitigawa*, 81 F.3d 1480 (9th Cir. 1996) (no intent needed under ADA Title II); *Helen L. v. Didario*, 46 F.3d 325,335 (3d Cir. 1995) (no intent needed under ADA Title III); *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661 (2009) (no intent needed under Civ. Code §51(f)).

[11] *Walker v. Carnival Cruise Lines*, 107 F. Supp.2d 1135, 1143 (2000).

The Last Steak

By Justice James Marchiano

In previous accounts Judge Carlton confronted Three Strikes, mental health, legal ethics and incarceration. Now he presides over a contentious civil jury trial.

IN DEPARTMENT 47 of the Bray Building, Judge Raymond Carlton reviewed his meticulous notes from *Serafina Abada and Edward Abada v. John Chambers, M.D.* in preparation for the motion for new trial. Three weeks earlier Judge Carlton imagined he had been observing Jack London's pugilist Tom King in a different arena, an aging warrior armed with words, not boxing gloves, mentally spent and bodily exhausted. Judge Carlton recently reread London's poignant short story, "A Piece of Steak," about a graying, over the hill boxer named Tom King who tried to use his last ounce of experience to vanquish a youthful, strong opponent to put food on the table for his family, to buy that nourishing piece of steak he so desperately needed before the fight and couldn't buy.

Plaintiff's attorney Frank McCauley was like King, a no holds brawler, in the twilight of his career, looking for one last victory. McCauley, now a seasoned, paunchy 71 year old, had fought in more civil trials than any other Contra Costa lawyer and needed his last piece of steak. Recent financial times had been hard on Frank McCauley — the 2008 financial crisis swallowed up the equity in his home and depleted his 401(k). After leaving a five-lawyer partnership during his tumultuous divorce, he had been in solo practice for a number of years and no longer had a line of credit left to finance cases. Time was running out. McCauley sensed this prize fight in Judge Carlton's courtroom was his last hurrah, a chance to walk away with hands held up in triumph, to grab the brass ring of a potential seven figure recovery, and help deserving clients.

The case management statement announced a ten day, grueling match. Settlement sessions before JAMS' best personal injury mediator could not settle the case. Dr. Chambers would not capitulate.

McCauley knew from his 47 years as a lawyer the most difficult case for a plaintiff to win was a medical negligence trial. The defense won nearly 90% of the time, especially before Contra Costa juries. And this time he was a 9 to 1 underdog facing the best lawyer from the top medical malpractice firm in the East Bay, ranked number one in the heavyweight division and 30 years his junior.

Brian Anderson was the Doctors Protective Insurance Company's Paladin, traveling to various Bay Area venues where he successfully defensed a string of ten medical cases in four years. Boalt Hall educated, Anderson was tutored by his older partners in the craft of defending doctors, divining the meaning of medical records, carefully constructing hypothetical questions understandable to lay people on the standard of care, and scripting an accused doctor in dress and language to transform a poor bedside manner into an engaging personality. Anderson took the art of defense several steps further with effective Power Point presentations, digitized records easily retrievable on his laptop, and three dimensional anatomical images that jurors could grasp. He personally trained an entourage of in-house paralegal medical assistants, graphic arts consultants, and associates with instant connection to online medical cases and medical books. The firm had easy access to a stable of leading defense experts from Stanford and UCSF medical schools.

McCauley was old school, using a trial binder indexed in topical hand written manila folders, his own highlighted, earmarked deposition summaries. His "PDA" was his longtime secretary, Joan, who knew how to subpoena witnesses and documents, prepare jury instructions and give him fresh black coffee in the late afternoon. She was a whiz with computer word processing and the latest digital advances.

Brian Anderson worked out regularly at the Renaissance Fitness Club to keep his body trim and mind sharp. He cultivated an appealing presence before jurors. Frank McCauley struggled with high cholesterol, high blood pressure, and high anxiety about the fate of Serafina Abada who needed a win as badly as McCauley did.

Two years before the trial, the Bar Association Lawyers Referral Service sent Edward Abada to McCauley for help with his wife's plight. No one else would take the case. The story was simple with a disastrous ending. Dr. John Chambers, board certified ob/gyn, admitted his patient Serafina Abada, age 58, in good health, to Central Valley Hospital for a routine hysterectomy for a uterus that had developed large polyps. Edward explained that after the uneventful surgery, his wife of 40 years, during post recovery lost consciousness. Now she was in a long term convalescent facility in a coma vigil, not comprehending, in need of 24-hour care. Her eyes were open to the movement of visitors, but without signs of recognition. Imprisoned in herself, Serafina had no response to external stimuli.

Edward and Serafina had been inseparable during their marriage. She prepared his breakfast every morning at 6:00 before he left for work as a truck driver for Federal Express. Now he faithfully stopped by each morning before work to feed his wife and to exercise her arms and hands for muscle therapy and to feel the touch of her soft skin that he knew so well. He returned after work to help feed and bathe his wife, not out of duty but from the love that flourished with 40 years of memories and the hope she would somehow recover. Dr. Chambers had spent 10 minutes attempting to explain what might have caused the problem. Edward did not understand the explanation, and Chambers did not return any of Edward's later calls.

Although California law capped general damages for pain and suffering at $250,000, the law allowed recovery of the cost of past and future medical care for Serafina, estimated to be over a million dollars, well beyond the limits of Edward's health insurance coverage for his wife. To obtain the humane, compassionate care Serafina required, McCauley had to win the case. Edward did not understand the legal nuances of loss of consortium, but McCauley knew it was priceless to him.

McCauley investigated the case. He obtained hard copies of the digital medical records and sent them to several consultant medical experts —unshackled, retired doctors now willing to testify against members of the profession. The reports came back mixed with criticism of the differential diagnosis. Serafina had suffered an episode of extreme hyponatremia, a severe depletion of her electrolytes, particularly sodium. The confirming lab test was ordered after the operation. The recovery room nurses' entries and the progress note of th00e attending anesthesiologist did not shed much light on the cause. A neurologist's consultation note was inconclusive. Dr. Chambers' progress note, with an entry at 7:00pm after the procedure, was unusual in its length. It posited several theories for his unconscious patient, and a battery of lab and neurological tests were ordered ▶

as well as a spinal tap and liver biopsy. Usually progress notes are short, rarely over a page, but Chambers' note was three-and-a-half pages long with references to medical journals. The detailed exposition postulated several possibilities, including Reyes Syndrome that attacks the brain and liver and can lead to unconsciousness. McCauley learned from the note that Reyes Syndrome is generally found in children, with aspirin involved, and rarely develops in adults. But some of the laboratory data was supportive of the Reyes Syndrome theory in Serafina's case. One of the experts McCauley consulted supported a case against Dr. Chambers' care, enough to warrant the filing of a complaint.

The depositions were difficult, like a twisting roller coaster ride plunging into darkness. Several long tenured Central Valley Hospital nurses testified about their urgent calls to Dr. Chambers' cell phone and answering service when the patient remained non responsive in the post recovery room. Cautious in their answers and protective of Dr. Chambers, they assumed the doctor received their call because his progress note indicated an examination time of time of 7:00pm, although none of those who were deposed remembered talking to him. Like good soldiers they circled the wagons.

In an all-day deposition, Dr. Chambers treated McCauley with condescension as he used his progress note as a script to carefully explain a medical quandary. Anderson guided Dr. Chambers through the shoals, with speaking objections, lifelines, and strategically timed recesses to control the deposition. McCauley, however, treated the deposition as a sparring session to size up his adversary. Dr. Chambers was self-confident but combative and defensive. As McCauley, wet with perspiration, drove back to his office after the deposition, he felt in his gut that Chambers was hiding something. In his 47 years as a plaintiff's attorney McCauley had never seen such a detailed, annotated progress note. Despite that note, McCauley instinctively knew Serafina deserved better.

The discovery preliminaries led to stepped up trial preparation, and then to the Monday morning 9:00 call for the jury to Department 47 for the main event. McCauley was satisfied with the seven men, five women jury and only used three peremptory challenges. Anderson used all six of his peremptories. None of the jurors showed an inclination to subjectively favor a professional in a caring profession over the plaintiffs.

McCauley realized the case was closer than the odds. Edward was a sympathetic, appealing witness. Serafina's condition and the need for lifetime care weighed in their favor, but the medical complexity and Dr. Chambers' well versed experts in contrast to the plaintiffs' one retired gynecologist expert tilted the odds toward the defense. McCauley knew the case ultimately rested on whether the jury trusted Dr. Chambers.

A hard copy of the digitized hospital records with the original digital record was received into evidence as plaintiff's exhibit 1 and 1a. Most of the jurors took notes and placed them in their own confidential binders at the end of the day for safekeeping by the bailiff. The jury wanted to do what was right.

Both attorneys were in their best form in opening statements, and direct and cross examination of witnesses. The trial progressed with blows and counter blows and some carefully timed uppercuts. There were few clinches. Anderson grabbed the jurors' attention with a multimedia presentation of digital exhibits, deposition excerpts placed on video screens, and medical graphics worthy of Madison Avenue. McCauley countered with incisive, understandable questions honed from years of practice. Edward left some of the jurors with tears in their eyes as he explained how much he loved Serafina, how he helped care for her each day, and how lonely he felt in his empty home.

Exuberant youth appears brighter than fading age. During the noon recess each day, McCauley washed his face with cold water to appear revitalized and changed into a fresh dry dress shirt that Joan put in a separate" to do" briefcase. He did not want Anderson or the jury to know how old he felt or how tired he was.

Judge Carlton could feel the tension as each side pressed forward without producing any knockdowns. The judge denied the defense motion for a non suit after McCauley rested his case. McCauley watched the jurors' reaction during his presentation, worried that he had not been persuasive enough and was behind on points. McCauley knew somehow he would have to come from behind during the defense case. Examination of the defense witnesses went as McCauley generally expected. The defense experts held their ground with a few concessions as they used Chambers' progress note to justify his judgment. McCauley could see that Anderson was laying the groundwork for a devastating, dual defense from the standard jury instructions: a doctor is not necessarily negligent if his efforts are unsuccessful or if he makes an error that was reasonable; and he is not necessarily negligent because he chooses one medically accepted method of treatment or diagnosis and it turns out another medically accepted one would have been a better choice. The court recessed early for the day at 3:00pm, in the ninth round, with McCauley on the ropes as the bell sounded. The last witness in the last round was Dr. Chambers at 9:00am.

In the corner of the empty courtroom Frank McCauley tried to regroup and again studied the timeline from the notes, orders, and lab results, from the time of admission to the post operative recovery room through the next day. Something wasn't right. He called Joan to discuss some last minute jury instructions and shared his misgivings with her. As he explained the timeline of events, she asked him if he had verified all of the times from the metadata on the original digitized hospital records. He knew from his classic Greek course at Santa Clara "meta" meant "with," or "among," and could be used to mean something "new." But what was metadata? Joan explained that besides the images of the entries in the records, the original disc, exhibit 1a, would also contain additional imbedded data showing the precise dates and times when entries were made, and by whom. While McCauley waited nervously in the courtroom, Joan contacted a computer specialist who arrived at the Bray Building at 4:30pm with a retrieval application for accessing the digital record, exhibit 1a. The result was stunning. Although Dr. Chambers had entered the time of his examination conveniently close to the nurses' call to him, the metadata showed his long entry was actually made hours later at 9:58pm. Chambers had not responded to Serafina's plight in a timely manner as he said under oath in his deposition. He was not at the hospital when she needed him most and the staff was relying on him for follow up care. His note was a lie, a cover up.

As the bell for the final round sounded, a self-confident Dr. Chambers looked directly at the jurors, answered Anderson's carefully prepared questions, and used Power Point displays to explain the conundrum that confronted him after the hysterectomy and why the mysterious Reyes' Syndrome might have been the culprit.

Fear of losing emboldened McCauley who devised a cross examination limited to 25 minutes, to maximize the impact of what he wanted to accomplish. He summoned up the strength for one final round. Dr. Chambers had no choice but to agree that a doctor's progress notes must be accurate, including the time specified, because nurses and other doctors rely on the continuity of notes for proper patient care. Hippocrates himself would have demanded nothing less. The jurors looked at their copies of the progress note as McCauley committed Chambers to the 7:00pm entry. Then the old fighter held up the digitized original and bore in on the defendant with the pivotal question. "Doctor, if you were at the patient's side at 7:00pm, why does the original digital time from the records department show your own entry at 9:58pm?" A basic trial rule is never ask an opposing witness "why;" but this question was like a taut vice on Chambers, and proved the exception to the rule.

Dr. Chambers looked like a leaf falling from a sudden gust. The silence was agonizing as he struggled to explain the discrepancy. He could not rest on the ropes or clinch his opponent. Anderson called for a short recess, but Judge Carlton denied the request. Jarred by a quick flurry of follow up punches, Dr. Chambers was forced to admit he had left the hospital after the operation and was at an important social event because he did not expect any complications after an uneventful procedure on a healthy patient. He missed the calls for help, and when he later found out what was happening, prepared the long note with researched citations to Reyes Syndrome because he indeed believed it was the cause. Apologetically he asserted it would have made no difference if he had been at Serafina's bedside and tried to explain why. A reeling Anderson attempted to counterpunch from the stunning blow by developing the same theme in his rehabilitative redirect examination. McCauley asked no more questions. The defense rested. Closing arguments commenced.

Anderson forcefully argued lack of causation and failure of proof to the jury. No one really knew what caused the coma, and certainly Dr. Chambers' absence and improperly timed entry made no difference. Like a medical school professor Anderson took the jury through the records and testimony that supported his fall back defenses. The jury remained attentive. On rebuttal, McCauley delivered a final blow with a quote from Hippocrates and the commandment *"Thou shall not bear false witness."*

Everyone in Department 47 waited anxiously for the jury's decision as the foreperson as part of the legal ritual handed the signed form to the bailiff to give to the judge for his review, and then on to the clerk. The clerk's voice reverberated as she announced the verdict: "We, the jury, find in favor of plaintiffs in the sum of $1,790,975."

Three weeks later, as he reflected on the trial, Judge Carlton concluded 12 jurors saw Dr. Chambers played with the truth and failed Hippocrates' imperative, "Do no harm." Dr. Chambers' fabricated note, his absence during a critical time of need, and his seemingly contrived Reyes Syndrome explanation were decisive. Judge Carlton denied the motion for new trial.

Frank McCauley earned that last piece of steak. Jack London would have been proud. ◆

MEMBER *news*

Jung Hye Lee v. Alameda-Contra Costa Transit District, et al.
Alameda County Superior Court
Settlement: $20,452,502.15
(Largest settlement ever paid by a public bus company in California)
Attorney: Luke Ellis, Gillin, Jacobson, Ellis, Larsen & Lucey

Plaintiff, an 18 year old female student, was a pedestrian attempting to catch an AC Transit bus in Montclair on a rainy night. Plaintiff saw the bus approaching the bus stop at the intersection of Moraga and LaSalle Avenues and thought it was going to stop; so she ran from under an awning across the street, crossing three lanes of traffic against a red light. She was run over by the bus as it passed by the bus stop and through the intersection on a green light. The accident caused catastrophic injuries, including amputation of Plaintiff's left leg, pelvic fractures and injury to her right leg.

A two-month police investigation and report found Plaintiff exclusively at fault, with no associated factors on AC Transit or its driver. Plaintiff was cited for violation of California Vehicle Code §21456 (stating no pedestrian shall start to cross the roadway in the direction of the signal with a flashing or steady "DON'T WALK" or "WAIT" signal). However, Plaintiff's counsel started their own investigation, re-interviewing witnesses and canvassing the neighborhood to secure important new evidence and testimony. Plaintiff's experts evaluated and analyzed the intersection to document the movement of buses and pedestrians in the area, utilizing a 3-D engineering survey. A detailed examination of hours of onboard bus surveillance videos of the accident produced critical new facts. Examination at depositions of bus employees and witnesses produced testimony demonstrating the driver's ability to see the plaintiff in time to recognize the need to stop for her.

Defendants claimed Plaintiff was solely at fault for darting out in front of a moving bus at night and in the rain. Further, Defendants claimed the bus had the green light and the right of way. Also, Defendants claimed the driver acted reasonably under the circumstances given glare and visibility of conditions at the scene.

Laura Tindall and Erin Tindall v. Alameda-Contra Costa Transit District, et al.
Alameda County Superior Court
Attorney: Luke Ellis

Settlements:

Contract Sweeping Services, Inc.:	$1,000,000
Kent's Oil Service:	$150,000
Oleson Trucking, Inc., dba Cooper Trucking:	$ 100,000
Daniel Lew:	$50,000
Gregory Hoedt:	$15,000
Frank Herman/Mid Coast Transportation, Inc.:	$15,000
George Reed, Inc., dba Table Mountain Quarry:	$10,000
Total	**$1,340,000**

Trial Verdicts:
County of Contra Costa: $11,700,796
(Largest wrongful death jury verdict ever awarded in Contra Costa County and the largest against the county itself)
State of California (CHP): Defense Verdict

Plaintiffs' decedent, William Tindall, was killed when he was struck by a motorist (Gregory Hoedt) while assisting another driver (Daniel Lew) on Marsh Creek Road in unincorporated Contra Costa County in August, 2008. The incident occurred during a chip seal construction project on Marsh Creek Road.

Defendant Hoedt was cited by the CHP as the "primary cause" of the accident. In light of Mr. Hoedt's minimum insurance policy limits, Plaintiffs' counsel investigated and then brought claims against the two drivers, five subcontractors, and the County and the State, which were alleged to jointly control the road where the incident occurred. Plaintiffs pleaded negligence or negligent undertaking causes of action against the subcontractors, and negligence causes of action against the drivers, as well as statutory dangerous condition causes of action against the public entities.

The case resolved by settlement in approximately September, 2011 as to all defendants except the County and State. A one-month jury trial took place, resulting in the verdicts described above. As a result of post-trial motions determining both credits applicable to the verdict as a result of pre-trial settlements, the Court's entered an Order on October 28, 2011 setting forth the total unallocated judgment in favor of the Plaintiffs in the amount of **$11,528,927.60**.

Doe v. Doe Transportation Authority (confidential)
Santa Clara County Superior Court
Attorney: Luke Ellis
Settlement: $8,000,000

On December 22, 2008, Plaintiff, a 17-year old college student, was crossing El Camino in Los Altos. Plaintiff was run over by defendant bus in the process of making a right hand turn.

Plaintiff claimed that the defendant driver was inattentive at the time of the accident and was talking on a speaker cell phone. Plaintiff claimed that the driver failed to see plaintiff crossing the street and continued turning. Defendants claimed the plaintiff was negligent and started crossing after the bus was already in the process of making its right turn.

Plaintiff suffered a right leg amputation below the knee. The case settled in January 2012.

Doe v. Doe (confidential case)
San Francisco County Superior Court
Attorney: Luke Ellis
Settlement: $7,000,000

This case involved a motor vehicle collision in Kings County, California. On August 31, 2008 in the early morning hours, a father and his two minor sons (7 and 11) were passengers in a pickup truck, operated by the boys' uncle on their way to a fishing trip. The pickup truck pulled out from a stop sign and was broadsided by a tractor/trailer rig. The driver of the pick-up died in the accident. The 7-year old minor passenger died of his injuries at the scene; his parents brought wrongful death claims. Both 11-year old passenger and his father suffered traumatic brain injuries.

The northeast corner of the intersection was planted with crops 6-10 feet high at the time of the incident. Plaintiffs claimed the crop impaired the visibility of drivers on roadways adjacent to the field. The big rig driver was operating the tractor/trailer pursuant to a sub-haul agreement with Corporate Defendant No. 1. Plaintiffs also claimed that, at the time of the incident, the big rig driver was also acting as an employee of a Corporate Defendant No. 2 and that the accident occurred within the scope of employment of both corporate defendants. All defendants denied dual employment and denied negligence by the big rig driver. Defendants claimed the accident was the sole fault of the pick-up truck driver who had run through a stop sign and was required to yield the right of way. Defendants also claimed the two minor plaintiffs were not wearing seatbelts.

The case settled in September, 2012, during the second week of trial and after the Court's denial of a directed verdict motion.

Doe v. Doe (confidential)
Alameda County Superior Court
Attorney: Jim Larsen, Gillin, Jacobson, Ellis, Larsen & Lucey
Settlement: $3,689,932.80

The 81-year old Plaintiff suffered a major neck fracture when he fell off the deck of his daughter's recently purchased lake house in Copperopolis, California. Plaintiff fell onto a lower structure below; the deck was missing a section of railing but had decorative plants across the opening. Plaintiff was pulling the cover off patio furniture at the time of his fall. There were no witnesses to the accident, although his wife found him shortly afterward.

Plaintiff was airlifted to Memorial Medical Center in Modesto where he underwent emergency decompression and repair of two levels of his cervical spine with placement of an external halo. He subsequently received critical care rehabilitation at the Veteran's Hospital in Palo Alto, where he was an in-patient for approximately 2.5 months. He was rendered an incomplete quadriplegic at levels C1-C4, as a result of his injuries and requires full-time attendant care.

Defendants argued Plaintiff had been to the house on numerous occasions in the past, was familiar with the layout of the deck and railings, should have taken more care and therefore was responsible for his own injuries. Plaintiff was able to show, based on his location on the deck where he was found, that the missing section of railing led directly to the fall, was in violation of the California Building Code and constituted an unreasonably dangerous condition of property. ▶

The case settled following mediation in October, 2013 with the Honorable Ellen James (Ret.) of JAMS (San Francisco).

Doe v. Doe (confidential)
Sacramento County Superior Court
Attorney: Luke Ellis
Settlement: Total $2,150,000
(unallocated sum)

Plaintiffs alleged damages for the death of Decedent No. 1, who was killed along with two others when the car they were in was struck head on by a drunk driver on August 30, 2012. Counsel was retained to represent the surviving spouse of Decedent No. 1, who was also a passenger in the car and suffered his own injuries, as well as the couple's four daughters, including two minors.

Although the liability of the adverse drunk driver was clear, the liability (and insurance coverage) of the registered owners of the adverse vehicle was not. In addition, the potentially available settlement proceeds were not nearly sufficient to adequately compensate the families of the decedents and the surviving injured passenger. Additionally, claims were made that the decedent driver of the car in which plaintiff was a passenger was also at fault, further complicating matters.

The case settled in March, 2014 after a mediation session with the Honorable Ronald Sabraw (Ret.) of JAMS (San Francisco) and after complicated and delicate subsequent negotiations.

Hye Ock Lee, et al. v. Florbele M. Desouza
Alameda County Superior Court
Attorney: Jim Larsen
Settlement: Total $1,200,000
(Hye Ock Lee, $1,100,000; Jae Han Shin, $100,000)

Plaintiff Jae Han Shin and his mother, Hye Ock Lee, were walking during the daytime on the sidewalk in front of a home in Hayward, in the exclusive, gated subdivision where they live. A vehicle, driven by Defendant Desouza was traveling in the opposite direction on the same road; Defendant's vehicle veered without warning into the oncoming lane, hitting a concrete curb and heading straight for Plaintiffs. Mr. Shin was able to dive out of the way, fracturing his nose in the process. However, Mrs. Lee was struck with enough force to launch her into a bush — she was obscured from view for some time until emergency crews and neighbors found her.

Mrs. Lee suffered blunt force trauma to her head with bleeding of the brain, a collapsed right lung, fractured left femur, lacerated liver, fractured rib, and emotional distress from the accident and resulting injuries. Mr. Shin suffered a fractured nose, sore legs and emotional distress from the accident and from the experience of witnessing his mother being severely injured.

Unfortunately, shortly before the accident, Mrs. Lee had completed a course of treatment for cancer, which included chemotherapy and ongoing medications. She was in the process of preparing to return to her work as a Registered Nurse when the accident occurred. Most likely because of the medications she had been given to treat her cancer, Mrs. Lee's femur fracture failed to heal properly, despite several additional surgeries.

Plaintiff's counsel worked closely with Mrs. Lee's treating physicians to determine and confirm that she would continue to require additional medical care; they were also able to confirm the full extent of Mrs. Lee's ongoing disability due to the leg fracture and that she would be unable to return to her work as a nurse. This enabled plaintiff to show that in addition to her severe injuries, the accident resulted in extensive lifetime wage loss damages.

Andrea Linstad, Don Linstad v. MV Transportation, Inc., et al.
Contra Costa County Superior Court
Attorney: Jim Larsen
Settlement: Total $1,000,000
(Andrea Linstad: $925,000; Don Linstad: $75,000)

On July 30, 2010 in Martinez, Plaintiff Andrea Linstad exited the County Connection bus at the AmTrak station and was walking with other passengers to a connecting bus, as she did at the end of each work day. The second bus started to pull away as Plaintiff attempted to board. The bus driver continued to drive away while Plaintiff was banging on the door, causing Plaintiff to lose her balance and fall to the pavement, landing on her right knee and both hands.

Plaintiff suffered low back and knee pain as well as tingling in her right arm and hand. Xrays showed a burst fracture in the mid-back at the T-12 level. A later lumbar MRI scan also demonstrated serious problems at the lumbo-sacral area, particularly at the L3-4 level.

Ultimately, Plaintiff underwent spinal fusion at the L3-4 level, to stabilize the spine and decompress the lumbar region. Subsequently, Plaintiff began to complain of right arm weakness and was readmitted to the hospital. A brain MRI confirmed a right lacunar stroke with some lesser signs of ischemic infarcts on the left side. This worsened Plaintiff's right leg weakness and added arm weakness to her status. She was diagnosed as having a right hemiparesis and was transferred to a rehabilitation facility for therapy. Due to her injuries, Plaintiff is completely and permanently disabled.

The defendant bus company contended Plaintiff was solely at fault for the ▶

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accident and claimed the bus doors were closed and the bus was leaving the stop when Plaintiff reached out and contacted the bus. Defendant also claimed Plaintiff suffered only minor injuries, the T-12 fracture was preexisting and any subsequent problems with lower extremity weakness was due to pre-existing diabetic neuropathies. Defendant's medical expert argued the lumbar spine surgery was unnecessary and Plaintiff's stroke was the result of not being restarted on baby aspirin soon enough after the unnecessary procedure.

Plaintiffs' counsel took numerous depositions of Defendant's bus drivers, obtained a copy of the on board video taken at the time of the accident and confirmed that the bus driver should have noticed Plaintiff's approach and should have waited for her to determine if she wished to board or not. Plaintiffs' counsel also retained and worked with several medical experts who, after having reviewed all of the extensive medical file, including radiology films, concluded that the accident was the direct cause of Plaintiff's lower extremity weakness and need for lumbar spine surgery, as well as for her current level of total disability.

Michelle Doe, Tarek Doe v. Timothy Fresch, Eric Fresch
San Francisco Superior Court
Settlement: $600,000
Attorneys: Eustace de Saint Phalle, Michael E. Gatto, The Veen Firm, P.C.

Plaintiff, a 47-year-old IT manager, was struck in a head-on collision when the defendant failed to yield and made a left hand turn into the plaintiff's left front end of her car. Michelle Doe injured her neck and suffered a 1-millimeter herniation of her C5-6 and a 2-millimeter herniation of her C6-7, affecting her ability to work, and her ability to perform household duties.

Defense contended that the collision occurred at under 20 mph and could not have caused the plaintiff's injuries. Michelle Doe did not report pain on the scene, but sought medical treatment for neck pain later that month. Plaintiff claimed she would require future surgery and ongoing pain management resulting in future medical charges of $150,000-$250,000.

The case settled for $600,000 at the second session of mediation seven weeks before the jury trial.

Lynda and Employer Intervenor v. Doe Land Owner
Contra Costa Superior Court
Settlement: $4,200,000
Attorneys: Eustace de Saint Phalle, Michael E. Gatto, The Veen Firm, P.C.

Plaintiff Lynda, 46, was injured while in the course of employment with Intervenor. Intervenor leased defendant Doe premises to hold a Model UN. Plaintiff fell as she backed up the center aisle while taking pictures of winners on the stage. She fell on her coccyx and struck her head on the armrest of a seat adjacent to the center aisle. Plaintiff claimed that the defendant premises had to make the auditorium safe for all users and that the steps in the center aisle posed a tripping hazard and a "human factors trap." Defense contended that the plaintiff and her employer were entirely responsible for the incident. Intervenor claimed that the auditorium was not a workplace and therefore it had no duty to inspect or warn the plaintiff. Plaintiff claimed $350,000 in past medical expenses; $4 million in future medical expenses and $320,000 in past and future wage loss. The case settled for $4.2 million. ◆

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