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atissue

A **STONE CHA & DEAN** PUBLICATION

Connecting you to trending and relevant legal developments in California

inside this issue:

Q&A with Kristi W. Dean

Managing Partner Kristi Dean is a skilled attorney with a variety of interests. In this Q&A article, Kristi shares details about her hobbies and her path to a legal career.

When did you know that you wanted to become an attorney?

My undergraduate degree was in psychology, and I initially wanted to become a "profiler" (this was before *Silence of the Lambs* and the multitude of TV shows that glorify the profession). In 1980, I was taking classes toward a master's degree and realized that the "quick path" to my goal was a five year program in criminal law/psychology that combined a Ph.D. and J.D. The colleges that offered that program were on the east coast, and I didn't think I could handle the cold weather and moving so far away from my family in Fresno. So I decided to go to law school first, and then go back to get my doctorate in psychology. My first job was working for a criminal law attorney and I found that our then-average clientele was much more interesting from a distance. I then worked for a civil litigation firm and the clerking experiences were so enjoyable, I decided to stay in civil law.

What is your favorite television show/film about the law?

Favorite TV show: *Law & Order*, especially *Criminal Intent*. Movie: *My Cousin Vinny*.

Who is your favorite TV lawyer?

Perry Mason. I use the objection "incompetent, irrelevant, and immaterial" whenever I can. It covers practically everything.

What is your ideal vacation day comprised of?

I prefer tropical ambience, spending my time at a pool bar, with an umbrella drink in my right hand and a good book in my left.

Do you have any pretrial rituals/ superstitions?

I start every trial wearing a black suit and end the trial (giving closing argument) wearing a light colored suit. I also carry my *Art of War* pocket book in my purse, in case I need inspiration.

Over the course of your career, what is the greatest lesson you have learned about being an attorney?

Never assume anything and always do your homework. Trials are seldom predictable and when you get too confident, you lose the case you should have won.

What is the best part of your position as Managing Partner at SCD?

The folks at SCD are all extremely professional, smart and interesting, which makes it routinely fun and extremely fulfilling. We are all here for the better part of our waking hours. In the perfect world I want everyone to feel good about coming to work, and to be confident that our firm is more than the sum of its parts. My job is to keep the mechanics of the operation properly maintained, and keep us steered towards the common goal of giving our clients a quality work product for a competitive price.

Share some of the most memorable words/phrases your clients have used to describe you.

In my young lawyer days I was described as fearless and a "bull dog" which was a bit horrifying. More recently, I was described as my client's "guardian angel." I definitely prefer the latter.

What do you believe is a lawyer's primary role in representing a client?

A lawyer is an individual whose principal role is to protect clients from other members of the profession (Author unknown).

If you could practice law in another time period and/or geographic region, which would it be and why?

I would like to be a barrister in the U.K. They get to wear wigs and black robes. When I first started practicing law in 1984, courts required white shirts on men, and skirts on women. Now the attire is a lot more casual, and I think it loses a little of the ambiance of the old days.

What are some unique qualities about your clients?

I am honored to represent a cross-section of family-owned small businesses, whom I have represented for decades. I have "grown up" with these clients, and now I see their children taking over the business as the business continues to grow. While it does make me feel a little aged at times, it also is gratifying to see them prosper.

Organ Donor Can Sue for Association-Disability Discrimination

By Robyn M. McKibbin, Esq.

In September 2010, Scott Rope was hired by Auto-Chlor. From his hiring through December 2010, Rope told his employer that he would need time off because he was scheduled to be an organ donor for his sister who had suffered kidney failure and required a transplant.

In November 2010, Rope became aware that the Donation Protection Act ("DPA") would go into effect on January 1, 2011. The DPA requires private employers with 15 or more employees to grant a paid leave of absence up to 30 days for organ donation. Rope's doctor advised that he would likely need 30 days leave to recover from the surgery and organ loss so Rope requested the leave. Auto-Chlor did not respond to Rope's request.

From September to December 2010, Rope received satisfactory performance reviews and posed no disciplinary problems. On December 30, 2010, two days before the DPA became effective, Rope's employment was terminated purportedly for poor performance. Rope sued claiming the real reason he was fired was Auto-Chlor's desire to avoid providing him paid leave or to accommodate his anticipated work restrictions when he returned. Auto-Chlor challenged the complaint several times. The trial court sustained Auto-Chlor's demurrers, denied Rope leave to amend his complaint, and dismissed the case. Rope appealed.

The Court of Appeal held that Rope was precluded from suing the employer for violation of the DPA because the law could not be applied retroactively. However, the employer could potentially be liable for association disability discrimination under California's Fair Employment and Housing Act ("FEHA"). Under FEHA it is unlawful for an employer to terminate or otherwise discriminate against a person in terms, conditions, or privileges of employment because of a physical disability. FEHA's prohibition against discrimination includes a perception that the person has a disability or is associated with a person who has, or is perceived to have, a disability. FEHA's pivotal purposes are to prevent, eliminate and remedy workplace discrimination.

There were very few cases on point so the Court of Appeal looked to cases determined under the federal Americans with Disabilities Act. Under federal law, there are three types of association discrimination claims: (1) expense, i.e., an employee is terminated because his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) disability by association, i.e., the employee's homosexual companion is infected with HIV and the employer fears the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); and (3) distraction, i.e., the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours. Rope's case fell into the expense category.

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Home Alarm Contracts: Are You Protected or Should the Homeowner Beware?

By John S. Cha, Esq. and Leslie A. Blozan, Esq.

A client suffered a home burglary while away on vacation. A wall safe tucked in a closet was removed resulting in significant losses. The client found out about the burglary the next day when the police contacted him to report the burglary. A neighbor reported seeing several men carrying a metal case out of the house but, because he didn't hear the alarm system, the neighbor didn't think anything was awry. The next morning, the neighbor contacted the police after seeing the front door ajar. The police obtained the client's contact information from the home alarm company. During the burglary, the front door was smashed in and windows were broken. The home alarm system did not trigger an automatic call to the local police.

Now, a reasonable person would naturally think that the home alarm company should bear some responsibility because the alarm system to whom the client pays $75 each month should have triggered an automatic call to the police that may have mitigated some of the losses from the burglary. California law does not support that and the home alarm company will "get away" with it.

Alarm company contracts typically contain a liquidated damages clause that limits the company's liability to a stated dollar amount. California law supports enforceability of liquidated damages clauses and rejects attempts to avoid the effect of the clause by pleading gross negligence. Since the relationship between the parties arises out of contract, collectible damages are limited to contract damages.

The Contract

The alarm company's contract provided that it is not an insurer and that it does not warrant that the services provided will "totally" prevent losses or injuries. The implication is that there will be some protection, although less than "total." But the contract does not state that the alarm system will perform as expected nor that the alarm system will automatically trigger notification to the police in the event of a break-in.

Rather, there are several clauses that attempt to disclaim liability and are so broad that they effectively absolve the company of any obligation for anything. They read:

- The company assumes no liability to the subscriber's loss and injury in case the alarm doesn't function as it is desired or it is due to the company's negligence.
- The subscriber agrees that if company should be found liable for failure to respond due to company's negligence, company's liability shall be limited to $300 as liquidated damage and not as a penalty. Liquidated damage clauses are allowed by law and are often upheld.

The Law - Claims of Negligence and Gross Negligence

Courts are reluctant to recognize the right to sue for any claim beyond breach of contract. In *Fireman's Fund Insurance Co. v. Morse Signal Devices* (1984) 151 Cal.App.3d 681, an insurance carrier sued an alarm company claiming that the company's

negligence in alarm monitoring resulted in losses that Fireman's Fund had to pay to its insureds. There, as here, there was no claim that the alarm company caused the fires or committed the burglaries, only that the company failed to prevent those events. In rejecting the plaintiff's action, the court noted: "… [P]laintiff makes no claim that a duty was owed to it outside of that created by the contract, and no breach of duty was alleged other than a failure to render the contracted-for service. Still the nature of the duty owed and the consequences of its breach must be determined by reference to the contract which created that duty."

In *Continental Insurance Co. v. American Protection Industries* (1987) 197 Cal.App.3d 322, after a burlgary, it was discovered that the homeowner had paid for a monitoring system that was never properly installed and, consequently, non-functional. *Continental* sued for subrogation based on gross negligence and fraud. The *Continental* court expressly rejected a separate cause of action for "gross negligence" and rejected the argument that gross negligence is a different tort from "ordinary negligence."

Case law is clear that, where the duty allegedly breached is a duty contemplated by a contract, a plaintiff may only sue for damages provided in that contract.

So, if you think your $75/month payments to the home alarm company give you protection against burglary or fire loss, read your contract again and make sure the services are specifically stated and that the liquidated damages provisions are high enough to justify the monthly costs. What you're really paying for each month may just be deterrence that, frankly, you can buy for a few bucks by planting a sign in front of your house.

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Rope alleged that his leave of absence under the DPA would cause Auto-Chlor to incur certain expense and Auto-Chlor terminated his employment on the pretext of poor performance two days before the DPA took effect. The Court held the reasonable inference was that Auto-Chlor acted preemptively to avoid an expense stemming from Rope's association with his physically disabled sister. Thus, Rope's lawsuit against his former employer was revived.

The Court of Appeal expressly stated that its ruling "should not be interpreted as a siren song for plaintiffs who, fearing termination, endeavor to prepare spurious cases by talking up their relationship at work to a person with a disability; such relationships do not, by themselves, give rise to a claim of discrimination." If an employee's association with a disabled person plays no role in an employer's decision to terminate, there is no disability discrimination.

Employers should train their supervisors on the breadth of FEHA's protections to ensure that they can properly address issues that may arise with employees who do not appear to fall into a protected category at first blush.

1989-2014: Happy Anniversary! 25 Years of Legal Representation

Thrust into a courtroom the first business day after he was sworn in as an attorney, Greg Stone has built a successful and rewarding relationship with SCD client, Ralphs Grocery Company. Greg's representation of Ralphs has encompassed a myriad of adventures, such as slip-and-falls, "swoop and squat" cases (intentional setups of accidents involving big rigs), false imprisonment and civil rights allegations and other fascinating factual scenarios. His courtroom success has, and continues to be, aided by the skilled adjusters, representatives, and team members of the Company. Ralphs has been instrumental in Greg's success as a well-rounded trial attorney, and SCD looks forward to the next 25 years!

In The Headlines: A Preview of California's New Laws

By Angie Jones

Governor Brown signed approximately 800 bills into law last year and most have already gone into effect. Immigration and labor and employment laws are some of the practice areas impacted by the new legislation.

Admittance to the California State Bar: The Case of Sergio Garcia

Assembly Bill 1024 ("AB 1024") (effective January 1) allows undocumented immigrants who satisfy certain requirements to be admitted to the State Bar. It played a crucial role in the case of *In Re Sergio Garcia* where the California Supreme Court considered whether §1621 of Title 8 of the United States Code precluded Sergio Garcia from admission to the California State Bar because he was an undocumented immigrant.

Under Section 1621, certain undocumented immigrants are not eligible for "any State or local benefit" (which includes obtaining a professional license). It also provides that states may provide undocumented immigrants with the benefits prohibited in §1621 but only by enacting legislation after August 22, 1996, that specifically provides for the benefit(s).The enactment of AB 1024 thus eliminated the statutory blockade between Garcia and his law license.

The California Supreme Court granted the motion to admit Garcia to the California State Bar and concluded that his undocumented status and his presence in the U.S. in violation of federal law are not sufficient to bar his admission to the State Bar.

To many, Sergio Garcia is a hero. His case represents a major victory for the immigrant community and furthers the idea that, regardless of your immigration status, you can and should be able to pursue your dreams in California. Others, however, ask how someone currently in violation of California law can take the oath to uphold and respect it. They also point to the saturation of the legal field in California and wonder how this ruling will impact the legal job market in the future.

It's Time (and-a-half) to Recognize Domestic Workers in California

Another new law entitles nannies, housekeepers, and other domestic workers to time-and-a-half overtime pay when they work more than nine hours in one day or forty-five hours in one week. The new law took effect on January 1, but it is not permanent. Due to a sunset provision (a provision that an agency or program will be terminated at the end of a fixed period unless it is officially renewed), the protections end in 2017 if not extended.

Reactions to the new laws are divided among party lines. Domestic employment agencies and Republicans argue the move could have negative consequences such as forcing people to stop hiring domestic help, cutting back hours, and causing a decrease in domestic jobs by putting domestic help out of reach for some families. Democrats argue that the new law is a step towards recognizing the value of domestic work and helping domestic workers sustain California's high cost of living.

Latest Legalities

By Kristi W. Dean, Esq.

In the competing worlds of the Hallmark initiated Valentine's Day and the publicly embraced Internet, (where privacy has vanished, nothing is sacred and meeting your prospective lover and/or life partner is now initiated through the computer and smart phone), I found the following bylines ironic.

Ashley Madison, the online "dating" website for married folks looking for an affair, is being sued by a woman who claims she injured her wrist while creating fake female profiles to inflate the number of female users willing to cheat on their husbands. According to the suit, these profiles entice paying heterosexual male members to join and spend money on the website. The employer issued a statement claiming the employee's workers compensation claim is without merit, and is a "frivolous claim brought by an opportunistic plaintiff." The allegedly injured worker was seen jet skiing after her allegedly traumatic injury. *(International Business Times, November 2013)*

An Amador County woman found herself on shesahomewrecker.com, an internet site which encourages women to post pictures and details about their husband's mistresses. The alleged wrongdoer had her picture captured from her Facebook page, and now she cannot remove the posting. Attorneys for the website say the website is protected from being held liable for defamatory or libelous remarks posted by their users. A lawsuit has still not been filed, and the website developer intends to start another website entitled hesahomewrecker.com. *(CBS News, January 2014)*

Speaking of internet dating, the lack of duty of a website to flag problematic profiles is being challenged by a Florida model who filed a $1.5 billion class action lawsuit against match.com. The suit was filed in Manhattan Federal Court and asserts that the company broke copyright laws and committed fraud by allowing profiles to be posted with photos belonging to unsuspecting strangers. The suit claims that match.com could easily detect fake profiles if they used photo recognition software and checked IP addresses. Plaintiff claims that match.com sports about 3,000 allegedly fake profiles that use photos of people who did not consent to their photo being used, including photos of actors, military personnel and Facebook users. *(ABC News, November 2013)*

Speaking of nothing being sacred, it would appear from the recently filed complaint in Elizabeth Dickson v. Playboy that the assumption of the risk doctrine is "in play" and unrequited love is not and has taken a shank in the Playboy realm. Dickson was selected to represent her city of Westland, Michigan, in hosting the Playboy Golf Finals in Los Angeles. Playboy reps asked her to lie down and pose for a photo with a player. Not a problem. However, the "bare lie" was ill advised; she lay flat on her stomach with her buttocks "partially" exposed. A golf tee was then placed between her "cheeks" and a golf ball was balanced on top. She "didn't know" that the player would take a swing. He did and missed the "sweet spot" but took an unexpected divot. His approach shot missed the ball entirely and squarely hit Ms. Dickson causing her to suffer severe pain, permanent damage, worry and anxiety. There is no word on the gentleman's final score. He blames the ball dimples for the pop-up and not on the rule to "play the ball as it lies."

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NEWS & ANNOUNCEMENTS

➔ Kristi Dean was successful in recovering the full value of SCD's attorney's fees incurred in enforcing a settlement agreement after the opposing party tried to avoid the terms reached in a trade secrets litigation settlement, necessary to protect the interests of the client's proprietary information.

➔ Kristi Dean and Amy Lewis prevailed in an appellate decision upholding a demurrer in favor of a real estate broker client who was accused of misrepresentation.

➔ In February, Kristi Dean spoke at the IIABOC quarterly meeting and offered a one hour continuing education seminar to insurance brokers entitled "Business Interruption Coverage: A Legal Primer." In March, Kristi also spoke at the IBA-SFV quarterly meeting and offered a one hour continuing education seminar "Anatomy of a Producer Agreement." Kristi is an approved CE provider with the California Department of Insurance.

➔ In March, SCD sponsored and participated in the Los Angeles I-Day 2014, an insurance trade show attended by retail and wholesale insurance producers and insurance carriers. Kristi Dean, John Cha, Robyn McKibbin and Michelle Macias hosted SCD's booth. Also in March, SCD was recognized at the San Fernando Valley Bar Association's Judge's Night, and was presented with a "President's Circle" plaque at the evening gala.

➔ Greg Miller secured a defense verdict for a corporate retail client sued by a woman who claimed that an employee negligently pushed a train of 12-15 shopping carts into her ankle. At trial, plaintiff's counsel asked the jury to award $467,000. After 32 minutes, all 12 jurors found in favor of the defendant.

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