JS&H | REPORTER

A PUBLICATION OF JONES, SKELTON & HOCHULI, P.L.C. | FALL 2009

Opinion Limits Discoverability of an Expert's Financial Information to Show Alleged Bias

By Gary H. Burger

In *American Family Mutual Insurance Company v. Grant ("Allo")*, 2009 WL 3245430 (Ariz. App. Oct. 8, 2009), Division One of the Arizona Court of Appeals recently granted special action review to address the issue of the proper scope of discovery into an expert witness's purported bias.

In *Allo*, the plaintiff was involved in a car accident and sought medical treatment for various injuries. She underwent arthroscopic surgery on her left knee, physical therapy and additional medical care for two years. The plaintiff eventually submitted a claim to her insurer, American Family, under her underinsured motorist coverage, and the carrier retained orthopedic surgeon, Dr. Jon Zoltan, to review her claim. Dr. Zoltan opined that the plaintiff's arthroscopic surgery and ongoing treatment were not necessitated by the accident, but by prior surgery and injury to her left knee. American Family then denied further payments under the UIM coverage. Thereafter, the plaintiff sued American Family for breach of contract

Continued on Page 10

A.R.S. § 12-716 Offers Expanded Protection to Police Officers and Manufacturers of Police Tools in Civil Litigation

By Christina Retts

In July 2009, the Arizona legislature amended A.R.S. § 12-716 to provide additional protection to law enforcement officers and manufacturers of police tools who are part of a civil lawsuit. This statute sets forth important provisions relating to presumptions that can apply in favor of police officers and manufacturers of police products and against persons injured while performing felony criminal acts or injuring others. The new additions to the statute also provide civil defendants with an avenue for recovering attorneys' fees and costs in appropriate circumstances.

A.R.S. § 12-716 originally provided that if a judge finds by a preponderance of the evidence that the plaintiff was harmed while attempting to commit, committing or fleeing from a felony criminal act, certain presumptions applied in a civil lawsuit. The amended statute now extends these presumptions to situations where the plaintiff intentionally or knowingly injures another. The

Continued on Page 8

In This Issue

Legislature Drastically Reduces Anti-Deficiency Protection...Oops, Nevermind

By Robert R. Berk

As the economy continues to struggle and the housing market continues to sag, increasing numbers of homeowners are abandoning their homes, defaulting on their home loans and seeking protection under Arizona's "anti-deficiency" statute. A.R.S § 33-814(G) very generally provides that if a borrower uses the proceeds of a loan to purchase a residence, the lender's only remedy, in the event of the borrower's default, is to foreclose upon the home. In situations, therefore, where a home is worth substantially less than the balance of the loan, abandoning the home and the related loan may be a reasonable option despite the adverse impact on the borrower's credit. This choice is especially attractive to owner/investors who own multiple rental houses, all of which are "upside down."

On July 10, 2009, Arizona's governor signed Senate Bill 1771 ("SB 1771") into law, which was scheduled to go into effect on September 30, 2009. The law, which was supported by the banking lobby, drastically reduced the number of borrowers who qualify for anti-deficiency protection. The law limited protection in two significant ways. First, the original law required only that the property be "utilized" as a residence, and it was generally understood that even a single night of occupancy, prior to foreclosure, satisfied the "utilization" requirement. SB 1771, however, defined "utilized" to mean six consecutive months of use.

Second, and far more important from a practical perspective, SB 1771 provided that the borrower him or herself must occupy the home for the six consecutive months, rather than a third party. This modification, which passed with limited public debate and notice, effectively created deficiency liability for thousands of real estate investors who purchased rental homes. In other words, because investors typically do not occupy the rental homes they purchase, they would not be entitled to protection under the new law.

After the governor signed SB 1771 into law and news of the statute's impact upon owner/investors spread, a grass-roots backlash began. The owner/investors' lobby, which had been largely ignorant of the new law, mobilized. It was unfair, they argued, to eliminate anti-deficiency protection when investment decisions had already been made in reliance upon the availability of that protection. As the debate grew louder, participants on both sides (including the original sponsor of SB 1771) agreed that while the anti-deficiency statute is probably due for revision, SB 1771 had not been adequately discussed, the impact had not been appropriately analyzed, and it was ambiguous in several, critical respects.

As a result, less than one month before SB 1771 was set to take effect, the legislature repealed it in House Bill 2008. Consequently, the original version of A.R.S. § 33-814(g) was restored, and owner/investors are again protected. The debate, however, is far from over, and while the banking lobby will undoubtedly try again to limit anti-deficiency protection, the fact that everyone is now paying attention will hopefully result in a better, and more equitable, law. ◆

Announcements & Speaking Engagements

JS&H is pleased to announce that **Heather E. Barrios** has joined the firm as an associate. She will concentrate her practice on bad faith and extra-contractual liability, governmental liability, insurance coverage and products liability.

Phil Stanfield has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America.

Georgia Staton served on the faculty for the 2009 Arizona College of Trial Advocacy.

Ed Hochuli presented, "Managing a Crisis in Real Time or Better Known as The Ed Hochuli Story!" at DRI's 2009 Annual Meeting on October 7, 2009 in Chicago.

Don Myles was a writer and producer for the FDCC Masters Presents "The Art of Mediation" DVD. The DVD is a training tool for how and why to mediate effectively.

Josh Snell was recently selected to serve as the DRI Vice Chair Substantive Liaison for the Workers' Compensation Committee.

Public Adjuster Beware: The Unauthorized Practice of Law

By Les S. Tuskai and William G. Caravetta, III

The scenario is all too familiar. The harried call from Adjuster X of Acme Insurance Company. Your advice will be key in staving off what is almost certain to be an attempt at setting up the carrier for bad faith. Your next step is to ask for a copy of the claim file. It is replete with the public adjuster's letters citing to and interpreting case law, insurance treatises, and statutes which she claims are dispositive. Your immediate thought: is this the unauthorized practice of law? Unfortunately, no simple answer exists - whether in Arizona or elsewhere.

The one constant rule is this: public adjusters are uniformly prohibited from the practice of law in all jurisdictions. But determining what is the practice of law is a trickier question. A few generalizations, however, can be made. Courts and regulatory departments in most states allow public adjusters to gather factual information about a claim, submit information on behalf of an insured to the insurance company, organize claims into proofs of loss or estimates, evaluate claims for damaged property and contents, negotiate settlements, and determine the cost of repairing or replacing damaged property. The general rule of thumb is that these activities do not require legal training or specialized knowledge of the law, and therefore are generally approved activities.

In contrast, public adjusters may not engage in acts related to legal and contractual rights or obligations that require a specialized legal knowledge or training, as this amounts to the practice of law.

A look at a few cases demonstrate the difficulty courts have in defining the practice of law. In *State ex rel. Junior Association of Milwaukee Bar v. Rice*, 294 N.W. 550 (Wis. 1940), the Wisconsin Supreme Court rejected the adjuster's contention that he could not have violated the state's unauthorized practice of law statute because everything he did was "incidental to his usual and ordinary business of adjusting losses for insurance companies." In *Rice*, the adjuster engaged in numerous lawyer-like activities, such as advising an insurance company of his opinion regarding liability and whether to settle a claim, and preparing contracts, releases or other agreements for the settlement of claims (above filling-in the blanks of pre-printed forms). The court concluded that these acts - giving advice as to legal rights for compensation - "is clearly the function of lawyers" and constituted the unauthorized practice of law. On the contrary, the court held that an adjuster could negotiate settlements of small claims on behalf of the insurance company without engaging in the practice of law. *Id.* at 557-58.

The Arizona Supreme Court held in *In re a Former Member of the State Bar of Arizona, Frederick C. Creasy, Jr.*, 198 Ariz. 539 (2000), that a disbarred attorney violated the "practice of law" injunction of his disbarment order based on actions he took as a public adjuster in connection with the taking of a sworn statement during a private arbitration of an insured's UIM claim. In that case, the claim went to private arbitration, and Creasy "represented" the insured during the sworn statement and proceeded to examine the insured's treating physician at length concerning the insured's injuries and their relation to the accident. Based on Creasy's appearance at and actions during the sworn statement, the state bar filed a petition essentially asking the court to determine whether Creasy violated the disbarment order by engaging in the practice of law. The court held that Creasy's actions did constitute the practice of law, even though it was not in connection with a judicial proceeding. The court found that based on the nature of the Creasy's examination, it was clear that Creasy rendered the kind of "core service" provided daily by legal professionals. *Id.* at 542-43.

In reaching its conclusion, the Arizona Supreme Court cited the Illinois Supreme Court's opinion, *In re Bodkin*, 173 N.E.2d 440 (Ill. 1961). In *Bodkin*, the Illinois Supreme Court held that a suspended lawyer engaged in the unauthorized practice of law when he represented a former client in settlement negotiations against her insurance company, even though the insurance company already admitted liability. The disbarred attorney had argued that his position was akin to that of an adjuster, except he was acting on behalf of the claimant. The court rejected this argument, and also rejected the contention that his acts were merely clerical, administrative and ministerial. The court reasoned that the disbarred attorney was engaged in the practice of law because it was "obvious that settling a case, under these circumstances, required legal skill." *Id.* at 441-42.

The Arizona Supreme Court also relied on a Kansas Court of Appeals opinion to support its finding that Creasy engaged in the unauthorized practice of law. In *State ex rel. Stovall v. Martinez*, 996 P.2d 371 (Kan. App. 2000),

Continued on Page 9

EEOC Issues Its Proposed Regulations Interpreting the ADA Amendments Act

By Barry H. Uhrman

The Americans with Disabilities Amendments Act ("ADAAA"), which took effect on January 1, 2009, represented the first significant legislative modification to the Americans with Disabilities Act ("ADA") since Congress enacted the ADA in 1990. The effect of the ADAAA was to overturn U.S. Supreme Court decisions that had narrowed the scope of the statute and to broaden coverage of individuals to the maximum extent permitted by the terms of the ADA.

On September 23, 2009, the Equal Employment Opportunity Commission ("EEOC") published its proposed regulations and accompanying interpretive guidance. The definition of "disability" remains the same: (i) an impairment that substantially limits one or more major life activities; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment. The proposed regulations, however, change how these statutory terms are interpreted in several key ways, including expanding the meaning of "disability" and clarifying key terms such as "substantially limits" and "major life activity." The net effect is that the threshold to establish whether an employee is a qualified individual with a disability under the ADA has been lowered significantly. This will undoubtedly expand the number of individuals who are considered disabled and will make defending ADA claims more difficult for employers.

Defining "Substantially Limits"

The EEOC's proposed regulations revise the definition of "substantially limits" by providing that a limitation does not have to "significantly" or severely restrict a major life activity in order to meet the standard. An impairment will satisfy the "substantially limits" requirement if it substantially limits an individual's ability to perform a major life activity as compared to most people in the general population. The regulation also deletes reference to the terms "condition, manner, or duration" under which a major life activity is performed. Temporary, non-chronic impairments of short duration with little or no residual effects (such as the common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, or a broken bone that is expected to heal completely) usually will not substantially limit a major life activity.

In its interpretive guidance, the EEOC states that the determination of whether an individual is substantially limited is a "common-sense assessment" of an individual's ability to perform a major life activity. This comports with the ADAAA's requirement that the determination of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.

Defining "Major Life Activities"

Under the EEOC's proposed regulations, "major life activities" are defined as basic activities that most people in the general population can perform "with little or no difficulty." The regulations also expand the non-exhaustive list of major life activities to include sitting, reaching, and interacting with others, in addition to working, performing manual tasks, and the other major life activities set forth in the ADAAA.

The ADAAA provides that major life activities include the operation of major bodily functions, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, circulatory, respiratory, endocrine, and reproductive functions. The proposed regulations add several other examples -- hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular. The stated purpose of adding major bodily functions to the list of major life activities is to make it easier to find that individuals with certain types of impairments have a disability.

Major Life Activity of "Working"

In addressing working as a major life activity, the EEOC notes that there may be situations in which an impairment substantially limits a person's ability to meet certain job-related requirements, even though it does not impose substantial limitations outside the workplace. The proposed regulations specify that an individual who is substantially limited in working can be qualified for the employment position the individual holds or desires. Rather than demonstrating exclusion from a "class of jobs" or a "broad range of jobs," the proposed regulations delineate a more straightforward approach - an individual must only demonstrate that the impairment substantially

limits the ability to perform or meet the qualifications for the "type of work" at issue.

The "type of work" includes the individual's current job, the one applied for, and those with similar requirements. The proposed regulations provide that the "type of work" may be determined by the nature of the work the individual is substantially limited in performing as compared to others with comparable skills, such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs. In addition, a "type of work" may be determined by reference to job-related requirements, such as jobs that require repetitive bending, reaching, or manual tasks; repetitive or heavy lifting; prolonged sitting or standing; extensive walking; driving; or working rotating, irregular, or excessively long shifts.

The regulations also make clear that an individual's ability to obtain similar employment with another employer is not dispositive of whether an individual is substantially limited in working. Similarly, someone who is substantially limited in a type of work will be substantially limited in the major life activity of working, even if the individual possesses skills that would qualify him or her for another type of work.

Episodic Impairments

Under the proposed regulations, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The EEOC lists specific examples of impairments it believes to consistently meet the definition of disability, including: epilepsy, hypertension, multiple sclerosis, asthma, cancer, and psychiatric disabilities (such as depression, bipolar disorder, and post-traumatic stress disorder).

The EEOC also lists several examples of impairments that may be disabling depending on the circumstances, including: asthma, high blood pressure, learning disabilities, psychiatric impairments (such as panic disorder, anxiety disorder, and some forms of depression), and carpal tunnel syndrome.

Mitigating Measures

The proposed regulations implement the ADAAA's prohibition on the consideration of mitigating measures when determining whether a condition substantially limits an individual's major life activities. Examples of mitigating measures include medication, prosthetics, use of assistive technology, auxiliary aids or services, and surgical interventions that do not permanently correct an impairment. The proposed regulations specifically exclude eyeglasses and contact lenses from the list of mitigating measures that should not be considered.

While the ameliorative effects of mitigating measures cannot be considered in determining whether an impairment substantially limits a major life activity, they may be considered in determining whether they would eliminate the need for reasonable accommodation.

Practical Advice and To Do List for Employers

The public is invited to submit written comments to the EEOC through November 23, 2009. The EEOC will review comments concerning the proposed changes to the regulations and the interpretive guidance. The EEOC will then issue final regulations and provide an effective date upon which they will be implemented.

These changes are significant for employers as they will make it easier for individuals to establish a disability (and claims of disability discrimination) under the ADA. Employers must understand their legal obligations and requirements with respect to the new regulations and disabled employees. Employee handbooks and other written policies will need to be updated to comply with the new regulations. Most importantly, employers must ensure that all human resources personnel, supervisors, and managers are trained regarding the new regulations to avoid costly litigation landmines.◆

Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning the Americans with Disabilities Act and the EEOC's proposed regulations. Please feel free to contact Barry H. Uhrman [(602) 263-7328, buhrman@jshfirm.com] with any questions you may have regarding these important developments in employment law.

Appellate Highlights

Johnson v. State
AZ Court of Appeals
Rule 407 precludes admission of subsequent remedial measures regardless if the measures were taken in response to a specific event. Thus, a defendant need not know of the injury-causing event or the hazard that caused it, so long as the measure could have cured the hazard.

Arizona Department of Administration v. Cox
AZ Court of Appeals
Under A.R.S. § 12-962, the state can recover the reasonable value of medical care and treatment provided to a person who is injured by a third-party, including services provided through the state health insurance plan. Recovery is limited to the amount the participant received from the third-party tortfeasor, less the participant's attorneys' fees and costs.

Lips v. Scottsdale Healthcare Corp.
AZ Court of Appeals
Arizona does not recognize a cause of action for third-party intentional or negligent spoliation of evidence.

Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology Consultants, P.C.
AZ Court of Appeals
Common law absolute immunity does not apply to reports of professional misconduct by a physician to the Arizona Medical Board; instead A.R.S. § 32-1451(A) provides a qualified privilege for reports made in good faith. Overcoming the qualified privilege, however, requires the plaintiff to show the defendant abused the privilege by clear and convincing evidence.

Tarron v. Bowen Machine & Fabricating, Inc.
AZ Court of Appeals
Right to control under borrowed servant doctrine may involve a question of fact notwithstanding contract language that the general employer has the "exclusive right to control" the employee's work.

State v. Grant (Lennar Communities Development, Inc.)
Arizona Court of Appeals
Protective orders generally do not bind a non-party from disclosing information the non-party knows is covered by a protective order, absent the non-party's consent.

Mendoza v. McDonald's Corp.
AZ Court of Appeals
In a workers' compensation bad faith case, the claimant may recover damages for pain and suffering, past and future medical expenses, and lost earnings caused by the insurer's bad faith; punitive damages may also be assessed against the insurer for actions of its attorney.

Salt River Sand and Rock Company v. Dunevant (Gravel Resources of Arizona)
AZ Court of Appeals
Trial court has discretion to set supersedeas bond amount in an amount different from the judgment where the judgment debtor demonstrates that posting a full supersedeas bond would subject it to undue financial harm.

Can You Rely On Your Written Agreement?

By Jamie D. Williams

After extended negotiations, you close a deal with a final written agreement. You include what is called an "integration clause" providing that "[t]his Agreement constitutes the entire agreement among the parties and there are no representations, warranties, covenants or agreements except as set forth in this Agreement." If a dispute regarding your obligations later arises, you look to the agreement, right? Not so fast. Arizona law may provide an opportunity for an unsatisfied party to introduce evidence outside the agreement to change your obligations after the fact.

To some extent, Arizona law recognizes the parol evidence rule, which typically prevents a court from rewriting the terms of a written contract. The purpose of the rule is to protect final written agreements by generally excluding evidence tending to vary, controvert, or add to them. The parol evidence rule, however, can be circumvented in Arizona if a party alleges fraud. *Formento v. Encanto Bus. Park*, 154 Ariz. 495, 499 (App. 1987) ("the parol evidence rule does not bar evidence of fraud in the inducement of a contract"). Under this exception, all a plaintiff's attorney has to do to alter or undo the contract is allege that the defendant made a false promise that induced the plaintiff to enter into the contract. And, despite the fact that the alleged oral promise was not included in the parties' written contract (and in some instances oral representations are expressly denied in the contract), evidence of the purported oral representation may be considered in determining the parties' obligations under their agreement. While the goal behind the exception is seemingly noble - protecting the unsophisticated from purposeful deception - unchecked, the exception could swallow the rule.

Ostensibly concerned with unpredictable application, the Arizona Court of Appeals has clarified the exception. In *Long v. City of Glendale*, 208 Ariz. 319 (App. 2004), the court instructed that a party cannot be allowed to circumvent the parol evidence rule simply by alleging fraud. Rather, the alleged fraudulent promise to perform some act must not contradict the terms of the contract, as the parol evidence is still not admissible in the case of a promise directly at variance with the terms of a written instrument.

In *Long*, the plaintiff donated property to the City of Glendale and, through a deed restriction, limited the future use of the land to municipal use or airport use. When Long later discovered that the City did not intend to use the land for a runway, he sued and sought to introduce parol evidence to show that the City agreed to build a runway on the land, and that his donation was based on that promise. *Id.* at 324. Affirming the trial court's dismissal based on the parol evidence rule, the court explained that "a proponent of parol evidence cannot completely escape the confines of the actual writings . . . there must be something in the deed that would permit the court to find that the deed's language is amendable to [a proponent's interpretation]." *Id.* at 329. Because the deed allowed the City to use the property for "any use 'accessory' to an airport and any other municipal use", without specifying that the parcel had to be held for construction of a runway, the court concluded that Long's interpretation of the deed's language was unreasonable. "Even assuming that the parties intended [the parcel] to be used for a second runway, there must be something in the deed that would permit the court to find that the deed's language is amenable to an interpretation specifying that the property must be used only for that purpose." *Id.* Thus, the court held that parol evidence was inadmissible to establish that the parcel was to be held for the construction of a runway. *Id.*

Similarly, in *Spudnuts, Inc. v. Lane*, 131 Ariz. 424, 427 (App. 1982), the court suppressed parol evidence of alleged oral representations because the representations directly contradicted express terms of the contract. In doing so, however, the court recognized that "an additional act not covered by the terms of the contract" may allow parol evidence to be considered.

Generally, then, these cases stand for the proposition that oral promises that are independent of or consistent with the terms of a written agreement may be admitted when a dispute regarding the parties' obligations under their agreement arises.

But, does this mean that the fraud exception to the parol evidence rule is a safe harbor or a loophole? Unfortunately, the answer is both. Of course, the exception could be lifeboat in a situation where fraud actually occurred. However, others who are unsatisfied with the results of their integrated agreements could unfairly manipulate the exception to alter the parties'

Continued on Page 10

It's Time for Additional Reform of the Adult Protective Services Act

By David S. Cohen

In 1988, the Arizona legislature enacted the Adult Protective Services Act ("APSA"), which criminalized the abuse, neglect or exploitation of an incapacitated or vulnerable adult. A.R.S. § 46-455(A). The following year, the Arizona legislature expanded APSA by creating a statutory civil cause of action. *Id.* at (B). The statutory civil cause of action allowed for the recovery of enhanced remedies, including damages for the pre-death pain and suffering of the decedent, punitive damages, and reasonable attorneys' fees. In *Denton v. Superior Court*, 190 Ariz. 152 (1997), the Arizona Supreme Court discussed the legislature's intent and policy behind the enhanced remedies available under APSA:

> The legislature's intent and the policy behind [APSA] are clear. Arizona has a substantial population of elderly people, and the legislature was concerned about elder abuse. … Because incapacitated or vulnerable adults are not employed, they cannot recover damages for lost earnings or diminished earning capacity. Because incapacitated or vulnerable adults generally have Medicare, Medicaid coverage, or other insurance, they may not recover for medical expenses. Property damage is generally not an issue in elder abuse cases. … Furthermore, most vulnerable or incapacitated adults are near the end of their lives.

Id. at 156-57. The court and legislature were clearly concerned that without the enhanced remedies available under APSA, the potential recovery in elder abuse cases would be minimal and potentially meritorious elder abuse cases would simply not be filed.

Although the reasoning of the Arizona Supreme Court and the legislature seemed reasonable at the time *Denton* was decided, the enhanced remedies available under APSA actually tipped the scales largely in favor of plaintiffs. This was evidenced by a series of large verdicts and settlements, which in turn caused insurance premiums for nursing homes to rise so dramatically that several nursing homes went out of business and others had difficulty operating. As a result, the legislature amended APSA in 2005. The amendments included a limitation on the amount of reasonable attorneys' fees that could be awarded to plaintiffs in the event of a plaintiff's verdict. The amended statute provided:

> The court may order the payment of reasonable attorney fees that do not exceed two times the total amount of compensatory damages that are awarded in the action, except that the court may award additional attorney fees in connection with the action after the court has reviewed and approved a request for additional attorney fees to the plaintiff.

A.R.S. § 46-455(H)(4).

Despite the 2005 amendment, APSA remains a plaintiff-friendly statute that creates excessive verdicts and settlements. For example, on March 19, 2009, a Maricopa County Superior Court jury returned an $11,000,000 verdict in a case involving a skilled nursing facility resident who ingested foreign objects and later died.

It is time for additional reform of APSA. It is clear that the legislature's intent, as interpreted by the Arizona Supreme Court, that enhanced remedies must be available in order for cases to be filed under APSA is no longer justifiable. The most obvious reform that would help level the playing field between plaintiffs and defendants in elder abuse cases is the elimination of the attorneys' fees provision. The time for this reform is now. ◆

A.R.S. § 12-716 continued from Page 1

injury need only result in the fracture of any body part, such as a toe, or cause a temporary but substantial disfigurement or impairment to a body part or organ.

Accordingly, if the plaintiff was committing a felony act or injures another, a police officer will be presumed to be acting reasonably in the following circumstances. First, the police officer must either threaten to use or actually use physical (including deadly) force or a police product tool. The inclusion of use of a "police product tool" is a new addition to the statute. A "police product tool" is defined as "any weapon, safety equipment or product that is used by law enforcement." Second, the police officer must be acting to protect himself or another person against the use or attempted use of physical

(including deadly) force. Prior to being amended, the presumption of reasonableness only applied to situations where a police officer was protecting himself. The new version now applies the presumption when an officer acts to protect another person. Alternatively, the presumption applies where the officer uses or threatens to use physical (including deadly) force or a police product tool while the officer makes an arrest or prevents or assists in preventing a plaintiff's escape.

A.R.S. § 12-716 also applies the presumption of reasonableness to a governmental entity's hiring and training of a police officer. As with the presumption for a police officer's conduct, the amended statute extended the presumption relating to training and hiring to apply to situations where a police officer acts to protect another person. Thus, a governmental entity is presumed to have reasonably hired and trained its police officers to use physical (including deadly) force where the officer acts to protect himself or another person, or makes an arrest or assists in preventing a plaintiff's escape.

The amended statute also expands the protection afforded to manufacturers of police product tools. A.R.S. § 12-716 now provides that any warning or instruction that accompanies a police product tool is presumed not to be defective and the manufacturer is presumed not to be negligent where the product either (1) conforms with the state of the art applicable to the safety and warnings of the product at the time the product was designed, manufactured, packaged, and labeled; or (2) complies with any applicable codes, standards or regulations approved by the federal or state government, or any of their agencies.

Finally, the most important amendment to the statute is the addition of a provision allowing for the recovery of attorneys' fees and costs. The statute now provides that if a party successfully moves for dismissal or summary judgment on the basis of A.R.S. § 12-716, the court **"shall award"** the moving party costs and attorneys' fees. The statute further provides that costs include **"all costs"** reasonably incurred in connection with the motion, including but not limited to, filing fees, record preparation and document copying fees, time away from employment, and expert witness fees. The court may also consider any other costs it deems appropriate.

With these amendments, it is important to analyze whether the statute applies in every case where a police officer, governmental employee and/or manufacturer of a police product tool is named as a defendant. Not only can they gain the benefit of the presumptions and potentially avoid civil liability, but if they succeed in dismissing the claim via pre-trial motion, they can recover costs and fees. Furthermore, defendants should be sure to preserve this affirmative defense and entitlement to fees and costs when answering the plaintiff's complaint. ◆

ADJUSTER BEWARE continued from Page 3

the court held that an insurance claims "consultant" engaged in the unauthorized practice of law by putting together settlement brochures, negotiating settlements on behalf of injured persons, and advertising that he could save claimants the trouble of hiring a lawyer. The court concluded that the consultant was engaged in the unauthorized practice of law by offering services that required knowledge of legal principles. The court also found that the consultant's financial interest in settling without litigation conflicted with his client's interest in receiving a fair settlement, thus distinguishing the consultant's work from that done by insurance company adjusters. The court thus enjoined the consultant from further representation. *Id.* at 374-75.

The *Creasy* court approved the reasoning of these cases in helping to define what constitutes the practice of law, even though the Arizona legislature arguably authorized private adjusters to represent claimants against insurance companies. *See* A.R.S. § 20-281(A).

The decisions in this area reflect the conclusion that the determination of whether a public adjuster should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some static definition of what constitutes that practice, but rather by asking whether the public interest is disserved by permitting such conduct. The resolution of the question is determined by practical, not theoretical, considerations, and courts will weigh the competing policies and interests involved in each particular case. Thus, the conduct, if permitted, is often conditioned by requirements designed to assure that the public interest is indeed not disserved. ◆

DISCOVERABILITY continued from Page 1

and bad faith, claiming the insurer knew Dr. Zoltan was biased against personal injury plaintiffs and that he would render an opinion adverse to her interests.

The plaintiff then issued a subpoena to Dr. Zoltan demanding that he produce extensive documentation. The subpoena requested, among other things, copies of all IME reports for the last five years; copies of all deposition and trial testimony for the last five years and a list of cases in which the doctor testified; and extensive financial documentation, including personal and corporate tax returns, shareholder statements, and income earned from law firms and insurance and workers' compensation carriers. Dr. Zoltan objected to substantial portions of the subpoena. American Family also moved to quash the subpoena and sought a protective order, arguing that the subpoena was overbroad, unduly burdensome, and harassing. In defense of her subpoena, the plaintiff argued that American Family breached its duty to the insured by sending her to a "biased, unfair physician" for evaluation of her claim, and she was entitled to discovery on this bias element. The superior court ordered production of much of this financial information.

On special action review, the Court of Appeals held that an expert's relation with the hiring party and its counsel are proper subjects of cross-examination, and therefore, a plaintiff is entitled to some latitude in discovering the nature and scope of any bias or prejudice, but such latitude is "not unfettered." Thus, trial courts must balance the party's need for bias-related information against competing interests, including the witness's right to be free from unduly intrusive and burdensome inquiries and the need to prevent discovery that increases the costs, length and burden of litigation with little or no corresponding benefit. *Allo* at ¶¶ 15-16. The court also articulated guidelines with respect to the timeframe for disclosures (finding that disclosures for a nine-year period were too expansive, and noting other courts have endorsed a presumptive time frame in the three-year range), as well as the requirement to pursue less intrusive discovery, because, as the court pointed out, overbroad discovery requests may have a chilling effect on would-be experts. *Id.* at ¶¶ 17-21.

Ultimately, the court found that the breadth of the subpoena and trial court's order were problematic and unwarranted, particularly since the plaintiff already had substantial information regarding Dr. Zoltan, his litigation related work, and his purported biases (much of which was obtained through trial reporters and prior litigation), and Dr. Zoltan had displayed some willingness to respond to the subpoena. *Id.* at ¶¶ 23, 27-28. And, although the Court of Appeals did not articulate a bright-line standard, the court noted that the financial affairs information sought by the plaintiff "serves only to emphasize in unnecessary detail that which would be apparent to the jury on the simplest cross-examination." Thus, the court cautioned that trial courts should only consider ordering production of exhaustive financial documentation "only in the most compelling of circumstances," and only after the plaintiff explored other less intrusive means of obtaining bias-related evidence. Only if those efforts proved unsuccessful, the court concluded, should trial courts consider permitting more comprehensive discovery. *Id.* at ¶¶ 25-26.

This opinion is significant because the Court of Appeals has again attempted to draw some distinction between an expert's personal financial information and the legitimate inquiry into the nature and scope of the expert's relationship with the defendant and defense counsel, the expert's testimonial history and the fees for expert services. This decision will make it much more difficult for plaintiffs and claimants to obtain detailed personal and corporate financial documentation from defense experts, absent evidence of evasive behavior or lack of disclosure of basic information traditionally utilized to show bias of a witness. ◆

WRITTEN continued from Page 7

obligations. It does not take a certain level of sophistication to shoehorn any oral representation to make it consistent with a writing after the fact, and it is a practical impossibility for the parties to contract for all contingencies so that there can be no subsequent allegations of an independent promise.

The bottom line is that, although results can be unpredictable, you can rely with some confidence on a clearly written agreement. When faced with a clear and complete instrument, an argument that sophisticated parties would have relied on a promise outside of or independent of the contract would seem incredulous and, with any luck, unavailing. Drafting clear contracts, therefore, should significantly reduce the risk of protracted litigation later. ◆

About The Authors

Robert R. Berk

Mr. Berk joined Jones, Skelton & Hochuli in 1989 and has been a partner since 1996. He concentrates his practice on commercial/contract litigation, professional liability defense and coverage litigation. Mr. Berk received his law degree from Arizona State University College of Law and is admitted to practice in Arizona, the U.S. District Court, District of Arizona and the Ninth Circuit Court of Appeals.

Gary H. Burger

Mr. Burger has been with Jones, Skelton & Hochuli since 1985 and a partner since 1991. He concentrates his practice on insurance law, construction, personal injury, and civil rights law. Mr. Burger received his law degree from Arizona State University College of Law and is admitted to practice in Arizona and the U.S. District Court, District of Arizona, the Ninth Circuit Court of Appeals and the U.S. Court of Military Appeals.

William G. Caravetta, III

Mr. Caravetta has been with Jones, Skelton & Hochuli since 1998 and a partner since 2004. He concentrates his practice on both national and state-wide bad faith class action litigation, bad faith litigation, insurance coverage disputes, coverage opinions and complex civil litigation. Mr. Caravetta received his law degree from the University of Arizona College of Law and is admitted to practice in Arizona, the Ninth Circuit Court of Appeals and the U.S. District Court, District of Arizona.

David S. Cohen

Mr. Cohen has been with Jones, Skelton & Hochuli since 1996 and a partner since 2002. His practice consists of medical malpractice defense, nursing home defense, personal injury defense and litigation. He received his law degree from Arizona State University College of Law and is admitted to practice in Arizona, Nevada, and the U.S. District Court, Districts of Arizona and Nevada.

Christina Retts

Ms. Retts joined Jones, Skelton & Hochuli as an associate in 2005 and concentrates her practice on governmental liability and general civil litigation. She received her law degree from Arizona State University College of Law and is admitted to practice in Arizona and New Mexico.

Les S. Tuskai

Mr. Tuskai has been a partner with Jones, Skelton & Hochuli since 2007. He concentrates his practice on insurance bad faith/extra-contractual liability, insurance consulting, insurance coverage and disputes, professional malpractice, and other areas of complex civil litigation. Mr. Tuskai is admitted to practice in Arizona and Missouri state courts and received his law degree from Drake University Law School.

Barry H. Uhrman

Mr. Uhrman joined Jones, Skelton & Hochuli in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. Mr. Uhrman received his law degree from Duke University School of Law and is admitted to practice in Arizona, the District Courts for Arizona and Ohio, and the U.S. Court of Appeals, Sixth and Ninth Circuits.

Jamie D. Williams

Ms. Williams joined Jones, Skelton & Hochuli in 2006 and concentrates her practice on commercial litigation, governmental liability, and product liability. She received her law degree from Arizona State University College of Law and is admitted to practice in Arizona, New York, the U.S. District Court, District of Arizona, and the Ninth Circuit Court of Appeals.

JONES, SKELTON & HOCHULI, P.L.C.
2901 NORTH CENTRAL AVENUE, SUITE 800
PHOENIX, AZ 85012

JS&H Reporter