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The Ninth Circuit Holds That Employees Are Only Entitled To Equitable Relief for ADA Retaliation Claims

By Rachel Love

In a case of first impression, the Ninth Circuit has decided that in Americans with Disabilities Act cases, employees who prevail on retaliation claims are entitled to recovery of equitable relief only. *See Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009). This means that in the Ninth Circuit, and for ADA retaliation cases only, employee plaintiffs are limited to recovery of back pay, front pay and/or reinstatement. This is a win for employers and a success for JSH attorneys Rachel Love and Lori Voepel who represented the employer before the Arizona District Court and the Ninth Circuit.[1]

In the *Alvarado* case, a former fast food worker filed Age Discrimination in Employment Act (ADEA) and

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[1] Plaintiff has filed a Petition for Rehearing En Banc with the Ninth Circuit, asking an en banc panel to reconsider the panel's ruling. The Ninth Circuit has not yet ruled on the Petition.

Dealing With "Absent" Clients in Light of Recent Ethics Opinions

By Daniel King

The following situations are not uncommon:

Situation #1: An attorney is retained to defend a trucking company and its driver regarding a motor vehicle accident. Despite the attorney's best effort, he cannot locate the driver who resides in another state. To avoid a default judgment, the attorney files an Answer on the driver's behalf without obtaining authorization to represent the driver.

Situation #2: An attorney is retained by an insurance company to represent its insured in a motor vehicle accident. The attorney makes initial contact with the client and files an Answer. During the course of representation, however, the client disappears.

Although these situations involving "absent" clients are not uncommon, the Arizona State Bar has recently made it clear that attorneys are not permitted to represent clients who are unavailable or who have disappeared. Specifically, the Arizona State Bar has stated that these actions violate Arizona Ethical Rules 1.2 and 1.4. Arizona

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Describing the "Empty Chair"

By Brandi Blair

In March 2009, Division One of the Arizona Court of Appeals examined the sufficiency of a defendant's notice of non-party at fault in *Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, 205 P.3d 1128 (App. 2009). In *Cendejas*, the court tightened the standards of non-party identifications and made it more difficult for defendants to reduce their own exposure by naming an "empty chair" at fault.

Comparative Negligence

In order to fully understand the implications of *Cendejas*, a brief discussion of Arizona negligence theory is necessary. Thirteen states, including Arizona, follow the doctrine of "pure comparative negligence." Arizona's comparative negligence statutes are found in A.R.S. § 12-2501, *et. seq*. Under this principle, fault is apportioned between each party, including the plaintiff where appropriate. Consequently, a defendant is generally only liable for her own portion of fault. This is true regardless of whether all tortfeasors have been named in the lawsuit, or whether they can even be properly named in the lawsuit.[1]

Non-Parties at fault

Given that Arizona's negligence scheme apportions liability based on a defendant's percentage of fault, apportioning fault, or "shifting the blame" is an important part of defending virtually any law suit in this jurisdiction. For a variety of reasons, however, there are often potential defendants that are not parties to a particular suit. For example, a tortfeasor may settle her claims with a plaintiff prior to litigation, the plaintiff may choose not bring suit against a particular tortfeasor for economical or personal reasons, or, in some cases, the identity of a tortfeasor may be unknown.

With that said, a defendant is still only liable for her percentage of fault, regardless of whether all tortfeasors have been made parties. In a perfect world, every tortfeasor will be at the litigation table. That way, the finder of fact can evaluate the evidence presented by each party and appropriately assign fault. In the real world, however, there are often one or more empty chairs at the table, which could potentially result in a defendant "eating" more than his fair share of fault because there is no one else available to whom the fact finder can assign blame.

In order to avoid that situation, Arizona defendants are allowed to file a notice of non-party at fault within 150 days of their answer. Rule 26, Ariz.R.Civ.P. This mechanism allows defendants to point the finger of blame toward an empty chair at the table and thereby potentially lower their own liability exposure. Additionally, it gives plaintiffs notice of another tortfeasor so they can, if they choose, name that tortfeasor in the suit.

Scottsdale Ins. Co. v. Cendejas

On its face, the non-party at fault system is a very simple mechanism designed to help the fact finder apportion fault among tortfeasors more fairly. In practice, however, noticing non-parties at fault can be both abused and complicated. Defendants have an incentive to bring as many "empty chairs" to the table as possible, in order to spread liability more thinly and, thus, reduce exposure among individual defendants.

Consequently, filing notices of non-parties at fault has become somewhat routine, regardless of whether they are truly warranted. The purpose of the rule is "to identify for the plaintiff any unknown persons or entities who may have caused the injury in time to allow the plaintiff to bring them into the action before the statute of limitations expires," *Cendejas*, 220 Ariz. at 286, ¶ 18, 205 P.3d at 1133. Prior to *Cendejas*, however, Rule 26 was often invoked for the sole purpose of creating an empty chair to point the finger at, rather than to encourage plaintiffs to bring everyone possible to the litigation. As a result, notices of non-parties at fault became increasingly vague.

In *Cendejas*, the defendant timely filed its notice of non-party at fault, which included the name of the entity defendant was designating a non-party, in addition to a more vague reference to any subcontractors that entity may have hired in relation to the facts underlying the lawsuit. Despite the fact that the notice arguably "identified for the plaintiff" the entity or entities that may have caused injury to the plaintiff, the court found the

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[1] There are, of course, exceptions to Arizona's comparative negligence scheme. For example, Arizona law retains joint liability where tortfeasors act "in concert" to commit a tort. Additionally, a party may be responsible for torts committed by its agent or employee in the "course and scope" of employment. Those exceptions, however, are not the focus of this article.

Implications of the Jilly Decision for Medical Malpractice Cases

By Cristina Chait

There have been a number of challenges to Arizona Revised Statutes (A.R.S.) §§ 12-2603 and 12-2604 since the statutes were added as part of medical malpractice litigation. These statutes are otherwise known as the "Preliminary Expert Opinion Affidavit" statutes that relate to lawsuits filed against healthcare providers. In *Jilly v. Rayes, et al*., 221 Ariz. 40, 209 P.3d 176 (App. 2009), the challenge to A.R.S. § 12-2603 was whether the statute conflicts with Rule 16(c), Arizona Rules of Civil Procedure. Rule 16(c) provides for a comprehensive pretrial conference in medical malpractice cases, during which the court determines, among other things, a schedule for the disclosure of standard of care and causation experts. Generally, Rule 16 does not require disclosure of experts until 30-60 days *after* the pretrial conference.

In *Jilly*, plaintiffs filed a medical malpractice lawsuit against healthcare providers alleging negligence against the defendant doctors. The defendant doctors filed a motion requiring the plaintiffs to comply with A.R.S. § 12-2603 by certifying *with the initial disclosures* that expert testimony was necessary to prove the standard of care or liability issues in the case. Plaintiffs argued that the statute is unconstitutional, alleging it infringes on the rule-making authority of the Arizona Supreme Court. The trial court denied the defendants' motion to enforce A.R.S. § 12-2603, and defendants filed a petition for special action with the Arizona Court of Appeals.

The crux of the argument to the Court of Appeals related to whether a preliminary expert affidavit pursuant to the statute violated Rule 16(c) by requiring a different schedule for the identification of an expert witness. In reversing the trial court's ruling, the Court of Appeals found that A.R.S. § 12-2603 and Rule 16(c) are not in conflict because the statute requires only a *preliminary* expert opinion affidavit. The statute does not require that the expert giving the preliminary affidavit serve as the expert at trial. The Court explained that a preliminary expert opinion affidavit is provisional and meant to certify that the action against the medical professional is not meritless. The Court noted that the state has a compelling interest in protecting licensed professionals from frivolous lawsuits as had been determined in previous decisions. The Court also found that the trial court's concern that plaintiffs are forced by A.R.S. § 12-2603 to disclose their expert earlier, making that expert subject to deposition by the defendants, is ameliorated by the fact that the statute provides for the affidavit to be preliminary. The statute also provides the trial court discretion to extend the statute's time frame for good cause. For these reasons, the Court of Appeals held that A.R.S. § 12-2603 does not conflict with the Supreme Court's rule-making authority, and the statute is therefore constitutional.

The practicality of the *Jilly* decision is that defendants will still await expert disclosure deadlines to receive the final opinions from plaintiffs' final expert. *Jilly* made it very clear that the expert opinion affidavits pursuant to § 12-2603 are simply preliminary, thus, defense counsel will run the risk of taking an unnecessary deposition if they seek to depose the expert who is identified in the preliminary affidavit. Plaintiffs may also argue that the expert opinions in the affidavit are subject to change because they are simply preliminary opinions to support the initial filing of a malpractice lawsuit. Nonetheless, *Jilly* is yet another decision by Arizona's appellate courts upholding the expert opinion affidavit statute in medical malpractice cases. ◆

Announcements & Speaking Engagements

Don Myles will present, "Exposure Recognition: Recognition & Evaluation of Severity," at the PLRB/LIRB 2010 Claims Conference on March 23, 2010 in San Antonio, TX. **Don** will also present, “Technology for Maximum Impact At Trial and Mediation,” and the CLM Annual Conference on March 24, 2010 in Jacksonville, FL.

Lori Voepel and **Jennifer Baker** presented, “Year in Review: Key Appellate Decisions in Civil Litigation,” at the AADC Advocacy Luncheon on January 14, 2010 in Phoenix, AZ.

Josh Snell was selected to serve as the DRI State Legislative Liaison for Arizona.

GINA - The Name Every Employer Needs to Know

By Barry H. Uhrman

In 2008, President George W. Bush signed into law the Genetic Information Nondiscrimination Act ("GINA"). GINA prohibits employers of 15 or more employees from acquiring any genetic information from applicants or employees, with few very limited exceptions. The new law amended Title VII, the Employee Retirement Income Security Act, the Public Health Service Act, and other federal laws, to prohibit employers from discriminating against applicants or employees on the basis of genetic information. GINA also prohibits health insurers from restricting enrollment and premium adjustments for health insurance on the basis of genetic information or genetic services.

What is Genetic Information?

"Genetic information" is not limited to the results of genetic tests administered to applicants or employees. The law is much broader in its protection. Under GINA, "genetic information" also includes the results of genetic tests administered to family members and information about "the manifestation of a disease or disorder in family members of an applicant or employee." The language of the statute is broad enough to include family medical history. Of note, "genetic information" does not including information about the sex or age of any individual.

The term "genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.

Title I - Health Insurance

Title I of GINA prohibits group health plans and health insurance carriers from "requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes." The law applies to all health insurance plans, including those under federally-regulated ERISA plans, state-regulated plans, and private individual plans.

In addition, GINA prohibits the collection of genetic information to determine eligibility for benefits or provide rewards in the form of premium or contribution discounts. This means that employer wellness programs would violate GINA when they seek information regarding family medical history.

The statute has an exception for the "inadvertent" request of a family medical history provided in the context of a "voluntary" wellness program. The Equal Employment Opportunity Commission ("EEOC") has acknowledged that under the Americans with Disabilities Act, a wellness program is voluntary if it neither requires employees to participate nor penalizes employees for non-participation. If the wellness program is not "voluntary," any questions about family medical history will be prohibited by the statute.

GINA requires amendments to the privacy regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") providing that "genetic information" is to be treated as health information. The use or disclosure of such information will not be considered a "permitted use or disclosure" under those regulations.

Title II - Employment Discrimination

The employment provisions ("Title II") of GINA became effective on November 21, 2009. These provisions apply to private and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs. Under Title II, employers are prohibited from discharging, refusing to hire, or otherwise discriminating on the basis of genetic information, and from intentionally acquiring genetic information about applicants and employees. The law imposes strict confidentiality requirements regarding genetic information.

For all covered employers, it is an unlawful employment practice under Title II:

> (1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or
>
> (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.

It is also an unlawful employment practice for an employer to request, collect, or purchase genetic information, except in several limited and clearly-defined situations. These exceptions include circumstances where the information is: (a) required to comply with medical certification requirements of state or federal family and medical leave laws, (b) included in commercially and publicly available documents; and (c) to be used for genetic monitoring of the biological effects of toxic substances in the workplace. There is an additional exception where an employer conducts DNA analysis for law enforcement purposes as a forensic laboratory.

There are also exceptions to the prohibitions against the disclosure of genetic information. For example, an employee may make a written request for the information. In addition, disclosure is permitted to occupational or other health researchers or to government officials investigating compliance with GINA. Information may also be disclosed pursuant to a court order or in connection with the employee's compliance with the Family and Medical Leave Act or state family and medical leave laws.

Even though genetic information may be inadvertently or permissibly received, such information may not be used for purposes of prohibited employment actions based on that information.

Remedies and Litigation Under GINA

Enforcement of and remedies under Title II for GINA violations are the same as those under Title VII of the 1964 Civil Rights Act, with one notable exception. Litigation under GINA is limited to claims of intentional discrimination (i.e., disparate treatment claims). There is no cause of action under the statute for "disparate impact" on the basis of genetic information.

Title II also includes a "firewall" provision intended to eliminate "double liability" by preventing claims under Title II from being asserted regarding matters subject to enforcement under Title I or the other genetics provisions for group coverage in ERISA, the Public Health Service Act, and the Internal Revenue Code. The firewall seeks to ensure that health plan or issuer requirements or prohibitions are addressed and remedied through those statutes and not through Title II and other employment discrimination procedures. The firewall does not immunize covered entities from liability for decisions and actions taken that violate Title II, including employment decisions based on health benefits, as such benefits are within the definition of compensation, terms, conditions, or privileges of employment.

Practical Advice and To Do List for Employers

GINA presents several new and significant concerns for employers. Employment decisions may now be challenged on the basis that an employer came into possession of such information and then made an adverse employment decision. Employers who offer employee wellness programs need to make sure that employees do not provide family medical history as part of those programs.

In addition, employment practices that are permitted under the Americans with Disabilities Act ("ADA") may be unlawful under GINA. Employers who require medical examinations or fitness-for-duty examinations for employees must change the kinds of questions asked as part of those exams. Even though the ADA permits employers to obtain medical information, including genetic information, from post-offer job applicants, employers are not permitted to obtain any genetic information (including family medical history) under GINA.

Employers are also required to post the revised workplace notice ("Equal Employment Opportunity is the Law") that includes information regarding GINA's ban on employment discrimination based upon an individual's genetic information. Employers may either post the supplement alongside the September 2002 poster or post the November 2009 revised version of the poster. Copies of the posters (in both English and Spanish) are available on the EEOC's website: http://www1.eeoc.gov/employers/poster.cfm.

Employers must understand their legal obligations and requirements with respect to the new regulations and disabled employees. Most importantly, employers must ensure that all human resources personnel, supervisors, and managers are trained regarding the new statutory provisions 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 Genetic Information Nondiscrimination Act. 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

American Family Insurance v. Hon. Grant
AZ Court of Appeals
No bright-line rule governs the proper scope of discovery into an expert witness' purported bias, but an order requiring an expert doctor to produce nine years of documentation is overbroad, and production of exhaustive financial documentation is only proper in the most compelling circumstances and only after exploring less intrusive means of obtaining bias-related evidence.

Schoeneweis v. Hamner
AZ Court of Appeals
A trial court should conduct an *in camera* review before permitting the release of death certificates, autopsy reports, and related investigative materials pursuant to the Arizona Public Records Law.

Alvarado v. Cajun Operating Co.
Ninth Circuit Court of Appeals
Compensatory and punitive damages are unavailable for retaliation claims under the Americans with Disabilities Act (ADA) because the plain language of 42 U.S.C. § 1981a limits the availability of such damages to specific claims, such as ADA discrimination. There is also no right to a jury trial on ADA retaliation claims because only equitable relief is available.

Kaufman v. Langhofer
AZ Court of Appeals
A pet owner is not entitled under Arizona law to recover emotional distress and loss of companionship damages resulting from the pet's death.

Wendland v. AdobeAir, Inc.
AZ Court of Appeals
OSHA standards may be considered as "some evidence" of the standard of care in a premises liability action even where defendant was not bound by those standards because plaintiff was not an employee of defendant, so long as sufficient foundation establishes that the standard is directly related to the existence of reasonable care, and a nexus exists between the standard and the circumstances of injury.

Romer-Pollis v. Ada
AZ Court of Appeals
A plaintiff's failure to personally appear for an arbitration hearing and bad faith failure to submit a pre-trial statement as ordered can result in waiver of her right to appeal the award.

Ballesteros v. American Standard Insurance Co.
AZ Court of Appeals
An insurer's use of a Department of Insurance approved form offering and explaining uninsured motorist coverage in English is insufficient to provide notice of UM/UIM coverage to a Spanish speaking client. A.R.S. § 20-259.01 requires the offer of uninsured motorist coverage to be provided to the insured in a way that reasonably could apprise him or her of what it contains.

Arizona Recognizes "Deepening Insolvency" as a Theory of Damages in Accountants' Liability Litigation

By Thomas R. Nolasco

CPA firms that provide a non-qualified audit opinion to an entity filing bankruptcy should expect the bankruptcy trustee to evaluate damages under the "deepening insolvency" theory. Deepening insolvency occurs when false financial statements prolong the corporate existence to the detriment of the company. In the seminal case of *Allard v. Arthur Andersen & Co.*, 924 F.Supp. 488 (S.D.N.Y. 1996), the bankruptcy trustee for DeLorean Motor Company alleged malpractice and negligence against the auditors for, among other things, failing to detect and disclose misappropriation of funds. The trustee argued that Andersen's failure to detect the misappropriation resulted in the corporation's further indebtedness to trade creditors. Andersen countered that the corporation received the benefit - more capital - rather than being harmed, and moved for summary judgment arguing that "deepening insolvency" was not legally recognized. The Court denied summary judgment and affirmed that deepening insolvency is a recognized theory of relief.

While a minority of states, like New Jersey, recognize "deepening insolvency" as a cause of action, Arizona follows the majority of states which only recognizes this theory as one for damages. In the Arizona bankruptcy case, *In Re Southwest Supermarket, LLC*, 325 B.R. 417, (Bankr. D. Ariz. 2005), the defendants moved to dismiss plaintiff's claim for deepening insolvency, arguing that under Arizona law, this theory is not recognized as a cause of action. The bankruptcy court refused to dismiss the claim, however, because the plaintiff did not state an actual claim for deepening insolvency, but rather used it as a theory of damages under the claim of breach of fiduciary duty.

Arizona courts have yet to explore how a deepening insolvency theory should be applied to prove damages. For example, it remains unclear whether the damages will consist of increased debt or the use of the assets obtained

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Happy Blogging

By Ryan McCarthy

As more and more people use the internet to communicate and share with others their experiences, it is important to have a general understanding about defamation law, as it applies to private (not public) figures. Defamation is made up of the twin torts of libel and slander. Libel, in general, is defamation in a written form, and slander, in general, is defamation in an oral form. In either form, defamation is an invasion of the interest in reputation and good name.

To be defamatory, a published communication must be false and bring the defamed person into disrepute, contempt, or ridicule, or must impeach the person's honesty, integrity, virtue or reputation. *Dube v. Likins*, 216 Ariz. 406, 418, 167 P.3d 93, 105 (App. 2007). In Arizona, a person who publishes a false and defamatory communication concerning a private figure is subject to liability. However, liability only attaches if, at the time he or she published the communication, the person: (1) knew the statement was false and defamed the other, and (2) acted in reckless disregard of these matters or acted negligently in failing to ascertain them. *Id.* at 417, 167 P.3d at 104.

There is a difference between the publication of defamatory statements of fact and defamatory expression of opinions about others. Factual statements that are false are actionable, whereas factual statements that are substantially true are not actionable. Also, statements of pure opinion are not actionable. Opinions are only actionable when they imply a false assertion of fact. *See Turner v. Delvin*, 174 Ariz. 201, 208, 848 P.2d 286, 293 (1993). Merely labeling a statement as your "opinion," however, does not make it so.

To succeed in a defamation claim, a plaintiff must prove that the defamatory statement caused actual damages, which can be difficult. However, false statements about a person's business, trade, or professional conduct, are defamatory *per se*. In other words, they are actionable without proof of *actual* damages because damages are presumed.

Defamation defendants may assert various defenses, including truth, absolute privilege, and qualified privilege. Truth is an absolute defense to a claim of defamation. True statements, no matter how disparaging, are not

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"No, I Insist, You Go First."

By Sanford K. Gerber

Most insurance adjusters are polite and courteous not only with their insured's, but also with their colleagues and other carriers. Yet, when it comes to whose policy is primary and whose is excess in a first party automobile case, that courteousness can sometimes evaporate like water in the Arizona desert. Every Arizona insurer knows that if two automobile liability policies apply to a third party loss, the owner's policy is primary and the driver's policy is excess. But what happens if two UM or UIM policies apply to a first party case? Is the owner's policy still primary? Is it excess?

Back in 1978, the Arizona legislature took on the issue of primary and excess coverage priorities in automobile **liability** cases by enacting A.R.S. § 28-1170.01 (now § 28-4010). A.R.S. § 28-4010(B) currently provides in pertinent part:

> … If two or more policies affording valid and collectible liability insurance apply to the same motor vehicle that is involved in an occurrence out of which a liability loss arises, it is conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile is primary and the insurance afforded by any other policy or policies is excess.

In other words, the owner of the vehicle's liability insurance is primary and the driver's insurance is always excess except in garage operations cases or as amended by written agreement. This statutory scheme provides insurers and insureds with a fair, predictable and cost efficient way of determining "who goes first."

Although it makes perfect sense to merely apply the same statutory scheme in first party UM or UIM cases, some insurers argue that A.R.S. § 28-4010(B) is inapplicable in any first party case. These carriers typically contend that UM or UIM coverage's are not insurance "against legal liability." Instead, liability loss payments are payments made to third parties, whereas UM and UIM insurance pay first party benefits only. Thus, carriers sometimes argue that A.R.S. § 28-4010(B) must be inapplicable to first party cases.

This issue regarding the proper statutory scheme for first party claims was reviewed by the Arizona Court of Appeals in *Brown v. State Farm Mutual Auto. Ins. Co.*, 161 Ariz. 427, 778 P.2d 1323 (App. 1989), *reversed and vacated on other grounds*. Elizabeth Brown was the personal representative of Jennifer Goode, who was a decedent passenger in a vehicle driven by Christopher Culliver. Ms. Goode and Mr. Culliver were in an accident with a third party. The third party insurer, Farmers, paid its $50,000 per person limit. Culliver's host vehicle was insured by Universal Insurance Company ("Universal"). Jennifer was also insured through her own State Farm policy. Both Universal and State Farm policies provided UIM coverage of $100,000 per person. The parties in the case stipulated that the damages in the wrongful death claim were more than $250,000.

The Court of Appeals held that A.R.S. § 28-1170.01 (now § 28-4010) provided the rules regarding priority between insurance carriers applicable to underinsured motorist insurance. Moreover, the Court of Appeals held that the primary underinsured motorist carrier is the carrier insuring the vehicle involved in the accident, and the passengers' carrier was therefore conclusively presumed to be excess.

The Arizona Supreme Court reversed the Court of Appeals' earlier decision in *Brown* on separate grounds and held that an insurer could not invoke escape or pro rata provisions of its "other insurance" clause to deny first party UIM coverage where an insured had not been fully indemnified. *See Brown v. State Farm Mutual Auto. Ins. Co.*, 163 Ariz. 323, 788 P.2d 56 (1989).

The Supreme Court looked to the case of *Nationwide Mutual Insurance v. CNA Insurance Company*, 159 Ariz. 368, 767 P.2d 716 (App. 1988), for guidance. In *Nationwide v. CNA*, the Court held that A.R.S. § 28-1170.01(A) served the purpose of establishing "firm rules determining priority between primary and excess coverage where there are multiple carriers." Nationwide argued that A.R.S. § 28-1170.01(A) did not encompass first party coverage because that statute refers to accidents "out of which a liability loss" arises. The Court disagreed with this argument and stated:

> There is nothing in the language of section 28-1170.01(A) to suggest that automobile liability insurance, as used in that section, was intended to have a narrower meaning than that required by section 20-259.01(A),

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ABSENT CLIENTS continued from Page 1

Ethical Rule (E.R.) 1.2 provides that, "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, *shall consult with the client as to the means by which they are to be pursued*. E.R. 1.4(a)(2) states, "a lawyer shall *reasonably consult with the client about the means by which the client's objectives are to be accomplished*. (emphasis added). Similarly, the Arizona State Bar has stated that filing unverified disclosure statements also violates E.R.'s 1.2, 1.4, and 8.4(d).

In light of these recent ethics opinions by the Arizona State Bar, the question becomes: How should an attorney deal with an unavailable client or disappearing client? Depending on the situation, there are multiple ways to appropriately deal with these situations. However, all these solutions require open communication with the insurance carrier.

The Unavailable Client

1. **Ask for an Extension from Plaintiff's Counsel**: This is can be the easiest solution, depending on the willingness of plaintiff's counsel to cooperate. However, if the driver is truly unavailable and cannot be located with the assistance of an investigator, an extension will likely be insufficient.

2. **File a Motion to Intervene on the Carrier's Behalf**: Under Rule 24(a)(2) of the Arizona Rules of Civil Procedure,

> [A]nyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest.

Importantly, Arizona courts have repeatedly recognized that, because collateral estoppel will generally apply, an insurance company has the requisite interest under Rule 24(a) to be entitled to intervene. *Mora v. Phoenix Indem. Ins. Co.*, 196 Ariz. 315, 996 P.2d 116 (App. 1980); *Lawrence v. Burke*, 6 Ariz. App. 228, 431 P.2d. 302 (1967). Thus, the insurance company can intervene and defend its interests in the lawsuit. In fact, an insurer that acknowledges its duty to defend, even if it reserves the right to contest coverage, retains an interest in the litigation that would support a right to intervene. *Mora*, 196 Ariz. 315. Although the court will permit an insurance company's intervention into case where there is a reservation of rights, attorneys need to be mindful of the potential conflict this can create. Specifically, if an attorney is retained to represent a trucking company and the driver, and the attorney represents the trucking company, the attorney would likely not be able to file a motion to intervene on behalf of the insurance company, as a potential conflict could arise.

The Disappearing Client

Under Arizona Ethical Rules 1.3 and 1.4, a lawyer must use reasonable diligence to learn of the client's whereabouts. If an attorney is unable to discover the client's whereabouts, he or she cannot continue representation of the client.[1] In such cases, the lawyer should prepare an unequivocal written notice of his intent to withdraw from the representation by a certain date. *See* Ariz. Op. 01-08. In a plaintiff's case, the notice should include any applicable statute of limitations. *Id*. Lastly, the client should be encouraged to obtain other legal representation or contact his insurance carrier as quickly as possible. It is also important to be cognizant of the duties to keep client confidences pursuant to E.R. 1.6. and/or to safeguard any client property pursuant to E.R. 1.15. *Id*.

Practically speaking, an attorney should consider filing a motion to intervene on behalf of the carrier in this situation as well. Depending on the stage of litigation, this may be more difficult. However, the "timely" application requirement under Rule 24(a) is a "flexible" one. *Weaver v. Synthes, Ltd.* (U.S.A.), 162 Ariz. 442, 446, 784 P.2d 268, 272 (App. 1989). In determining whether an application for intervention is timely, the court must consider several factors, including the stage of the proceedings and whether the applicant could have

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[1] *See* Ariz. Op. 80-11: "What are the ethical obligations of a lawyer who, for reasons beyond his control, is unable to communicate with or secure instructions from his client in a pending action? His duty would appear to be to protect the interests of his client to the extent he can reasonably do so and, when the lawyer cannot reasonably carry out his employment effectively, he should relieve himself from those duties by seeking withdrawal…taking care to obtain permission from the court when needed…and to avoid foreseeable prejudice to the rights of the client."

EMPTY CHAIR continued from Page 2

notice inadequate for failing to contain sufficient facts to support the notice. *Id*. at 287, ¶ 27, 205 P.3d at 1134.

The Aftermath

Certainly, Rule 26(b)(5), Ariz.R.Civ.P., has always required that notices of non-parties at fault contain "facts supporting the claimed liability." In practice, however, notices were routinely filed alleging vague identities, with little or no specific facts that would tend to establish liability. From a defense perspective, a bare bones notice expends few resources, and still creates an empty chair to which liability may be assigned. After *Cendejas*, however, it is clear that such notices will no longer be sufficient.

It is important to note that *Cendejas* addressed situations where a legitimate non-party tortfeasor cannot be named, through no fault of either party. For example, consider a situation where a person is injured partially due to the negligence of a named defendant, and partially due to the criminal actions of an unidentified third party. The *Cendejas* court made it clear that notices of non-party at fault are still permitted under such circumstances, but sufficient facts must be included to allow the fact finder to allocate fault. *Id*. at 286, ¶ 24, 205 P.3d at 1133. Additionally, the court referred to the fact pattern underlying an earlier decision, where the court upheld such a notice, *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 937 P.2d 353 (App.1996), based in part on the fact that the defendants had gone to great lengths to discern the identity of the unknown assailant.

The practical result of *Cendejas* is that such notices will need to be well thought out and supported, prior to filing. Moreover, a "shot gun" approach will no longer be sufficient to create an empty chair. Rather, defendants will now need to sufficiently develop the factual record prior to filing a notice of non-party at fault. In some situations, this may require that defendants expend additional time and resources in order to properly designate non-parties at fault. Consequently, supporting such notices should be a prominent consideration during the initial discovery period in order to avoid incurring unnecessary costs, or blowing the 150 day deadline.

Despite these changes, notices of non-parties at fault are still an effective defense tool that can and should be employed to reduce exposure. In the aftermath of *Cendejas*, defense counsel must simply be more deliberate and detailed in designating non-parties, but the pay off, measured by reduced defense exposure, can be substantial. ◆

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attempted to intervene earlier. *Napolitano v. Brown & Williamson Tobacco Corp.*, 196 Ariz. 382, 384, ¶ 5, 998 P.2d 1055, 1057 (2000). "The most important consideration, however, is whether the delay in moving for intervention will prejudice the existing parties in the case." *Id.* A motion to intervene may be timely filed even after a judgment has been entered. *Weaver*, 162 Ariz. at 446, 784 P.2d at 272; *Liston v. Butler*, 4 Ariz.App. 460, 466, 421 P.2d 542, 548 (App. 1966).

Due to the Arizona State Bar's recent ethics opinions, it is important for attorneys and their clients to be cognizant of the legal and ethical obligations that arise when a client cannot be found, either at the outset of the litigation or during the course of litigation. The Arizona Rules of Civil Procedure and the Arizona Ethical Rules provide the necessary tools and guidance to appropriately handle such situations and should utilized accordingly. ◆

ADA RETALIATION continued from Page 1

Americans with Disabilities Act (ADA) claims alleging that he was terminated because of age and disability and retaliated against for making employee hotline calls complaining of his restaurant manager's alleged discriminatory conduct. The district court granted summary judgment on the employee's ADA disability discrimination claim, finding he did not suffer from an ADA-covered disability. Although the district court found no disability discrimination, the court decided that the issue of whether the employee was terminated for ***reporting*** alleged ADA discrimination to the employee hotline would go to the jury. The day before trial, the district court granted the employer's motion in limine barring the employee from seeking compensatory and punitive damages for his ADA retaliation claim and also barred the claim from being decided by a jury (because only equitable relief was available). The employee appealed this eve-of-trial decision to the U.S. Court of Appeals for the Ninth Circuit.

In limiting ADA retaliation claim damages to equitable relief, the Ninth Circuit Court of Appeals found that when Congress expanded the types of relief available under the ADA, it did not specifically provide for recovery of compensatory and punitive damages for retaliation claims. Being bound by the statutory language, the Ninth Circuit refused to infer that it was an oversight by Congress to not include recovery of compensatory and punitive damages in the ADA retaliation claim statutory scheme. In short, although when Congress passed the Civil Rights Act of 1991, Congress sought to make compensatory and punitive damages recoverable in disability discrimination claims and in reasonable accommodation claims, Congress did not specifically provide for such recovery in ADA retaliation claims.

The Ninth Circuit is not alone in this conclusion. The holding in this case mirrors a 2004 decision by the Seventh Circuit Court of Appeals in *Kramer v. Banc of Am. Sec.,* 355 F.3d 961*, cert. denied*, 542 U.S. 932 (2004).[2] Like the Ninth Circuit, the Seventh Circuit found five years ago that while 42 U.S.C. §1981a expanded the remedies under the ADA to include punitive and compensatory damages, this applied only to certain ADA claims - namely, discrimination claims. ADA retaliation claims are not addressed by the statute. This is not out of line with recoveries permitted under other employment discrimination statutes. For example, under the Age Discrimination in Employment Act (ADEA), damages are limited to recovery of back pay, front pay and/or reinstatement with double damages recoverable upon a finding of willful discrimination by the employer.[3] This applies to both age discrimination and age retaliation claims.

In sum, under *Alvarado*, an employee can no longer claim the right to recover compensatory and punitive damages in addition to back pay/front pay/reinstatement. Nor can an employee demand the right to a jury trial for an ADA retaliation claim. The *Alvarado* opinion recognizes that a special exception exists under the statute for ADA retaliation cases - ie: cases in which the employee alleges that the employer took adverse action against the employee for engaging in the protected activity of ***reporting*** alleged ADA discriminatory actions by the employer. Employees may still recover equitable relief (back pay/front pay/reinstatement) as well as compensatory and punitive damages in ADA discrimination cases - ie: cases in which the employee alleges he or she was subject to discriminatory employment practices because the employee suffered from a recognized disability covered by the ADA.

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[2] *Compare Shellenberger v. Summit Bancorp., Inc.*, 2006 WL 1531792 (E.D. Pa. 2006) (holding that compensatory and punitive damages provided for in 42 U.S.C. § 1981a(a)(2) do not apply to 42 U.S.C. §12203 (ADA retaliation claims)); *Cantrell v. Nissan North America, Inc.*, 2006 WL 724549 (M.D. Tenn. 2006) (same); *Bowles v. Carolina Cargo Inc.*, 10 F App'x 889 (4th Cir. 2004) (holding that compensatory and punitive damages for ADA retaliation claims are precluded); *Santana v. Lehigh Valley Hosp. & Health Network*, 2005 WL 1941654 (E.D. P.a. 2005) (same); *Sabbrese v. Lowe's Home Ctrs., Inc.*, 320 F.Supp.2d 311, 331-32 (W.D. Pa. 2004) (same); *Johnson v. Ed Bozarth #1 Park Meadows Chevrolet, Inc.*, 297 F. Supp. 2d 1286 (D. Colo. 2004) (same); *Sink v. Wal-Mart Stores*, 147 F.Supp.2d 1085, 1100-01 (D. Kan. 2001) (same); *Boe v. AlliedSignal*, 131 F.Supp.2d 1197, 1202-03 (D. Kan. 2001) (same), *Brown v. City of Lee's Summit*, 1999 WL 827768, *2-*4 (W.D. Mo. 1999) (same), *with Edwards v. Brookhaven Sci. Assocs.*, LLC, 390 F.Supp.2d 225 (E.D. N.Y. 2005) (holding compensatory and punitive damages available in ADA retaliation claims); *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d. 236, 240-41 (W.D.N.Y. 2003) (same); *Rhoads v. FDIC*, 2002 WL 31755247, *1-*2 (D.Md. 2002) (same); *Ostrach v. Regents of the Univ. of Calif.*, 957 F.Supp. 196, 200-01 (E.D. Cal. 1997) (same).

[3] The ADEA does specifically, provide, however, that an employee's age discrimination/retaliation claim may be heard by a jury.

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with that debt. Moreover, the causation element still applies and remains critical. As stated by the bankruptcy court in *Drabkin v. L & L Construction Associates, Inc.*, 168 B.R. (Bankr. D. Colorado, 1993), the resultant damages must have been proximately caused by the negligent or wrongful act of the accountant. In any event, the deepening insolvency theory of damages can provide a motivating factor to include the debtor's accountant in the lawsuit. ◆

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actionable. Plaintiffs in a defamation case must prove that the statement was false.

As defamation cases can be expensive to defend, you will want to be cautious when you are on-line "chatting" about your experiences with certain people or businesses. And, before you blog, you may want to read your homeowner's or commercial general liability insurance policy carefully to confirm that you have coverage and the extent of your coverage.◆

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> or that the priorities established by that subsection did not apply to all types of coverage. We believe it is unreasonable to conclude that uninsured motorist coverage is excluded from the term automobile liability insurance as used in A.R.S. § 28-1170.01(A).

In short, the *Nationwide* case stands for the proposition that A.R.S. § 28-4010 encompasses first party coverage. Although in *Brown*, the Supreme Court held that the State Farm escape clause was unenforceable, it also went on to hold:

> Thus, to the extent her actual damages are not fully compensated, Brown is entitled to recover the limits of her State Farm UIM coverage over and above the amounts of available liability coverage from Farmers and primary UIM coverage from Universal.

Thus, the Supreme Court in *Brown* concluded that Universal (the vehicle's insurance) was the primary UIM coverage while State Farm (the passenger's insurance) was excess.

Moreover, numerous courts from foreign jurisdictions have held in both UM and UIM cases that the primary carrier is the one that insures the vehicle while the excess insurance is the passenger's carrier. See *Progressive Casualty Insurance Company v. Farm Bureau Mutual Insurance Company*, 27 Kan.App.2d, 765, 767, 9 P.3d 565, 567 (Kan.Ct.App. 2000); *US Fidelity & Guaranty Company v. John Deere Insurance Company*, 830 So.2d 1145, 1148 (Miss. 2002); *Elrod v. General Casualty Company of Wisconsin*, 566 N.W. 2d 482, 486, 1997 S.D. 90, 15 (1997); *Tarango v. Farmers Insurance Company of Arizona,* 115 N.M. 225, 227, 849 P.2d 368, 370 (1993). Authors of respected insurance treatises agree. *See Couch on Insurance*, 3d § 171: 26, page 171-30 (2006); *Widiss*, uninsured and underinsured motorist insurance Section 40.5, at 266 (2d Ed. 1995).

The above cases and secondary authorities confirm the majority rule that an insurer of a vehicle involved in a collision has primary UM or UIM coverage for passengers of that vehicle, while the insurer of a passenger in that vehicle has excess coverage. So the next time your insurance colleague insists that you go first, let the person know that Arizona law may require you to be the most "courteous" one in these circumstances.

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This decision is a win for Arizona employers, greatly limiting the scope of recovery in ADA retaliation cases. What remains to be seen is whether the Supreme Court will weigh in on the matter after declining to take up the Seventh Circuit *Kramer* case five years ago and/or whether Congress will take action to "correct" what plaintiffs' attorneys say must have been a "drafting error." It may very well have been Congress' intent however to *limit* recovery in this context because the statutory scheme providing for ADA retaliation claims does not require that the employee *actually suffer from* an ADA protected disability, as illustrated by the employee's situation in the *Alvarado* case. ◆

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