

**The In-House Counsel Interview:
Jonathan Gulsvig of Professional Plastics, Inc.
By Darrell P. White**



*This installment features
Jonathan S. Gulsvig,
General Counsel,
Professional Plastics, Inc.*

Q: Can you describe your career path?

My career path is rooted in Southern California. I attended UCLA, graduated early, and went right on to Chapman University, Dale E. Fowler School of Law. Externing for the Hon. Andrew J. Guilford was my best experience in law school. I learned first-hand how courtrooms and chambers function, analysis of litigation matters from chambers, and more than I could possibly describe in this short interview.

After law school, I worked as a litigation associ-
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**Nonparty Discovery in California Arbitration:
How to Get What You Want
By Leilani L. Jones**



Opting for arbitration requires attorneys to balance efficiency and procedural protections. The implications of arbitration are something clients certainly have to carefully consider both when drafting arbitration provisions, and after initiating a demand. While arbitration can in many respects streamline the civil discovery process, one of the largest roadblocks for cases in California arbitrations is “streamlining” discovery from nonparties. This article explores the challenges presented by third party discovery in arbitration, and proposes strategies for obtaining such discovery efficiently and expeditiously.

Alternative dispute resolution tends to make sense to most businesses implementing preventive measures for future litigation. Clients, lawyers, and judges can generally agree that arbitration is the more “cost-effective” way to resolve disputes, especially in California. While arbitration is theoretically a low-cost option for dispute resolution, almost all parties (particularly the party defending) bristle at climbing expenditures during discovery. This is all despite the perception of more “streamlined” processes in arbitrations. On balance, arbitrators, employing less formal procedures for discovery disputes, can typically cut to the chase faster than a civil judge. Parties often resolve issues via letter brief and telephonic hearing, if necessary, instead of formal noticed motions with accompanying separate statements. The Judicial Arbitration and Mediation Services, Inc.’s (“JAMS”) own “Arbitration Discovery Protocols” specifically

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The President's Message

By Daniel A. Sasse



It is hard for me to believe that Thanksgiving is behind us and the holidays are upon us. 2018 is quickly becoming a memory. It has been an absolute honor and an inspiration to serve as President of ABTL Orange County this past year. There are so many things that happen behind the scenes as part of this great organization: people are helped, lawyers are

trained, connections are made between lawyers, connections are made between bench and bar, and connections are made with our community. In an age where civility can be lacking, it is easy to take these connections for granted and underestimate the importance of working and learning together. These connections form the fabric of our legal community and the core of our civility. Thank you to the entire ABTL OC family for making 2018 such a great year.

With this final message, I am pleased to report that ABTL is as strong as ever. Since the last issue of the ABTL Report we concluded a fantastic Annual Seminar at beautiful Wailea Beach Resort in Maui. The event was entitled “#this is 2018: When #metoo Becomes a Business Dispute.” We heard from some of the country’s top lawyers and judges, and Orange County showed up strong! Judge Doug McCormick, Maria Stearns, Karla Kraft, Ken Parker, Mark Wilson, Judge Linda Marks, Michael Penn, and Mark Finkelstein provided valuable tips, insights, and advice. I heard from many of you who attended, and—without exception—the feedback was incredibly positive (I’m sure the perfect weather, great food, and golf/tennis/spa activities were contributing factors). A special thank you to John Holcomb and Will O’Neill who led the planning efforts on behalf of Orange County. If you were not able to attend, I would strongly recommend that you make it a priority to join us next year at La Quinta Resort & Spa, when Orange County is the host!

In addition to the very successful Annual Seminar, we have enjoyed amazing programs this year. Our November dinner program helped us “Decode The Midterm Election Results: what every lawyer needs to know.” We were joined by Dr. Andrew Busch who discussed “Macro Trends” underlying the federal, state and local midterm election results, Dr.

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Insurance Coverage for a Breach of Contract Claim May Not Be Subject to a Contractual Liability Exclusion

By Maren B. Hufton



Introduction

It is routine for policyholders to submit a claim for a lawsuit that includes a breach of contract cause of action. It is equally common for an insurer to initially deny coverage for such a claim, based either on a false assumption that policies cover only tort-related losses, or on an overly-expansive interpretation of standard exclusions for contractual liability. However, policies generally do not explicitly distinguish between tort or contractual claims, and contractual liability, particularly in the insurance context, is not necessarily the same as liability for breach of contract. As a result, where an insurer denies coverage for a claim arising from a breach of contract cause of action, the insured should not accept such denial without carefully reviewing the language and meaning of the policy and its exclusion for contractual liability.

This article describes two ways that an insurer may deny coverage for claims relating to breach of contract actions. In doing so, this article also explains how a significant majority of courts have sided with policyholders who have challenged such denials. In short, the lesson for policyholders is two-fold. First, as discussed in section (I), the form of a cause of action should not dictate whether coverage is provided. Second, and as explained in section (II), a standard exclusion for contractual liability is more limited than its name may imply. That said, policyholders who are considering a coverage denial should be aware of certain outlier case law, examined briefly in section (III).

I. Coverage for Breach of Contract Claims is not Automatically Precluded.

First, insurers may be inclined to deny coverage for all contract-based claims, perhaps inferring from a contractual liability exclusion that coverage should extend only to claims in tort. This approach likely misreads the language of the policy and how it has been interpreted by many courts, which have found policies not so limiting. The California Supreme Court, for example, has explained that the focus

Three Lessons Learned from the *Sheppard Mullin v. J-M Manufacturing* Decision

By Michael S. LeBoff

On August 30, 2018, the California Supreme Court issued its much-awaited opinion in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.*, 6 Cal. 5th 59 (2018). The *Sheppard Mullin* opinion is one of the most impactful opinions the California Supreme Court issued on the practice of law in years. But, what does this forty-three page opinion mean for California business litigators? The answer: A lot.

The Facts

J-M Manufacturing Company (“J-M”) retained Sheppard, Mullin, Richter & Hampton, LLP (“Sheppard Mullin”) to represent the company in a federal *qui tam* action involving several public entity intervenors, including the South Tahoe Public Utility District (“South Tahoe”). Prior to being retained, Sheppard Mullin ran a conflict check and discovered the firm did a small amount of unrelated employment counseling for South Tahoe. Sheppard Mullin’s retainer agreements with J-M and South Tahoe contained a blanket waiver of all current and future conflicts. After internal consultations, Sheppard Mullin concluded it could concurrently represent both clients and, as it will later regret, did not have to disclose the conflict to either J-M or South Tahoe. After performing 10,000 hours of work for J-M in the *qui tam* action, South Tahoe discovered the conflict and successfully moved to disqualify Sheppard Mullin. During the time Sheppard Mullin represented J-M, the firm performed only 12 hours of unrelated employment counseling for South Tahoe.



After the court disqualified Sheppard Mullin, the firm sued J-M in state court for roughly \$1.2 million in unpaid legal fees. J-M countersued, seeking disgorgement of nearly \$2 million in fees it already paid the firm in the federal *qui tam* action. Sheppard Mullin successfully petitioned to compel arbitration of the fee dispute, and the arbitrator awarded Sheppard Mullin more than \$1.3 million in fees and interest after concluding Sheppard Mullin’s ethical violation was not sufficiently serious or egregious to warrant forfeiture or disgorgement of its fees. The Superior Court confirmed the arbitration award.

J-M appealed, and the Court of Appeal reversed,

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Young Lawyers Division Update

The Young Lawyers Division has had an exciting year. In April, we met with Judge Martha Gooding for a brown bag lunch to discuss the pitfalls to avoid as young lawyers. She provided fantastic advice about how to present ourselves in court and how best to present our arguments in motion practice. In June, the YLD visited the California Court of Appeal where we observed a series of oral arguments in the morning, attended a courthouse tour, and engaged in a fascinating discussion with Justice Bedsworth over lunch.

On December 12, 2018, we had our final brown bag lunch with Judge Nathan Scott. Judge Scott presented on Communicating with Clarity and Civility. He gave YLD members advice on how to present arguments efficiently and effectively, and answered questions about his path to the bench, his experience as a research attorney at the California Court of Appeals, and his pet peeves.

Finally, on December 13, 2018, ABTL sponsored the Federal Bar Association's Swearing-In Ceremony and Champagne Reception. ABTL welcomed new young lawyers to our community and explained to them why ABTL is so great.

We have enjoyed serving our YLD community this past year and look forward to another exciting year of YLD activities.

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ate at WFBM, LLP and then Selman Breitman, LLP. My practice focused on toxic torts along with environmental litigation, and commercial litigation matters. I enjoyed the challenge of litigation and working with top attorneys in the field.

As a more senior attorney, I increased my business development efforts. One of the companies I started working with was Professional Plastics, Inc. – a local, multi-generational family-owned business experiencing tremendous growth. After a series of meetings with my contacts at the company, I was impressed with what they were doing and the conversation changed to how a legal department could further support the company's growth. This naturally led to me becoming the company's first General Counsel. I couldn't be happier with that decision.

Q: What is a typical day like in General Counsel's office at a national plastics manufacturing company?

We have the traditional mix of corporate, labor and employment, and compliance issues challenging a company of our size. I typically spend the mornings putting out fires and handling the day-to-day business transactions and reserve the afternoons for more system and procedures type projects that are part of running a legal department. As a global company with locations in 13 states and Asia, on any given day I find myself dealing with issues across state and national borders so jurisdictional issues are common questions to hit my desk.

Q: What is your favorite part of your role?

I enjoy building and running a legal department that partners with a growing company. One of the biggest differences I enjoy about being in-house is that I need to work with the business side to make progress; it is not arms-length legal services. The executive team I work with has trusted me to run with numerous business and legal projects that I would never have been able to implement from the outside. In my experience, that is a rarity for companies that do the volume and size that we do.

I have also really enjoyed working directly with the owners of the company. They bring a depth of knowledge of our industry, and are refreshingly invested in the employees' long-term success. Together, we've been able to create a legal department that is part of the company's culture, and not an obstacle to its success. They're great people to work with here.

Q: What do you look for in outside litigation counsel?

Along with the standard advice about responsiveness, budgets, and doing great work, I'd stress the importance of bringing value. I appreciate when outside counsel provides solid legal advice, but I really appreciate when they translate the advice so that the non-lawyers I advise can understand it, too. The easier it is for me to translate the advice and options to our Board and CEO, the greater the value to our company. There is a lot of emphasis in the business world on "value," so I evaluate a lot of the outside legal work through the perspective of "What value does this bring?" Outside counsel bringing value to the company is the most important quality to me because that is how I am evaluated at the end of the day (or quarter).

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Q: What advice would you give to junior or mid-level associates interested in going in-house?

In my experience, litigation is a less traditional way of going in-house because there is more demand inside large companies for corporate attorneys, regulatory and compliance, etc. So the first point I'd make is if you are interested in going in-house down the road, try to incorporate some of those skill sets as they directly translate to business need. Litigators have opportunities throughout their career to become subject matter experts in areas of the law that translate very well to in-house roles at large companies, and the ability to manage risk can be just as valuable to a company as being able to handle an acquisition.

Regardless of experience, understanding the strategy, goals, and risk tolerance of the company is paramount. Working in-house means working with businesspeople who are driven to accomplish business goals; they are not lawyers and they do not (usually) care about your legal analysis of an issue unless it is helping or hindering their work. The role of an in-house attorney should not be to present roadblocks to business units over every theoretically possible risk. Instead, successful in-house attorneys integrate with the team by providing actionable solutions to important problems as much as possible. Big picture takeaways can be more important than issue spotting for the Board and owners.

♦ *Mr. Gulsvig was interviewed by Darrell P. White, a partner with Kimura London & White LLP in Irvine, CA.*

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finding the undisclosed conflict required the arbitration award be vacated and further required Sheppard Mullin disgorge the \$2 million in fees it already received. The California Supreme Court granted Sheppard Mullin's petition for review.

The Supreme Court Finds Sheppard Mullin's Entire Fee Agreement, Including the Arbitration Provision, Is Illegal and Unenforceable.

The Court of Appeal held the undisclosed conflict of interest rendered the entire fee agreement, including the arbitration provision, illegal and unenforceable. The California Supreme Court agreed, reaffirming prior precedent holding that a contract or transaction with attorneys may be declared unenforceable if it violates the California Rules of Professional Conduct. The courts, not arbitrators, determine whether the agreement is an unenforceable illegal contract.

The Supreme Court concluded Sheppard Mullin's concurrent representation of J-M and South Tahoe rendered the entire fee agreement between Sheppard Mullin and J-M unenforceable. The Supreme Court did not discuss the impact of the conflict on the South Tahoe fee agreement, raising the question whether the outcome would have been different if Sheppard Mullin represented J-M before representing South Tahoe. Under that hypothetical scenario, there would have been no conflict when the J-M fee agreement was signed, and thus, at least at the time, the agreement would not have been unlawful.

In reaching its decision, the Supreme Court emphasized the fact Sheppard Mullin knew of but did not disclose the conflict *before* it started representing J-M. The court, stating the obvious, held that "[t]o be informed, the client's consent to dual representation must be based on disclosure of all material facts the attorney knows and can reveal. . . . An attorney or law firm that knowingly withholds material information about a conflict has not earned the confidence and trust the rule [Rule 3-310] is designed to protect." *Sheppard Mullin*, 6 Cal. 5th at 84. Applying this standard, the court held the conflict waiver was inadequate. While it put J-M on notice that there *might* be a conflict, Sheppard Mullin did not advise J-M that a conflict *actually existed* and, thus, the firm did not disclose all the relevant circumstances within its knowledge.

The Supreme Court rejected Sheppard Mullin's argument that its advance waiver was sufficient because J-M was a sophisticated purchaser of legal ser-

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vices. “Whether the client is an individual or a multinational corporation with a large law department, the duty of loyalty demands an attorney or law firm provide the client all material information in the attorney or firm’s possession.” *Id.* at 86. The court also rejected the notion that clients should have to investigate their attorneys, holding: “Simply put, withholding information about a known, existing conflict is not consistent with informed consent.” *Id.* The court, however, stopped short of holding that blanket conflict waivers are *per se* invalid. “Because this case concerns the failure to disclose a current conflict, we have no occasion here to decide whether, or under what circumstances, a blanket advance waiver . . . would be permissible.” *Id.*

Sheppard Mullin also argued even if it violated conflict of interest rules, the violation would not render the entire retainer agreement void because the agreement encompassed other matters. The Supreme Court disagreed, finding the object of the agreement was representation in the *qui tam* action. Therefore, the client entered the transaction with terms that undermined an ethical rule designed to protect clients, as well as public confidence in the legal profession. The court nevertheless cautioned not to read its holding too broadly, noting “nor do we today hold, that an attorney-services contract may be declared illegal in its entirety simply because it contains a provision that conflicts with an attorney’s obligations under the Rules of Professional Conduct.” *Id.* at 79. Thus, a client probably cannot invalidate an entire fee agreement based on a technical violation, or violations that do not go to the core of the representation, such as an illegal fee-sharing provision. It is unclear where future courts will draw that line, so expect more litigation on this issue as unhappy clients use *Sheppard Mullin* to try and avoid unfavorable fee agreements.

The opinion left many other questions unanswered. It is unclear, for example, whether the result would have been different if Sheppard Mullin discovered the conflict *after* J-M signed the retainer agreement. Would it have mattered if Sheppard Mullin performed 1,000 hours of work before discovering the conflict, but worked another 9,000 hours without disclosing the conflict to its clients? What if Sheppard Mullin missed the conflict through an honest mistake or simple negligence? Time will tell how future courts will answer these and other open questions.

**The Court Opens the Door to
Quantum Meruit Recovery.**

Unlike the Court of Appeal, the Supreme Court showed Sheppard Mullin some mercy. In the last por-

tion of its analysis, the court addressed the \$3 million question: Was Sheppard Mullin entitled to any compensation for the 10,000 hours it worked in the *qui tam* case, or would it have to forego its fees and disgorge the \$2 million it already received? The Court of Appeal ordered the firm to disgorge the entire fee. But the California Supreme Court punted, finding the question was not “ripe for our resolution.” *Id.* at 88. Two dissenters, Justice Chin and Chief Justice Cantil-Sakauye, agreed with the Court of Appeal’s harsher response.

The majority, however, refused to find the ethical violation categorically disentitled Sheppard Mullin from recovering the value of services rendered to J-M. Instead, the court left open the possibility Sheppard Mullin could recover under a *quantum meruit* theory. The court found Sheppard Mullin could potentially show its conduct was not willful and its departure from the ethical rules was not so severe or harmful that its legal services had no value to J-M. Sheppard Mullin may attempt to show the value of its 10,000 hours of legal services despite the harm done to J-M and “to the relationship of trust between attorney and client.” *Id.* at 90. The trial court must then exercise its discretion to fashion a remedy as equity warrants, while preserving attorneys’ incentive to scrupulously adhere to the Rules of Professional Conduct.

In asserting a *quantum meruit* claim, the burden lies with the law firm. Relevant considerations include the gravity and timing of the ethical violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies. And, before awarding compensation, courts must be satisfied the award does not undermine incentives for complying with the Rules of Professional Conduct. For this reason, the Supreme Court held, absent exceptional circumstances (no guidance on what this includes), the agreed upon hourly rates should not be the measure of value in *quantum meruit*. “Although the law firm may be entitled to some compensation for its work, its ethical breach will ordinarily require it to relinquish some or all of the profits for which it negotiated.” *Id.* at 95.

The Supreme Court concluded its opinion by emphasizing that by leaving open the possibility of *quantum meruit* recovery, it “in no way condone[s] the practice of failing to inform a client of a known, existing conflict of interest before asking the client to sign a blanket conflicts waiver.” *Id.* at 96.

It remains to be seen how future courts will handle the *quantum meruit* analysis, particularly where, as here, the consequences of denying compensation are

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severe. Nevertheless, the opinion exposes firms to a substantial risk in the event of an undisclosed conflict or other violation of the Rules of Professional Conduct. At the very least, firms should expect an uptick in disgorgement claims and fee disputes.

Three Take-Aways:

When It Comes to Potential Conflicts: Disclose, Disclose, Disclose.

The mortal sin Sheppard Mullin committed in this case was not disclosing a known conflict. The number one lesson from this case is, when it comes to conflicts, disclose, disclose, disclose. Spend time thinking about and identifying potential conflicts. Do not ignore the obvious conflicts, like husband-wife, parent-subsidary, and partner-partnership. The stakes are too high to take a cavalier attitude towards conflicts. In fact, attorneys should not only disclose known conflicts but all potentially conceivable conflicts. The more you disclose, the better protected you are from future disgorgement claims.

Although the court did not go so far as to determine blanket advance conflict waivers are per se invalid, given the *Sheppard Mullin* opinion, it would be foolhardy to rely on such waivers going forward. Counsel are well advised to draft conflict waivers specific for each case. As the saying goes: An ounce of prevention is worth a pound of cure.

Make those disclosures in writing. The sincerest, detailed verbal disclosures are meaningless. And do not forget to have the client sign off on those disclosures, as the rules require *informed written consent*. If you do not, the consequences can be severe. Your engagement letter goes out the window. Your arbitration provision goes with it. And so does your agreed-upon hourly rate.

Fall Back on *Quantum Meruit*.

Although the Supreme Court harshly criticized Sheppard Mullin's handling of the conflict, the court showed some mercy by allowing Sheppard Mullin to potentially recover some of its fees under a *quantum meruit* theory. The Supreme Court seemingly recognized that mistakes happen, and a *per se* rule barring Sheppard Mullin from receiving any compensation for the 10,000 hours it devoted to the case would be too harsh, particularly given a lack of actual harm.

So, if you are in a position where your fee agreement was invalidated, fall back on *quantum meruit*.

Attorneys can increase their odds of getting a larger *quantum meruit* recovery by acting in good faith, taking responsibility, disclosing problems as soon as they are discovered, and doing good work. On the flip side, a lawyer's chances of a meaningful *quantum meruit* recovery diminish if the attorney tries to bury the facts hoping the firm will not get caught (it will), tries to blame the client, or has already upset the client through poor work or ineffective communication.

Think Twice Before Suing Your Client for Fees.

There is no *Sheppard Mullin v. J-M Manufacturing* if Sheppard Mullin does not sue its client for unpaid fees. Suing a client is fraught with risk, so be sure to evaluate all the possible consequences and be sure to exhaust all pre-lawsuit resolution options. In fee disputes, lawyers should expect clients will rely heavily on the *Sheppard Mullin* decision to not only defend the claim for unpaid fees but to seek disgorgement of fees paid. Clients will not be able to disgorge fees in all fee disputes, but the *Sheppard Mullin* opinion will embolden clients to at least try.

♦ *Michael S. LeBoff, P.C.* is a partner at Klein & Wilson in Newport Beach, California.

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“ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court.” *Accessed at* <https://www.jamsadr.com/arbitration-discovery-protocols>.

The Facts and Fictions of Third Party Discovery in Arbitration

Once in arbitration, the fact-finding process can be a challenge simply between the parties, where extracting necessary evidence from the opposition is an uphill battle in itself. Typically, arbitrators are able to resolve these disputes expediently. Unfortunately, the same cannot be said when it comes to obtaining discovery from nonparties outside of the four corners of the applicable agreement or clause. In most commercial disputes, parties take for granted the potential necessity of such information—they certainly are not prioritizing or thinking about it when drafting contracts at the outset. The problem is arbitrators lack the statutory or contractual authority to monitor and enforce third-party discovery absent parties’ forethought. So what options are there?

The California Civil Discovery Act sets forth arbitration discovery rights. The Act only authorizes arbitrators to issue third-party subpoenas, with the same force as a civil judge, if the nature of the dispute is personal injury or wrongful death. *See* Cal. Code Civ. P. § 1283.1. In such cases, section 1283.05 of the Code applies, stating that after the appointment of an arbitrator, the parties to the arbitration have the same rights to take depositions and obtain discovery and to “exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration ... as provided in” the statutory provisions governing subpoenas (§§ 1985 to 1997) and in the Civil Discovery Act (§§ 2016.010 et seq.) “as if the subject matter of the arbitration were pending before a superior court of this state in a civil action” Because section 1283.05(a) incorporates the Discovery Act, and that law permits discovery from nonparties (§§ 2020.010 et seq.), the right to discovery in such cases includes discovery from nonparties.

This statutory authority, however, does not automatically apply in cases that *don’t* involve personal injury or wrongful death. *See* Cal. Code Civ. P. § 1283.05(b). In all other cases, the arbitrator can only utilize the authority granted by the Discovery Act if the arbitration agreement explicitly provides

for third-party discovery. *Id.* This is a pitfall for many litigators who, when initiating arbitration, are stuck with an agreement (or merely a clause) that does not unambiguously mention third-party discovery—and simply referencing the right to conduct discovery won’t do the trick. Indeed, the Code of Civil Procedure makes clear that “[o]nly if the parties by their agreement so provide, may the provisions of Section 1283.05 be incorporated into, made a part of, or made applicable to, any other arbitration agreement.” *Id.*, subs. (b). According to that language about “incorporat[ion],” it seems a mere nod to discovery generally is not enough.

Getting What You Need from Nonparties: Easier Said Than Done

But even when parties are actually in arbitration, the discovery-seeker faces other challenges with regard to third party discovery under California law. They may try to send a subpoena to the third party, and hope that the nonparty will respond in good faith. Wiser third parties will request a copy of the applicable arbitration agreement, eventually seeing that it doesn’t permit discovery from nonlitigants. In this situation, there really is no option for a party to enforce discovery if the agreement does not incorporate section 1283.05. In fact, probably the only available route is to initiate a miscellaneous action in civil court, either in California or in the out-of-state forum. Both present risks. As far as California goes, the court is under no obligation to force compliance, especially because the Discovery Act is specific regarding non-party subpoenas. It’s also safe to say an out-of-state judge is unlikely to enforce a California subpoena issued out of an arbitration forum. Moreover, judicial review of third-party discovery disputes during arbitration imposes huge delays to the information gathering process. Third parties may even use judicial review as a tactic to create delay sufficient to dissuade the arbitrating parties from seeking documents from them in the first place.

If the arbitration agreement does incorporate section 1283.05, at least the party is in a hypothetically better position, and the process of enforcement should be easier. Emphasis on “should be.” Despite so many cases circumventing the court system in favor of ADR, California case law is thin on commentary about how third-party discovery functions in arbitration. The California Supreme Court has stated that, at least in cases subject to section 1283.05 (*i.e.*, personal injury), the “arbitrator’s powers to enforce discovery resem-

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Lori Cox Han who discussed the National Election Results, including impact on the federal judiciary, and former California State Senators Dick Ackerman and Joe Dunn who provided State and Local Commentary on the election. The conversation was enlightening, but it was even more entertaining when our speakers did not see eye to eye on the impact of the election (which seemed to happen frequently). The event was also our annual holiday gift giving opportunity, where we raised money for the children of Mercy House as well as collected new stuffed animals for the Orange County Superior Court's adoption program.

And finally, last but not least, a huge thank you goes to our Executive Director Linda Sampson, who works tirelessly for this organization. Linda is graceful under pressure, creative in her solutions, and makes the impossible possible. We are fortunate that she continues to play such an important role in our organization.

I wish you all a safe, and happy, holiday season and a fantastic New Year.

♦ *Daniel A. Sasse is a litigation partner at Crowell & Moring LLP.*

-Insurance Coverage: Continued from page 3-

should not be on the legal theory asserted against the insured, but on the substance of the claim and the damages:

[W]hether a particular claim falls within the coverage afforded by a liability policy is not affected by the form of the legal proceeding.... The coverage agreement. . . is intentionally broad enough to include the insured's obligation to pay damages *for breach of contract as well as for tort*, within limitations imposed by other terms of the coverage agreement. . . .

Vandenberg v. Superior Court of Sacramento County, 21 Cal. 4th 815, 841 (Cal 1999). (emphasis added and internal citations omitted).

Based on this approach, a policy should provide coverage based on the substance of a claim and not the form of the cause of action pled. And this makes sense. In many instances, a breach of contract claim may just as readily be pled as a tort claim, such as where a party assumes by contract a duty to perform, fails to adhere to the applicable standard of care, and a third party is injured as a result. Put simply, recovery under an insurance policy should not depend on whether the injured party sued the policyholder in contract or tort.

This reasoning is consistent with typical policy language—which does not expressly limit the definition of a claim to one brought in tort and which uses “claim” to refer to the relief or damages that an insured may face, rather than the type or nature of a cause of action. Representative definitions of “claim,” taken from sample policies, are illustrative:

- a civil proceeding against any Insured seeking monetary damages or non-monetary or injunctive relief, commenced by the service of a complaint or similar proceeding;
- any written notice or demand for monetary, non-monetary, or injunctive relief ... any notice of suit ... any arbitration or mediation proceeding;
- a civil, criminal or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by ... service of a complaint or similar proceeding;

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-Insurance Coverage: Continued from page 9-

- a civil, criminal, regulatory or administrative proceeding for monetary, non-monetary, or injunctive relief commenced by service of a complaint or similar pleading...

The definition of terms like “damages” and “loss” often also reflects the primacy of a claim’s substance over its form. One exemplary definition of “damages” states that it:

- means compensatory damages, any award or prejudgment or post-judgment interest and settlements which the Insured becomes legally obligated to pay on account of any Claim...

And “loss” has been defined as:

- damages, judgments, settlements, pre- and post-judgment interest...

These representative definitions show that covered harm is not dependent on the nature of the pleading. The reasoning of *Vandenberg* is well-grounded and supported by example policy language. A denial of coverage relating to a breach of contract claim should not be summarily denied because of the form of the pleading. Any policyholder facing such a denial should consider challenging the same.

II. Excluded Contractual Liability is Not all Contractual Liability.

Second, rather than denying a claim mechanically based on the notion that all contract-based causes of action are ineligible for coverage, an insurer may offer a more substantive argument based on the language of the contractual liability exclusion. Specifically, an insurer may assert that such language should be read expansively to bar recovery for most (if not all) claims arising under contract. From a carrier’s perspective, this seems like a promising approach, for a party assumes an array of liabilities when entering into a contract, and a policy’s standard exclusionary language seems amenable to being interpreted in such a broad fashion. Such language commonly excludes claims:

- alleging, arising out of, based upon, or attributable to any actual or alleged **contractual liability** of the Company or any other Insured under any express contract or agreement; provided, however, this exclusion shall not apply to liability which

would have attached in the absence of such express contract or agreement [or]

- for breach of any express, implied, actual or constructive contract, warranty, guarantee, or promise, including **any actual or alleged liability assumed** by the Insured, unless such liability would have attached to the Insured even in the absence of such contract, warranty, guarantee, or promise.

However, courts have consistently held that a contractual liability exclusion refers not to any liability related to a contract, but rather to the assumption of another party’s liability, as in the case of indemnity and hold harmless agreements. *See Indiana Ins. Co. v. Kopetsky*, 11 NE, 3d 508, 523, 525 (Ind. Ct. App. 2014); *Gibbs M. Smith v. United States Fidelity & Guaranty Co.*, 949 P2d 337 (Utah 1997); *Olympic, Inc. v. Providence Washington Insurance Co.*, 648 P2d 1008 (Alaska 1982); *Cont’l Cas. Co. v. Greater Omaha Packaging Co.*, 2015 U.S. Dist. LEXIS 80549, *13 (D. Neb. June 22, 2015); *Travelers Prop. Cas. Co. of America v. Peaker Servs., Inc.*, 306 Mich. App. 178, 187-88 (2014); *Ironshore Specialty Ins. Co. v. 23andMe, Inc.*, 2016 U.S. Dist. LEXIS 96079, *15-16 (N.D. Cal. July 22, 2016) (finding that decisions limiting policy exclusions to contracts that assume the liabilities and obligations of third parties “represent the majority view”). As the court in *Cont’l Cas. Co. v. Greater Omaha Packaging Co.* explained:

[T]he majority of courts have concluded that this exclusion [in a policy for contractual liability] applies only where the insured has contractually assumed the liability of a third party, as in an indemnification or hold harmless agreement ... the exclusion does not operate to exclude coverage for any and all liabilities to which the insured is exposed under the terms of the contracts it makes generally.

2015 U.S. Dist. LEXIS 80549, *13-14 (D. Neb. June 22, 2015).

The *Gibbs M. Smith v. United States Fidelity & Guaranty Co.* court provides a well-reasoned analysis supporting the *Cont’l Cas. Co.* case by suggesting that there is a distinct difference between liability for one’s own acts and for the acts of others:

Liability assumed by the insured under

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-Insurance Coverage: Continued from page 10-

contract refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to liability that results from breach of contract Liability ordinarily occurs only after breach of contract. However, in the case of indemnification or hold harmless agreements, assumption of another's liability constitutes performance of the contract.

949 P2d at 341 (emphasis added).

Accordingly, from an insurance perspective, there may very well be a different set of risks and expectations to consider when it comes to insuring against, on the one hand, the actions of the policyholder and, on the other hand, the actions of third parties whom the policyholder has agreed to indemnify and hold harmless.

The Michigan Court of Appeal in *Travelers Prop. Cas. Co. of America v. Peaker Servs., Inc.*, explores this line of reasoning, while also offering perhaps the most persuasive substantiation of the majority view. In that case, the policy at hand did not define the phrase “assumption of liability,” and there was otherwise no published case law in Michigan defining that phrase in that context. *Travelers, supra*, 306 Mich. App. at 188. The court accordingly looked to Black’s Law Dictionary, which “defines ‘assumption’ in relevant part as, [t]he act of taking ([especially] someone else’s debt or other obligation) for or on oneself . . .” and “liability” as “[t]he quality, state, or condition of being legally obligated or accountable . . .” *Id.* “[W]hen viewed in the context of a . . . policy as a whole—the purpose of which is to ‘protect[] business owners against liability to third-parties’—the plain meaning of the phrase ‘assumption of liability’ can reasonably be construed to mean the act of taking on the legal obligations or responsibilities of another.” *Id.* at 187-88. “Indeed, a review of relevant legal treatises and case law from other jurisdictions supports that . . . ‘assumption of liability’ refers to the assumption of another’s liability.” *Id.* at 188. “The rationale behind excluding the contractually assumed liability of another from . . . coverage is that ‘liability assumed by the insured under a contract or agreement presents an uncertain risk’ which cannot be determined in advance for the purpose of fixing premiums.” *Id.* at 189.

Thus, a breach of contract claim is a more certain risk that policyholders should expect to be insured against under a policy. But, in general, a carrier

should not be expected to insure against the insured’s contractually assumed liability of another, which presents a more uncertain risk. Practically, this means that an insurer denies coverage for a claim related to a breach of contract cause of action based on an exclusion for contractual liability at its own peril, potentially offering both claimants and counsel avenues to coverage.

III. An Exception That Proves the Lesson?

A different interpretation of the phrase “assumption of liability” in a contractual liability exclusion by the Texas Supreme Court in *Gilbert Texas Constr., L.P., v. Underwriters at Lloyd’s London*, 327 SW3d 118 (Tex. 2010) warrants discussion. In that case, the court ruled that assumption of liability was not limited “to the narrow set of contracts by which the insured assumes the liability of another person.” *Id.* The court found that a policy’s contractual liability exclusion precluded not just claims related to a contract’s hold harmless and indemnification agreements, but to other contractually assumed liability as well.

Understanding the nature of the contracts at issue in *Gilbert* is key to reconciling the court’s position with the majority view. The policyholder in *Gilbert* had agreed by contract to extend liability for its own actions beyond the liability imposed under general law. In other words, the policyholder had assumed greater liability for itself, and the court concluded that this was an “assumption of liability” subject to the traditional contractual liability exclusion. *Gilbert*, therefore, does not represent an outlier at all, but just an extension of the reasoning used in *Gibbs* and *Travelers*. As the *Travelers* court explained:

Under *Gilbert*, when an insured would be liable at general law for damages arising from its breach of contract, the contractually assumed liability does not preclude coverage, but when an insured takes on additional legal obligations and liabilities beyond those imposed at general law, coverage is barred by the contractual-liability exclusion.

306 Mich. App. 178, 195 (2014).

In any event, the *Gilbert* court did not rule that the contractual liability exclusion at issue excluded all liability for a breach of contract cause of action. Rather, the court merely extended the contractual liability

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






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ity exclusion. Accordingly, *Gilbert* should not, by itself, discourage a policyholder from challenging a carrier's denial of coverage on these bases.










Summary

When dealing with insurance claims arising from lawsuits involving breach of contract causes of action, policyholders should not accept a carrier's denial of coverage at face value. As described above, an insurer's denial may be unsupported by the law. In particular, the form of a cause of action should not dictate whether coverage is provided, and the standard exclusion for contractual liability is more limited than its name may imply.










♦ *Maren B. Hufton is a shareholder in the Newport Beach office of Stradling Yocca Carlson & Rauth, where her practice focuses on enforcement defense, investigations and litigation. Litigation associate Sheila S. Mojtehedhi provided valuable research regarding this topic.*












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








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



















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



















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































-Nonparty Discovery: Continued from page 8-

bles that of a judge in a civil action in superior court...including the authority to enforce discovery against nonparties through imposition of sanctions.” *Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.*, 44 Cal. 4th 528, 535 (2008). In *Berglund*, a party filed a lawsuit against a number of health-care providers for negligent care. Plaintiff served a subpoena for the production of medical logs on a defendant, the Arthroscopic & Laser Surgery Center (“ALSC”). They unsurprisingly objected. The other defendants successfully moved to compel arbitration; meanwhile, the suit against ALSC settled and was dismissed with prejudice. At that point, the arbitrator was asked to direct ALSC—a dismissed nonparty to all proceedings—to produce documents. ALSC challenged that order in court via a request for protective order. The California Supreme Court denied the protective order since “the proper forum for a nonparty to challenge the discovery sought by a party to the arbitration” is the arbitration proceeding itself; “the arbitrator’s power to enforce discovery resembles that of a judge in a civil action,” so it is “reasonable to infer that the Legislature intended discovery disputes arising out of arbitration to be initially litigated before the arbitrator.” *Berglund, supra*, at 535.

With that reasoning, the *Berglund* court held that “all discovery disputes arising out of arbitration must be submitted first to the arbitral, not the judicial forum.” *Id.* at 535-36. Importantly, the Supreme Court’s holding in *Berglund* that discovery disputes must be initially submitted to the arbitrator was based on the arbitrator’s power to control discovery pursuant to Cal. Code Civ. P. § 1283.05. Arguably, nonpersonal injury disputes with agreements incorporating 1283.05 fall in this same category. But there is a risk that a decision-maker considers third-party discovery outside the scope of the statute if not a personal injury or wrongful death case, regardless of whether the parties incorporated the relevant statute. Even with *Berglund*’s lack of clarity, parties should optimistically include a reference to section 1283.05. At best, when push comes to shove, the third-party discovery meets the *Berglund* test, and nonparties will be required to submit any objections to the arbitrator before attempting judicial review. This means the third party ignoring the subpoena has that dispute submitted to the arbitrator—who can render sanctions for noncompliance. In fact, the Code details that arbitrators have the power to enforce the obligations of discovery by imposing the *same sanctions and penalties*

-Continued on page 13-

-Nonparty Discovery: Continued from page 12-

as a court could impose—short of the “power to order the arrest or imprisonment of a person.” Cal. Code Civ. P. §§ 1283.05, 1283.1.

When (and if) The Arbitrator Intervenes

But of course, it couldn’t be as simple as incorporating a Code section to ensure an easy review mechanism. It depends on which party seeks review. Per *Berghund*, if the party seeks judicial review of a discovery order, only limited review is available. *Berghund*, *supra*, at 534-36. This comes with one caveat. The *Berghund* court held that while the dispute must first be submitted to the arbitrator for resolution, the nonparty is entitled to full judicial review of the order. *Id.* The latter makes sense, since nonparties to arbitration are not bound by an arbitrator’s decision because his or her authority is derived from the parties’ consent—and nonparties have not consented to arbitration. *Id.* at 538. All of these “review” provisions come with the important asterisk that this particular review provision under *Berghund* might not even apply to non-personal injury or wrongful death cases.

There is one silver lining. It’s important to remember that the arbitrator does have jurisdiction over nonparties for a limited purpose: appearance at the actual arbitration hearing, as well as production of evidence. Cal. Code Civ. P. § 1282.6 (“Subpoenas shall be served and enforced” in compliance with §§ 1985-1997). But parties looking to avoid these discovery issues altogether may want to assess whether pre-hearing discovery is even necessary, or whether they could rely on a third party’s testimony at the hearing only. This is because the same “third party” risks apply; third parties can still challenge subpoena, and the procedure for an arbitrator or court to compel a nonparty’s attendance at arbitration is not specified under section 1282.6. When a court action is pending (*e.g.*, the action in which the court compelled arbitration), a motion to compel attendance of the witness is a safe bet. If there is no action pending, a party might have to turn to another miscellaneous action.

Implications for Contract Drafting

Practitioners looking to avoid nonparty discovery roadblocks at the outset need to advise clients at the point of contract formation. Depending on the type of contract and most likely risk profile for litigation, it probably makes sense to incorporate Cal. Code Civ. P. § 1283.05. At least one California

case suggests that simply incorporating section 1283.05 is enough to evidence intent on the parties’ part to be bound by that section (and thus its provisions on nonparty discovery) during the arbitration. *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1188 (S.D. Cal. 2002). When making this decision, it’s critical for the party to understand that incorporating section 1283.05 into an arbitration discovery agreement is the equivalent of agreeing to the full range of discovery provided in the Discovery Act, with the exception that the arbitrator must still pre-approve depositions for discovery. Cal. Code Civ. P. § 1283.05(e). This could be a double-edged sword; if counsel chooses to provide for more discovery, the level of procedural protection makes the proceedings more like litigation. The parties might instead want a clause that specifically states the parties agree to operate *without* formal discovery. At least one option that courts have upheld is to place specific limitations on discovery in the arbitration clause—such as limiting depositions to one per side, plus expert depositions—but allow the arbitrator to expand discovery upon a showing of need. *See Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975 (2010).

Another consideration is that institutional rules differ. When putting together contracts or clauses, drafters should read the JAMS or American Arbitration Association (“AAA”) rules before incorporating them. However, those with national clients may be using uniform arbitration agreements across multiple states. One solution is to advise clients to use California-specific arbitration agreements for any business in California, or any deals that will ultimately be carried out in the state. While it presents an upfront cost for national clients, it would save time and money at arbitration if the party anticipates needing broader discovery (and a means to enforce it). At minimum, companies utilizing cross-state arbitration forms should express a clear intent to allow or disallow third-party discovery.

Putting Things Into Perspective

These discovery issues matter because cases are steadily going to arbitration instead of civil court. To put national caseloads into perspective, the United States District Courts reported that there were 25,067 private contract disputes filed in all the federal courts in the United States in the year ending June 30, 2018. *Statistical Table for the Federal Judiciary*, Table C-3. Three years ago, the American Arbitration Association reported that parties filed 8,360 new business-to-business arbitrations, including commercial cases,

-Continued on page 14-

-Nonparty Discovery: Continued from page 13-

construction, and executive employment disputes. See *American Arbitration Association B2B Dispute Resolution Impact Report 2015 Key Statistics*, accessed at https://www.arbitrationnation.com/wp-content/uploads/sites/469/2016/06/AAA186_2015_B2B_Case_Statistics.pdf.

The claims and counterclaims made in those arbitrations totaled over \$16 billion. To top it off, 56% of the arbitrations filed three years ago (in 2015) were resolved prior to award.

Such statistics show the obvious: on a national scale there were—and are—a significant percentage of business disputes being resolved in arbitration, potentially getting all the way to an award at a much higher rate than in court litigation. The trend doesn't show signs of changing. Although state-by-state data is not available, there is really no reason to believe California is any different.

Overall, there is considerable time and expense involved in navigating third-party discovery in arbitration. And, given the unknowns of such discovery, practitioners should consider heading off both at the outset of contract formation. Limited discovery in arbitration can be an advantage in certain cases, but in others it can cripple a party and increase the possibility of surprise at the arbitration hearing.

♦ *Leilani L. Jones is a litigation associate in the Irvine office of Payne & Fears, LLP.*



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Dinner Program

6:00 p.m. Wine Reception; 7:00 p.m. Dinner and Program
The Westin South Coast Plaza

March 13, 2019

Dinner Program

6:00 p.m. Wine Reception; 7:00 p.m. Dinner and Program
The Westin South Coast Plaza

May 22, 2019

20th Annual Robert E. Palmer

Wine Tasting Fundraiser to Support PLC

6:00 p.m. Wine Tasting; 7:00 p.m. Dinner and Program
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September 11, 2019

Dinner Program

6:00 p.m. Wine Reception; 7:00 p.m. Dinner and Program
The Westin South Coast Plaza

October 3-6, 2019

46th Annual Seminar

La Quinta Resort & Spa

La Quinta, California

November 6, 2019

Dinner Program and Holiday Gift Giving Opportunity

6:00 p.m. Wine Reception; 7:00 p.m. Dinner and Program
The Westin South Coast Plaza

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

ORANGE COUNTY

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