CHOLAKIAN & ASSOCIATES

400 Oyster Point Blvd., Suite 415
South San Francisco, CA 94080
Phone: 650-871-9544
Fax: : 650-871-9552
www.cholakianlaw.com

Sacramento Office
Pacific Business Center
770 'L' Street, Suite 950
Sacramento, CA 95814
Telephone (916) 341-7560

Fresno Office
Valley Oak Executive Suites
516 W. Shaw Avenue, Suite 200
Fresno, CA 93704

Attorneys
Kevin Cholakian
Brian Finn
Colin Jewell
Arsen Sarapinian
Jeffrey Schwalbach
Melvin Marcia

Paralegals
James Baker
Kathryn Benham

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Cholakian & Associates Newsletter

Winter 2017

Cholakian Law Firm Prevailing Party In Major UIM Arbitration With Dreyer Babich Firm

After two and a half years of defending an admitted liability underinsured motorist claim on behalf of Capital Insurance Group (CIG), the matter went to a day-and-a-half 11-witness binding arbitration and the defense beat its C.C.P. 998 offer of $300,000. CIG was represented by Kevin Cholakian and Arsen Sarapinian. Claimant Carlos Garcia was represented by Joseph Babich and Sean Wisman of Dreyer Babich, Buccola, Wood, and Campora. The defense served two C.C.P. 998 offers-one in the early stages after failed mediation at $175,000, and the second following surgery and a potential second lumbar fusion surgery at $300,000. Just prior to the arbitration Claimant's counsel, who had suggested he would never settle for less than the $500,000 policy limits, responded with a C.C.P. 998 offer of $415k. In opening statements, Claimant's counsel asked for $1,000,000 in damages and in closing argument asked for over $1.8 million.

After weighing the evidence, including conflicting medical testimony from top medical experts, and applying the $15,000 UM credit, the initial binding award was $198,434.91.

Following the initial award, the defense served a memorandum of costs to recover non-expert and expert costs pursuant to section 998. Claimant opposed. After oral argument, the arbitrator agreed with the defense and awarded more than $17,000 in expert costs, further reducing the award to **$181,091.40**, more than $100,000 below CIG's $300,000 C.C.P. 998 offer, and well-below Claimant's request for 1.0 to 1.8 million dollars at arbitration.

The UIM claim arose out of an August 2, 2013 rear-end accident which took place in Elk Grove, California. Claimant Carlos Garcia was driving his 2011 Toyota Highlander. His wife, Sarah Garcia, was passenger. While stopped, their vehicle was slammed from behind by a 2005 Chevrolet Cavalier driven by an underinsured driver and was propelled forward. Mr. and Mrs. Garcia complained of headaches and an onset of pain to their necks and backs. They were seen and treated at an urgent care facility that same day.

The Garcias retained the Dreyer Babich firm and reached third party settlements with the underinsured driver for his policy limits (minimal coverage limits of $15k per person). The Dreyer firm then made an underinsured motorist claim pursuant to Mr. Garcia's UM policy, and served a demand for arbitration.

Mr. Garcia's injuries presented complex questions related to causation and medicine. Mr. Garcia complained of constant back pain and lower extremity symptoms following the accident, claiming he was asymptomatic prior to the accident. At deposition, he testified his symptoms did not improve with conservative treatment, including medicine and physical therapy. He later underwent epidural injections to his lumbar spine which only provided temporary relief. He then sought a surgical consultation with Gary Schneiderman, M.D., a well-known and respected orthopedic surgeon at Sutter Heath. After performing a record and imaging review, as well as an orthopedic examination, Dr. Schneiderman advised against surgery. Specifically, while he complained of back pain and there was evidence of a minor lumbar disc herniation, there was no neuropathy or clear radiculopathy.

In an apparent attempt to "work-up" damages, the Dreyer Babich firm referred Mr. Garcia to VanBuren Lemons, M.D., a well-known neurosurgeon in Sacramento. Unlike Dr. Schneiderman, Dr. Lemons undertook an aggressive treatment plan which included numerous spinal injections and a recommendation for a lumbar laminectomy surgery. The defense took Dr. Lemons' deposition and learned that all treatment offered to Mr. Garcia was performed via a medical-legal lien (i.e., the doctor would be paid from any settlement or award proceeds).

Sacramento orthopedic spine surgeon Mark Hambly, M.D., performed an IME and offered a second opinion regarding the recommended surgery. Dr. Hambly agreed with Dr. Schneiderman over Dr. Lemons—that surgery was not implicated.

(Continued on page 2)

Major UIM Arbitration Win, Con't.

Specifically, there was no neuropathy. Furthermore, given that Mr. Garcia complained of 90 percent back pain and only 10 percent lower extremity pain, Dr. Hambly opined (agreeing with Dr. Schneiderman) that a laminectomy would not alleviate his back symptoms because laminectomies tend to alleviate radicular lower extremity symptoms and not chronic, mechanical low back pain.

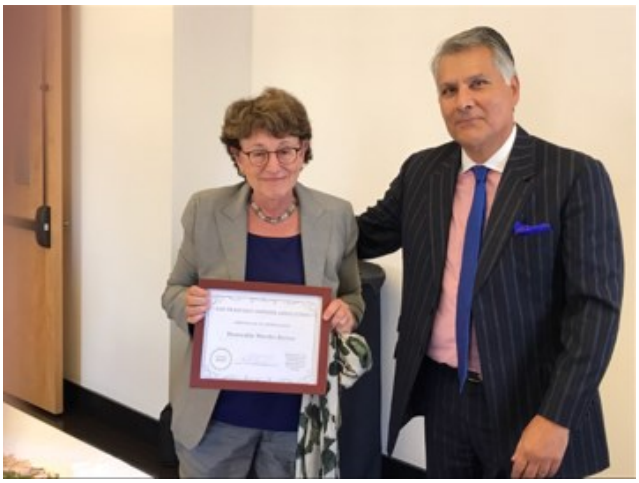
The parties mediated the case on November 9, 2015 with neutral Nick Lowe, Esq.. Claimant would not drop his demand below the UIM policy limits of $500k.

Following the mediation, Mr. Garcia went forward with the surgery with Dr. Lemons on February 8, 2016. Not surprisingly (given the opinions of Dr. Hambly and Dr. Schneiderman), Mr. Garcia reported only nominal improvement of the lower extremity symptoms, and continued complaining of low back pain. Dr. Lemons' proposed solution was further surgery, this time a three-level lumbar fusion, an invasive and risky procedure.

The defense took the depositions of Mr. Garcia's employer, as well as family members. The defense learned Mr. Garcia injured his tail bone and low back in a snowboarding accident which occurred in 1994-1996, and was involved in a previous rear-end accident in 2006. Mr. Garcia contended that these were old injuries and that his symptoms had resolved (despite conflicting deposition testimony from Mr. Garcia, and a lay witness-family member, Wesley Costa). Furthermore, Mr. Garcia worked as a warehouseman for almost ten years, where he manually lifted over 200 cases of wine each day (each case weighing 20-40lbs) and continued to do so for another year after the accident. In preparation of arbitration, the defense retained accident reconstructionist William Woodruff, Ph.D. and injury biomechanics expert Elaine Chiu, Ph.D., M.D., to offer opinions regarding speed and force (Delta-V) and to determine the effect of the impact of the accident on Mr. Garcia's body. Dr. Chiu opined that the compressive forces involved in this line of work (bending, squatting, and lifting), and the frequency in which he performed it, had a much greater impact on his spine than the subject-vehicle accident. The defense also retained Jerome Barakos, M.D., Chief Neuroradiologist at UCSF, who reviewed the imaging and opined that, not only was surgery not indicated at L4-L5, levels L5-S1 were much more degenerative (Modic II signal changes) and were likely the pain generator. When confronted with this at arbitration, Dr. Lemons became quite defensive and suggested he fuse these levels in addition to levels L4-L5!

The defense also discovered from performing a social media search (Twitter), despite his claims of ongoing symptoms, Mr. Garcia remained an avid coyote hunter. The arbitrator indicated that Mr. Garcia's post-accident symptomatology (mild to moderate in intensity), as well as his level of physical activity (ability to hunt), were important factors in awarding minimal damages for future pain and suffering ($75k of the total $181,091.40 Award).

Federal Judge Marsha Berzon of Ninth Circuit Speaks at SFDA



Hon. Marsha Berzon and Kevin Cholakian, Esq.

By Arsen Sarapinian, Esq.
Associate

The San Francisco Defense Association (SFDA) was honored to have the Honorable Marsha Berzon, a Senior Judge at the Ninth Circuit Court of Appeals, attend and speak at a recent luncheon at The City Club in San Francisco.

Judge Berzon was invited by Kevin Cholakian and Arsen Sarapinian of the SFDA to speak about the intricacies of federal appellate law practice, advice to trial attorneys to preserve potential legal issues on appeal, what federal appellate judges look for in effective oral advocacy in brief writing, and advice to avoid potential appellate mistakes. The discussion was followed by a question and answer opportunity. Twenty-five members attended the luncheon.

Judge Marsha S. Berzon is a graduate of Radcliffe College and the University of California at Berkeley (Boalt Hall), where she was Articles Editor of the California Law Review. She served as a law clerk to Justice William J. Brennan, Jr., of the United States Supreme Court and for Judge James R. Browning of the United States Court of Appeals for the Ninth Circuit. Before joining the Ninth Circuit, Judge Berzon worked as an appellate and Supreme Court advocate at Altshuler, Berzon, Nussbaum, Rubin & Demain, a San Francisco law firm. She presented cases in most of the federal circuit courts and the appellate courts of California and several other states. She filed briefs in dozens of cases in the United States Supreme Court, appearing four times as an oral advocate before the Court. Among the cases in which she participated were many setting important precedents in the fields of labor and employment law, environmental, women's rights, and free speech.

The SFDA is a 53-year-old organization comprised of civil defense attorneys who practice in various areas of civil litigation including intellectual property, premises liability, personal injury, and employment law. The common thread amongst these distinguished members is the fact that they practice civil defense. It is the oldest association of defense attorneys in San Francisco.

The list of impressive past speakers includes: California Supreme Court Justice Kathryn M. Werdegar, California Supreme Court Justice Marvin R. Baxter, California Supreme Court Justice Ming Chin, California Supreme Court Justice Ronald George, California Supreme Court Justice Leondra Kruger, California Supreme Court Justice Justice Mariano-Florentino Cuéllar, California Court of Appeal Justice Patricia Bamattre-Manoukian, United States District Court Judge Susan Illston, Congresswoman Jackie Speier, Congresswoman Barbara Lee, and numerous presiding judges of the Bay Area state courts.

Coordination of Cases in Different Counties

By Melvin Marcia, Esq.
Associate

When dealing with a loss that involves several parties and generates multiple cases, which are filed in different counties, defense counsel should consider a manner in which all of the cases can be litigated in one judicial district and in front of same judge. California Rules of Court, Rule 3.300, allows the court to treat pending cases as "related cases" if the cases involve the same parties and are based on same or similar claims, and arise from the same or substantially identical incident which requires determination of the same or substantially identical question of law or fact. When the Court treats various cases filed in the same county, as related cases, it helps reduce the number of appearances parties have to make and reduces the amount of time that the court will dedicate to resolving multiple cases which have similar questions of law and fact, thereby saving judicial resources, but also saving the client time and money.

However, when cases that "involve the same parties and are based on the same or similar claims" or "arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact," are filed in different counties, no court can treat all cases as "related." (*Ibid*.) When this situation occurs, parties are unable to "consolidate" the various cases, and may not rely on California Rules of Court, Rule 3.350, because consolidation requires that all cases be filed in the same county; thus, the only way to combine all cases and have only one case dispose of all claims, would be to file a motion for coordination based on California Code of Civil Procedure section 403 and California Rules of Court, Rule 3.500, after making a good-faith effort to obtain agreement of all parties to each case to the proposed coordination.

In order to coordinate the cases as described above, the cases cannot be "complex" as described by California Rules of Court, Rule 3.400. One of the factors considered by the court, which may cause it to sua sponte label a case "complex," is the "management of a large number of separately represented parties." If the actions are complex, a petition is filed with the Chair of the Judicial Council, in accordance with Code of Civil Procedure section 404. The procedure for petitioning for Coordination changes when it involves Complex cases; it requires parties to file a petition to the Chair of the Judicial Council, along with a declaration stating facts that support that the actions are complex. "If a direct petition is not authorized by Code of Civil Procedure §404, a party may request permission from the presiding judge of the court in which one of the included actions is pending to submit a petition for coordination to the Chair of the Judicial Council." (California Rules of Court Rule 3.520.)

The court favors coordination when having one judge hear all of the actions for all purposes in a selected venue will promote justice, serve the convenience of the parties and witnesses, avoid unnecessary duplication and thus be an efficient use of judicial resources, avoid inconsistent rulings in actions involving the same issues, and increase the likelihood of settlement.

The impact of coordination can be positive, as it will reduce the number of appearances necessary and remove the danger of having conflicting rulings/judgments in the various cases. The main factor to consider in anticipation of coordination, would be to determine which venue would be most agreeable to your client's position. Coordination can be a useful efficiency technique but it is not without its potential dangers, counsel should consider all potential pitfalls, and keep the client's best interest at the forefront. Simply reducing the number of appearance should not be the end of the discussion, and keeping a clear understanding of the ultimate goal should give counsel in making this determination.

Melvin Marcia is a graduate of Santa Clara University School of Law, and is an associate at Cholakian & Associates. His areas of practice include catastrophic personal injury, wrongful death, and premises liability litigation.

Emotional Distress Claims in Alleged Miscarriage Cases

By Jeffrey Schwalbach, Esq.
Associate

Our firm recently litigated a case in which a Plaintiff brought a cause of action for wrongful death of her fetus and negligent infliction of emotional distress based on her allegation that a vehicle accident caused her to have a miscarriage of her eight week-old fetus. The temporal connection between the accident and her miscarriage seemed plausible. She noticed spotting and suffered the miscarriage immediately after the accident, several months into her pregnancy.

Under California law a fetus is not a "person" whose death gives rise to a wrongful death claim per Code of Civil Procedure section 337. Additionally, a death of an eight week old fetus cannot be seen or heard by the person carrying the child or anyone else such that a plaintiff cannot establish she witnessed the injury at the time of the accident. Witnessing the injury is an essential element of a bystander emotional distress claim under California common law. (*See Justus v. Atchison* (1977) 19 Cal.3d 564; *Dillon v. Legg* (1968) 68 Cal.2d 728.)

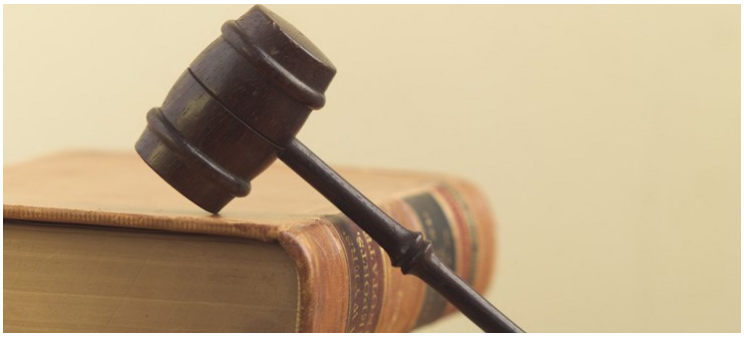
We successfully demurred to Plaintiff's causes of action for wrongful death and negligent infliction of emotional distress. Nevertheless, Plaintiff continued to make extremely inflated settlement demands, claiming general damages for her own trauma from the miscarriage.

The California Supreme Court has held that although public policy precludes parents from recovering damages for loss of filial consortium, a mother is not barred from recovering damages as a "direct victim" for emotional distress arising from a miscarriage caused by the negligent conduct of another. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1084-1085.) In the case of a miscarriage, a portion of a mother's emotional distress is barred by policy concerns prohibiting damages related to loss of filial consortium claims. Other portions of her emotional distress may have separate, distinct origins that are unrelated to loss of filial consortium. For instance, a mother would be entitled to seek her emotional distress related to a particularly painful operation required because of her miscarriage.

The key to these situations is evaluating whether the accident was the likely cause of a miscarriage through testimony from a plaintiff's treating OB/GYN or retained expert OB/GYN. Plaintiff's treating OB/GYN testified that Plaintiff's genetics had a greater than 50% probability of causing her miscarriage, or in the alternative that it was more likely caused by Plaintiff's age, forty. The treating OB/GYN gave important testimony that it is unlikely the automobile accident caused the miscarriage since there was no clear evidence of a significant abdominal injury.

The deposition testimony allowed us to obtain a very favorable settlement in which Plaintiff drastically reduced her previous 7-figure settlement demands, down to the low 5-figures just before trial where a summary judgment was being threatened. While it is important to understand the law in these miscarriage claims, it is imperative that defense counsel understand the required medical basis to connect an acute trauma to a miscarriage. Defense counsel handling these claims should evaluate the severity of impact to the abdominal area. Counsel must be vigilant in defending against similar claims if a Plaintiff cannot identify a severe abdominal injury even if the timing of a miscarriage implies a causal connection.

Jeffrey Schwalbach is a graduate of Pepperdine University School of Law, and is an associate at Cholakian & Associates. His areas of practice include employment law, catastrophic personal injury, wrongful death, premises liability, construction defect, real estate law and business litigation.



CHOLAKIAN & ASSOCIATES

Memberships:

Defense Research Institute (DRI)

International Association of Defense Counsel

Northern California Association of Defense Counsel

American Bar Association (ABA)

San Mateo Bar Association

Bar Association of San Francisco

Alameda County Bar Association

San Francisco Trial Lawyers Association

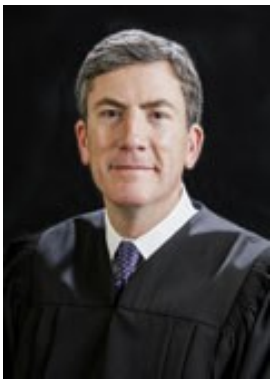
California Trial Lawyers Association

National Association of Subrogation Professionals (NASP) (Northern California Chair 2004-2008)

Trucking Industry Defense Association (TIDA)

San Francisco Defense Association-President

EVENTS



Hon. Jon S. Tigar

The San Francisco Defense Association (SFDA) and the Cholakian Law Firm is proud to sponsor Federal Judge Jon S. Tigar of the United States District Court (San Francisco) as a keynote speaker at an SFDA luncheon at The City Club in San Francisco on February 1, 2018. Topics of discussion will include: Judge Tigar's transition from state court to federal court (he was a guest speaker at the SFDA in 2008 while an Alameda Superior Court judge), notable differences or similarities, and practice advice to litigators. To obtain more information about the SFDA, please contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary and Treasurer, at asarapinan@cholakian.net.

Cholakian & Associates is listed in Best's Insurance Directory, has been AV rated by Martindale-Hubbell since inception in 2000, and is retained defense counsel to a dozen major commercial carriers doing business in California. This practice includes, though is not limited to, the representation of carriers regarding commercial and personal lines claims as well as the defense of insureds involved in serious personal injury, catastrophic trucking accident litigation, complex commercial litigation, product liability, and construction defect litigation. This also includes defense of matters involving allegations of fraud/SIU investigations, environmental liability, labor and employment law, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

Kevin K. Cholakian a native Californian, grew up on a family farm in the Central San Joaquin Valley. He attended Fresno and Tulare County schools until his senior year of high school, when he received a full scholarship to attend North Carolina School of the Arts in Winston-Salem, North Carolina from 1971-1972. He then attended San Francisco Conservatory of Music on a Ford Foundation Scholarship from 1972-1974. He graduated *magna cum laude* with a B.A. in Philosophy from CSU Fresno in 1977. From 1976 to 1978, he served as Chief Administrative Assistant to California State Senator Rose Ann Vuich (first woman elected to the California State Senate serving Central California), managing the Senator's Central Valley field offices stretching from Modesto to Bakersfield. In 1981, he received his law degree from the University of California, Hastings College of the Law, where he was on Law Review, which he attended on scholarship, and now serves on the Board of Trustees. Mr. Cholakian began his legal career practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy and McCutchen, Doyle, Brown & Enersen (Bingham-McCutchen) in San Francisco. He became an equity partner and managed the defense practice of a well-known AV rated 25 attorney San Francisco insurance defense firm (1988 through 1999). He founded Cholakian & Associates in January 2000 and has continued to specialize in high exposure personal injury defense, product liability, environmental, and employment/housing discrimination matters. He has been selected as Northern California Super Lawyer under the Personal Injury Defense and Environmental Defense categories for ten consecutive years. He has been on a Blue Ribbon Panel that oversees the selection process for that organization. He was awarded "Gladiator of the Year" in 2006 and 2009 by Farmers/Zurich for trial accomplishments and awarded the Values and Vision Medallion by the Director of Commercial Claims in 2008 and 2010. Mr. Cholakian regularly defends cases that have exposures in excess of $1,000,000.00. His trial record is 51-1 in disputed liability, disputed causation jury trials.

Mr. Cholakian is a member of the following organizations: Defense Research Institute (DRI), the International Association of Defense Counsel, the Northern California Association of Defense Counsel, the American Bar Association, the San Mateo Bar Association, Bar Association of San Francisco, the San Francisco Trial Lawyers Association, the California Trial Lawyers Association, National Association of Subrogation Professionals (former San Francisco Chapter President) (NASP), and Trucking Industry Defense Association (TIDA). Mr. Cholakian is the current President of the San Francisco Defense Association, a 40 year old organization comprised of defense litigators. Mr. Cholakian sits on the Executive Committee of the Board of Governors of the City Club of San Francisco. He also serves on the Board of Trustees at UC Hastings College of the Law.