At Issue

A Stone, Rosenblatt & Cha Publication
Winter 2001

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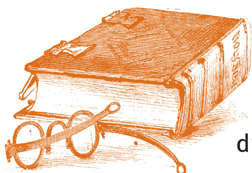
Happy Holidays

Stone, Rosenblatt & Cha hopes your holiday season was a joyous one, and wishes you and yours health, happiness and prosperity for the New Year

Legal Lines

SR&C Prevails on Appeal ! On October 27, 2000, the California Court of Appeal for the Sixth Appellate District published the decision of *Reliance Insurance Company v. Wells*, in which the Court held that an insurer is entitled to intervene in a lawsuit against its insured where the insured's corporate status has been suspended. The published decision appears at 84 Cal.App.4th 383 and 100 Cal.Rptr.2d 807. Should you wish to obtain a copy of the decision or review SR&C's winning brief on the issue, please drop us a line. SR&C

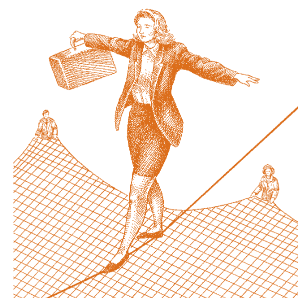


At-Will . . . At-Risk ?

California Supreme Court confirms that the rule of "at-will" employment is alive and well.

By John S. Cha and B. Ben Mohandesi

The California Supreme Court recently reaffirmed the rule of "at-will" employment in California. In *Guz v. Bechtel National, Inc., et al.* 2000 Daily Journal D.A.R. 10929, a long-time employee sued his employer after he was released when his work unit was eliminated. One of the allegations raised was for breach of an implied employment contract. The trial court granted summary judgment in favor of the employer, reasoning that the plaintiff was an at-will employee and did not introduce any evidence that he was ever told at any time that he would be retained as long as he was doing a good job. The Court of Appeal reversed in favor of the employee, concluding that there was an implied-in-fact contract that the employee would be dismissed only for good cause. The California Supreme Court granted review.



California *Labor Code* section 2922 provides that an at-will employment

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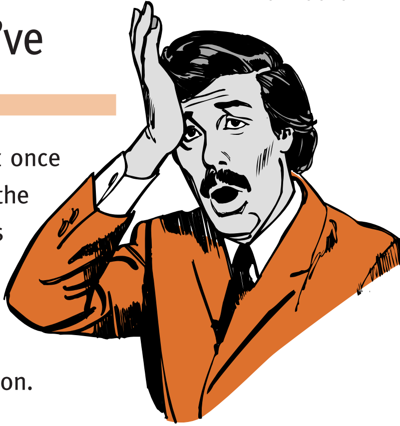
Who Goofed, I've Got to Know !



Comedian Steven Wright once said, "the problem with the gene pool is that there is no lifeguard." Well, the following true stories amply demonstrate the accuracy of this observation.

LOW-JACK – An experienced thief sneaked onto the lot of a car dealership in London, Ohio, intending to steal tires from the new cars. But his expertise failed him when the vehicle he had jacked up slipped and fell, landing squarely on his chest. The police had little difficulty apprehending this criminal.

SAY CHEESE – A 53-year-old tourist posing nude for his camera slipped from the stone wall while preparing for the shot, and fell sixteen feet to his death.

A TRUE FISHERMAN – While every tool box contains the miracle which is duct tape, there are some limits to the wonders it can work. Specifically, a misplaced faith in the powers of duct tape led to the demise of a man whose 12-foot aluminum dinghy, held together with duct tape repairs, capsized during a fishing trip.

ROCK(ET) SCIENTIST – A 36-year-old biochemist who attended a farewell performance of the legendary rock band KISS climbed a 7-foot wall to gain a better view of the stage— only to mistake a curtain for a solid wall, and plunge to his death on an escalator 100 feet below.

SLIP SLIDING AWAY – A North Carolina woman who had been smoking marijuana learned a hard lesson about drugs when she decided to sleep on the roof of the King Charles Inn. Sound asleep, she slid off the roof and fell to her death shortly before dawn. When police arrived at the scene, her stoned boyfriend was found still sleeping on the roof.

LIGHT OF THE PARTY – A 26-year-old Stanford graduate earned a place in history as the first person to die celebrating the millennium. Minutes before midnight, he climbed to the top of a street light in front of a Las Vegas Hotel and waved to the enthusiastic revelers below. At midnight, he slipped and, in an effort to break his fall, grabbed the electric wires and found himself conducting more than a cheering crowd. SR&C

Editor's Notes

Happy New Year ! We hope that your holiday season has been a happy and healthy one, and that the new year is a prosperous one for you and yours. It is difficult to believe that the year 2000 is now history !

Literally hours before press time, the California Supreme Court published its ruling in decision in *Aas v. The William Lyon Company* (which was surveyed in our fall edition). Thanks to the hard work of our editorial staff, we will include a summary of this important Supreme Court holding. We also feature an article on the impact on California employers pursuant to the California Supreme Court holding in *Guz v. Bechtel National Inc.* We hope that you find these articles of interest and of practical application.

We truly hope you enjoy our publication. If you are tired of sharing your "At Issue" with your colleagues or know of someone who would like to be placed on our mailing list, please contact us at ggarfinkel@stone-rosenblatt.com, and we will make sure that they receive all future editions. Also, should you ever need additional copies of our newsletter, or back editions, please let us know.

If there are particular topics which you would like to see addressed in future editions of "At Issue," please don't hesitate to drop us a line (ggarfinkel@stone-rosenblatt.com). If you wish to speak with us directly, call (818) 789-2232. Once again, we truly hope you enjoy "At Issue." SR&C

Gregg S. Garfinkel, Editor

"At Issue" is the newsletter of Stone, Rosenblatt & Cha, A Professional Law Corporation. "At Issue," published quarterly, is designed to keep our clients, colleagues, and friends apprised of recent decisions and legal trends which affect our mutual areas of interest. Questions or comments regarding "At Issue" should be directed to:

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Attorney Profile: John S. Cha

In this issue, we are pleased to profile Stone, Rosenblatt & Cha's newest named principal, John S. Cha.

John is the youngest of three sons, all of whom are attorneys. He grew up in Chicago, attended college at Northwestern University in Evanston, Illinois, and attended law school at the Washington University School of Law in St. Louis, Missouri. Given his mid western roots, he never thought Los Angeles would be his home in the future, despite struggling through the inclement weather in both Chicago and St. Louis. As fate would have it, John's oldest brother moved to Los Angeles in 1979 to attend law school at UCLA. His entire family followed soon thereafter, and settled in the San Fernando Valley. Year-round golfing weather was what eventually attracted him to Los Angeles.

After moving to Woodland Hills in December 1986, John passed the California bar examination in June 1987. While waiting for his bar results, he began his law career with a small insurance defense firm in Woodland Hills. After passing the bar, he joined a large Santa Monica firm where he defended attorneys in legal malpractice claims. In January 1990, he moved to Rodi, Pollock, Pettker, Galbraith & Cahill as a litigation associate, where he developed his talents in representing various corporate and individual clients in business/commercial litigation matters. After becoming a partner in January 1995, John developed a variety of practice areas, including products liability, commercial litigation, employment, real estate, and professional errors and omissions. John joined Ira Rosenblatt and Greg Stone in January 1998, and the rest is history !

John currently represents the interests of a wide range of business clients, insurers, and insureds in a variety of litigation and non-litigation matters. He represents manufacturers, suppliers, real estate developers, accountants, and insurance agents and brokers. John is a skilled trial attorney who has successfully tried bench and jury cases in Los Angeles and the surrounding counties, and has appeared before California's appellate courts. John is sensitive to the high cost of legal services and strives to provide all clients with efficient and effective service.

John's sport-of-choice is golf. A devoted family man, John works diligently during the week so that he can make time on the weekends to hit the links with his wife Jennifer and two sons, Daniel and Matthew (in whom he is banking his retirement as a professional caddie). John and his family reside in Woodland Hills, California.

John may be contacted at (818) 789-2232, ext. 206, or e-mail him at jcha@stone-rosenblatt.com. SR&C

No Harm, No Foul

California Supreme Court Rules That Tort Recovery Is Unavailable Where Construction Defects Have Not Caused Property Damage

By Laurence F. Dunn III and Adam J. Soibelman

The wait is over ! The California Supreme Court has held that homeowners and homeowners' associations may **not** recover tort damages for construction defects which have **not** caused property damage. *(Aas v. Superior Court (William Lyon Company)* (Dec. 4, 2000) 2000 Daily Journal D.A.R. 12831.)

As discussed in the Fall 2000 edition of "At Issue," *Aas* and its companion case *(Provencal Community Association v. Superior Court (William Lyon Company))* dealt with the construction of single-family and multi-family residential developments. The homeowners sought tort damages for myriad defects, ranging from improperly constructed and connected shear walls to improperly constructed fire walls to electrical problems. Importantly, the defects at issue had not yet caused any physical damage to the structures.

Applying the 'economic loss doctrine' articulated in *Seely v. White Motor Company* (1965) 63 Cal.2d 9, the Supreme Court held that construction defects which have not (yet) manifested in physical damage to the building itself give rise solely to 'economic losses' - for which no recovery in tort (e.g., negligence) is available. While remedies may exist for damages giving rise to 'economic losses,' they are limited solely to contract

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➔ Side Bar . . .

By Gregg S. Garfinkel and Laurence F. Dunn III

"Side Bar" is a permanent feature of our newsletter designed to provide our clients, friends, and colleagues with brief summaries of recently decided cases which affect our areas of practice. Copies of the listed cases are available upon request by contacting Gregg S. Garfinkel telephonically, or by e-mail at *ggarfinkel@stone-rosenblatt.com*. Please don't hesitate to contact us should you have any questions regarding any of the cases reported below.

EDITOR'S NOTE

In the Fall edition of "At Issue," we reported on the decision of Ortega v. K-Mart, wherein the Court of Appeal held that a premises owner's shoddy inspection practices permitted a jury to infer that a substance was on the floor long enough that a reasonable inspection would have discovered it. However, on November 15, 2000 the California Supreme Court agreed to review the decision of the Court of Appeal. Thus, the case is currently without precedential value.

CIVIL PROCEDURE/HOMEOWNER'S ASSOCIATIONS

Real estate developer cannot rely on arbitration clause in CC&Rs to preclude homeowners' association from filing construction defect lawsuit

Villa Milano HOA v. Il Davorge presented a case of first impression. Arbitration agreements in home purchase-and-sale agreements are not enforceable as a matter of law (Code of Civil Procedure § 1298.7). In *Villa Milano,* a real estate developer tried to avoid this notion by including an arbitration provision in the declaration of covenants, conditions, and restrictions (CC&Rs). When the homeowners' association filed suit, the developer moved to compel arbitration. The trial court denied the developer's request, and the developer appealed.

The Court of Appeal (Fourth District) affirmed. It held that inclusion of the arbitration provision within the CC&Rs was unconscionable, and therefore unenforceable, and further ruled that such an arbitration provision is contrary to public policy.

INSURANCE LAW

An insurer which fails to disclose statute of limitations may not assert statute as a defense

In *Neufeld v. Balboa Insurance Company,* the owner of a ski lodge, damaged when the roof collapsed under heavy snow, made a claim against her insurer. The insurer denied the claim, and the lodge owner filed suit. Balboa obtained summary judgment on the grounds that the litigation was commenced more than one year after the loss, in violation of a contractual one-year statute of limitations. (This one-year statute of limitations is part of the standard provisions contained in many casualty insurance policies.)

Plaintiff appealed, arguing that the copy of the policy did not contain the standard one-year limitations provision. The Court of Appeal (Fourth District) overturned the summary judgment, noting that violation of a disclosure regulation compelling insurers to notify insureds of the shortened statute of limitations operates to estop the insurer from asserting that defense.

CIVIL PROCEDURE - OFFERS TO COMPROMISE

An offer to compromise a defamation claim under CCP § 998 may not properly contain a confidentiality requirement

In *Barella v. Exchange Bank,* a real estate developer was denied a bank loan because of a derogatory e-mail which implied dishonesty. When the offending e-mail was made public, the developer sued the bank for libel.

The bank tendered a $25,000 statutory offer to compromise (Code of Civil Procedure § 998), conditioning the offer on a requirement of confidentiality. The developer balked, on the basis that a confidential settlement did nothing to restore his good name in the community. When the jury returned a $10,000 verdict, the bank attempted to shift certain cost-related burdens to the developer (as provided by § 998). The trial court refused to apply the cost-shifting provisions of § 998, and the appeal followed.

The Court of Appeal (First District) affirmed the trial court's refusal to shift costs, finding that the putative statutory offer did not comply with the Code's requirements. First, it is difficult to assign a dollar value to one's good name, rendering it uncertain as to whether or not the developer obtained a better result than he would have under the statutory offer (which is preferable: $10,000 plus one's reputation? or $25,000 and a shroud of secrecy?). More importantly, the confidentiality requirement was an extrajudicial component to which the bank would not have been entitled in court. Accordingly, the insertion of a confidentiality requirement into a § 998 settlement offer renders the offer invalid for purposes of shifting costs after trial.

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TORTS-PECULIAR RISK DOCTRINE

An employee of an independent contractor may not pursue a claim for negligent hiring against the entity hiring the independent contractor

In the Fall edition of "At Issue," we reported on the case of *McKown v. Wal-Mart,* in which the Court of Appeal reaffirmed a prior exception to the general rule that a hiring party cannot be held vicariously liable when an independent contractor's employee is injured while performing inherently-dangerous work (the Privette case). In this issue, we are pleased to report on another case addressing the issue of independent contractors.

In *Minster v. Contadina Foods, Inc.,* the employee of an independent contractor, hired by Contadina to install insulation, sued Contadina for alleged asbestos-related injuries. The trial court granted Contadina's motion for summary judgment, from which plaintiff appealed.

The Court of Appeal (First District) affirmed Contadina's summary judgment, reasoning that under Privette (and the related Toland case), an employee of an independent contractor may not pursue a claim for negligent hiring against a hirer of the independent contractor. Although a hirer has an inherent duty to exercise reasonable care in employing a competent and careful contractor with the skills necessary to perform the work safely, that duty does not extend to an employee of the independent contractor.

AGE DISCRIMINATION

Plaintiff may recover for age discrimination when he presents both a prima facie case and evidence to dispute his employer's nondiscriminatory explanation for termination

In *Reeves v. Sanderson Plumbing Products, Inc.,* the U.S. Supreme Court clarified the requirements for an age-discrimination plaintiff to prevail at trial.

Reeves was a 57-year-old personnel supervisor in a manufacturing plant, fired purportedly for shoddy record keeping and similar activities. He presented his case to a jury, stating a *prima facie* case for age discrimination. His employer offered evidence of a nondiscriminatory explanation for his termination, but Reeves presented additional evidence to contradict the company's innocuous explanation. A jury awarded him damages, and his employer appealed to the federal appellate court. The Fifth Circuit reversed on the grounds that plaintiff had not presented additional evidence - above and beyond his *prima facie* case - of age discrimination. Reeves appealed.

The U.S. Supreme Court held that this 'additional' evidence which the circuit court required was not a necessary prerequisite to prevail. A plaintiff presenting a *prima facie* case and presenting evidence to refute the employer's nondiscriminatory explanation may, under the law, be entitled to a verdict. While such a showing, without more, will not always be adequate to sustain a jury's finding of liability, it finds support in the law.

TORTS - SPOLIATION OF EVIDENCE

No tort recovery exists for 'spoliation of evidence,' but property owners may recover damages for non-consensual trimming of trees

In *Hassoldt v. Patrick Media Group, Inc.,* property owners sued a billboard advertising company for "severely" trimming a tree on their property, presumably to increase the exposure and visibility of an adjacent billboard. Among other allegations, the property owners asserted that Patrick had destroyed documents, photographs, and other records which would have shown the extent of damage inflicted upon the tree. (Intentional or negligent destruction of evidence is referred to as "spoliation" of evidence.)

The jury returned a verdict awarding $130,000 in compensatory damages for the damage to plaintiffs' tree, and $150,000 in punitive damages on the spoliation cause of action. Patrick appealed.

The Court of Appeal (Second District) reversed the jury verdict. Relying on *Cedars-Sinai Medical Center v. Superior Court (Bowyer),* a 1998 California Supreme Court case, the appellate court ruled that spoliation of evidence did not constitute a separate, recoverable tort; instead, other remedies exist which provide redress for a party's spoliation of evidence. However, the court did note that plaintiffs could recover damages equal to the diminution in value of their property as a result of the damaged tree, or the reasonable cost of restoring/replacing the tree, whichever was less. SR&C

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At -Will . . . At-Risk ?

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(employment having no specified term) may be ended by ***either party*** for any or no reason. This statutory provision of at-will employment, however, is subject to some limitations. An employment relationship is considered fundamentally contractual; the statute does not prevent the parties from agreeing to any limitation on the employer's termination rights or the employee's termination rights. For example, the parties can agree that the employee may be terminated only for good cause, some cause, the occurrence of some event, or some reason regulated by good faith, and not simply for some trivial reason unrelated to business needs.

Significantly, the agreement between the parties need not be express. Where there is no written agreement, the issue becomes whether other evidence of the parties' conduct demonstrates the existence of an actual mutual understanding of the terms of employment. In the absence of a written contract, the contractual understanding may be implied in fact, arising from the parties' conduct. In other words, an *implied-in-fact* agreement between the parties can place limits on the employer's rights to discharge an employee.

There are several factors that may bear upon the existence of an implied-in-fact agreement. According to the California Supreme Court, such factors might include the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged. These factors, taken in context with the totality of the circumstances, are examined to determine whether the parties' conduct gave rise to an implied-in-fact contract limiting the employer's termination rights.

In *Guz v. Bechtel National, Inc.,* the employee alleged that there was an implied agreement that he would be discharged only for good cause. The employee claimed that such an agreement can be inferred by combining several factors, such as his long service; assurances of continued employment in the form of raises, promotions, and good reviews; and written personnel policies, which suggested that termination for poor performance would be preceded by progressive discipline. However, the Supreme Court concluded that the employer in this case had the absolute right to eliminate the employee's work unit.

The Court's reasoning focused on the employer's intent. In fact, the Court stated that even at-will provisions in personnel handbooks, manuals, or memoranda do not necessarily overcome evidence of the employer's contrary intent. Disclaimer language in an employee handbook is taken into consideration, along with all other pertinent evidence, to determine the terms of the agreement.

In this case, the Court did not find any evidence to suggest that the employee received any individual promises or representations that he would be retained except for good cause. The Court rejected the employee's argument that his long and successful service constituted an implied contract for permanent employment except for good cause. According to the Court, ***mere passage of time, even with successful service (absent some other actions or communications by the employer), does not form an implied-in-fact contract.*** The Court correctly observed that a rule granting such contract rights on the basis of successful longevity alone would discourage the retention and promotion of employees.

Alternatively, the employee argued that even if his contract for employment was at-will, the employer violated the implied covenant of good faith and fair dealing. However, the Court quickly disposed of that argument by holding the covenant does not apply to at-will contracts.

The covenant of good faith and fair dealing is implied by law in every contract entered into in California. It exists to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement. However, the Court held that "because the implied covenant protects only the parties' right to receive the benefit of their agreement, and, in an at-will relationship there is no agreement to terminate only for good cause, the implied covenant standing alone cannot be read to impose such a duty." In other words, where the contract allows the employer to terminate at-will, its motive and lack of care are irrelevant.

Guz is an important case for California employers. It reaffirms the *Labor Code's* "at-will" provision and firmly holds that an employee's longevity in the same job does not obviate the rule of at-will employment. However, as the Supreme Court observed, the employer's intent is the critical issue when it is faced with a wrongful termination lawsuit. The employer should be cautious to be consistent in its application of its termination policies.

For more information about *Guz* or any questions concerning the issue of employment at-will, please feel free to call your contact at SR&C. SR&C

No Harm, No Foul

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and warranty-based claims.

The Supreme Court declined to create an additional exception to the economic loss doctrine for construction defect claims. Of equal importance to the construction industry was the Court's refusal to expand an existing exception to allow it to encompass construction defects.

The existing exception to the economic loss doctrine was formulated in two earlier Supreme Court cases *(Biakanja* and *J' Aire)*. In essence, the exception held that if a "special relationship" existed between plaintiff and defendant, a plaintiff could be entitled to recover tort damages, even without personal injury or property damage, if a six-factor balancing test

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No Harm, No Foul

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was satisfied. Applying one of these factors ("the degree of certainty that the plaintiff suffered injury"), the Supreme Court in *Aas* held that defects that have not ripened into property damage are wholly speculative and insufficient to create a "special relationship," thus leaving construction defect cases outside the *J' Aire* exception to the economic loss doctrine.

The *Aas* opinion will likely have a significant effect on pending and future litigation, from both liability and coverage standpoints.

In cases where plaintiffs have not contracted directly with the developer or general contractor (no privity of contract), recovery will be limited to ascertainable tort damages. After *Aas,* such damages are limited to the cost of repair of - or diminution in value caused by - those defects that have caused physical injury (e.g. mold claims) or actual property damage. Gone, it would seem, are the days when plaintiffs recover tort damages for the tremendous costs of repairing a litany of minor Building Code violations that have not caused any damage.

Aas will have little effect on homeowners who purchased directly from the developer or general contractor. In such cases, the cost of repairing defects that have not caused damage is recoverable as an item of contract or warranty damage.

In pending litigation, some defendants may file summary judgment motions in an effort to eliminate those defects that have not caused damage. However, smart contractors will think twice about piecemeal resolution of their claims, as a successful motion for summary judgment / adjudication may win the battle, but lose the war, if the 'resultant damage' upon which insurance coverage is premised results from the unripe defects.

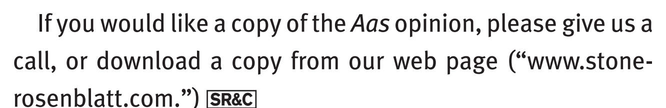
In future litigation, plaintiffs will plead "actual damage" in their complaints so as to survive demurrers and motions to strike; plaintiffs and their experts will become very creative in finding "damage" caused by technical Code violations; and the recent proliferation of 'personal injury' construction defect cases - such as those alleging the presence of mold as a result of poor construction - will continue unabated.

While adopting a bright-line rule with respect to these 'unripe defects,' the Court seemed somewhat uncomfortable with aspects of its ruling. In the pre-*Aas* world, for example, a lawsuit could be brought where a builder failed to adequately fire-stop an apartment building, forcing the contractor to pay the costs of bringing the building up to Code. Post-*Aas*, we must wait for the building to catch fire, and for fire to spread unchecked from one unit to the next, before any legal recourse, *in tort*, exists.

In light of this, the Court made several references to the ability of the Legislature to fill the apparent vacuum left by its ruling. While concerns and shortcomings are likely to exist with any proposal, the Supreme Court expressed its opinion that the question is better left to those who make the law, rather than those who interpret it.

From a coverage perspective, *Aas* may help clarify the sticky issue of so-called "work-product exclusions." Commercial general liability (CGL) policies do not traditionally cover the costs to repair or replace an insured's defective work product, but rather cover only "resultant property damage" caused by the defective work. Under *Aas,* the only surviving plaintiff claims will be those for which actual damage exists, potentially avoiding the tough-call determinations about whether or not coverage exists.

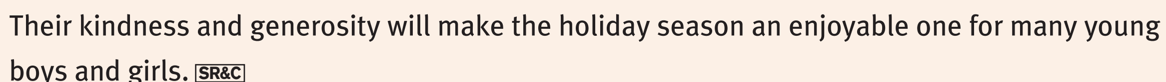
As is readily apparent, the *Aas* decision will likely have a wide impact on the Firm's construction defect practice, and on the practices of many of our insurer, developer, contractor, and subcontractor clients.



If you would like a copy of the *Aas* opinion, please give us a call, or download a copy from our web page ("www.stone-rosenblatt.com.") SR&C

Special Thanks !

To Starbucks Coffee and Property Specs – A Real Estate Inspection Company, for their generous contributions to SRC's charity, Hillsides Family Center.



Their kindness and generosity will make the holiday season an enjoyable one for many young boys and girls. SR&C

Client corner: a quarterly review of results achieved by, and for, the clients of Stone, Rosenblatt & Cha.

Client corner: a quarterly review of results achieved by, and for, the clients of Stone, Rosenblatt & Cha.

Kudos to Partner **Ira Rosenblatt** who assisted in the formation of **Premier Fiber Technologies, LLC**. The Company will engage in the purchase and sale of fiber optic cable, components, and accessories ► Congratulations to Partner **John Cha** who obtained a complete defense verdict on behalf of a insurance broker in a hotly contested matter ► Associate **Gregg S. Garfinkel** recently gave a presentation in Las Vegas, Nevada to the Claims Prevention and Procedure Counsel on "Litigation Strategies for Moving & Storage Companies" ► **Gregg** also authored "Moving Along – Summary Enforcement of Contractual Limitations of Liability" for the Los Angeles Daily Journal and "Avoiding the Pitfalls; Legal Issues for the Personal Property Appraiser" for the Personal Property Journal of the American Society of Appraisers ► Congrats to **The Beverly Hills Professional Medical Center** on its facility expansions to Koreatown, Los Angeles, and Las Vegas, NV, and to **Castlebrook Barns** for its recent land acquisition and built-to-suit deal which further expands their thriving pre-fabricated horse barn manufacturing and distribution centers; **SRC** is proud to have participated in the expansion of this fine company ► Welcome aboard to **David M. Gonor**, who has joined the firm as an associate; he was formerly associated with Soltman & O'Meara, where he specialized in complex multi-party litigation and insurance coverage. SR&C

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