

**NEW CASE HOLDS THAT DEFENDANT IS LIABLE FOR  
DEFAULT CAUSED BY CARRIER - LEAVING BOTH CARRIER  
AND DEFENDANT ON THE HOOK**

Generally, California law is lenient about allowing a defendant to obtain relief from default from the court, if he can show "excusable neglect" for not answering the lawsuit timely. What happens when the mistake is not his own, but that of someone else, like his insurance carrier? In *Scognamillo v. Herrick*, the defendant turned his summons and complaint over to his broker, who turned it over to the carrier, who accidentally placed the summons and complaint in a closed subrogation file. At the time, the carrier was undergoing reorganization. The claims manager filed a declaration with the court explaining that it was an innocent mistake made by a clerk because of the tumult of the reorganization. The court fully agreed that the insured acted reasonably and was blameless, but agreed with a prior court decision that an insurance company should not be allowed to "shield itself behind the blamelessness of the insured" when the carrier makes what the court considers to be an inexcusable mistake leading to a default judgment.

The *Scognamillo* opinion is quite harsh, and, we think, wrongly decided. The defendant in that case is an individual who is considering an appeal or request for depublication of the opinion, according to conversations we have had with his attorney. For now, the case stands. There was previously a split of opinion among the California appellate courts as to whether a blameless insured should be saddled with a default caused by the carrier. The split is even deeper now as a result of the *Scognamillo* opinion.

Where there is a split of opinion among California appellate courts, a trial court has to use its own best judgment in following one line of cases or another. Thus, fortunately, should the situation arise where a matter goes into default while on the carrier's watch, it is important to know that while the recent opinion is obviously not helpful, there is still a split of opinion on the subject and a vigorous brief must be immediately prepared and presented to the trial court to try to get the trial court to

follow the more liberal line of cases, which will allow relief from default under such circumstances. The first line of attack is to show that the default was "excusable" mistake. In *Scognamillo*, the evidence established that the broker and the carrier had been advised several times about the matter, and the appellate court agreed with the trial court that it was inexcusable that under those circumstances, the lawsuit was not followed up on. Each case is fact sensitive and the assigned lawyer must do everything in his or her power to put together a record showing that the mistake was understandable human error and not simply ignoring phone calls or letters.

The second line of attack is to rely on case law indicating that a carrier's mistakes are "extrinsic" to the defendant, so that the defendant should not be blamed for the mistakes of his carrier, whether they were "excusable" or not. Interestingly, this issue was briefed to the *Scognamillo* court, yet the published opinion does not touch on that argument or case law at all.

From a standpoint of fairness, it seems that the *Scognamillo* result brutally punishes the defendant for something the Court of Appeal admitted was not his fault,

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by saddling him with a default judgment that may be in excess of the policy limits, and which will in any event “go on the books” and thus affect a defendant’s credit, whether or not his carrier covers the whole default or not. This fairness argument should be made to the trial court if such a default occurs. Another important argument to make, in a motion for relief from such a default, is that focusing on the insurer rather than the defendant, i.e., punishing the carrier with the default, not only punishes the defendant who has to pay any excess and whose credit is affected, but is also likely to clog the courts with a second lawsuit (the defendant against his insurance company) rather than letting the first lawsuit go forward, based on evidence.

If for any reason a case goes into default as an alleged result of carrier neglect, the first thing to do is get the matter into the hands of defense immediately, who should then begin preparing an in-depth factual presentation, including declarations from the carrier, showing how the mistake came about so that the court is more likely to find that the mistake was “excusable” rather than inexcusable. The brief to the court should include the case law that runs counter to *Scognamillo*, and should include the fairness arguments, namely that upholding a default to punish a carrier in reality punishes a blameless insured and fosters the possibility of a second lawsuit instead of just letting the first one go forward on its merits.

- Paul J. Lipman

## NEW AT WESIERSKI & ZUREK

We are pleased to welcome back Junior Partner Stephen M. Ziemann. Mr. Ziemann has returned to Wesierski & Zurek after a five year absence, and he brings with him a wealth of experience in all areas of civil litigation.

We are also pleased to announce that Dana-Monica Paun has joined our firm. Ms. Paun attended the University of California at Irvine and Whittier Law School. She was admitted to the California State bar in 2002. Ms. Paun’s prior experience is in the areas of personal injury, business litigation, employment law, medical malpractice and immigration law.

Wesierski & Zurek LLP has put together a trial seminar using the latest cutting edge trial technology. If you are interested in a presentation, please contact our Administrator, Jennifer Lindskoog, at (949) 975-1000.

## SUBSTITUTE SERVICE OF A SUMMONS AND COMPLAINT AT A PRIVATE POST OFFICE BOX IS PROPER

Is substituted service proper upon a defendant’s private post office box? *Ellard v. Conway* answered this issue in the affirmative. In *Ellard*, defendants appeal from an order denying their motion to vacate a default judgment against them on the grounds they were not properly served and that the trial court abused its discretion when it denied their motion based on lack of actual notice.

Plaintiffs executed and delivered deeds of trusts to plaintiffs on three residential properties to secure various promissory notes. United Company was the escrow company for two of the properties. On or about July 1997, plaintiffs sued defendants for fraud and asked the court to void the deeds of trusts and notes. In October 1997, the process server attempted to serve the defendants at their residence. The security guard told the process server that the defendants no longer lived there. Plaintiffs’ counsel then contacted the U.S. Postal Office and obtained defendants’ forwarding address, which was the “Postal Annex” located at 751 Weir Canyon, #157-114, Anaheim Hills, CA. The process server went to the Postal Annex to serve the defendants and spoke with the manager who confirmed that the defendants received mail there. The process server then left the summons and complaint with the manager and mailed a copy of the summons and complaint to the defendants at their postal annex address.

One month later, defendants contacted plaintiffs’ counsel and there was conflicting evidence of whether or not defendants received the summons and complaint. Regardless, defendants called the plaintiffs’ attorney to discuss settlement and faxed him a signed waiver to toll the time limit to respond. Plaintiffs’ attorney said that if an answer was not received, he would seek a default. The answer did not arrive and plaintiffs took a default against defendants. Defendants relied on *Code of Civil Procedure* Section 437.5 as their basis to vacate the default because they were not properly served and did not have “actual notice” of the litigation. The appellate court cited case law that held a default judgment entered against a defendant who was not properly served with a summons in the manner prescribed by statute was void. Pursuant to Section 473, the court has discretion to vacate a default judgment which may be valid on its face, but void, as a matter of law, due to improper service.

Section 415.20 authorizes substitute service of process in lieu of personal delivery and that statute has been

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## PRE-LOSS RELEASES MUST NOT BE SUSCEPTIBLE TO ALTERNATIVE MEANINGS

While courts review liability releases with a great deal of scrutiny, there is no question that private parties are free to enter into agreements that shift the risk to a person other than the one requesting the release so long as the agreement complies with the basic laws of contracts (*Baker Pacific Corp. v. Suttles*, (1990) 220 Cal.App.3d 1148 at 1152). In the context of sporting and recreational activities, release agreements have consistently been enforced (*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748; *Buchan v. United States Cycling Federation*, (1991) 227 Cal.App.3d 134).

Most practitioners are familiar with releases in the context of settlement of a claim. Ordinarily, an event has already occurred which triggers a potential for liability on the part of the defendant. If the claim is ultimately settled, the claimant routinely executes a written release that discharges the defendant from any further claim arising out of the incident. However, it is now becoming commonplace for persons or entities engaged in potentially dangerous events to require a “pre-event” release of all claims from a participant. These types of releases are valid and enforceable, but are viewed by the courts with even more scrutiny than post-event releases (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715 at 1728).

The release at issue in *Solis v. Kirkwood Resort, Co.* (2001) 94 Cal. App.4th 354 was contained within a season pass for skiing at the Kirkwood Resort in Northern California. Prior to the ski season, plaintiff had purchased a season pass that permitted him to ski Monday through Friday without purchasing lift tickets. The pass included a release that had the plaintiff acknowledge the inherent dangers of skiing and snowboarding, including the risk of death and injury. The release contained the standard language releasing the resort and all parties affiliated with the resort, from any liability for injury or death “resulting from the pass holder’s participation in the sport of skiing . . . .”

Plaintiff’s accident occurred on a Sunday. Earlier in the day, Kirkwood employees modified a particular ski run to include jumps and other obstacles in preparation for a ski race. There was a dispute as to whether or not the Kirkwood employees blocked off this particular run by use of bamboo poles. Regardless of whether a barrier was erected, plaintiff entered this ski run and attempted to ski a

course that was now groomed for racers. Consequently, he lost control and was injured.

Once the lawsuit was filed, counsel for Kirkwood filed a motion for summary judgment based on the language contained in the release. Kirkwood acknowledged that since plaintiff’s accident happened on a Sunday, he was required to purchase a one day lift ticket. The one day lift passes do not contain any release language, and persons purchasing such passes are not required to sign releases. Kirkwood argued, however, that since plaintiff had purchased his season pass at the beginning of the season and had signed the release at that time, the release was essentially in effect at the time of his injury, but for the fact that the accident occurred on a Sunday, rather than a day between Monday through Friday.

The trial court granted the summary judgment, however, the Court of Appeals reversed and remanded finding there was a triable issue as to whether or not the language for the season pass could bind the plaintiff on a day of the week that was not covered by the release. The court noted that a prior release must be clear, unambiguous and explicit. An ambiguity would exist when a party could identify an alternative, semantically reasonable candidate for the meaning of a particular writing, *Solis, supra*. While the court was clear in stating that they were not deciding whether or not the release was effective on a day that was not between Monday and Friday, the court held the release language could reasonably be interpreted to read that it only covered a “pass holder’s participation” and, thus, since the pass was ineffective on a Sunday. A jury could then potentially find that plaintiff was not a pass holder on a Sunday, thus rendering the protection of the release to be inoperative on the day he was injured. Plaintiff conceded that the release language barred any claims against Kirkwood while a skier was skiing under the terms of the pass, however, since plaintiff was not skiing under the terms of the pass on a Sunday, a jury could find that the release was not in effect. If Kirkwood had intended to have plaintiff release them from any and all claims at any time, they could have included language to that effect. Plaintiff only purchased the right to ski under the pass from Monday through Friday. He had to pay a separate price for the privilege of skiing on that Sunday. Thus, the terms of the contract suggest that the provisions of the contract would not be effective on a Sunday. The *Solis* court cited the language contained in the *Paralift* case (*Supra*) and ruled that “The release is valid forever.”

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liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant. Section 415.20(b) states in pertinent part that if a copy of a summons and complaint be personally delivered to the person to be served with reasonable diligence, then “a summons may be served by leaving a copy of the summons and complaint at such person’s dwelling, house, usual place of abode, usual place of business, or usual mailing address other than a U.S. post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business or usual mailing address other than a U.S. post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and complaint to the person served at the place where a copy of the summons and complaint was left.”

Defendants argued the process server was required to effectuate personal service on at least two or three attempts and their failure to do so did not satisfy the requirement of reasonable diligence to allow substituted service to be made. The appellate court disagreed, stating it would be absolutely futile for the process server to go back to the same bad address when it was clear that the defendants had moved. Further, the process server was not required to exhaust all avenues of obtaining a current address and that contacting the U.S. Postal Service was sufficient. The court reasoned that the plain language of section 415.20(b) authorized substitute service at a defendant’s usual mailing address which *includes a private/commercial post office box*. In the case at bar, defendants leased a private/commercial P.O. box and notified the U.S. Postal Service that it was their forwarding address making it their “usual mailing address.”

Defendants further argued that the Postal Annex manager was not “apparently in charge” of their P.O. box and not “closely connected to them.” The court again disagreed and stated that the manager knew the defendants and knew that they received mail there and under those circumstances, it was more likely than not that the manager would deliver the summons and complaint to them.

Finally, defendants argued that the trial court abused its discretion by not vacating the default judgment because they did not receive “actual notice” of the lawsuit. “Actual notice” pursuant to section 473.5 is defined as “genuine knowledge of the party litigant.” Importantly, it has been strictly construed with the goal of implementing the policy of liberally granting relief so that cases may be resolved on their merits. The appellate court refused to buy this

argument because defendants did contact the plaintiffs’ attorney and discussed possible settlement of the matter. Defendants would not have done so if they in deed, did not have actual notice of the action. Further, not only did defendants have actual knowledge of the lawsuit, they knew that their time to respond was approaching and tried to toll the time limit, eventually failing to answer the complaint altogether. The court found that defendants’ failure to answer was not the result of excusable neglect. As such, the trial court’s ruling was affirmed in that substituted services upon a private post office box was not only proper but valid.

- Mary X. Nguyen

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Since a contract is construed against the drafter (*Civil Code* §1654), the court returned the case for trial. A release must be unambiguous and explicit in expressing the intent of the parties. The agreement must clearly notify the prospective releaser or indemnitor of the effect of signing the agreement, and that a release effective as to one type of conduct, may not be effective as to another (*Olsen v. Breeze, Inc., (1996), 48 Cal.App.4th 608 at 622*).

The *Solis* case has only been cited in one other opinion at *Kahn v. Eastside Union High School District, 2002, 96 Cal.App.4th 781 at 796*. The *Kahn* case was critical of the *Solis* opinion in that it may have suggested that inducing a sports participant to exceed his or her abilities may generate a duty of care thus abrogating the holding in *Knight v. Jewett, 1992, 3 Cal.4th 296*. The *Knight* case held that participation in certain recreational or sporting activities relieves potential defendants of any duty of due care from the outset (primary assumption of the risk).

*Olsen v. Breeze, Inc, Supra*, held that releases are not per se contracts of adhesion, but rather, the broader and more encompassing the language of a release, particularly a pre-event release, the more successful the drafting party will be at claiming it is an adhesive contract. The drafter certainly cannot exclude any pertinent language, as can be seen by the *Solis* decision. Surely being overly broad in scope also has its dangers.

- Thomas E. Martin

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