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## *The Mercurial Issue of When an Owned, Non-Scheduled, Motorized Vehicle is a "Motor Vehicle" for Purposes of Exclusion from UM/UIM Coverage*

**By Vivian Lerche**  
Associate Attorney/Staff  
Writer

With ever-increasing technology and creativity of the electronics and motorized vehicle industries producing a wide variety of vehicles which have the capacity to self-propel, automobile insurers are increasingly facing the question of what they must cover once an insured is involved in an accident with an uninsured or underinsured motorist ("UM/UIM") while the insured is riding one of these motorized vehicles.

Today's motorized vehicles range anywhere from electronic ride-on Barbie cars, to motorized scooters, motorized skateboards, quads and mopeds (just to name a few). Many of these motorized vehicles can be found in the "toy" section of department stores and specialty toy stores. However, a casual walk down city streets will reveal that (with the possible exception of the Barbie cars) adults use these motorized vehicles (in addition to teenagers and adolescents). Typically, these vehicles are not individually insured, i.e., they are not scheduled vehicles under any auto policy. So what happens when a person who is insured under an auto policy which describes a car (or other similar vehicle)

is injured by an UM/UIM while riding one of these motorized vehicles?

California Insurance Code §11580.2 governs UM/UIM coverage. UM/UIM coverage is mandated under section 11580.2 for auto policies issued in California unless there is an express waiver pursuant to specified terms. However, even when the policy includes UM/UIM coverage, subdivision (c)(6) of section 11580.2 allows an exclusion to such coverage for "bodily injury of the insured while

occupying a 'motor vehicle' owned by an insured or leased to an insured under a written contract for a period of six months or longer, unless the occupied vehicle is an insured motor vehicle." Most auto insurance policies which provide UM/UIM coverage contain an identical or similarly worded exclusion.

But, although the term "motor vehicle" is defined in section 11580.2(c)(6) as any self-propelled vehicle, California

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## *The Admissibility of Animation*

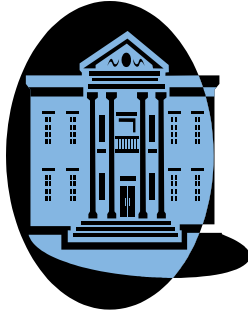
**By Lauren Koblitz**  
Associate Attorney/Staff Writer

Animation can be a very powerful and persuasive tool at trial. Animation is most often used to relay to a jury how a particular accident event occurred. However, despite the increasing prevalence of animation within the courtroom there is no California law directly on-point governing how faithful a representation of the actual facts it must be. This may be in part to do the nature of an animation; a sequence of single drawings strung together in an almost cartoon style. As such, in order for a complete animation (collection of single drawings) to be admissible each frame should pass scru-

tiny under the existing and well established California laws.

California law is clear – only scientific evidence which is "generally accepted" in the scientific community is admissible to establish causation and/or other elements of a party's case. *People v. Kelly* (1976) 17 Cal.3d 24, 30 [130 Cal.Rptr. 144]. In determining whether a technique is "generally accepted" in the relevant scientific community the court may consider, among other things, relevant scientific literature and technical publications, expert testimony provided in the case and, through the taking of judicial notice, the results of other Kelly court proceedings

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### *The Mercurial Issue of When an Owned, Non-Scheduled, Motorized Vehicle is a "Motor Vehicle" for Purposes of Exclusion from UM/UIM Coverage*

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courts have held that mopeds are not "motor vehicles" for purposes of the exclusion under Insurance Code section 11580.2 (c)(6) and similar exclusionary language in auto policies.

*Farmers Insurance Exchange v. Galvin* (1985) 170 Cal.App.3d 1018. According to the reasoning of the *Galvin* court, if the vehicle is "light weight", "low-powered" and "can be pedaled," it may not be a "motor vehicle" despite the fact that it contains a motor and can also be self-propelled. *Id.* at 1021. Furthermore, California

Insurance Code §11580.06 defines "motor vehicle" as "any vehicle designed for use principally upon streets and highways and subject to motor vehicle registration under the laws of this state." As such, many motorized vehicles, including ride-on Barbie cars, motorized scooters, motorized skateboards, quads and mopeds, may not be a "motor vehicle" excluded from UM/UIM coverage. It is likely that this list of motorized vehicles which are not excluded "motor vehicles" will only grow as manufacturers find new ways to propel

people from point A to point B. Consequently, insurers may find the term "motor vehicle" to be more and more mercurial. Accordingly, when an insured is injured while he/she is involved in an accident with an uninsured or underinsured motorist while riding one of these motorized vehicles, insurers who issued a policy describing completely unrelated motor vehicles may find themselves covering injuries arising from the use of vehicles which they had not intended to cover when the policy was issued.

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**only scientific evidence which is "generally accepted" in the scientific community is admissible**

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involving the same techniques at issue. *Shirley, supra*, 31 Cal.3d at 55-56; *People v. Morris* (1988) 199 Cal.App.3d 377, 387; *People v. Smith* (1989) 215 Cal.App.3d 19, 25.

In *Kelly, supra*, 17 Cal.3d, at 30 [130 Cal.Rptr., at 148], the California Supreme Court adopted the test set forth in *Frye v. United States* (1923) 293 F. 1013, for determining the reliability of novel scientific tests and techniques which established that the principle must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The *Kelly* test, as applied to animation, requires that three elements must be satisfied before expert testimony is considered admissible: (1) the reliability of the methodology used to create the animation must be established, by showing it has gained general acceptance with the particular field in which it belongs and meets that standard; (2) the

### *The Admissibility of Animation*

witness creating the animation must be generally recognized in the scientific community and must be properly qualified as an expert to give an opinion on the particular subject; and (3) the proponent of the evidence must demonstrate that correct scientific procedures were used in the preparation of the disputed evidence in the particular case. *Kelly, supra*, 17 Cal.3d at 30 [130 Cal.Rptr., at 148].

Further, while an animation prepared by an expert is potentially admissible as "demonstrative evidence," it must meet the standard of foundation and reliability to show that it is not fabricated, fictional or speculative, i.e. (a) the input data must be accurate and based upon reliable measurements capable of being checked; and (b) the data must be consistent with the laws of nature; and (c) commercially recognized software and hardware was used.

The defense concern when animation is used by Plaintiffs is that it faithfully represents the evidence, as opposed to distorting or ignoring the physical evidence in a manner favorable to an accident scenario that never happened.

*Cholakian & Associates* was recently successful, through the use of a Motion in Limine and first day 402(A) hearing based on the law above, in limiting Plaintiffs in a wrongful death case to the use of a mere eight frames of their initial 590 frame animation at trial.



## Injured Pet Animals And Peculiar Value

**By Colin Hatcher**  
Special Counsel/Staff Writer

One of the cases which the Cholakian firm recently litigated to eve of trial (and then prevailed) was a case involving a cat that had been shot and injured by a person unknown. Plaintiff accused the Cholakian firm's clients/Defendants (his neighbors) of being responsible for the shooting. He claimed substantial damages for his cat's "special value", i.e. an "irreplaceable" emotional relationship with his cat. This is a major issue in northern California, where there is a strong Plaintiffs' bar movement towards treating injured pet animals as property of "special value," i.e. irreplaceable, with subsequent potential for large damages awards for emotional distress. However, for the purpose of calculating damages, current California law treats animals as no different than inanimate property, and permits only the cost of repair or replacement, whichever is the lower value. Only if a pet owner can prove "peculiar value" can damages be enhanced, pursuant to Civil Code section 3355. The issue is: does an owner's

emotional relationship with a pet animal constitute "peculiar value"?

A new appellate case just recently published provided some clear guidance to the court on the issue of the calculation of damages for an injured pet. The case in question is *McMahon v. Craig* (2009) 176 Cal.App.4th 222 [97 Cal.Rptr.3d 555]. In *McMahon*, a Plaintiff dog owner sued Defendant veterinarians for malpractice and intentional infliction of emotional distress after her dog died in their care. In this case the Appellate court expressly held that plaintiff could not recover damages for loss of companionship based on her dog's peculiar sentimental value to her. This was, the court said, because "peculiar value" under Civil Code, section 3355 referred to economic value and did not include an owner's emotional attachment to an item.

The *McMahon* court was very clear: "Peculiar value under Civil Code section 3355 refers to a property's unique economic value, not its sentimental or emotional value. "[P]eculiar

value" ... refer[s] to special characteristics which increase the animal's monetary value, not its abstract value as a companion to its owner. ... damages cannot be based on sentimental value. *McMahon v. Craig* (2009) 176 Cal.App.4th 222, 237-239 [97 Cal.Rptr.3d 555, 566-568].

In the Cholakian firm's recent case we brought a motion in limine pursuant to *McMahon* that resulted in a court order that Plaintiff's damages for his injured cat were limited to the economic replacement value of the cat, which, since the cat was an adopted stray was clearly an amount well below \$100. On that basis, Plaintiff threw in the towel and told the Judge he could not and would not try the case under such restrictions. The Cholakian firm will now seek its costs as prevailing party. The Plaintiff intends to appeal the matter and try to overturn *McMahon v. Craig*. Since that ruling is scarcely 6 months old, Plaintiff has a tall order.

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**current California law treats animals as no different as inanimate property, and in essence permits only the cost of repair or replacement, whichever is the lower value**  
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## Reasonable Disability Accommodations Under the Fair Employment and Housing Act & the Americans With Disabilities Act in Employment

**By Dave Tate**  
Associate Attorney/Staff Writer

The federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA) both prohibit employer disability discrimination in the workplace and require an employer to engage in an interactive process with a qualified individual (employee or prospective employee) to evaluate the nature of that person's

disability(s) and to explore reasonable workplace accommodations that might be available for the employer to provide to that individual. An increasing number of employers are being sued for disability discrimination and the definition of what constitutes a protected disability is expanding.

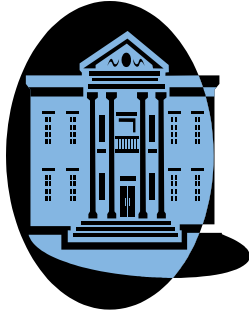
A qualified or protected individual is an employee or prospective employee with a dis-

ability, who, with or without reasonable accommodation, can perform the essential job functions of the employment position that the person holds or desires.

A disability can be physical or mental and generally is broadly defined as a condition that substantially limits (that is, makes more difficult) a major life activity, without regard to such things as medi-



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**the employer has the discretion to choose between different, effective accommodations, and is not necessarily required to choose the accommodation desired by the employee, or the "best" accommodation**  
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## *Reasonable Disability Accommodations Under the Fair Employment and Housing Act & the Americans With Disabilities Act in Employment*

(Continued from page 3)

cations, assistive devices, or reasonable accommodations. Life activities include physical, mental and social activities, and working. Generally, a physical disability is a physiological condition, whereas a mental disability includes but is not limited to any mental or psychological disorder or condition, and the definitions of both physical and mental disability include being regarded or treated by the employer as having or having had a disability or a condition that may become a physical or mental disability. Generally, the prohibition against discrimination or harassment relating to a medical condition includes a health impairment related to a diagnosis of or a record of a history of cancer; or any scientifically or medically identifiable genetic characteristic (gene or chromosome), or inherited characteristics.

The Equal Employment Opportunity Commission has recently proposed rule making changes to in part revise that portion of its regulations defining the term "substantially limits", and expand the definition of "major life activities" by including two non-exhaustive lists, the first of which includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating), and the second of which includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circula-

tory, endocrine, and reproductive functions").

To give you some ideas, the following are examples of possible reasonable accommodations that may or may not apply in a particular circumstance. The items listed are not exhaustive; nor are they necessarily mandated.

- Making existing facilities readily accessible and usable.
- Job restructuring.
- Reassignment to a vacant position.
- Part-time or modified work schedules.
- Acquisition or modification of equipment, furniture or devices; providing mechanical or electrical aids.
- Adjustment or modification of examinations, training materials or policies.
- Providing readers or interpreters.
- Changing the job duties.
- Changing the work shift.
- Providing leave for medical care.
- Accommodating or restructuring work schedules or responsibilities.
- Relocating the work area.

In *Dark v. Curry County* (2006, U.S. 9th Circuit Court of Appeals) the Court held that the employee has the burden of showing the existence of a reasonable accommodation that would have enabled him to perform the essential functions of an available job; however, the employee need only show that an accommodation seems reasonable or ordinary on its face. The employer's description, if any, of the essential functions of the particular job can be important. In

*Albertson's Inc. v. Department of Fair Employment and Housing* (2006, California Court of Appeal) the Court held that the burden is on the employer to establish that the employee is incapable of performing his or her essential duties with reasonable accommodation. However, the employer has the discretion to choose between different, effective accommodations, and is not necessarily required to choose the accommodation desired by the employee, or the "best" accommodation. *Hanson v. Lucky Stores, Inc.* (1999, California Court of Appeal); *Williams v. Genentech, Inc.* (2006, California Court of Appeal).



## Delay in Settling UM Claim in bad faith in HAT v. Depositors Insurance Co, No. 07-16949, (9th Cir. July 30, 2009)

By Kevin Cholakian

The 9th Circuit Court of Appeals reversed the U.S. District Court for the Northern District of California's ruling granting summary judgment in favor of Depositors Insurance. The underlying case involved a serious injury accident in 2001 caused by an uninsured driver resulting in significant medical treatment and a resulting deformed leg by claimant. Shortly after the accident, claimant sought her \$500,000.00 policy limit and claimed she experienced delays and low-ball offers despite repeated requests for payment and demands for arbitration. Depositors Insurance on the eve of arbitration tripled its standing offer to \$300,000.00 and plaintiff accepted. She then sued in the Northern District for bad faith.

In reversing the Northern District's ruling granting a summary judgment in favor of Depositors, the court noted a "period of apparent inactivity" of 15 months during which time the insured had all claimant's medical records and agreed she had achieve "maximum medical improvement that it agreed this was a "policy limit" case". The court pointed out that "Depositors' failure to respond to several of HAT's arbitration demands, its advice that she not retain an attorney, and its conduct at depositions also contribute to the totality of conduct that might reasonably be characterized as bad faith".

Importantly, the fact that claimant accepted a settlement between the policy limits and the amount of Depositors first offer

did not vitiate the bad faith claim the panel said.

The case was remanded with instructions for the District Court to rule on claimant's claims of intentional infliction of emotional distress and punitive damages.

The old adage that bad facts make bad law holds true in this case. The general rule is that claimant's acceptance of a settlement offer less than the policy limits and before Arbitration precludes a claim of bad faith is slapped down in this particular case because of the egregious claims handling and apparent sense by the Court that an *in pro per* claimant was taken advantage of by this particular carrier.

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**the fact that claimant accepted a settlement between the policy limits and the amount of Depositors first offer did not vitiate the bad faith claim**  
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## Truck Company sued for bad faith despite being filed outside the one year suit limitation

By Kevin Cholakian

*Superior Dispatch, Inc. v. Insurance Corporation of New York* (2009, California Court of Appeal).

In the underlying case, Matson Navigation Company hired Superior Dispatch to carry freight, by truck, from a terminal at the Port of Los Angeles to another location July 2003. Freight included a dump truck on a flat rack trailer. The dump truck struck an overpass while the trailer was passing under a bridge. Because of the damage to the dump truck, Matson notified Superior that its customer rejected the vehicle and demanded payment from Superior for its full value.

Superior's carrier denied the claim four months after the accident.

Superior waited until May of 2005 to bring its bad faith suit. The trial court granted the carriers dismissal motion citing the one year supervision period.

The Second District Court of Appeal reinstated the case finding a fact question regarding whether the carrier properly notified the truck company about the one year limitation period.

California reg. code, Title. 10 and for san 2695.7, subd. (f), requires a carrier to notify a

claimant of any limitations. And any "other time period requirement upon which the insurer may rely to deny a claim" covers contractual limitations provisions as well because there is a factual dispute as to whether INSCORP so complied. The court allowed the case to continue.



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California Trial Lawyers  
Association

National Association of  
Subrogation Professionals  
(NASP)  
Chair in California

Trucking Industry Defense  
Association (TIDA)

San Francisco Defense  
Association  
(President 2001-2009)

Italian and Armenian  
American Bar Association



Cholakian & Associates is listed in Best's Insurance Directory, is AV rated by Martindale-Hubbell since inception, and is retained defense counsel to a dozen major insurance companies doing business in California. This practice includes, though it is not limited to, first and third party representation regarding serious personal injury, catastrophic trucking accident litigation, complex commercial litigation, product liability/fire subrogation matters and coverage litigation. This includes defense of matters involving allegations of construction defects, mold related claims, inter and intrastate trucking, commercial landlord/tenant, environmental liability, professional liability, including insurance agents, labor and employment law, officer's and director's liability, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

## UPCOMING EVENTS

February 4, 2010 – California Court of Appeal, Sixth Appellate District Court Judge Patricia Bamattre-Manoukian will be San Francisco Defense Associates President Kevin Cholakian's guest speaker at a SFDA luncheon.

For more information about this event, please contact Lauren Koblitz at (650) 871-9544 ext. 212

**Kevin K. Cholakian** a native Californian, who grew up on a family farm in the Central San Joaquin Valley, attended North Carolina School of the Arts in Winston-Salem, North Carolina his senior year of high school 1971-72 on a full scholarship. 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 CSUF, 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. He received his law degree from the University of California, San Francisco Hastings College of the Law in 1981 where he was on Law Review and which he attended on scholarship. 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 an AV rated 25 attorney San Francisco insurance defense firm (1988 through 1999). He began Cholakian & Associates in January 2000 and has continued to specialize in high exposure personal injury defense, product liability/fire liability matters, environmental, coverage and employment/housing discrimination matters. He is a Northern California Super Lawyer under the Personal Injury Defense and Environmental Defense categories. He was awarded "Gladiator of the Year" 2006 by Farmers/Zurich for trial accomplishments and awarded the Values and Vision Medalion in 2008 by the Director of Commercial Claims. Mr. Cholakian regularly defends cases that have exposures in excess of \$1,000,000.00.

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 Seminar 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.