CITATIONS

FEBRUARY – TWO THOUSAND FOUR

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To work to improve the administration of justice.

ONE DAY, ONE MOUNTAIN, ONE MISSION

By TERENCE GEOGHEGAN
Page 4

EULUA ACCOUNTING

Feeling California-ish

Philip Garrett Panitz

Neil Diamond's song "I am...I said" is about how he was torn between life on the two coasts. Like Neil, I also struggle at times with my "heritage" as an ex-East Coaster. I was born in Brooklyn, raised in North New Jersey, and have lived most of my adult life in California.

To exorcise the demons of this bicoastal disorder, I come to you, my faithful and ardent readers, to vent. I am hopeful that this venting will cure all of us of our reflexive tendency to compare Californians or Left Coasters with the actions of Easterners. We are two different species. Consider just four of our salient distinguishing characteristics.

1 **We Vote Constantly.** We vote for referendums, initiatives, plebiscites, propositions, elected offices, recalls, dog catcher, whatever. We just keep pushing those buttons, levers, and chads. We are truly democracy in motion. On one and the same ballot we vote for initiatives that cancel each other out. We vote for initiatives that can't possibly be funded, for measures that have to be deciphered in court. All of these things are important in a democracy.

Back East they have what is known as a Republic. They elect people to do all their politicking for them, and then don't worry about it for two years. I'm not making any political comment here, just wondering which of the two systems is better. Left Coasters vote often and accomplish nothing; East Coasters vote almost never and let the Mob make sure that everything works.

2 **We Duck Our Neighbors.** If our neighbor so much as looks at us, we turn away and keep on walking. At all costs we value our privacy. Back East not only does everybody "know thy neighbor," but everyone knows everyone's business. For example, one weekend during my teen years in New Jersey, my parents trusted us kids (big mistake) and left us alone while they went upstate to visit friends. We had no sooner begun to party than the neighbors called the cops on us. They all knew my parents were out of town and that there was no way a few hundred cars should be parked outside our house. If we had lived in California, our neighbors would have drawn the curtains and turned up the volume on their TVs.

3 **All of our Friends Live Outside the One-Hour Radius.** This trait is truer of Los Angelenos but we all follow it. If we have a close friend, they must be at least an hour's drive from us. Relatives also should be outside the one-hour radius. This provides complete insulation from the dreaded "I was just in the neighborhood" intruder. People are never just in the neighborhood here. They need GPS just to get to your neighborhood.

Back East nobody leaves the neighborhood. When my mother gave a party, it was the neighbors she invited. We knew the names of every family for at least one hundred houses. From a teenage perspective that was a bad thing (see salient characteristic #2 above). If Johnny down the street was out too late or snuck out the bedroom window, Johnny's mom would be answering the phone 15 times with reports of Johnny sightings. Easterners have their own version of GPS — the mother network.

If it was dinner time, all the kids playing outside would be summoned home by the ringing of the mother bell. Every mother had a different bell, so that we wouldn't be drawn inadvertently toward the wrong house. Here in California, this is totally unnecessary. All the kids are indoors, gathered around the computer. If it is dinner time, every kid in the house is required to be fed by the mother whose house they are currently in. The other mothers get a night off. It's sort of a California version of musical computers.

4 **We Pretend There's No Weather.** We have weather, of course; it just has no pattern. It never repeats. In the East, winters are cold. Summers are hot. If it is time to pack up the family to go to a Mets game, it will rain. These things are totally predict-

Continued on page 10

One Day, One Mountain, One Mission

Mt. Whitney, Sunday, August 31, 2003 (Part 2, The Climb) — *Terence Geoghegan*

The Omen

Wake-up calls at 4:00 a.m. — whose idea was *this*? We rolled in the evening before, and checked into the Dow Villa, one of the motels on the main street of Lone Pine. Nice clean rooms, for cheap. Air conditioners that crank decent enough, which will matter. Strolled across the street for a pizza, and tried to bag some shut-eye. Ain't easy, with the mountain staring us down from across the Alabama Hills.

A Bureau of Land Management Recreation Area since 1969, the Hills were named after a famous Confederate warship that had terrorized northern shipping until the steamsailer U.S.S. Kearsarge caught her off the coast of Normandy on June 19, 1864, returning to the theater of war after repairs in Cherbourg. In one of the most famous battles in naval history, the Alabama Hills, equal in size but outgunned, was sunk.

The Alabama Hills are famed for that "Badlands" look; they've been featured in many of Hollywood's best-known Westerns, from *How the West was Won* to *Maverick*. A lot of car commercials are filmed there as well. Not to mention *Gunga Din*.

We race through before sunup, up the eleven miles or so that takes us from Lone Pine at just above 3,000 feet, to the trailhead at Whitney Portal, at somewhat above 8,300. Why the sudden lack of precision? Well, yesterday, I was typing in Ventura, with all of the resources of the 'net just a click away. Now, I'm sitting at a table, under the *palapa* canopy at Don Mucho's restaurant, deep in the jungle near the Mayan ruins at Palenque, near the Guatemalan border in southern Chiapas. (The *zapatista* uprising is oversold as a danger, and anyway, I've been in three shooting wars now, and with one notable exception, neither the government forces nor their adversaries have ever been dumb enough to start shooting at the tourists.) There actually is not just a wireless access point within view, but a *TWPS*-equipped one. ("Tupperware Weather Protection System" — the unit is housed in a

Tupperware cake box, nailed to a tree, with tiny holes in the bottom to accommodate the wiring. It's how everything in the jungle is protected from rain, humidity, insects, and the natural yet most cussed inquisitiveness of monkeys.) However, I don't have the IP information to lock into it, and Steve, the gonzo archaeologist from Texas who set the bugger up, isn't to be found at the moment.

But I digress.

We find a place to park — in one of the distant overflow lots, as our mountain is popular — and start up the trail in the dark, at 5:25 a.m. Narrow, sandy and rocky, it is yet an easy climb, as it begins with a rather gradual ascent. Scant minutes later, we see the bouncing headlamps coming down, six of them in the unmistakable lockstep of pallbearers, or their less funereal counterparts, the stretcher-bearers. And that's just what they are.

"Stand aside — injured party coming down!" cries their leader, interspersed with incantations of "All praise to the lord!", making me wonder if he's getting ready to box the guy up to continue his journey.

And as we stand aside, and they pass, I wonder if he might have a premonition. Their cargo is a middle-aged man, unconscious. Is it just the effect of these newfangled halogen lamps, with their disturbing violet cast, or is his face really showing that ghastly dark grey pallor?

Darkness into Light

We climb on through dense pine. Soon the trail widens out in spaces, allowing us the luxury of turning our gazes, and our thoughts, east to the breaking day. By 6:30, although we walk in deep shadow, we are able to stow our lanterns. Soon all is visible, and pretty spectacular it is. At times the thick pine gives way to grassy meadows; at times we can see that, even this late in the season, many wildflowers are in full bloom. We pass small alpine lakes, Lone Pine and Mirror, sparkling clear, and the icy brooks that both feed and drain them. And always, we are surrounded by the steep walls of rock and scree, that scarcely seem to recede no matter how one struggles to look straight *up*, trying to adjust the horizon to avoid their easy reminder of our complete *insignificance*.

Back in Lone Pine, the temperature will be in the mid to high nineties by noon. Here, as we pass 9,000 feet, and then ten, it is yet cold, but even though the way is not yet overly steep, we're not feeling the chill.

My recollection of the landmarks along the way will be imprecise. Why? I had a watch; Stubbie had an altimeter. The wayposts are well marked, and we both could have made notes. But we didn't. Part of it is the pace of the death-march; I had never walked twenty-two miles in one day in my life, let alone with more than 12,000 feet of altitude change. (Why count both ways? After all, half of it is downhill, yes? Well it's like this — eleven miles and 6,000 and change of ascent leaves you breathless

and exhausted, but is, at least relatively, biomechanically unpunishing; the trip down, while allowing no *recovery* from the ascent, throws in a sound thrashing of your ankles and knees as well.)

And then there is that little hobgoblin...only very infrequently does it kill you; usually it just makes you wish that it had. Altitude sickness. It comes in two charming forms: usually pulmonary first; that only makes you hack up a little pink mist. And then, and only if you're spectacularly unlucky (at least at 14,000 feet or so), the cerebral form that makes your brains leak out your nose. Just type "altitude sickness" into any browser, and surf a bit. Here's the best part: there's no way to predict who will get it, or when, or at what altitude. Sure, there are negative indicators. If you've taken time to acclimate, and hike up a thousand feet a day or so, you're far less likely to get bit on the butt than some idiot who raced up from sea level in Ventura yesterday, then from Lone Pine to the trailhead in the wee hours, and is now racing like a maniac to the peak.

But even experienced mountaineers who have spent time at altitude, and properly acclimated, can get bitten. Without warning. So it's always this little specter dancing on your shoulder. And when it bites, judgment can falter. You get *stupid*.

What to do? There are a number of recognized amelioratives, palliatives, and other kinds of snake oil, none of which are nearly as effective as getting *off* the mountain and down to a sane pressure, at the first sign of trouble, right *now*!!! But you might already be too stupid at that point to remember to do that, and save our own life. The latest miracle cure? Viagra. I swear that I am not making this up, and the cardiovascular explanation makes sense enough, But no thanks. As if we didn't have enough of a problem already with chafing the tender bits while sky-marching.

So, the halfway point at Trail Camp...was that at 11,000 feet, or 12? Did we get there by 10:30, or 11, or when? Who knows? We were *trudging*, gasping in the vanishing air, putting one foot before the other, climbing the "97 Switchbacks," bloody steep, to Trail Crest at 13, 600 feet. This is the spot where the Muir Trail intersects from the west, bringing in those who have chosen a gentler route, traversing a couple of the more northerly peaks en route to Whitney.

And this is the heartbreaker...because the trail from Trail Crest to the summit begins by *descending* several hundred feet. And every step tells you that it must be made up, *and* that the eventual descent will bear its own invitation to quit, as you descend again, knowing that you must again go *up* to Trail Crest, before being allowed the final luxury of ceasing with the burning the lungs and quads, and instead be rewarded by the Trashing of the Joints of the Lower Extremities. Oh yassuh.

We descend. We climb again. It has gotten quite cold, and rain is threatening. There are signs everywhere, warning of lightning. *Get off the mountain*. Instead, we curse. We Trudge. It is our expiation, and our Mecca. More than anything, it is not that we *continue*, but rather that we refuse to *quit*.

And we are at the summit. 2:30 p.m. — does that sound right? Stubbie and I, we have had no manifestations of altitude sickness. But now, it is very cold. I must put on my bicycle leggings, and some other warm clothes, to prepare for the icy descent. I struggle to take my shoes off. Just bending over narrows my vision. Trying to take off my pants, and pull on my leggings, and bolt my socks back on, and attempt to weld my boots back into place...I'm panicking. I'm trying to fill my lungs to widen my vision to rebuild my lower legs with all of the proper components, but I have no tools! How can I bolt my socks on without the right wrench? How can I weld my boots on

Continued on page 6

One Day, One Mountain

Continued from page 5

without a torch? It makes no sense! I curl up for a moment, and realize that, on the ground, in a fetal position, I can put my socks and boots on pretty nicely. I do it. I get up. I gather up Stubbie. We flee. It is about 3:00 p.m. Nine hours up — surely we can be down in five, yes? Because otherwise, we will be breaking out the lanterns again.

We hammer down. Our old knees and ankles protest. We tell them to shut up, but choke down fistfuls of Ibuprofen, just to be nice. We are going faster, downhill — what trick of the mind is it that causes the landmarks that seemed to greet us so quickly, on ascent, to unreel so grudgingly in reverse?

Stop thinking. March. Be thankful for thickening air. *Run*.

We would like to make it, but we don't. Stubbie forges ahead: I hang back to pick up a couple of "hitchhikers." Folks who were *sure* they would be down before dark, but weren't. One lantern for three people, in pitch blackness, reveals the avarice for human flesh of every ankle-twisting root, berm, and stream crossing. It makes for slow going, with much stumbling and mumbling and cursing

And suddenly we are down. 8:35 p.m. finds us in the parking lot. We have marched twenty-two miles in fifteen hours and ten minutes. We drive to town, and fall, stinking, into the last open restaurant. Meat. Beer. We lurch across the street and sleep for many hours.

We will learn later that our unfortunate fellow hiker, he of the ashen complexion, suffered a diabetic coma. Perhaps the altitude made him forget to check his blood sugar, or to eat. But he will recover. And as for us? When we return, the mountain will be as it was.

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Terence Geoghegan has a civil litigation practice in Westlake Village. When not lawyering or suffering altitude-induced hallucinations, he attempts to stay out of trouble by bicycling, racing motorcycles, teaching Taekwon-Do, playing the violin and viola, flying airplanes, and also jumping out of them. It doesn't seem to be working.

Five Easy Pieces of Advice About Drafting a Buy-Sell Agreement — Part 3

Stephen D. McMorrow, CPA, CBA

In the September 2003 issue of CITATIONS the first part of this series discussed the importance of specifying the appropriate level of appraisal in buy-sell agreements. In the November 2003 issue, the second article explained the importance of specifying the qualifications of the appraiser and offered suggestions on how to set up the process of getting appraisals. This third article concludes the series by addressing what buy-sell agreements should say about discounts for the minority shareholder's interest and which standard of value to use.

4 Specify Whether Minority Interests are Discounted

The issue of discounts for a minority interest is often the biggest point of contention between owners involved in the buy-out process. This issue could be easily avoided if the attorneys address it when they draw up buy-sell agreements.

Minority owners usually expect to receive their pro-rata share of the value of the entire business. However, most buy-sell agreements state that the minority interest is to be bought out at fair market value (FMV): the price at which property would **change hands between a hypothetical buyer and seller.** A hypothetical buyer is not going to pay a price equal to the pro-rata value of the entire business to purchase a minority interest because such an interest lacks control and will be hard to sell. Instead, such a buyer will demand discounts for lack of control and lack of marketability.

Such discounts can be as much as 60 percent of the pro-rata value. Not surprisingly, minority owners are often furious when they hear this, and the buy-out process begins to unravel from there.

To obtain guidance on the applicability of discounts, attorneys might look to the way discounts are handled in dissenting shareholder actions in California. California Corporations Code section 2000 establishes the law but does not clearly define the complex appraisal terms and concepts contained in it, in particular in regard to discounts. However, in *Brown v. Allied Corrugated Box Company (1979) 91 Cal.App.3d 477,* the court determined that minority shares should not be devalued for lack of control in a section 2000 appraisal. In those actions the court uses a standard of value which they describe as "fair value."

Thus on one hand the FMV standard dictates discounts of up to 60 percent. On the other hand, under the "fair value" standard used in section 2000 dissenting shareholder actions, there should not be any discounts. If the buy-sell agreement simply addresses how discounts will be handled, the issue goes away. Consider the following language, "When appropriate, in valuing the shares subject to the buyout, any discount or discounts based on the fact that the shares constitute a minority interest in the company, or lack marketability, or are underproductive, etc., shall be taken into account provided that the sum of all discounts shall not exceed fifteen percent (15%) of the pro rata value of such Shares in the Company."

5 Specify the Meaning of Fair Market Value

Attorneys can help parties understand how FMV fits into the standards of value by discussing this point when they are drawing up the buy-sell agreement. There are at three commonly used terms: fair market value, fair value, and investment value.

Fair Market Value • FMV is the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell, and when both have reasonable knowledge of the relevant facts.

Fair Value • According to The Guide to Business Valuations, 13th Edition by Shannon Pratt, et al., p. 1-109, fair value is a "judicial concept, defined differently in different states and countries." However, it is not unusual for the term to come up in California because it is used in section 2000(a) dissenting shareholder actions. Section 2000 states that "fair value shall be determined on the basis of the liquidation value as of the appraisal date, but taking into account the possibility, if any, of sale of the entire business as a going concern in liquidation."

This definition has created more confusion than clarity because businesses are generally valued with either a going-concern value or a liquidation value (when a business is worth more dead than alive). Furthermore, section 2000 does not define liquidation value. I recommend against using the term fair value in buy-sell agreements because it only creates confusion.

Investment Value • The International Glossary of Business Appraisal Terms defines investment value as, "the value to a particular investor based on individual investment requirements and expectations." To understand this definition one must understand the difference between a synergistic buyer and a financial buyer.

A financial buyer is anyone who does not bring any unique synergies to the transaction. A synergistic buyer will pay more for the business because the synergies they bring to the table allow them to get a better return on their investment than a financial buyer.

Of course, business owners hope to find a synergistic buyer when they are selling. However, since the value to the synergistic buyer will be known only to that buyer, an appraiser cannot determine investment value unless they are working with information from the synergistic buyer. Thus a buy-sell agreement can only require appraisers to determine the value to a financial buyer.

Conclusion • These three articles have offered five pieces of advice for attorneys drafting buy-sell agreements: specify (1) the appropriate level of appraisal, (2) the credentials of the appraiser/s, (3) the appraisal process, (4) whether or not minority interests are to be discounted, and (5) the meaning of fair market value.

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Lascher at Large — *Wendy Lascher*

Candor From the Courts

Judge Richard Kramer of San Francisco seems like a practical kind of guy. The other day I heard him explain how he controls law and motion whiners. "No adjectives, no adverbs," he tells the attorneys. "Just tell me what the problem is, and let's come up with a way to solve it."

Always helpful to lawyers, Fifth District Justice Rebecca Wiseman introduced one of her opinions this way: "In this 'chop shop' case we are presented with a tedious and complex set of factual circumstances....For the serious reader, we suggest a strong cup of coffee, a pencil and scratch paper. For the casual reader and insomniacs, we suggest a comfortable reclined position to avoid any neck strain that may result from abrupt slumber. For skimmers, we summarize our holdings...." *People v. Joiner* (2000) 84 Cal.App.4th 946, 952.

Who Are These People?

As the Can Spam Act takes effect, we may lose the unintentional humor spammers bring to our e-mailboxes daily. I assume some robot program combines ordinary English words to produce the (presumably) phony names that fill my "from" line. In the recent past I have received messages from "Discolor H. Beefed," "Beautician H. Bilk," "Parkman Inculcation," and "Grandpa H. Pitfall." I doubt there are any such people, but bear in mind that Benjamin Franklin used to write under the pen name "Constance Dogood."

My friends, colleagues, and clients have fooled me more than once with odd *noms de internet* and vague subject lines. I apologize if I've mistakenly deleted any important messages — I assume if anyone feels slighted and really wants to reach me, they'll consider picking up the telephone — but I prefer making my own decisions about whose mail to read than letting either the government or AOL do it for me.

Editor Invites Readers to Write

As co-editor with Stan Hodson, one of my responsibilities is to help fill holes in *CITATIONS* that occasionally develop when we don't have the right mix of advertising and editorial copy. I welcome the column space to vent, but would be delighted to share the forum. If you don't want to write a long article, consider a short comment on a law- or lawyer-related issue.

Send your contributions to me at the e-mail address below, referencing *CITATIONS* in the subject line, and no jokes with the names, please. We will publish beefs — but not by anyone named Discolor H. Beefed.

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Wendy Lascher is an appellate lawyer in Ventura, California, at Wendy@Lascher.com.

Ear to the Wall

In December 2003, **Don Austin** was elected President of the California Council of School Attorneys, an organization associated with the California School Board Assn., the National School Board Assn., and the National Council of School Attorneys. Don has practiced school law in Ventura County since 1988, and has served as General Counsel for the **Ventura Unified School District** since 1996.

Camarillo attorney **Mindy McQueen** has been elected President of Women Lawyers of Ventura County, a section of the Ventura County Bar Association formed in 1980. The organization serves educational, networking and mentoring needs in Ventura County, and all local attorneys, judges, and law students are eligible for membership. Other recently elected officers include **Susana Goytia-Miller**, Vice President; **Charlene Saxey-Andrews**, Secretary; and **Nancy Goldstein**, Treasurer. **Michelle Erich** of Ventura is the immediate past President.

The Law Library has a list of books up for bid in February: two examples: *PDR*, 2003 ed.; *Ca. Drunk Driving Law*, Kuwatch. Come in and pick up the complete list.

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Feeling California-ish

Continued from page 3

able. In California, Santa Ana winds can strike at any time, turning winter into summer. The only thing that I have been able to ascertain about California is that it never rains here except when I get invited to play golf at Lake Sherwood Country Club. This occurs every other year on average, and even then it only rains on Sherwood Country Club.

I'm sure that I have left out numerous differences, but this is only a column, after all, not a book.

Ahhh, I feel much better now.

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Philip Garrett Panitz, 2004 President of the Ventura County Bar Association, specializes in corporation and tax law.

'Phishing' Protection

Continued from the back cover

exploiting vulnerabilities in software and they are getting quicker at using it. That means there may be little or no time between the announcement of a vulnerability and the appearance of a threat that exploits it.

Be Careful. Be very careful (1) what e-mails you open, even if they are from trusted sources. (2) Keep your virus signatures updated at least every few days; and (3) install a firewall. This may be standard operating procedure at the office — but make sure you have the same protection at home. Nasty things have been known to migrate from home computers to the work environment.

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Trevor Maingot operates Digital Detectives, a computer forensics and network security company. To receive his Network Alert e-mail which Trevor sends on an irregular basis when there is something truly bad floating about on the internet, contact him at Maingot@sbcglobal.net

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CE SPREAD

Federal HIPAA Privacy Rules — *Karen Darnall*

You may have noticed a *flurry* of new papers at your last doctor's visit. On April 14, 2003, the Federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule established a new doctor/patient ritual. Basically, HIPAA requires every medical office ("Covered Entity" or "CE" for short) to inform patients about their medical privacy. The CE usually complies by distributing a written "Privacy Practices Notice" (PPN), which is ordinarily dispensed by personal delivery, followed by a good faith effort to obtain each patient's signature ("Acknowledgement of Receipt")

Does HIPAA bestow rights that didn't exist before? Alas, the answer is no for most Californians. Federal privacy tends to be less protective than California's statutory law. The purpose of HIPAA is to establish uniform standards to assure safe and efficient flow of traffic ("Protected Health Information") along the information superhighway. To review the entire Rule, see the Office of Civil Rights website: http:www.hhs.gov/ocr/hipaa.

Federal Supremacy

Uncertainty about federal supremacy can be a major source of bumps, curves—and even traffic jams for attorneys who are trying get hold of their clients' Designated Record Set (DRS). HIPAA says that CEs must comply with both Federal and State law. Difficulties arise when a provider takes a hyper-technical route to avoid HIPAA violations. You should never submit an attorney-drafted authorization to obtain records from UCLA. That mammoth CE has created its own HIPAA-compliant form. Submitting a substitute may cause several weeks delay in getting medical records.

Preemption of State Law

Rules for HIPAA preemption are relatively simple. The first step is to examine the type of information being sought. HIPAA affects custodians of Protected Health Information (PHI). CEs are covered, but attorney-client confidentially is not enhanced (or diminished) simply because the law office has PHI buried in client files. CEs include health plans, health care clearinghouses, and any health care provider that transmits PHI in electronic form in connection with Federal HHS transactions.

The second analytical step is to determine whether it is possible to comply with both California and HIPAA laws. State law is preempted only when it is "contrary to" and "less stringent" than HIPAA. Where California doesn't exactly mesh with HIPAA, the CE must follow the rule that affords the greatest privacy protection for the patient.

California's Confidentiality of Medical Information Act (CMIA)

One major criticism of the original 1979 version of CMIA was that it left unclear whether certain kinds of medical information could be released without an authorization. After major revision in 1981, plus several amendments, CMIA's ambiguities have never been fully cured.

Important CMIA exceptions (to the requirement for signed authorization) include: medical information shared among treating health care professionals; hospitals may release limited information (names, addresses) to identify patients; employment-related health care services can be described (in limited terms); quality control committees may discuss relevant patient information; health care services are disclosed for billing purposes; law enforcement and public health agencies have discretion to disclose PHI for the public good (with probable cause); research facilities may obtain limited PHI for "bona fide" research purposes; agencies, lawyers and courts may issue subpoenas for a variety of purposes. (See Civil Code section 56, et seq.)

In light of HIPAA, it will be interesting to see what happens to *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, cert. denied, 513 U.S. 1059. In *Heller*, the California Supreme Court interpreted CMIA as a statutory privilege that allows a *potential* malpractice defendant to discuss plaintiff's medical condition with the doctor's insurance provider.

HIPAA will probably close many gaps in California's medical disclosure laws because CEs, and patients, will become more fluent in HIPAA jargon. Federal rules are more precise than CMIA, and much easier to read than judicial interpretations of California privacy.

Drafting a Valid Authorization
The HIPAA Privacy Rule does not specify who may draft an authorization, nor does it recommend a specific format. The code provides "Core Elements" and "Required Language" that are needed for a Valid Authorization. (See 45 CFR §164.508(c).)

Last September, Governor Davis signed new legislation that requires the authorization to be handwritten, by the person who signs it, or have a typeface "no smaller than 14-point type." (See Civil Code section 56.11.) Since HIPAA does not dictate a font of any particular size, you might wonder if 14-points is more "stringently protective of medical privacy" than a smaller typeface.

It would be great if the California Legislature would enact a statutory authorization that conforms to HIPAA privacy rules. In the meantime, you should check the requirements of 45 CFR section 164.508(c) before you draft the Authorization — and don't forget to use 14-point typeface required by CMIA.

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2003 Developments in Insurance and ERISA Law – Part 1

Mark E. Hancock

In 2003 there were some interesting developments in insurance and ERISA law. This two-part article covers a number of those developments. This installment details changes in ERISA and in areas ranging from advertising injury to rescission. Part 2 will report on the very significant case of *State Farm Mut. Auto. Ins. Co.* v. *Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, which deals with insurance bad faith and punitive damage awards.

Advertising Injury

Hameid v. National Fire Ins. of Hartford (2003) 31 Cal.4th 16 held that "advertising injury" coverage did not give rise to a duty to defend an unfair competition lawsuit brought by one beauty parlor against another. In opening his shop the defendant insured had hired two hairdressers who brought most of their customers with them from the plaintiff's shop.

The underlying complaint, which contained causes of action for misappropriation of trade secrets and unfair competition, etc., alleged that the insured defendant had taken the other shop's customer lists and pricing policies to solicit customers and to undercut the other shop's prices.

The court, however, stated that "advertising" means widespread promotion to the public at large and does not encompass one-on-one solicitation of a few customers, such that even if the customer list was taken and contact was made with those people, there would be no coverage.

Note the distinction being made between *personal* solicitations and *public* advertising. The Court cited approvingly to one case that said: "'[W]e doubt that every pitch made...constitutes advertising as the word is understood in American usage,'" and stated that small businesses might qualify for CGL coverage for advertising injury if they place spots on the radio or television, buy space on billboards or benches, or take out advertisements and the contents of that *advertising* causes injury. Coverage arising from solicitations must be sought elsewhere.

Cancellation

Most lawyers know that prior to an effective cancellation of auto insurance for nonpayment of premiums, there must be ten days' written notice. (Ins. Code, §662). The point of *Mackey v. Bristol West Ins. Service of Cal., Inc.* (2003) 105 Cal.App.4th 1247 is that this notice must be given upon actual default, not ahead of time to try to shorten the period between due date and cancellation. The insurer wrote a policy on a year basis from December to December with an annual total premium stated but set up for monthly payments. The carrier gave 13 days' notice of cancellation *prior to actual default*, notifying the insured that the policy would be cancelled a day after the premium was due.

The premium was due on February 2 but it was not paid then. The accident happened February 17 and on the 18th the insured paid the premium. Even though more than 10 days' notice was given, because that notice was not sent out before the actual default, USAA's attempt to cancel the insurance was held ineffective. (Of course an advocate for insurance companies might call this purchasing insurance after the fact.)

Collapse

While there are cases stating that insurance is not meant to be a maintenance contract, the insurance industry is always involved in maintenance. By this I mean that every time the industry senses a "hole," they move to patch it. Most holes do not last very long. Take "collapse" for example. In *Doheny West Homeowners' Assn. v. Amer. Guar. and Liab. Ins. Co.* (1997) 60 Cal.App.4th 400, the court had held that collapse, as defined in that policy, could be interpreted to include imminent as well as actual collapse. Additionally the question (and policy) was raised: why risk peoples' lives waiting for the structure to fall?

By the time of *Rosen v. State Farm Gen. Ins. Co.* (2003) 30 Cal.4th 1070, collapse was defined in the policy as "actually fallen down or fallen into pieces." The insured sought coverage for a deck apparently in imminent danger of collapse but State Farm denied coverage. Both the trial court and the court of appeal found for the plaintiff, holding that, in spite of the language of the revised definition, public policy required coverage for imminent collapse. However, in a victory of contract over public policy, the California Supreme Court reversed, stating that the definition of collapse was clear, explicit, and unambiguous and that the appellate court had exceeded its authority in rewriting the policy so as to conform it to its idea of public policy.

Duty to Defend

A liability insurer has two basic obligations: the duty to defend and the duty to indemnify. The duty to defend is broader. This point was reinforced in *Marie Y. v. General Star Indem. Co.* (2003) 110 Cal.App.4th 928, though the result was a mixed bag.

The plaintiff sued her dentist for sexual battery. She amended her complaint to also allege a vicarious negligence theory against his dental assistants for failing to protect her and/or failing to report his conduct. Failure to report could be a covered "dental incident." The insurer nevertheless refused to defend and/or indemnify. The insured hired his own counsel and the case apparently proceeded to a verdict and judgment for the plaintiff.

The appellate court held that while there was no duty to indemnify, on the ground that sexual molestation of a patient did not fall within the policy's definition of "dental incident" and because Insurance Code section 533 prohibits coverage for willful acts, the insurer had been wrong in refusing to defend because of the negligence theory (even though the court held that despite that theory there was, ultimately, no duty to indemnity because of Insurance Code §533 and the fact that the negligence was "inextricably intertwined" with the **proven** molestation). The possibility of coverage had been there.

The reason the case is a mixed bag is that the court did not punish the carrier very severely for breaching the duty to defend; it did not order the carrier to pay the entire judgment but only to pay the defendant insured's fees and costs incurred in defending. Because of the holding that a defense was due to the insured, even in

light of the verdict against him, the case raises the question whether there will be a finding of bad faith in future denials of a defense in such situations?

Rescission

Insurers sometimes attempt to rescind the insurance policy after a loss. Insureds and their lawyers sometimes contend that this amounts to unfair "post-claim underwriting." An argument supporting a claim of unfairness is that in the absence of loss the insurer is willing to take the premium and look the other way. Allowing "post-claim-underwriting" supports this practice by allowing the insurer to accept the premium and only make a stink if there is a loss.

In the context of auto insurance there are restrictions on the insurer's ability to rescind in view of the public policy of making coverage available for injured third parties. In *Barrera v. State Farm Mutual Auto Ins. Co.* (1969) 71 Cal.2d 659, the court held that after an insured has injured a third party an insurer may not rescind based on an alleged misrepresentation in the application unless it conducted a reasonable investigation into the insurability of the insured within a reasonable time after accepting the application. In that case investigation after the fact of a loss revealed that one of the insureds had falsely denied that his license had been suspended or revoked in the prior 5 years.

In *USAA v. Pegos* (2003) 107 Cal.App.4th 392, the court held this duty to investigate also applies when an insured makes the significant policy change of adding additional vehicles to the policy. In *Pegos* the insured added two cars to her policy. At the time, one carried a commercial license plate. Sure enough, the insured was subsequently involved in two accidents, and in one it was apparent that she was using the vehicle as a taxi. The insured and insurer disputed whether the agent had asked during the policy change whether these vehicles were to be used to carry passengers for hire. However, it was apparently undisputed that there was no additional investigation, the inference being that investigation would have disclosed the commercial status of the vehicle. USAA was defeated in its attempt to rescind.

ERISA

Contrary to public opinion, it's not easy being a plaintiff. Premiums help pay for advocacy toward restricting the right to recover some of those premiums in cases of loss. Take for example disability coverage and the treating physician rule. In *Regula v. Delta Family-Care Disability Survivorship Plan* (9th Cir. 2001) 266 F.3d 1130, the court held that, at least in the Ninth Circuit, an ERISA plan had to defer to the treating physician's determination, especially in cases of conflict among doctors, even if the Plan gave discretionary authority to the Administrator. In my opinion this was a good rule.

I submit that most treating physicians are honest souls; who knows the patient better? Holding otherwise allows the Plan (i.e. the Employer and its Insurer) to do the dog-and-pony routine with hired guns with ostensibly impressive credentials, and increases the cost of fighting to get benefits. After all, disability coverage generally implies a person who is, or is at least claiming to be, disabled. Disabled implies not working, and not working generally means no money coming in. Who is more likely to be honest, the treating doctor or the hired expert? Given that the deck is already stacked in favor of the plan, what with discretion often vested in the Administrator and a standard of review that is often deferential, this was a ray of sunshine for claimants.

Well, so much for sunshine. In *Black and Decker Disability Plan v. Nord* (2003) 538 U.S. 822, 123 S.Ct 1965, 155 L.Ed.2d 1034, the U.S. Supreme Court stated that ERISA does not require plans to give special deference to the opinions of treating physicians in making benefit determinations.

Forget the family doctor; bring on the hired guns.

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Mark E. Hancock is an attorney with offices in Ventura. He handles insurance disputes for insureds in first-party cases and defends insureds in liability insurance cases where there is a conflict of interest, a reservation of rights and/or excess exposure.

ARC

Combating the Negative Image of Lawyers — Think Globally, Act Locally

Barbara A. DiMeo

The Hon. **George Eskin,** who was appointed to the superior court by Governor Gray Davis on August 26, 2003, as the newest member of the Santa Barbara bench, was the featured speaker at the Ventura County Trial Lawyers' Association dinner meeting on December 9, 2003.

We in our profession are painfully aware of the negative image the public and media have of lawyers and the legal profession. Judge Eskin's comments were directed at combating this negative image by "thinking globally and acting locally."

He underscored that much of the unfair criticism of the profession is produced by the insurance industry, which generates op-ed pieces by syndicated columnists and constant attacks on trial lawyers by right-wing hosts of radio and television talk shows. Like the word "liberal," they have tried to make "trial lawyers," a dirty label. We are bombarded by tasteless lawyer jokes.

Judge Eskin quoted from a set of 25 favorites sent by a high school classmate: "Why does California have the most lawyers in the country while New Jersey has the most toxic waste sites? New Jersey got first choice." Such jokes are insulting to the vast majority of attorneys dedicated to their profession and the protection of their clients.

What can we do about it? How can we combat the hundreds of millions of dollars devoted to discrediting trial lawyers and their clients? What kind of effective educational campaign can we mount to counter the sarcastic comments of President Bush, who recently stated, "No lawsuit ever cured a patient?"

Judge Eskin recalled that the *Ventura County Star* ran a Scripps-Howard syndicated column by John Lang, which argued that billions of dollars are spent on lawsuits that cost the business community every year. Lang traced all the ills of society back to the American civil justice system, most significantly the contingent fee system.

Past presidents of the Ventura County Bar Association **John Howard**, **Dennis LaRochelle**, and **David Shain** authored a response, disputing Lang's statistics and ridiculing the "fear in the marketplace." They argued that the "fear" leads to safer products, less fraud, higher quality goods and services, and fair competition that helps keep our economy the envy of the world. Insurance companies are enjoying record profits as cars get safer, in part because of product liability lawsuits

We tend to publish articles in professional journals about positive contributions of lawyers to society. Judge Eskin asked us to consider whether these are effective. We need to get the message out to the community at large. How we deliver it is the key.

The **Hon. Richard Aldrich**, Associate Justice of the Second District Court of Appeal and recipient of the 2001 Consumer Attorneys of Los Angeles Roger J. Traynor Appellate Justice of the Year Award, has articulated the message most eloquently:

Being a trial lawyer is a noble calling. Against seemingly insurmountable odds you represent clients against even the most formidable opponents at great personal sacrifice and financial risk to yourselves. By your scholarship and your advocacy you perform a great public service as you help to define the way in which people interact with one another in society. And to all those special interests who use the term 'trial lawyer' in a disrespectful way to further their own agenda, I would only say this:

In the 1960s the Corvair automobile was rolling over on our streets and highways, killing and severely injuring people. The Ford Pinto gas tank was thoughtlessly positioned next to the spare tire bracket so that on minor rear end impacts ignited gasoline flowed into the passenger compartment killing or severely injuring the occupants. It was not the National Transportation and Safety Board that removed these vehicles from the highways . . . It was trial lawyers.

Over the years, pharmaceutical companies have placed many drugs into the

Continued on page 20

Negative Images

Continued from page 19

stream of commerce such as cholesterol reducing MER 29 that as a side effect caused cataracts and blindness in those who consumed it; Thalidomide and Bendectin were given to pregnant women who only later tragically learned that a side effect was the most horrendous birth defects in their children. It was not the Food and Drug Administration that caused these drugs to be taken off the market . . . It was trial lawyers.

When cigarette companies deceived the public for decades that cigarette smoking was not hazardous to the smokers' health, it was not the Federal Trade Commission that forced the tobacco companies to compensate smokers for their injuries . . . It was trial lawyers.

It wasn't the Environmental Protection Agency who caused asbestos to be removed from products and buildings in this country. . . It was trial lawyers.

Judge Eskin urged us to "think globally but act locally" for change. Participate in non-profit organizations, volunteer to coach, participate in schools, run for public office. Talk to neighbors about our work. Most importantly, take care of our clients. The focus should be on leaving a positive impression on people we know so that ***they*** will respond to unfair criticisms of the legal community.

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Barbara A. DiMeo is in private practice in Westlake Village. She is a past president of the Ventura Trial Lawyers Association and served on the VCTLA Board of Directors for seven years.

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Steve Henderson, Executive Director

In what appears to be a legal first, a Washington man has been charged with cell phone voyeurism. Jack Vu is accused of slipping a phone under a woman's skirt and snapping photos as she shopped for groceries. Voyeurism is a felony in Washington and carries a punishment of up to five years in prison…Did you know there was a dance club out there called El Cien? Lots of attorneys participate including **Dennis LaRochelle**, **Brian Lawler**, **Tom Hinkle**, **Lou Carpiac**, **Ted Muegenburg**, **Dick Chess**, and **Judge David Long**. I assume their wives go too…

On 12-28, T. Dale Pease died from complications related to pneumonia. T. Dale was born in Ventura in 1934 and had been in the hospital since 11-23. His memorial service Jan. 4 was attended by many people in the legal profession and the La Reyna Sisters of Notre Dame read from the scriptures and sang songs while the local Masons shined and Scottish music played. T. Dale and his wife Jacqueline (secretary too) were fixtures at Probate and Estate Planning lunches since I've been here…

One needs a sense of humor in dealing with Colorado firm Powers Phillips. In fact, the firm insists upon it. As a sort of quirky screening device, it has created a website so firmly tongue-in-cheek that some readers may have troubling swallowing. With the site organized in categories such as "sleaze ball attorneys" and "agonized clients," the firm's "uppity women" and "token males" apologize in advance to readers they offend. Find them at www.ppbfh.com…**Stephen Millich**, assistant city attorney for Simi since 1989, is also a volunteer jazz disc jockey at KCLU-FM (88.3) on Friday afternoons from 2:00 p.m. until 4:00 p.m. He's been doing so for three years and calls it his "gateway to the weekend." **Kevin Rose** and **Jennifer Calderwood** were married November 15 at the Pierpont Inn and honeymooned in Costa Rica…**Marvin Jacobs'** new Chrysler Pacifica was whacked mid December and the driver was a State Farm Insurance agent. The agent was in a new Mercedes…

The results are in for the **2003 RBZ Law Firm Compensation Survey** for Southern California. RBZ surveyed more than 6,500 attorneys and more than 7,500 non-attorney staff for their information and found average partner compensation has continued to increase for the third year in a row to $393,798. Average billing rates increased for a fifth year in a row to $353. Details may be found at www.lacba.org…**Spain's passionate opposition to the death penalty** has bolstered the appeals of Pablo Ibar, who is on Florida's death row for a 1994 triple murder. Ibar's countrymen have raised over $150,000 for his defense, and a delegation of Spanish Senators even visited him in prison. The death penalty is a hot-button topic in Spain, and the European Union denies membership to countries that execute prisoners. Ibar, however, was born in Florida and only took Spanish citizenship *after his conviction*…**Matt Guasco**, **Guy Parvex** and **Tom Hinkle** were honored by the Boys and Girls Club of Ventura for years of service — 5, 12 and 12 respectively…

Brian Nomi of NCHC has returned from a 6-month tour of duty in Germany. He's got photos to prove it at www.geocities.com/briannomi…**Feeling jealous, Justice Rehnquist?** Next year the Chief Justice of the New Zealand Supreme Court will make $335,000 in annual pay…**Nevada lawyers have won permission** to advertise as specialists. The state high court has approved a State Bar petition to allow such ads by lawyers with certified expertise…

Another year, another quiet holiday gathering by Willie Gary's firm. Some 15,000 people attended this bash hosted by the Florida plaintiffs attorney known for mammoth verdicts such as the $500 million he won from a Canadian funeral company in 1998…**Death row became a safer place** for two Texas inmates. Kevin Zimmerman and Frank Vickers escaped the gurney because of doubts about whether a paralyzing chemical in their proposed lethal injections amounted to cruel and unusual punishment. Zimmerman won a reprieve from the U.S. Supreme Court 20 minutes before his scheduled demise. While human rights advocates cheered, Zimmerman complained of having to endure "*18 more months of this crap.*"

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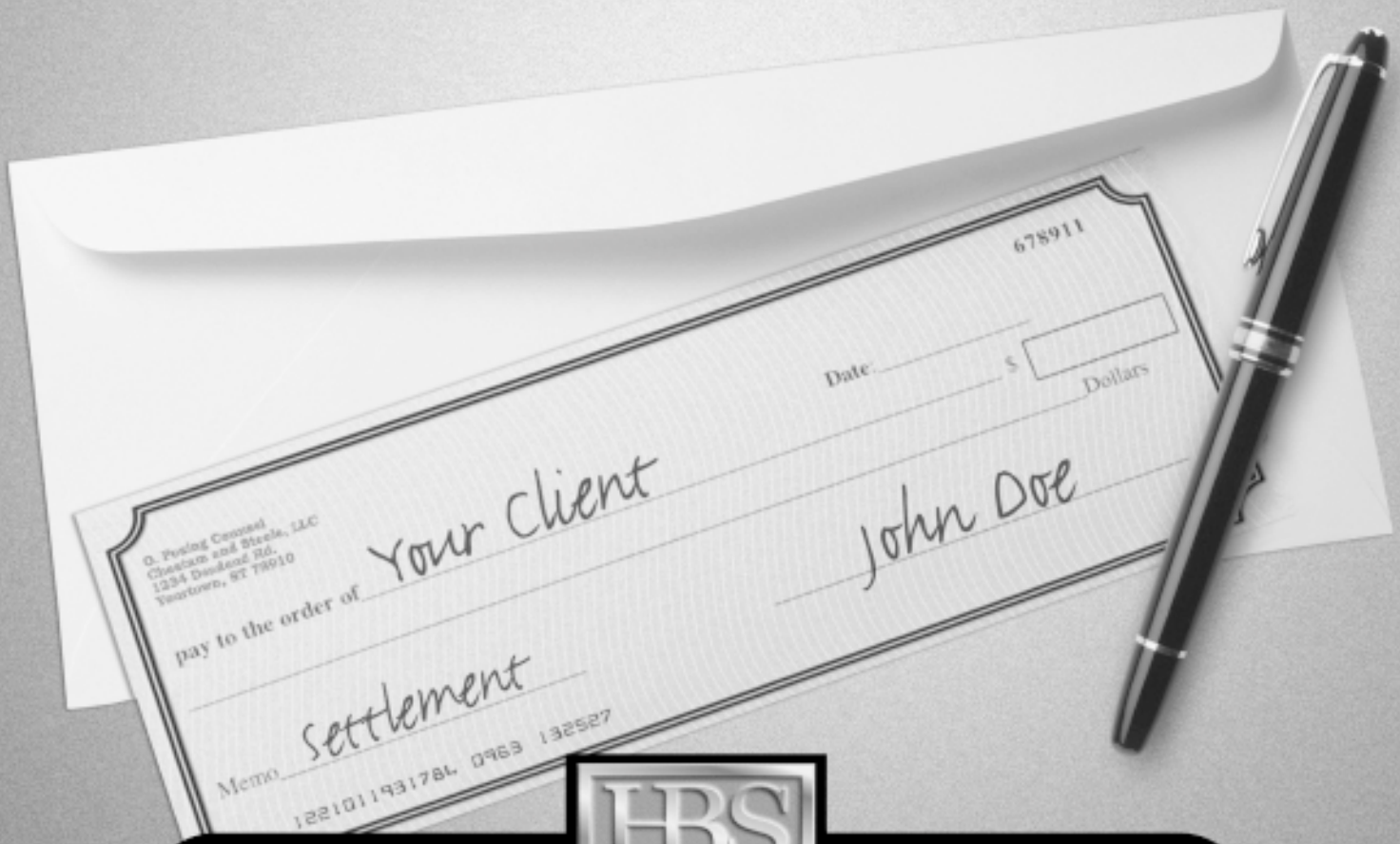
Steve Henderson has been the executive director of the bar association since November 1990 and feels Pete Rose must not be allowed entry into the Baseball Hall of Fame. In 1947, 85% of the fans and 15 of 16 owners did not want to integrate baseball. Sometimes, a decision against public opinion is the right thing to do. Indeed, Steve believes character should be a criterion for induction into the Hall.

Check, Double Check, and Settlement Check



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Protect Yourself from 'Phishing' Scams

Trevor Maingot

As if things on the internet were not bad enough with continual hack attempts against unprotected computers, spam zombies, viruses, and Trojan Horses, now there is a new class of attack to worry about called 'phishing.'

Unlike the other forms of attack that can be thwarted by firewalls and antivirus software before they affect your computer, there is a good chance that a phishing attempt can make it into your inbox. There is a possibility that a spam filter may catch it, but spam filters usually do not delete e-mail; they just store it in a folder for you to look at. When you check your spam folder you may see the phishing e-mail, decide it is legitimate and put it back into your inbox. Sites that track phishing attempts such as www.anti-phishing.com noticed a huge jump in phishing attempts over the holidays. They expect the trend to continue in 2004. Why? Because phishing works!

What is phishing and how do you combat it? Obviously phishing is a corruption of the word "fishing," and what are the bad guys fishing for? Nothing less than your personal information, credit card numbers, social security numbers, dates of birth etc, all the things that add up to Identity Theft. Yet people fall for phishing attempts all the time. A phishing attempt arrives as an official looking e-mail possibly from your bank, ISP, eBay or many other well known businesses. The e-mail states that there is a problem with your account and you should reply with the information needed. The more sophisticated ones will give you a web address to click on.

Once clicked, the e-mail message will bring up an official looking web site into which you will enter your data. This scam is exacerbated by an as yet unpatched flaw in Microsoft Internet Explorer that allows false websites to show up in the address bar after clicking on a link. You may think you are going to www.mybank.com when in fact you are going to www.phishingguy.com and you would not even know it.

How do you protect yourself against phishing if technology won't do it? By being aware. That's it. Phishing is a form of attack called social engineering. The famous hacker Kevin Mitnick considers social engineering to be the most successful type of attack that can be launched against a person, business or government. In the past many attempts to insert viruses on computer were made by appeals to peoples' curiosity such as the "I Love You" and the "Anna Kornikova" viruses. This time it is an appeal to authority that makes phishing work; many people feel that if their bank or ISP has e-mailed them for information, they must respond.

Steps to take. If you do get an official looking e-mail with an embedded link asking for information, don't do as you are told. Instead, contact the institution involved without using the suspect e-mail. Look up the phone number or find the correct internet address through a search engine like Google, then ask if there is a problem with your account. Do not use the embedded link or any phone numbers that come with the e-mail; always do an independent check.

You can also find out if your browser is vulnerable to the false address flaw by going to www.secunia.com and clicking on **Internet Explorer URL Spoofing Vulnerability** at the top of the page. This brings up an explanation of the vulnerability. About halfway down is a link to another page which will allow you to test for the vulnerability.

But be aware that if you do so, there is a chance that your virus checker will alert you that a virus has been detected once you test your browser.

This is a good thing, in that at least you are being warned — but there is no virus being installed. At this time there does not appear to be a patch from Microsoft to remedy vulnerability to phishing.

In the computer security world 2003 was a pretty bad year, but 2004 will probably be worse. The bad guys are getting more adept at finding and

Continued on page 11

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