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Bad Faith and Punitive Damages

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II. Bad Faith and Punitive Damages

A. Transcript—Bad Faith and Punitive Damages

1. Introduction—Professor Eric Wright*

In this second panel of the conference on The Future of Tort Litigation in California we will be focusing on the areas of bad faith and punitive damages. We are privileged to have on the panel three of the leading experts in California on these topics. In fact, our three panelists literally wrote the book on bad faith practice in California. Moreover, one of our panelists is now actually shaping California law in the two areas of discussion as a member of the California Supreme Court.

If we had held this conference only a few years ago, our focus would have been—as it will be today—on the California Supreme Court. However, the questions that we would have been asking would almost certainly have been very different from those to be addressed today.

Three years ago we would have been asking whether the California Supreme Court was going to expand tort law further, and speculating on how far the court was likely to go in that expansion. At that time most legal observers saw the California Supreme Court as being at the forefront—some would say beyond the forefront—of tort law across the country in virtually all areas. With respect to such issues as products liability, landowner liability, affirmative


duties to act, and emotional distress, the California Supreme Court had handed down landmark decisions expanding tort law.

In addition, the California Supreme Court took the lead in the area of insurance settlements and claims practice. The court helped to develop the concept of the implied covenant of good faith and fair dealing, which was found to be a part of every insurance contract. As a consequence, a breach of the insurance contract might also involve a violation of the implied covenant, and, therefore, a basis for a tort cause of action. Such tort actions could (and often did) involve recovery for emotional distress as well as large punitive damage awards. Moreover, in the Royal Globe case, the California Supreme Court found that actions could even be brought against a third party’s insurance carrier who failed to live up to the insurance code requirements for settling claims.

Once the concept of good faith and fair dealing was found to be a part of the insurance contract, it did not take long until attorneys were asserting that such a covenant must also logically be a part of other types of contracts. Following what appeared to be the obvious lead of the California Supreme Court, lower courts began extending the concept of good faith to other types of contracts, most particularly, to employment contracts.

At the mythical conference three years ago, we would therefore have been asking how far these concepts of good faith and fair dealing would go, and whether there would be any logical stopping place. It would not have been too difficult to anticipate the general direction of the court in these areas. However, since the so-called Rose Bird recall election of 1986 and the subsequent addition of

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7. Id.
three new members to the California Supreme Court, predictions on any of these issues are much more difficult and much more complex. Quite often now the question is whether the court is going to limit, perhaps cut back, or even overrule the past precedents that have expanded tort law.

The role of *stare decisis* has become a central issue in California law. In fact, a reporter for the San Francisco Chronicle described an interchange on this very question between a “brilliant jurist” and an attorney arguing before the “new” California Supreme Court in April 1987. Let me quote briefly from that exchange. The brilliant jurist asked, “Is it acceptable to overrule a decision if it is incorrectly analyzed and incorrectly reasoned?” The attorney replied, “It would be inappropriate to reverse a court precedent just because there has been a change in the composition of the court.” The brilliant jurist said in response, “So how long must we enforce it if we conclude it was incorrectly decided, incorrectly reasoned and incorrectly analyzed?” The attorney in response said, “I have the feeling that I’m standing on quicksand.”

A number of attorneys coming before this brilliant jurist have felt at various times that they were standing on quicksand. We are privileged to have him here today to answer the question that he raised in that interchange, namely, under what circumstances is it appropriate for a court to analyze past precedents, limit them, and even overrule them. It is a great pleasure for me to introduce the first panelist, Justice Marcus Kaufman of the California Supreme Court—the brilliant jurist whom I quoted earlier.

2. The Panelists’ Discussion*

   a. Justice Marcus Kaufman**

   Ladies and gentlemen, I am delighted to be with you today. The reason I was asked to discuss this particular topic is that I can’t talk about anything else. I was on the court of appeal for seventeen and one-half years and nobody cared what I said. I learned very quickly after being appointed to the supreme court that being a member of that court made a difference. I went to

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* We are indebted to Professor Eric Wright for moderating this discussion.

a dinner and I discovered I really couldn’t say a thing. You become quite limited in what you can discuss. I sat here today during the conference discussion of Proposition 103, having heard the oral arguments on that Proposition just the other day, and I obviously didn’t listen to anything that was said today on the issue. Being on the supreme court does impose some limitations. I should also make a disclaimer: any opinions I express are my own. They do not represent the views of the majority of the California Supreme Court or, indeed, of any other justice. If you have been reading the advance sheets you will see that recently I have been dissenting in almost every major case.

The question whether to overrule an earlier decision is usually a very difficult question. It almost always involves a conflict among competing considerations of fundamental importance to the court and to the administration of justice. When an established rule is challenged, the desirability of retaining the established rule, and thereby maintaining consistency and stability, must be weighed against the evil of perpetuating a bad rule of law. This dilemma often puts a court in a no-win situation, particularly after a significant change in its membership. If the court has concluded that the earlier decision was wrong when it was decided, or that subsequent events have demonstrated it is incorrect, unserviceable or mischievous, the court has the option of perpetuating the erroneous or mischievous rule, thus bringing discredit upon itself, or overruling the earlier decision and inviting speculation by the media and some poorly informed court commentators that the only reason for the new rule is that the composition of the court has changed.

Our nation is governed by a unique and fundamental premise. We often refer to it, somewhat cavalierly I think, as the rule of law. What that means is that the government itself must obey the law. That is really a concept that is unique to our people and to this country. Of course, the government includes its judges. Thus the rule of law means that the judges are expected to obey the law as well. A tension is created by the fact that in our common law tradition the law changes and develops. It is the judges who are duty bound not only to obey the law but to make changes in the law, to the extent that the changes are not within the legislative prerogative. The courts are bound to see, and have a duty to see, that the law changes as public mores and norms change.

13. This panel refers to the statute as Proposition 103, as it was called on the November, 1988 ballot.
The foremost duty of courts in a free society is the principled, and I emphasize principled, declaration of public norms. Any breakdown in principled decision-making, any rule for which no principled basis can be found and clearly articulated, subverts and discredits the institution as a whole. For the power base of the courts is fragile. It consists of the public perception of the courts’ role in the structure of American government as the voice of reason, and the public’s faith that the laws judges make today, the judges themselves will be bound by tomorrow. Any rule that permits or encourages judgments based not on universal standards but individual expediency, or, worse yet, individual biases, erodes the public trust which the courts serve and on which the courts must ultimately rely.

Stare decisis, therefore, should not be lightly dismissed in any thoughtful reconsideration of the law. But history and experience really are the final judge of whether a decision was right or wrong, and whether it should be retained or modified. Adherence to precedent cannot justify the perpetuation of a policy ill-conceived in theory or unfair in practice. As Justice Harlan aptly observed, a judicious reconsideration of precedent cannot be so threatening to the public faith as the judiciary’s continued adherence to a rule unjustified in reason which produces different results for breaches of duty in situations that cannot be differentiated in policy.

I hope that will demonstrate to you that the courts have a duty to change the law. They also have a duty to obey the law, and it is the tension between those two duties that is involved in the question whether to overrule an earlier decision or earlier rule of law. The courts have developed some criteria that are of some help in their determinations whether to overrule or not. The following are some criteria which would point toward not overruling a decision. (By the way, there is a whole set of these and many pages of discussion in Volume Nine of Witkin’s California Procedure, and I should give credit to Witkin by acknowledging that this is where I have found some of these).

One is that the earlier rule has been long accepted and relied on. A special category within that heading is that the rule has been relied on to create vested property or contract rights. That would lead to a greater reluctance to overrule. Another criteria is the failure of the legislature to act following the earlier decision. That is most applicable to earlier decisions which interpreted a statute, a

legislative enactment, or an initiative. That would indicate or point to a reluctance to overrule. Then there are some miscellaneous considerations. One is whether the earlier case was well-presented; in other words, fully argued, fully briefed, thoroughly considered, and well supported by legal doctrine or theory. It also seems to make some difference how developed was the court. I think an earlier decision that was decided four to three on a seven person court is more vulnerable to overruling.

What are some of the criteria that point to overruling an earlier decision? One is that the earlier decision was wrong when it was decided, that it was improperly analyzed or based on an incorrect legal theory, that it failed to follow a controlling precedent or statute, or was contrary to sound public policy. The second would be that the earlier decision states a legal principle or rule that may have been correct at the time it was decided, but subsequently became or has been shown to be incorrect or improvident. That can arise, for example, from a statutory change in the law, a change in controlling United States Supreme Court decisions, the fact that the earlier decision is now inconsistent with the court's recent rulings, or that it has proved impractical in application. It could be that the earlier decision was based on public policy grounds, and now the public policy has changed dramatically. Probably the last one I should mention is that the earlier decision is now contrary to the great weight of authority in the overwhelming majority of other jurisdictions which have considered the same question. That is just one way of saying that the decision is out of step with change, public mores and practices.

The recent Moradi-Shalal decision of the California Supreme Court, overruling the court's earlier decision in Royal Globe, is a classic case both of and for overruling. Before I proceed, I suppose I had better give some background on these cases. In Royal Globe the supreme court interpreted subdivision (h) of California Insurance Code section 790.03, a provision of the Unfair Practices Act, which prohibits insurers from engaging in certain unfair claims settlement practices. The court held that an individual who is injured by the alleged negligence of an insured may sue the negligent party's insurer for violation of California Insurance Code section 790.03(h).

The reason I say Moradi-Shalal is a classic case is that the rule of Royal Globe was of some vintage. It had been decided nine to ten years before Moradi-Shalal was decided. Since its inception Royal Globe had been relied on by litigants and their attorneys. In addition, the legislature had failed to decisively act in response to Royal Globe and the court’s interpretation that a private right of action was established.

Several bills were introduced to countermand the Royal Globe decision, but none were passed. On the other hand, no other legislation was passed indicating clearly one way or another that the legislature really approved of the decision. I will mention this just briefly as my last point. Justice Kaus spoke earlier about the myth of legislative intent or the will of the voters. We always say we look for legislative intent, but one must wonder whether in fact it exists at all, and in many cases we are absolutely sure it does not. If the legislature had thought of the problem, they would have done something about it, the legislature did not think about it. We will come back to that.

There were factors which would have pointed to not overruling Royal Globe. On the other hand, the decision in Royal Globe was by a deeply divided court with a four to three vote. Royal Globe was clearly incorrect when decided. The Unfair Practices Act was very clearly a piece of regulatory legislation. Many states had essentially the same legislation because the Unfair Practices Act was based on a model act, and California used virtually the same language as was adopted in numerous states throughout the country. Practically every state supreme court that considered the matter said “No, this was not intended to create a private right of action.” Thus the California decision in Royal Globe turned out to be contrary to the overwhelming weight of authority. I recognize, of course, that Royal Globe was among the first of the decisions. It was not known what the reaction of other jurisdictions would be at the time Royal Globe was decided.

In addition, Royal Globe had caused great mischief. It created a serious conflict of interest between the insurer and its insured. It also permitted the injured third party to take advantage of that conflict in sometimes very unfair ways. In addition, it spawned an absolute deluge of litigation. The trial courts and courts of appeal were over-

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18. Id.

whelmed with these cases. This at a time when they and the California Supreme Court were already overloaded.

On balancing these factors, the majority of the court decided Royal Globe should be overruled. I have said that it was clear the Insurance Code sections were not intended to create this right. Obviously, I am stating this from the viewpoint of hindsight, because the court in Royal Globe decided that question the opposite way, and the dissenting justices in Moradi-Shalal still felt that a private right of action was established. We have to give recognition to that. However, the Moradi-Shalal majority thought Royal Globe had done more harm than good, and that it should be overruled on the basis of these factors that I have discussed with you.

I do want to say before sitting down a special word about the inference to be drawn from legislative inaction following a decision of a court. Let me read from just a very brief portion of Witkin on the topic of appeals. It says:

Despite the formidable list of declarations to this effect, [that legislative inaction means that the legislature has either adopted or approved the court's earlier decision] the theory that failure of the legislature to act safeguards an erroneous rule of law seems the least impressive of the reasons for following precedent. The notion of an alert and omnipresent legislative watchdog is pure fantasy. 'It is unrealistic to suppose that [the legislature] can take note, much less deliberate the effect, of each judicial construction of statutory provisions, absorbed as it is with forging legislation for an endless number and variety of problems, under the constant pressure of considerations of urgency and expediency. The fiction that the failure of the legislature to repudiate an erroneous construction amounts to an incorporation of that construction into the statute not only commits the legislature to embrace something it may not even be aware of, but bars the court from re-examining its own errors, consequences as unnecessary as they are serious.'

Certainly you will continue to see the failure to act rule just referred to. There are certain occasions where history would indicate that the legislature's failure to act may indeed be an adoption. For example, in some other area the Legislature may have enacted a

20. See supra note 17 and accompanying text.
21. Moradi-Shalal, 46 Cal. 3d at 313, 758 P.2d at 75, 250 Cal. Rptr. at 133 (Mosk, J., dissenting).
22. 9 B. Witkin, supra note 14, § 791.
23. Id. (quoting In re Halcomb, 21 Cal. 2d 126, 132, 130 P.2d 384, 387 (1942) (Traynor, J., dissenting)).
statute that refers to the rule that the court has announced. In any event, you will still encounter the rule, but bear in mind that it really is a fiction. It may be more or less applicable in individual circumstances, but it is a fiction, and, according to Witkin, has never fared well as an argument for not overruling decisions.

b. Guy O. Kornblum*

As a practicing lawyer, I am charged with the responsibility of advising and counseling my clients on what such cases as Moradi-Shalal and Foley mean. In doing so, it is also my responsibility to advise them on the prospects for future changes in the law. Not only must I consider tort reform in general and what the rules ought to be, but how change might occur. In that vein, we are really concerned with three things.

First, who should initiate, or be responsible for, reform in the law? The courts have traditionally taken an active role in California, but are questioning whether they should continue to do so. Justice Kaufman's decision in the Foley case is instructive on this issue.

The legislature, a traditional forum for reform, has been inactive in initiating the process of reviewing and revising laws in accordance with the will of the people as reflected in the polls. There is also the initiative process, which to some represents a hysterical and expensive appeal to the electorate, rather than the staid, traditional, investigative process. One issue to consider is whether it is really effective and efficient to permit the trend towards reliance on the initiative process to continue, and whether it can be quelled by a more active judiciary or more active legislature.

The second issue that I think we are faced with is how fast tort reform should occur. It is one thing to say that we should initiate the process of revising the rules. It is another thing to say how and when that should be done. Moradi-Shalal and Royal Globe represent ten years of judicial and legislative history which virtually turned our courtrooms upside down. Royal Globe created the "Settle and Sue

26. Id. at 715, 765 P.2d at 412, 254 Cal. Rptr. at 250 (Kaufman, J., concurring and dissenting).
Syndrome," which motivated the California Supreme Court to reach the decision it did in Moradi-Shalal.

Foley represents tension in this area as well. New rules of damages, or revised rules of damages, are now applicable to certain types of contract claims that mature into more expansive, potential tort claims. There is now a restriction on the covenant of good faith and fair dealing as it establishes the rules of damages which apply. That is a dramatic change to some, an anticipated change for others and a well-received change for many, particularly the employers.

The major question now is: Should we have the evolution occur so rapidly, or is it better to let that evolution occur through the fabric of the common law over a long process? We should also consider to what extent the courts are to be involved in the editing process by having a "statute" that is drafted and put before the electorate, passed and then reviewed and revised by the judiciary. Should that occur in the dialogue concerning Proposition 103?28 Who should institute or be responsible for reform in the law? How fast should it occur? Those are the first two issues.

The third issue along this line is: Should these dramatic changes apply to past events? For example, the Newman29 case was argued recently before the California Supreme Court on the single issue of whether Foley is retroactive.30 Given these three issues, it is important for those of us who practice law to evaluate these rules and how we will apply them. All that has been discussed today fits into one of those three categories. We also are charged with the responsibility of anticipating the changes. In order to do that it is necessary to understand what rules have emerged from Moradi-Shalal and Foley.

In that process we have to look at Foley and Moradi-Shalal and ask, "What about the future?" What do these cases say about the health and vigor of Seamen's?31 How do they affect lender liability cases? Will they continue to provide tort remedies to those who are injured?

I see the arguments on both sides very well posited in Foley. What I do not see at the present time in the California Supreme

28. See supra note 13.
30. Subsequent to this panel discussion, the California Supreme Court rendered its opinion in Newman, 48 Cal. 3d at 973, 772 P.2d at 1059, 258 Cal. Rptr. at 592, that Foley, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211, was fully retroactive.
Court is a commitment to a particular view. Rather, I see the tensions building. Five to two in *Moradi-Shalal* and four to three in *Foley* tells me that we still do not have a commitment on the part of the court to a particular line that we can anticipate in the future. Justice Kaufman made a strong emotional appeal in his dissent in *Foley* for allegiance to what I perceive to be a more expansionist approach to tort law, perhaps in the vein of the late Chief Justice Traynor or the late Justice Tobriner.

Important new rules of law have been decided in *Moradi-Shalal* and *Foley*. From *Moradi-Shalal*, we know that *Royal Globe* is reversed, dead, and buried. The rule in *Royal Globe* that third party liability claimants can bring a direct action against an insurer no longer exists. Such claims may possibly be resurrected by the legislature, or (doubtfully) resurrected by Proposition 103. Nonetheless, for the time being, section 790 claims are no longer.

We also know from *Moradi-Shalal* that the bar against third party claims is prospective only, in that such claims are preserved as to those cases that were filed before October 18, 1988, when *Moradi-Shalal* was decided. As to *Royal Globe* cases that existed before that date, there must be a final judicial determination of the insured's liability. What exactly is a "final judicial determination"? That is for the courts to determine. From *Moradi-Shalal* we know that a settlement is not sufficient. Even a stipulated judgment may not be enough, although I see that the *Liu* case was ordered not published recently. There is still a question of whether a summary judgment of liability followed by a trial on damages is a sufficient judicial determination. A recent unpublished opinion from the Fourth Appellate District indicates that this is not sufficient to qualify for a pre-*Moradi-Shalal* section 790.03 suit. *Farah*, a Second District opinion, deals with a question of whether a bifurcated trial with a plaintiff's verdict followed by a settlement is sufficient to qualify. *Farah* indicates such a settlement is sufficiently final. So there appears to be an inconsistency between the Second and Fourth Districts. It is also not clear whether verdicts with judgments, appeals

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32. *Id.* at 715, 765 P.2d at 413, 254 Cal. Rptr. at 240 (Kaufman, J., concurring and dissenting).
38. *Id.* at 980, 255 Cal. Rptr. at 276.
and then settlements afterward qualify. There are many issues attendant to defining "final judicial determination."

The fourth thing *Moradi-Shalal* tells us is that traditional tort remedies are preserved. A third party may still bring a direct cause of action against the insurance company for fraud, intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy. Defendants may also be joined through conspiracy allegations. The future of these four rules from *Moradi-Shalal* will depend upon how the courts interpret the supreme court opinion and how the legislature acts.

*Foley* also presents interesting developments in tort law. While *Moradi-Shalal* eliminates a cause of action, *Foley* simply restricts the damages that can be recovered in cases involving wrongful termination. Moreover, *Foley* indicates that the covenant of good faith and fair dealing is alive and well in employment contracts. The question becomes whether a breach of that covenant or promise leads to tort damages, and especially punitive damages. If there is a tort cause of action, then punitives may attach. If a plaintiff is limited to contract remedies, then a limitation is placed on compensatory damages, and a limit may also be placed on what punitive damages can be recovered.

*Foley* holds that a breach of the covenant of good faith and fair dealing does not give rise to tort damages in the employment situation, even though it may be somewhat convincingly argued that the employment relationship is similar to the insurance relationship, and that the same rules ought to apply. Justice Kaufman's dissent in *Foley* reflects that analysis. His opinion in *Koehler* outlines the rules that he believes should apply in this situation.

The third rule from *Foley* is that tort actions for violations of public policy (all of the *Tameny* cases) are not affected by *Foley*. There is still such a thing as a wrongful discharge tort claim, but it is predicated strictly on the rules that were announced in *Tameny*.

The last rule from *Foley* is that a cause of action for an implied in fact promise not to terminate without just cause, similar to the

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40. Id. at 715, 765 P.2d at 412, 254 Cal. Rptr. at 240 (Kaufman, J., concurring and dissenting).
case, is not affected by *Foley* because it sounds in contract, not tort. So despite the fact that California law dictates that if there is no provision in the contract for a period of employment the employment is at will, this interpretation of the contract may be modified by oral evidence at trial. The contract may be interpreted as providing for permanent employment, but if breached it may only entitle the plaintiff to contract remedies. There is still exposure to punitive damages in the employment area but only if the plaintiff proves a tort claim. There are limitations on the recovery of punitive damages in wrongful discharge cases. The question now is to what extent the courts are going to be involved in determining how extensively punitive damages remedies may be applied. The Legislature’s reform measure, Civil Code section 3294 now requires that there be “clear and convincing” evidence in punitive damage cases. Mandatory bifurcated trials are available if requested by the defendant or ordered by the court. “Despicable” is now an element to be proved before punitive damages may be awarded.

The problem, as I see it, is that punitives have become too commonplace. They are sought in virtually every type of tort action. There is an element of irrationality in punitive damage awards that has offended many, including judges and lawyers. What is needed is controls. The judge in my view has the duty to screen cases involving punitive damages. The judge must determine whether there is enough to present the case to the jury. The jury must be given standards beyond just the slippery notion of “conscious disregard.” In my view, that is what the U.S. Supreme Court will consider when deciding *Kelco*. The question may be whether the recent reforms in California by amendments to Civil Code sections 3294 and 3295 meet any minimum institutional standards which are adopted.

Throughout my twenty-three years at the bar and almost twenty years in handling cases that involve punitive damage concepts, punitive damages have evolved as a weapon of the David versus Goliath war. They are simply a means of punishing only corporate America. They are not applied to all. They are a form of

45. *Id.* § 3294(a).
46. *Id.* §§ 3294(c)(1), 3294(c)(2).
selective punishment. They are contrary to the basic fundamental notions of equal justice under the law. It is not fair to have rules that say it is okay to do it to Donald Trump, but not to everyone else.

c. Harvey Levine*

I was looking at the audience when I came in here today and saw many law students, some judges who have been on the bench for a long time, and some incredibly fine trial lawyers who have worked hard, including probably two or three of the most brilliant appellate attorneys in the country. And it is quite interesting to me to hear everyone take a position.

I have always loved tort law and there are some real reasons for it. I listened carefully to Justice Kaufmann discussing the factors that go into the writing of an opinion. Similarly, when you choose your profession, you hope to choose it for a select group of reasons and based on a number of factors. I started practicing punitive damage law and began preparing my first case when I was about fifteen years old while living in the slums of Brooklyn and watching most of my friends go to jail or prison at a young age for a moment’s indiscretion.

One night I was reading a book and I came to a quote in the book that established probably the beginnings of preparing my first punitive damage case. This excerpt of the book said, “The greatest evil is not now done in those dens of crime that Dickens used to paint, it’s not even done in concentration camps or labor camps because there you see the final result. But is conceived and ordered, moved, seconded, and carried, in clean, carpeted, warmed, and well lighted offices by quiet men with white collars and cut fingernails and smooth shaven cheeks who do not need to raise their voice.” Hence, naturally enough, my symbol for hell is something like the bureaucracy of a police state, or the offices of a thoroughly nasty business concern.

No matter what you hear or read in relation to tort law, large damage awards, and bad faith or punitive damages, it is undisputed that tort law has served as one of the most significant deterrents in this country to injury and death. I wrote an article in 1979 entitled, “Demonstrating and Preserving the Deterrent Effect of Punitive

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All of the articles that I cite there demonstrate the deterrent effect of punitive damage law ten years ago. These references, for the most part, are to Guy Kornblum’s articles, which have served the advantage of many insurance companies and thereby the public who benefit from increased fair claims practices.

By writing those articles and giving those lectures, Guy has been able to improve the claims practices of companies throughout the country. He’s done much to prevent unfair claims practices, at least as much as plaintiff lawyers have. Maybe the spark was the large punitive damage verdict against Mutual of Omaha or maybe it was the fear of punitive damage awards. Nonetheless, I know Guy believes in the deterrent effect of punitive damages, and I know he would not want to see punitive damages abolished as much as I don’t.

Everyone is here today with their bias, and I would like to share a thought with you: every one of you has public trust. The diversity of the group attending today’s conference is astounding. You have got the farthest of the far right joining us today with the leftist of the left. But unless there comes a time within the immediate future when we reacquire respect for our government, and we re-mind ourselves of those basic terms, separation of powers and the governmental institutions that we all ascribe to as a profession, the future of bad faith and punitive damages will be just a small drop in the bucket compared with the continued decay and deterioration of our beautiful legal system. I conducted a lengthy trial shortly after the initiatives. I have had jury selection, have read numerous focus group transcripts, and have read numerous pollings incident to those initiatives. None of these talk about plaintiff lawyers, defense lawyers, or lawyers at all. They talk about the courts and the legal system. The public doesn’t know what lawyers do. Nonetheless, lawyers are seen as part of a legal system that is unfair.

I would like to share with you some reasons why the public view of lawyers is negative. I believe it has infected the thought processes of our courts and just about every element of our society. For example, I will read excerpts from an article entitled “Joke Writers, Among Others, Go Wild at Attorneys’ Expense: Lawyer Laughs.” “What’s black and brown and looks good on a lawyer? A doberman.” “What do you call 12,000 lawyers at the bottom of the Pacific Ocean? A good start.” “Why do scientists use lawyers instead

of laboratory rats? Because there are some things rats won’t do.” “What’s the difference between a lawyer’s body and a skunk’s body laying in the road? There are skid marks in front of the skunk.” I laughed when I read these, but you shouldn’t laugh at these jokes because when you walk into a courtroom you are a lawyer.

Every insured in this state received a letter along with their premium increase, giving the carrier’s objective appraisal as to why their premium is being increased. One of them from a company called, ironically enough, Safeco:

This new policy is a response to our rapidly changing legal climate. There is a tendency by the courts to distort the homeowner’s policy. The reason your policy is increasing is because of the courts. (Emphasis added).

You want to pick some jurists and speak to them about it? I have done it. Jurists don’t look at the judges much more favorably than they look at you.

Plaintiff’s lawyers and law professors’ hypotheticals could not get close to the facts of Tibbs v. Great American Ins. Co.\(^5\) The Great American Insurance Company was told by the trial judge to defend the famous rodeo star Casey Tibbs because he was not an independent employee but rather an independent contractor and therefore he was an employee of the insured. When the lawyer told the company what the trial judge held, the company refused to defend. In the federal trial which proceeded afterwards on the refusal to defend, it was undisputed that the claims manager of the eastern company said “. . . no court of law is going to tell us what to do.”\(^5\)

Isolated instances, but I have worked with companies and evaluated bad faith cases for fourteen years, and there are some cases in my office with companies that have never come across the desk of any attorney. They are fine companies. What have they done with some of the money they made from premiums? I have listened this morning to Frank Rothman\(^5\) who is probably, in my opinion, one of the most respected attorneys in this country, and I have heard how important the constitution is and how important it is to abide by the constitution.

Let me read you the full-page ad paid for by our insurance.............

\(^5\) Id. at 1376.
\(^5\) Partner, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, CA; Chairman of the Board and C.E.O. of MGM/UA Communications; L.L.B., University of Southern California; lead counsel for the plaintiffs in Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 258 P.2d 1247, 258 Cal. Rptr. 161 (1989).
premiums, regarding the case of *California Trial Lawyers Association v. Eu,*\(^\text{54}\) in which our First District Court of Appeals held that the first no-fault initiative violated the single subject rule of the California Constitution. A campaign contribution law had slipped into the middle of the pages of the no-fault law and the court saw that it really did not have anything to do with the no-fault law. The single subject rule is a very vital part of our California Constitution, especially in regard to initiatives—no “bait and switch.”

The court decided the case, and the insurance industry, in a full page article utilizing the Superintendent of Public Education, stated “paid for by your premium dollars”: “Having the public respect for the constitution of this state, the lawyers responded to no-fault reforms by filing a lawsuit against the no-fault initiative asking an appeals court to strike no-fault from the ballot on grounds of a ‘legal technicality’ called the single subject rule, which says an initiative can only address one issue.”

Since when is the California Constitution a legal technicality? When in the history of this state or this country have you seen insurance companies putting full page ads in the paper, dealing with the same object that the initiative is suppose to direct itself toward. And if that’s not bad enough, there is a continued attack upon the courts. How would you feel if you were an appellate justice in this state? You can’t even respond to this. I say, “To the amazement of responsible leaders, the judges agreed with their fellow lawyers, and ruled against the 650 thousand Californians who signed the initiative for no-fault auto insurance.”

I am the president of California Trial Lawyers Association, and after *Moradi-Shalal,*\(^\text{55}\) there wasn’t one member of CTLA who liked that opinion. If any lawyer ever came up to me and said “Let’s take out a full page article in a *Sacramento Bee,* and take a hit upon that supreme court for what we might consider some ostracism of consumer rights,” I would move to have that lawyer removed from our Association. Here is an industry taking premium dollars. Forget about plaintiff lawyers, forget about the tort system, the attack is upon the system, upon the constitution and upon our courts.

The future of bad faith law and the future of punitive damages will be like the future of much of our law in this state and probably in the country. There have been a lot of dissatisfied people in busi-


nesses. I suggest that what you need to do as a leader is to not have forums like this in which the debate goes on, spending 100 million dollars to fuel the debate through high tech media polling focus groups and confusing people. All we do is partake in a system which is supposed to benefit the public. The system whereby the court serves the public, the lawyers serve the public, and the insurance companies and legislators are supposed to serve the public, has been a total failure in the last few years. The initiative process is a by-product of public dismay with leadership. Californians are turning their lonely eyes, their empty pockets, and their confused minds to the initiative process.

I could not agree more with Justice Kaus\textsuperscript{56} that the initiative process needs some examining, and as lawyers we could pick apart words in an initiative. That is how we argue our cases. I have tried enough punitive cases to tell you that the standard is incredibly high. It has got to be clear and convincing. The move in \textit{Parker}\textsuperscript{57} was towards beyond a reasonable doubt. When the standard is beyond a reasonable doubt, and fines are restricted (making it profitable to engage in the same act they are supposed to deter), what I would like to see is a corporate decency act to fight the crime in the suites, not only the streets.

People say that plaintiff lawyers like punitive damages because of the money. Nonetheless, I make a proposal, in terms of my public contribution to this state, to work pro bono for two years in order to try the first corporate executives who engage in the kind of fraud that usually results in punitive damages. In this way, corporations don’t slough it off to their customers or pass it on to policy holders. Instead, there is individual accountability for wrongful acts resulting in possible prison terms. In this way, corporate misconduct is deterred in the same way we deter others.

The future of punitive damages, the future of bad faith, and the future of our legal system will depend on what you do after hearing all these varied viewpoints today. I have been involved in this for many years now and I always get confused and angry. Emotionally, I feel as if I want to do something. Hence, in the last four or five months, as president of California Trial Lawyers, I have tried to do a few things. I have written a lot of pieces, spoken to members of the

\textsuperscript{56} Partner, Hufstedler, Miller, Kaus & Beardsley, Los Angeles, CA; Associate Justice of the Supreme Court of California 1981-1985; Justice of the Second District Court of Appeal 1964-1981; Judge of the Superior Court for Los Angeles County 1961-1964; L.L.B., 1949, Loyola Marymount University, School of Law.

\textsuperscript{57} People v. Parker, 159 Cal. 3d 903, 205 Cal. Rptr. 767.
legislature, and I am trying to reach out to insurance companies and
manufacturers to suggest that we have established processes. Plaintiff
lawyers, defense lawyers, insurance company lawyers, and insurance
companies have been beating up judges, and our court system is not
going to solve the problem. I believe the problem will get worse
before it gets better.

I have taken effort to invite legislators, insurance companies,
plaintiff lawyers, defense lawyers, and most importantly consumer
groups, to join together in the one thing that they all believe in as
human beings and in which they all have a common interest in terms
of their own economic needs—prevention. Insurance companies
profit from preventing injury with good underwriting, and then the
public benefits from that as well. The legislature is supposed to pre-
vent injury and death, as are lawyers and consumer groups. We
should get off the bandwagon about whether the tort system is good
or not, and get down to preventing harm. Even if you wanted to look
at it from a purely economic standpoint, you can really prevent a lot
of injury and death by having tort laws that hold asbestos tortfeasors
accountable for their conduct. You can prevent a lot of economic
harm and tragedy by having products liability laws that discourage
manufacturers from marketing and selling products they know cause
serious injury or death.

If someone said to you “Give me your constitutional rights and
your fourth amendment rights because they aren’t working correctly.
Let’s take your rights away, and not try to fix the problem.” You
would probably respond “My God!” In modern America, the law of
punitive damages and products liability is as important to you as any
of your constitutional rights. Yet, no one believes that they will ever
have to use these rights. Nonetheless, many sitting in this room
might be here because of the tort law that currently exists.

I have had people who have been sued for punitive damages,
some of them large corporations, and I have represented people who,
while being sued for punitive damages, have sought punitive dam-
gages themselves. I have represented people who were worth ten times
as much as the insurance company they sue, and they believe in pu-
nitive damages. You can find cases in which corporations bring suit
against insurance companies, and I have represented insurance com-
panies against insurance companies. The doctrine is available when
you need it. However, some effort to preserve it must be made be-
cause your pride, your profession, and this legal system, is at great
risk.

Today, the pride you feel as an attorney or justice is very con-
trary to the way people look at you and what you are doing. The future of punitive damages and bad faith law will depend on how you respond to those challenges and the forces that present and portray you the way the public sees you.

d. Summation—Justice Marcus Kaufman

As usual, Harvey, Guy and I have worked on a number of programs together. I find it very difficult to sum up what they said, therefore I am not going to make that attempt. I just have a couple of observations.

I am sure you all know that Harvey has had a couple of zillion dollar verdicts against the insurance companies in the bad faith area, and it was interesting for me to hear him say he has been reaching out to insurance companies. Now I know where the telephone company got that slogan, "Reach out and touch someone." The only other things I would say, though I can't comment too much on what the result of these efforts will be, is that I have two thoughts about where we are going to see some expanded litigation as a result of Foley58 and perhaps also Moradi-Shalal59 to some extent.

One is that I think you are going to see an effort made on behalf of claimants in wrongful discharge cases to recover emotional distress damages under the contract theory. There are some cases in various fields allowing emotional distress damages in some contract cases. For example, Justice Broussard's dissent in the Foley case discusses these damages. As I say, I can't tell you what success they will have, but I see that as a fairly obvious move.

I also think there is an interesting question with respect to the issue of ERISA60 preemption and the Foley decision. I am not sure what the Foley decision really said about the covenant of good faith and fair dealing. The one thing I do know is that after Foley one could argue that bad faith only pertains to insurance companies. It is no longer a part of the general tort law of the State of California. Now I am not saying that as a fact, but I say it could be argued. In which case, what effect does that have upon the ERISA preemption?

60. 47 Cal. 3d at 701, 765 P.2d at 402, 254 Cal. Rptr. at 240 (Broussard, J., dissenting).
Well, if it pertains only to insurance companies, maybe it is a regulation of insurance companies and therefore would be exempt from the ERISA preemption. I could not possibly predict the result of any such argument, but it seems to me that the *Foley* decision has lots more in it, and may have lots more ramifications, than initially meets the eye.

My final comment is I think you are to be congratulated for taking your time on a Saturday, and having the interest in the law and the problems that we all face in our society, to come here and discuss these things and educate yourself to some extent about them. I think you are to be highly commended and I hope to see you at another such event someday in the future. Thank you very much.