

## PROFESSIONAL LIABILITY UPDATE

### BREACH

By Glen R. Olson

***Kasem v. Dion-Kindem*** (2014) 230 Cal.App.4<sup>th</sup> 1395

*The Second District holds underlying judicial error can negate the elements of a legal malpractice claim.*

Plaintiff Jean Kasem sublet property from Ralph's Grocery Company situated over a grocery store. After water and sewage damaged the property, Kasem retained Peter Dion-Kindem to pursue an action against Ralph's for her damages.

The contract between Ralph's and Kasem limited Ralph's financial responsibility for repairs and maintenance to the abatement of rent, but an exception was Ralph's duty to indemnify Kasem for damages caused by the release of "hazardous materials." This was the focus of the litigation.

The trial court rejected Dion-Kindem's argument the Federal Water Pollution Control Act and the Safe Drinking Water Act defined the terms "pollutant" and "contaminant" to include sewage discharge. The lower court noted that Kasem failed to present evidence of substances or chemicals in the discharge.

Kasem sued Dion-Kindem, alleging he failed to designate and call an expert witness on whether sewage qualified as hazardous material under the sublease. Dion-Kindem successfully demurred.

The Court of Appeal observed the trial court in the underlying case erroneously denied Dion-

Kindem's request for judicial notice of statutes that include sewage within the definition of hazardous materials. Evidence Code § 451 mandates a court take judicial notice of federal statutes, which would have readily resolved the hazardous material question in Kasem's favor. Judicial error can negate the elements of a legal malpractice claim.

The trial court may have been correct that to establish there were hazardous substances or chemicals besides sewage in the discharge, expert testimony was required. However, that evidence was unnecessary, because sewage itself constituted hazardous material under federal law.

*Comment:* This is a helpful addition to precedent examining the effect of judicial error on standard of care analyses. Arguably, judicial error also affects proximate causation, as the court's error in the Ralph's – Kasem litigation appears to have been the substantial factor in causing the client to lose her case.

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