

# Daily Journal

www.dailyjournal.com

WEDNESDAY, AUGUST 5, 2009

## Appeals Case Went On and On and On — and Could Go On Some More

**By Laura Ernde**

Daily Journal Staff Writer

Justice David G. Sills of the 4th District Court of Appeal in Santa Ana candidly admitted in the first sentence of his opinion: “At first we did not know what to make of this case.”

After more than three years and two oral arguments, Sills and his colleagues finally got to the bottom of the complex, hard-fought legal issues. On Friday, the court overturned an \$11 million judgment against an insurance company. *Griffin De-watering Corp. v. Northern Insurance Co.*, G036896.

But the drama could continue. The plaintiffs, complaining the ruling gives insurance companies a “get-out-of-jail-free card,” said they intend to take the case to the California Supreme Court.

The docket tells the story of what might be the Court of Appeal’s longest-running case.

After an Orange County jury came back with the large verdict to punish Northern Insurance Co. of New York for denying insurance coverage in connection with a sewage overflow, the insurance company appealed. That was March 2006, and the court heard oral argument in November 2007.

Under court rules, an opinion is due within 90 days of argument. But the court effectively extended that deadline by “vacating submission” five times. The court also asked the lawyers to answer more than a dozen new questions.

Lawyers who specialize in appeals said it’s rare to see a court vacate submission once, let alone five times.

“That’s extraordinary,” said Paul Fogel of Reed Smith in San Francisco, who did not work on the case. “It tells you that, No. 1, the case is very complicated, and No. 2, the court’s diligently studying the issues.”

Sills said in the opinion that the court dug into the voluminous record with the help of attorneys Curt Cutting and Daniel U. Smith.

“It was only after the second oral argument in April of this year that the case finally unfolded itself,” Sills wrote. “The whole theory of liability... turned out to be an illusion that dissolved under scrutiny.”

Sills traced the problem back to “one fatal decision” by Superior Court Judge W. Michael Hayes. Before the case went to trial, Hayes ruled as a matter of law that the insurer had been unreasonable in denying coverage.

Sills disagreed, saying the insurer acted reasonably.

Cutting gave credit to his opposing counsel for taking a case that appeared to be worth very little in damages and convincing a jury to award the plaintiff \$1 million in compensatory damages and \$10 million in punitive damages.

Cutting said his colleagues at Horvitz & Levy in Encino, which specializes in appeals, had never seen a case stretch out so long after oral argument.

“It was a complete victory for our side, so I’m not complaining,” Cutting said Tuesday. “This has been a hard-fought case from day one.”

Smith, who practices in Kentfield, was on vacation Tuesday, but the lawyer who represented the plaintiffs at trial, Timothy Cronin of San Francisco, said the case is not over yet.

“We’re going to take it up. We’re not done fighting,” he said.

Smith said the court’s ruling contradicted settled insurance law and made it easier for insurance companies to get away with denying coverage.

“It’s literally a get-out-of-jail free card,” Cronin said.

Cutting disputed Cronin’s assessment of the ruling’s significance, saying the court rejected the policyholder’s attempts to expand insurance bad-faith law.