FIGHTING THE BITE:

Strategies for Countering Two Recent Appellate Decisions Expanding Liability for Insect Bites and Stings

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Have you or a loved one been bitten by an insect? If so, call 1-800-BUG-CASH.

While ads hawking the services of personal injury lawyers are ubiquitous, insect-bite litigation has not yet reached the mainstream. There is a good reason for the absence of such cases – the duty requirement, which serves "to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act.' " (*Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083 (*Vasilenko*)), has ensured that routine bug bites do not spawn costly litigation.

But two recent appellate decisions addressing businesses' liability for injuries caused by insects (or arachnids, in the case of spiders) threaten to open the floodgates. And even if the pro-plaintiff decisions in *Coyle v. Historic Mission Inn Corporation* (2018) 24 Cal. App.5th 627 (*Coyle*) and *Staats v. Vinter's Golf Club, LLC* (2018) 25 Cal.App.5th 826 (*Staats*) do not spawn a swarm of insect-bite suits (pun intended), these cases reflect an expansive view of duty that threatens to diminish the duty element's function as a barrier against limitless liability. Defense counsel should be prepared to confront these decisions. After summarizing these cases, we propose some ideas for doing so.

The *Coyle* and *Staats* Opinions

In *Coyle,* the plaintiff sued the owner of the Mission Inn in Riverside after she was bitten by a black widow spider while eating on an outdoor patio. (*Coyle, supra,* 24 Cal. App.5th at p. 631.) Reversing summary judgment for the Mission Inn, Division Two of the Fourth District Court of Appeal held that the Mission Inn owed the plaintiff a duty of care to guard against such insect bites, explaining that it is commonly known that black widows are present in the Riverside area, and the restaurant had spotted some in the past. (*Id.* at p. 636.) The court reasoned that, absent a tort duty, restaurants would have little incentive to protect patrons from spider bites. (*Id.* at p. 638.) The court also found that the restaurant's failure to prevent the bite was morally blameworthy, because "it is morally wrong to do nothing while exposing unknowing patrons to a risk of harm." (*Ibid.*)

Similarly, in *Staats,* Division One of the First District Court of Appeal followed *Coyle* and held that a golf club owed a duty of care to protect its patrons from a swarm of yellow jacket wasps and reversed summary judgment for the golf club. (*Staats, supra,* 25 Cal.App.5th at p. 830.) In *Staats,* a golfer was attacked by wasps that, unbeknownst to the golf club, had built a hive on the course. (*Id.* at pp. 830-831.) The court concluded that this was foreseeable in a region where wasps are endemic. (*Id.* at pp. 838-839.) The court also rejected the club's argument that the burden of ongoing wasp control would be prohibitively expensive. (*Id.* at pp. 840-841.) The court explained that, because the club was in the best position to control an infestation, imposing a duty would prevent future harm, and the club's failure to search for hives was morally blameworthy. (*Id.* at p. 842.)

Coyle and *Staats* thus required business to face the uncertainty and expense of trial based on injuries to their patrons caused by common insects. In so doing, *Coyle* and *Staats* deviated from older precedent precluding liability arising from injuries inflicted by wild animals, and aggressively applied the familiar, multi-factor duty test articulated in *Rowland v. Christian* in a manner that threatens to vastly expand business' potential liability to their customers.

The *Rowland* factors include "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached

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to the defendant's conduct, [5] the policy of preventing future harm, [6] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [7] the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113.) Foreseeability is generally treated as the most important of these factors, but the application of that factor by the *Coyle* and *Staats* courts, regarding interaction with natural, indigenous pests, brings to mind the oft-quoted words of the California Supreme Court in *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668: "there are clear judicial days on which a court can foresee forever and thus determine liability[,] but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury."

Strategies for challenging *Coyle* and *Staats*

The first strategy for combatting *Coyle* and *Staats* is to direct courts' attention to these cases' departure from precedent holding that landowners have no duty to guard against wild animals present on their property. Because trial courts are not obligated to follow appellate decisions that conflict with earlier authority (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454 (*Auto Equity Sales*)), defense counsel confronted with *Coyle* and *Staats* should bring this conflict to the court's attention.

In *Brunelle v. Signore* (1989) 215 Cal.App.3d 122 (*Brunelle*), the Court of Appeal held that a homeowner had no duty to protect a guest from a spider bite in the home. The court noted that the common law doctrine of *ferae naturae* supports the conclusion that "a landowner has no duty to protect against attacks by indigenous animals or insects" (*Id.* at p. 129, fn. 5), and it reasoned that concluding otherwise risked creating a burden that "would be enormous and would border on establishing an absolute liability" (*Id.* at p. 130).

The court in *Brunelle* made clear that some general level of foreseeability that potentially harmful creatures might be indigenous to the area would not be enough to create a duty to eradicate any potential for those creatures' presence on a defendant's property. "Imposition of a duty even in those cases where the [defendant] shared general knowledge with the public at large that a specific harmful insect was prevalent in the area but the [defendant] had not seen the specific harmful insect either outside or inside the home would impose a duty on the owner or occupier of the premises that would be unfair and against public policy." The court also cited the Restatement and out-of-state authority as "support for the conclusion that a landowner has no duty to protect against attacks by indigenous animals or insects." (*Id.*, at p. 129, fn. 5.)

Similarly, in *Butcher v. Gay* (1994) 29 Cal. App.4th 388, 392, 401 (*Butcher*), the court held that a homeowner was not liable to a guest who claimed she had contracted Lyme disease after being bitten by a tick on the homeowner's dog. Following *Brunelle*, *Butcher* also observed that rule holding landowners liable for injuries inflicted by wild animals would risk creating an " 'absolute liability.' " (*Ibid.*)

Coyle expressly declined to follow *Brunelle*, reasoning that *Brunelle* made factual findings inconsistent with the Court of Appeal's proper role in reviewing a grant of summary judgment. (*Coyle, supra,* 24 Cal.App.5th at pp. 641-643.) But duty is a question of law for the court, so *Coyle's* criticism of *Brunelle* does not withstand scrutiny. Defense counsel should urge other courts to follow *Brunelle* rather than *Coyle*.

Rather than disavowing precedent, *Staats* attempted to distinguish *Brunelle* and *Butcher*. According to *Staats*, *Brunelle,* and *Butcher* apply only to injuries caused by stray insects, rather than insects originating from a nest on the landowners' property. (*Staats, supra,* 25 Cal.App.5th at pp. 835-836.) But this is a distinction without a difference. Insects are fact of life, and imposing a duty on landowners to guard against insect bites threatens landowners with what *Brunelle* aptly characterized as absolute liability.

Ultimately, only the Supreme Court can conclusively resolve the inconsistency

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between *Coyle* and *Staats,* on the one hand, and *Brunelle* and *Butcher,* on the other. And the Court recently declined the opportunity to do so when it denied petitions for review in *Coyle* and *Staats*. Until the Supreme Court resolves the conflict, defense counsel should urge lower courts to follow *Brunelle* and *Butcher*.

Defense counsel seeking to counter *Coyle* and *Staats* should also emphasize these cases' inconsistency with the Supreme Court's recent pronouncements concerning the duty requirement in *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077. Directing lower courts' attention to this tension could help convince those courts to follow *Brunelle* and *Butcher,* rather than *Coyle* and *Staats*.

In *Vasilenko,* the Supreme Court declined to impose a duty on a church to assure the safety of its congregants crossing a public street to reach the church's additional parking lot. The Court reasoned that "there is ordinarily no duty to warn of obvious dangers," so the church had no obligation to warn congregants that crossing the street can be dangerous. (*Id.* at p. 1088.) The Court further explained that imposing liability on the church "could result in significant burdens," because landowners "would have to continuously monitor the dangerousness of the abutting street and . . . they may have to relocate their parking lots as conditions change." (*Vasilenko, supra,* 3 Cal.5th at p. 1090.)

Coyle and *Staats* – which found a duty to guard against insects in part because spiders and wasps are common (*Coyle, supra,* 24 Cal.App.5th at p. 636; *Staats, supra,* 25 Cal. App.5th at pp. 838-839) – conflict with the Supreme Court's teaching in *Vasilenko.* It is obvious that spider bites and wasp stings can occur in regions where those insects live, and can be dangerous. *Coyle* and *Staats* thus depart from *Vasilenko* to the extent they impose a duty on landowners to guard against obvious risks.

Coyle and *Staats* are also inconsistent with *Vasilenko's* teachings regarding the need to incentivize businesses to take safety precautions. In *Vasilenko,* the Supreme Court declined to impose a duty on the landowner in part because "landowners already have incentives to provide parking that is safe." (*Vasilenko, supra,* 3 Cal.5th at p. 1088.) By contrast, neither *Coyle* nor *Staats* properly considered whether imposing a tort duty is necessary to incentivize pest control. Customers are obviously less likely to patronize businesses that are infested by dangerous insect, and online reviews such as those on Yelp are bound to spread the word of such infestations). Moreover, businesses have good reasons to want to protect their employees from harm that causes absenteeism and can raise workers compensation costs. Businesses thus already have an incentive to reasonably guard against insects in the absence of potential tort liability. Neither *Coyle* nor *Staats* accounted for this common-sense proposition.

Finally, *Coyle* and *Staats* did not account for unintended consequences of imposing liability, such as encouraging the overuse by businesses of abatement measures that harm the environment. The law should not create a perverse incentive for businesses, government entities, and other landowners to remove beneficial vegetation, apply pesticides, and otherwise attempt to sterilize outside dining patios, golf courses, parks and the like, for fear of liability due to interaction with elements of nature.

These concerns confirm that *Brunelle* and *Butcher,* but not *Coyle* and *Staats,* are consistent with the rule that "foreseeability is not synonymous with duty, nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.) While a great many events may be objectively foreseeable, especially in hindsight, a court's analysis must be "tempered by subjective reasonableness" "to bring imposition of duty in line with practical conduct." (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306-307; see *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 476 [" 'social policy must at some point intervene to delimit liability' even for foreseeable injury"]; see *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 340-341 [retailers owe no duty to provide defibrillators at stores, even though it is foreseeable that some number of patrons will suffer heart attacks].)

The Bottom Line

Coyle and *Staats* illustrate some appellate courts' willingness to stretch the *Rowland* factors to avoid ending negligence suits at the summary judgment stage. Defense counsel should be prepared to confront these decisions in the trial court and on appeal.

Defense counsel should emphasize *Coyle* and *Staats'* departure from precedent precluding liability arising from insect bites, and should marshal evidence bearing on the *Rowland* factors that do not support imposition of a duty. When confronted with conflicting appellate decisions, trial courts are free to follow the authority they believe to be correct. (*Auto Equity Sales, supra,* 57 Cal.2d at p. 454.) Defense counsel should argue that the expansive view of liability reflected in *Coyle* and *Staats* should not be adopted, particularly because it conflicts with the Supreme Court's teachings in *Vasilenko* and other duty cases from the California Supreme Court.

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