CAIIA Status Report

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A Contractual Attorney Fee Provision Cannot Override the Statutory Cap on Attorney Fees in a Small Claims Appeal

Michael Dorsey v. The Superior Court of San Diego (Crosier)

Low, Ball & Lynch, San Francisco, CA

Small Claims Court exists so those with meritorious claims under $10,000 can have their claims adjudicated without spending more on attorney fees than the claims are worth. No attorney may take part in conducting or defending a small claims action. There are no formal pleadings, discovery, rules of evidence or a right to a jury trial in small claims court. Even the court may conduct its own investigation and is not required to issue a statement of decision. Simply put, it is the low cost method to "right a wrong." This case considered the interplay between the statutory cap on attorney fees available on appeal in such an action, and in a contractual provision in the parties' written agreement.

In October 2012, Jeffery Crosier entered into a one-year lease with Michael Dorsey for a condominium. In March, 2014, Mr. Crosier brought an action in small claims court against Mr. Dorsey alleging breach of the lease, wrongful retention of the security deposit, constructive eviction and various other causes of action. He sought $10,000 in damages. Mr. Dorsey filed a "defendant's claim" alleging Mr. Crosier was liable for holdover rent and other damages. The small claims court entered judgement in favor of both parties resulting in a net judgment for Mr. Crosier in the sum of $2,047.

Mr. Dorsey appealed to the superior court where both sides were then represented by counsel at the new hearing. The superior court found that Mr. Dorsey breached the lease by not returning Mr. Crosier's security deposit of $1,560. Over Mr. Dorsey's objections, Mr. Crosier was also awarded attorney fees in the sum of $10,447 based upon the attorney fee provision in the lease. Mr. Dorsey then filed a petition for writ of mandate with the Court of Appeal, contending that California Code of Civil Procedure section 116.780(c)[1] governed the award of fees in all small claim appeals, capping the fees at $150. The superior court's judgement on a small claims appeal is final and not generally appealable. However, it is appropriate to seek relief from the Court of Appeal when significant issues of small claims law and interpretation of statutes need to be settled.

Here, the Court of Appeal reversed the attorney fee order of the superior court. They found that throughout history the Legislature and courts have acted to make small claims court cost - effective for litigants. In doing so, the courts have upheld small claims statutes which restrict what are otherwise recognized as constitutional rights. The small claims court is the great equalizer since justice is dispensed fairly, promptly and inexpensively. Otherwise known as the "People's Court," the Legislature declared the small claims court a fundamental element in the administration of justice.

Keeping in mind the special nature of the small claims process, the Court of Appeal held that the attorney fee cap reflected a legislative determination that a small claims appeal should require no more than minimal attorney time and be cost-effective for the participants. Therefore, CCP section 116.780(c) was construed to override the attorney fee provision in the condominium lease and limit the attorney fee award to $150.

COMMENT

Since the jurisdiction of Small Claims Court has increased to $10,000, attorneys are called upon more frequently to assist on appeal. Now there is no doubt that the statutory provision limits fees to $150 (or $1,000 when there is no good faith basis for appeal) even if there is a contractual provision for their fees.

Inside this issue…..

CAIIA Newsletter
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California Association of Independent Insurance Adjusters, Inc.

President's Message

Paul Camacho

CAIIA President

Communication is the key to survival, both in life and business situations. How many times have you heard, "be careful what you ask for?"

Many feel that to get what you need, they have to be very detailed. We have all had the experience of trying to describe a noise the car makes to the mechanic for something that is going wrong. Unfortunately, the vehicle is operating perfectly when you meet with the mechanic, and you get that infamous puzzled look which you perceive to be, *"are you nuts?"*

A husband complains to his wife that his vehicle is having an issue with the rear differential. He does not have the time to take the vehicle in, and reluctantly, the wife agrees to take the car to the mechanic. The husband takes great pains to describe the noise and his diagnosis. The description was something like this, *"the noise is coming from the rear end on an intermittent basis. It may be the ring or pinon gear, or possibly the cone and roller bearings and the gasket also appears to be leaking. It makes the most noise when going about 55".*

The wife, being the good sport that she is, takes the vehicle to the mechanic. The mechanic, before test driving the vehicle, asks about the problem. The wife, trying to remember all the technical information says, *"well, my 55 year old husband leaks and says his rear end makes a funny noise every now and then".* The mechanic gets that puzzled look on his face and responds, *"well, what about the vehicle?"*

We can all gather that the communication failed and as a result, the problem was not addressed. Could a possible solution have been to take the wife for a ride in the vehicle so she could listen for the sound and then ask the mechanic to take a test drive?

> With the Holiday Season upon us, a national chain of coffee shops has been criticized for serving their beverage in a red cup with no specific seasonal greeting. How do we please all interests to convey a greeting without offending someone? The response from the chain was something to the effect, that with a blank cup, you can write in your own memories. This is a great response, but I am personally not going to take my marking pen to the coffee shop, write my memory on a disposable cup and have the ink bleed all over my hands while holding the cup to keep them warm.

I have communicated with the new board and committees and provided the minutes of the Annual meeting. The tentative plan is to schedule our Mid-term meeting in San Diego, on April 7 and 8, 2016. Make a note on your long term calendar as more details will follow, but this way, at least you can plan ahead.

As I close this second President's message, from the "Ketchumblog," here we go:

Best wishes for the holiday season
Deck the halls
Happy Hanukkah
Happy Holidays
Happy New Year
Joyous Kwanzaa
Merry Christmas or Merry Xmas
Peace on earth
Season's Greetings
Warm wishes

I hope I communicated well and extend the above greetings and any that I may have missed. Thanks for taking the time to read, see you next month!

Paul R. Camacho, ARM, RPA
President – CAIIA 2015-2016
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News from our Members

DOI Curriculum Board Update

I attended the California Department of Insurance Curriculum Board Meeting on October 29th.

The year of 2015 pass rates for the independent adjuster examination through September are 38% for first time test takers and 31% for repeat test takers. The DOI is aware of the low pass rates and is taking actions to attempt to improve the results.

These actions include a two-day review of the test questions in Sacramento at which the subject matter experts will be myself and 4 other CAIIA members.

Additionally, the DOI is considering lowering the cut score from 70% to 60% as it has done with several other licensing exams. Finally, the difficulty of the test questions is being reviewed for use in future tests.

Senate Bill 488 has become a public adjuster only bill. A separate bill to address independent insurance adjuster licensing has been written, and is awaiting a sponsor. The plan is for the bill to be submitted in early 2016.

Assembly Bill 1515 was called to our attention. It includes the following text:

1725.5. (a) For purposes of Sections 32.5, 1625, 1626, 1724.5, 1758.1, 1765, 1800, 14020, 14021, and 15006, every licensee shall prominently affix, type, or cause to be printed on business cards, written price quotations for insurance products, and print advertisements distributed exclusively in this state for insurance products its license number in type the same size as any indicated telephone number, address, or fax number. If the licensee maintains more than one organization license, one of the organization license numbers is sufficient for compliance with this section.
(b) Effective January 1, 2005, for purposes of Sections 32.5, 1625, 1626, 1724.5, 1758.1, 1765, 14020, 14021, and 15006, every licensee shall prominently affix, type, or cause to be printed on business cards, written price quotations for insurance products, and print advertisements, distributed in this state for insurance products, the word "Insurance" in type size that is at least as large as the smallest telephone number or 12-point type, whichever is larger

I suggest you review your business cards to confirm compliance.

If anyone has a question, please call or email me.

Peter Schifrin CAIIA – Past President

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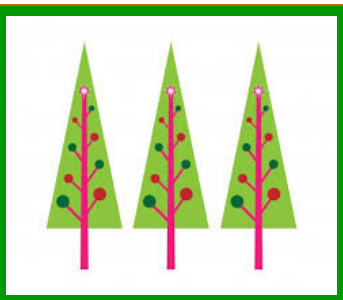

Happy Holidays to you and yours!

The Second Appellate District Finds UCLA Not Liable For Third Party Criminal Acts of a Student With a Known Mental Illness

The Regents of the University of California, et al. v. Superior Court of Los Angeles County
Katherine Rosen, Real Party in Interest

Credit to: Low, Ball & Lynch, San Francisco, CA

The issue in this case is whether a college or university owes a duty of care to a student who is harmed by the third party criminal misconduct of another student who is known by the university to have a serious mental illness.

On October 9, 2009, Katherine Rosen ("Rosen"), a student at the University of California, Los Angeles ("UCLA") was attacked with a knife during a chemistry lab by fellow UCLA student Damon Thompson ("Thompson"). She sustained serious bodily injuries.

Shortly after enrolling at UCLA in 2008, Thompson began to exhibit erratic and troubling behavior on campus. He sent numerous emails to various professors and administration officials complaining that he was "angered" and "outraged" by "abusive" remarks from his fellow students. Thompson also complained to police that he heard other residents "talk about having a gun and shooting him." After police found no gun in Thompson's dorm, nor any evidence to substantiate his claim of the alleged threats against him, they convinced Thompson to let them escort him to the UCLA emergency room for a psychiatric evaluation.

Thompson was diagnosed with paranoid delusions and possible schizophrenia disorder, without any signs of suicidal or homicidal ideation. He was referred to outpatient treatment on campus and prescribed antipsychotic medication. Thompson met with psychologist Nicole Green and psychiatrist Charles McDaniel, M.D. who came to largely the same diagnosis, adding that Thompson did not express any intent to harm others. Later, Thompson told Dr. McDaniel that he experienced "general ideations of harming others." But Thompson clarified that he never formulated an actual plan to harm anyone, nor did he identify a specific victim. Thompson subsequently stopped taking his medication and discontinued treatment. In June, 2009, Thompson was involved in a physical altercation with another student where he pushed him and stated "this is your last warning." Thompson was ordered to return to outpatient treatment. On October 9, 2009, Thompson attacked Rosen. He told police "they were out to get me," that students were "picking on him," and that he was "provoked" and "insulted." Rosen stated that she had been in the lab for three hours and had no interaction with Thompson.

Rosen brought suit against the Regents of the University of California and several UCLA employees for general negligence. UCLA moved for summary judgment arguing that colleges and universities have no legal duty to protect their adult students from the criminal conduct of other students, nor did Rosen's status as a student on campus create a special relationship triggering such a duty, and that UCLA has breached no duty because its personnel had acted appropriately in dealing with Thompson.

In her opposition to UCLA's motion for summary judgment, Rosen argued that UCLA owed her a duty of care under the theory of premises liability (California Civil Code § 1714), a duty to supervise the classroom to prevent foreseeable harm, and a duty under the theory of negligent undertaking, alleging UCLA did not adequately follow its own violence prevention and mental health protocols. Rosen further argued that there were disputed material facts regarding whether psychologist Nicole Green discharged her duty to warn under California Civil Code § 43.92.2, and that UCLA failed to follow its own policies and procedures and the standard applicable to all universities.

The trial court denied UCLA's motion for summary judgment. UCLA appealed to the Second District Court of Appeal.

The appellate court held that UCLA did not owe a legal duty to protect Rosen from third party criminal acts because of her status as a student. Distinguishing this case from many prior school decisions which had placed a duty on schools to protect elementary and minor school children from harm, the Court noted that plaintiff here was an adult attending college, that her attendance was voluntary, not compulsory and that UCLA was not acting *in loco parentis*. Thus, no special relationship triggering a duty of care between UCLA and Rosen existed. (Crow v. State of California (1990) 222 Cal.App.3d 192; Ochoa v. California State University (1999) 72 Cal.App.4th 1300).

The Appellate Court also distinguished cases Rosen relied for her negligent supervision claim including an intercollegiate baseball incident and a loading incident at an adult truck driver training course, as factually distinguished and not applicable.

Next, the Court held that Rosen's premises liability/business invitee argument was without merit because the general rule requiring private landowners to protect invitees from foreseeable third party misconduct does not apply to public entity landowners. "Liability will not attach unless the defect in the physical condition of the property [has] some causal relationship to the third party conduct that actually injures the plaintiff." Rosen offered no evidence of any physical defect to the university property nor its causal relationship to the third party conduct. .

The Court found no triable issue of material fact regarding Rosen's claim that UCLA owed her a duty of care pursuant to the negligent undertaking doctrine. The court pointed to prior decisions which had held that "Nonfeasance which results in failure to eliminate a preexisting risk is not equivalent to nonfeasance which increases a risk of harm." (Zelig v.County of Los Angeles (2002) 27 Cal.4th 1112)
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The Court also found no triable issue of material fact regarding psychologist Nicole Green's duty to warn under California Civil Code § 43.92 because Thompson had not communicated an "actual threat of violence against an identified victim." (City of Santee v. County of San Diego (1989) 211 Cal.App.3d 1006 at 1015-1016)

Finally, Rosen's newly-raised claim of duty flowing from an implied contract with UCLA based on matriculation and payment of tuition was rejected by the Court because it was not included in her opposition to summary judgment and was raised for the first time on appeal.

COMMENT

This decision affirms restrictions on premises liability claims against public entity landowners, and in particular, universities. No special relationship is formed based solely on a university student's status as a student or by implied contract.

The Golden Rules of Claim File Documentation

Credit to Tyson And Mendes, La Jolla, CA

Although most claim file review is generally conducted internally by management, occasions arise where your documentation will be subject to harsher examination, particularly in the litigation realm. So how do you ensure your claim file will withstand the scrutiny of the most tenacious plaintiff's counsel or expert? These four rules will guide you to a better claim file.

1. **Document early and often.** Every time you communicate in any way with the insured, document it: this includes leaving messages with representatives or by voicemail. If you do speak to the insured by phone or in person at an inspection or meeting, document the content of the conversation as soon as possible while the memories are fresh. This will ensure no detail is overlooked. Each and every email and letter should be documented in the claim notes, and saved to the file.

2. **Take photos and caption them.** Any time you perform an inspection of a vehicle or property, take as many photos as you can. Upload them as soon as possible, and include descriptive captions. This will help refresh your memory of the inspection should you need to recall the details years later if the matter proceeds to litigation. It also provides information to other adjusters who may pick up the claim after you. Word usage is critical – see Rule 3.

3. **Word choice is more important than you think.** Imagine you are uploading photos from a site inspection. You are phrasing your descriptive captions. You take a photo of a slope of a residential roof that has hail impact marks. Your caption is "hail damaged north slope of the roof". Perfectly descriptive, right? Wrong. Although use of the word "damage" may seem appropriate, in a litigation context, a plaintiff's attorney or expert will view that as an admission the property is in fact damaged, when in actuality the hail impact marks may be superficial and not warrant repair or replacement of the roofing materials. Upon reflection, if there is a more specific word to use, use that. Continuing the example here, damage is a very general term. "Condition of north slope" or "hail impact marks on north slope" is more appropriate. Careful word choice is also helpful to experts retained on the claim, who often prefer to not have any suggestion as to what the adjuster thinks of the condition, but rather would prefer to make the determination as objectively as possible.

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4. **Be objective. B-E Objective!** Often when dealing with insureds and their representatives, personalities will conflict, and difficulties may arise. Refrain from using personalized descriptive words for these interactions. Do not say, "insured called and was a jerk," the "public adjuster continued to act like an idiot." Simply report the specifics of the interactions, how you responded, and describe the next steps on the claim. Unnecessary criticism of the insured or representatives will invariably haunt you at any deposition and trial testimony, and may affect credibility, even though it was documented innocently enough. Keep your claim notes as dry and un-colorful as you can while still accurately documenting the activity and interactions on the claim.

While this is certainly not an exhaustive list as to how to best document your claim files, following these simple rules will make the litigation process much simpler with fewer surprises in depositions or at trial. If you are ever faced with a documentation challenge, seek assistance or advice from your managers.

Torts – Effect of *Howell* Decision on Purchased Medical Liens

Anna Uspenskaya v. Clare Meline

Credit to Low, Ball & Lynch, San Francisco, CA

Howell .v Hamilton Meats & Provisions, Inc. (2011) 52 Cal.4th 541 was a landmark case in which the California Supreme Court ruled that the evidence of the billed amount of plaintiff's medical treatment was inadmissible where plaintiff's medical provider has accepted less than the full amount from plaintiff's health care provider as full payment. Many cases since *Howell* have dealt with the impact of the admissibility of medical billings or payments at trial. Here, the issue was whether the defendant could introduce evidence of the purchase price paid by a third party for medical liens from plaintiff's health care providers as evidence of the reasonable value of that treatment.

Plaintiff Anna Uspenskaya ("Plaintiff") was involved in an automobile accident with defendant Clare Meline ("Meline"). Plaintiff lacked medical insurance, and contracted with her medical providers to treat her in exchange for a lien on any recovery she might make in a lawsuit against Meline. A third party assignee, MedFin Managers, LLC ("MedFin") purchased the lien from the providers for a discounted amount, but plaintiff remained liable for the total bill.

At trial, plaintiff introduced evidence that the total amount billed by her providers was $261,713.71. Meline unsuccessfully moved to have this evidence excluded, arguing that under *Howell*, the medical bills were irrelevant, and that plaintiff should have been precluded from presenting them to the jury or in any manner referring to the bills. Meline also unsuccessfully sought to introduce the amount that MedFin paid, claiming it represented the reasonable value of plaintiff's treatment. Plaintiff opposed the motions, presenting evidence that MedFin was a company which purchased "lien-based accounts receivables from healthcare providers," (such companies are sometimes referred to as "factors"), and that the medical provider was under no obligation to sell its account at a reduced rate, and that she was not relieved of her obligation to reimburse the full amount of the medical bill by this assignment. Evidence of the total bill amount was admitted, and the jury found Meline negligent and awarded plaintiff the entirety of the medical expenses, plus an additional $158,000 in general damages. Defendant appealed.

The Court of Appeal affirmed the trial court's ruling allowing in evidence of the billed amounts and precluding evidence of the MedFin payment, disagreeing with Meline's arguments about *Howell* and its effect on admissibility of either the total bill amount or the amount MedFin paid to purchase the lien.

The Court of Appeal first noted that the MedFin payments *were* relevant because they did have some *tendency* in reason to prove reasonable value. However, without further evidence that the payments represented a reasonable value for treatment, the Court held that the probative value of that evidence was minimal. On the other side of an Evidence Code section 352 balancing analysis, the Court felt that there was a substantial danger of undue prejudice and that the evidence of the MedFin payments would confuse or mislead the jury.

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According to the Court, the problem in cases involving MedFin, or similar companies purchasing accounts receivable, is that the purchase price will typically represent a reasonable approximation of the collectability of the debt, rather than a reasonable approximation of the value of the plaintiff's medical services. The medical provider obtains immediate payment in such cases, and transfers expense of collection and the risk of non-payment to someone else. MedFin, in turn, acquires the medical bills as well as the lien, and will make a profit if it is successful in its collection efforts. The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a discount does not reduce the value of the services provided in the first place.

The Court distinguished *Howell*, because there the health care provider had paid a reduced amount, but through a contractual arrangement with the medical provider wherein that reduced amount represented the full amount that would be owed any payable by the plaintiff. However, this case did not involve a transaction between the buyer of health care treatment (the injured party and that person's health insurance carrier) and the seller of that treatment (the health care provider). This case involved a sale of an asset – the right to collect the injured person's debt. Furthermore, unlike the plaintiffs in *Howell* and subsequent cases, the injured plaintiff here was "still on the hook" to pay the entire debt. Consequently, the amount paid by the third party was not sufficient evidence, on its own, of the "reasonable value" of the medical services.

The Court held that the inquiry into the reasonable value for medical services where, as here, a lien has been purchased, would require "some additional evidence showing a nexus between the amount paid…and the reasonable value of the services." Here, defendant had not offered any evidence through expert testimony or otherwise as to the "reasonable value" of the treatment rendered to plaintiff. Without any evidence tending to show that the MedFin payments represented a reasonable value of the treatment provided, evidence of those amounts was likely to confuse the jury and cause the jury to speculate, and it was properly excluded.

Judgment in plaintiff's favor was affirmed

Comment

This ruling is consistent with *Howell* and its progeny, since in those cases, the plaintiff/patient no longer had any responsibility for payment of any of the bills. Reasonableness was a different question. Market factors such as collectability of the lien affect what will be paid, so when dealing with lien purchases such as these, the defense will need to submit additional evidence to show that the purchase amount does in fact represent the "reasonable value" of services.

DOI New Release-School Security Officer Arrested for Workers' Compensation Fraud

SAN BERNARDINO, Calif. - Valentino H. Douglas, 45, of Rialto, was arrested and booked into the West Valley Detention Center on multiple counts of felony insurance fraud after receiving more than $112,000 in workers' compensation benefits for an alleged work injury that actually occurred a month earlier while playing softball.

While employed as a security officer at Rialto High School, Douglas filed a workers' compensation claim in July 2013, two months after an altercation with a student claiming that he injured his shoulder during the incident. An investigation by Department of Insurance detectives revealed Douglas sought treatment a month earlier for the same shoulder injury stating that it occurred while playing softball.

"Workers' compensation fraud is a costly crime that we all pay for," said Insurance Commissioner Dave Jones. "Insurers pass along the cost of their losses to businesses through higher insurance premiums and those costs are passed onto to consumers through higher prices for goods and services. Ultimately, there is a ripple effect on our economy."
Videotape evidence also showed Douglas exercising with a boot camp group with no apparent physical limitations. When questioned about his statements to physicians and his exercise activity, Douglas continued to misrepresent the facts of his alleged injury. The case is being prosecuted by the San Bernardino District Attorney's office.

On the Lighter Side

1. ONE TEQUILA, TWO TEQUILA, THREE TEQUILA … FLOOR.

2. ATHEISM IS A NON-PROPHET ORGANIZATION.

3. IF MAN EVOLVED FROM MONKEYS AND APES, WHY DO WE STILL HAVE MONKEYS AND APES?

4. THE MAIN REASON THAT SANTA IS SO JOLLY IS BECAUSE HE KNOWS WHERE ALL THE BAD GIRLS LIVE.

5. I WENT TO A BOOKSTORE AND ASKED THE SALESWOMAN, "WHERE'S THE SELF- HELP SECTION?" SHE SAID IF SHE TOLD ME, IT WOULD DEFEAT THE PURPOSE.

6. WHAT IF THERE WERE NO HYPOTHETICAL QUESTIONS?

7. IF A DEAF CHILD SIGNS SWEAR WORDS, DOES HIS MOTHER WASH HIS HANDS WITH SOAP?

8. IF SOMEONE WITH MULTIPLE PERSONALITIES THREATENS TO KILL HIMSELF, IS IT CONSIDERED A HOSTAGE SITUATION?

9. IS THERE ANOTHER WORD FOR SYNONYM?

10. WHERE DO FOREST RANGERS GO TO "GET AWAY FROM IT ALL?"

11. WHAT DO YOU DO WHEN YOU SEE AN ENDANGERED ANIMAL EATING AN ENDANGERED PLANT?

12. WOULD A FLY WITHOUT WINGS BE CALLED A WALK?

13. WHY DO THEY LOCK GAS STATION BATHROOMS? ARE THEY AFRAID SOMEONE WILL BREAK-IN AND CLEAN THEM?

14. IF A TURTLE DOESN'T HAVE A SHELL, IS HE HOMELESS OR NAKED?

15. IF THE POLICE ARREST A MUTE, DO THEY TELL HIM HE HAS THE RIGHT TO REMAIN SILENT?

16. WHY DO THEY PUT BRAILLE ON THE DRIVE-THROUGH BANK MACHINES?

17. HOW DO THEY GET DEER TO CROSS THE ROAD ONLY AT THOSE YELLOW ROAD SIGNS?

18. WHAT WAS THE BEST THING BEFORE SLICED BREAD?

19. ONE NICE THING ABOUT EGOTISTS: THEY DON'T TALK ABOUT OTHER PEOPLE.

20. DOES THE LITTLE MERMAID WEAR AN ALGEBRA? (This one took me a minute)

21. HOW IS IT POSSIBLE TO HAVE A CIVIL WAR?

22. IF ONE SYNCHRONIZED SWIMMER DROWNS, DO THE REST DROWN TOO?

23. IF YOU ATE BOTH PASTA AND ANTIPASTO, WOULD YOU STILL BE HUNGRY?

24. WHOSE CRUEL IDEA WAS IT FOR THE WORD 'LISP' TO HAVE 'S' IN IT?

25. WHY ARE HEMORRHOIDS CALLED "HEMORRHOIDS" INSTEAD OF "ASSTEROIDS"?

26. WHY IS IT CALLED TOURIST SEASON IF WE CAN'T SHOOT AT THEM?

27. WHY IS THERE AN EXPIRATION DATE ON SOUR CREAM?

28. CAN AN ATHEIST GET INSURANCE AGAINST ACTS OF GOD?

29. WHY DO SHOPS HAVE SIGNS, 'GUIDE DOGS ONLY', THE DOGS CAN'T READ AND THEIR OWNERS ARE BLIND?