# appellate highlights

by Donn Kessler and Patrick Coppen

## SUPREME COURT CIVIL MATTERS

The Arizona Supreme Court held that A.R.S. § 31-237 and amendments to A.R.S. § 31-238 enacted on April 22, 1993, limiting the amount of money the Department of Corrections must provide to prisoners upon release apply to inmates whose crimes occurred prior to January 1, 1994. The Court also ruled such application affected only an expectancy, not a vested right, did not violate due process and did not violate the prohibition of ex post facto laws. *Zuther v. State of Arizona*, CV-99-0425-PR, 12/21/00 . . . Overruling *Rogers v. Ogg*, 101 Ariz. 161, 416 P.2d 594 (1966), the Arizona Supreme Court held that **on remand a litigant no longer needs to seek permission of the appellate courts to obtain Ariz.R.Civ.P. 60(c) relief from a judgment after that judgment has been affirmed and mandate issued.** *US West Communications, Inc. v. Arizona Dept. of Revenue*, CV-00-0022-PR, 12/20/00 . . . Resolving conflicts between appellate court decisions, the Supreme Court ruled that **a home buyer's agent has a duty to disclose to the seller the buyer's possible financial inability to close and could be liable at common law for negligent misrepresentation for failure to make such a disclosure.** Such a duty was found from the buyer's duty to disclose and from the *Restatements (Second) of Torts and Agency*. The Court also held that Department of Real Estate regulations dealing with this issue codified the common law and created a standard of care. The Court did not reach the issue of whether such regulation created a private cause of action. *Lombardo v. Albu*, CV-99-0316-PR, 12/13/00 . . . In a series of three opinions, the Supreme Court explained its bases for granting relief on challenges to the Arizona Legislative Council (ALC) and analyses of initiative proposals by the Joint Legislative Budget Committee (JLBC). In ******Citizens for Growth Management*, CV-00-0259-SA, 12/8/00, the Court ruled the **ALC's analysis of the growth initiative was not impartial under A.R.S. §19-124(B) because it attempted to persuade the reader that present laws adequately address the perceived problems the initiative sought to remedy**, implied another initiative's approach was better and omitted critical information concerning funding. In ******Healthy Arizona Initiative PAC v. Groscost*, CV-00-0274-SA, 12/8/00, the Court held that the ALC's paragraph **failing to mention the possibility of federal matching funds failed to meet the impartiality test, held the JLBC's fiscal analysis also had to be neutral and failed to do so by not explaining the bases for such analysis**. In *Sotomayor v. Burns*, CV-00-0305-SA, 12/8/00, the Court explained that the first paragraph of the ALC's summary of Proposition 203 was misleading because it suggested that current law required English and Spanish instruction when current law provided ESL instruction to be in English. However, **the Court rejected the other challenges to the summary based on principles of laches**.

## COURT OF APPEALS CIVIL MATTERS

Division One of the Court of Appeals held that **A.R.S. §12-201.01(L) prevents an inmate from suing the state for a nonphysical injury**. However, the court also ruled that an inmate **may sue the Director of Corrections personally under 42 U.S.C. § 1983 provided the inmate alleges the director was personally involved in such misconduct**, such as by approving a custom and tradition of losing property, knowing the policy resulted in widespread deprivations and acting with deliberate indifference. *Tripati v. State of Arizona*, 1 CA-CV-00-0263, 12/19/00 . . . Division One of the Court of Appeals held that **an inmate's tort claim, filed more than 180 days after his injury but within 180 days after conclusion of a permissive grievance proceeding, may have been timely filed under equitable tolling principles even though the grievance proceeding was not mandatory for tolling purposes under A.R.S. § 12-820.01.** The court held that there was a material issue of fact precluding summary judgment if the inmate was excusably ignorant of the limitations period and the state would not be prejudiced by the late filing. The court remanded the case for further findings. *Kosman v. State*, 1 CA-CV 99-0616, 12/12/00 . . . A school board's **decision to appeal an adverse trial court judgment vacating its firing of a teacher was held null and void because the board's decision to appeal was made in executive session in violation of A.R.S. § 38-431.05.** *Johnson v. Tempe Elementary School Dist. No. 3 Governing Board*, 1 CA-CV-99-0555, 12/12/00 . . . An **heir to an estate is collaterally estopped from setting aside the accounting of the personal representatives when she originally failed to object to the accounting and could not show extrinsic fraud; claims the personal representatives failed to disclose the bases for their conclusions in characterizing property as community property did not amount to extrinsic fraud** where the representatives permitted full inspection of all the documents and the heir was given notice of the prior hearings. The representatives were not bound to comply with Ariz.R.Civ.P. 26.1 before the probate matter became a disputed claim. *In re Estate of Thurston*, 1 CA-CV-99-0629, 12/12/00 . . . Division One of the Court of Appeals expanded the rule applicable to overnight traveling employees and held that **an injury to a local traveling employee that occurred during the salesman's lunch break off the employer's premises was in the course of employment for purposes of worker's compensation.** The court also held that the employee's choice of a particular restaurant and his jaywalking that led to the accident did not render the claim noncompensable. *Bergmann Precision, Inc. v. Industrial Commission*, 1 CA-IC-99-0173, 12/7/00 . . .**Construing a pollution exclusion clause in an insurance policy**, Division One of the Court of Appeals held that **the clause did not apply to bacterial contamination of a water supply** because bacteria did not fit within the policy's definition of pollutants and the clause was limited to traditional environmental pollution. The victim of the pollution was also held to have standing to intervene in the insured's action against its insurers both pursuant to a Damron assignment and as an interested party under A.R.S. § 12-1832. The court reversed summary judgment for the insurers and directed entry of judgment for the victim. *Keggi v. Northbrook Property & Casualty Ins. Co.*, 1 CA-CV-99-0566, 12/5/00 . . . In Arizona's own election contest controversy, Division One of the Court of Appeals **construed A.R.S. § 16-101 as not to require circulators of initiative and referendum petitions to be residents**

**of the political subdivision of which the initiative or referendum would be placed on the ballot.** The Court reasoned that any such local residency requirement would not survive constitutional challenge and it had a duty to construe the statute so as to be constitutional. The court also held that the county board of supervisors and the county were not necessary or indispensable parties to the challenge to the referendum and that a corporation had standing as a citizen to challenge the referendum certification. *KZPZ Broadcasting, Inc. v. Black Canyon City Concerned Citizens*, 1 CA-CV-00-0128, 11/30/2000 . . . Division Two of the Court of Appeals held that a trial court did **not abuse its discretion by ordering a new trial after admitting a defendant's evidence of an improperly disclosed affirmative defense first raised at trial. The court also held that the plaintiff's failure to promptly object to the failure to disclose did not preclude raising the issue as a basis for new trial**. The court also affirmed the trial court's granting of a new trial on all issues of liability and damages, holding that **partial trials on limited issues should not be granted when the issues are inextricably intertwined** because the potential of prejudice to the parties requires that any doubts should be resolved in favor of a full trial. ***** *Englert v. Carondelet Health Network*, 2 CA-CV-00-0017, 11/28/00 . . . Agreeing with a prior decision from Division Two of the Court of Appeals, Division One held that **A.R.S. § 13-3111, prohibiting unemancipated minors in certain counties from knowingly carrying or possessing a firearm in a place open to the public, is unconstitutional as special legislation.** *In re Marxus B.*, 1 CA-JV-00-0013, 11/24/00.

### COURT OF APPEALS CRIMINAL MATTERS

Division One of the Court of Appeals held that **possession of equipment and chemicals to manufacture a dangerous drug is a lesser-included offense of manufacturing the same drug,** and a defendant's conviction on both charges violates the Double Jeopardy Clause. The court held it could correct the error by vacating the conviction for the lesser-included offense. ***** *State v. Welch*, 1 CA-CR-99-0324, 11/17/00 . . . Distinguishing *State v. Melendez*, 172 Ariz. 68, 834 P.2d 154 (1982), Division One of the Court of Appeals **affirmed admission of an inmate's confession to a legal representative where**

## CASE OF THE MONTH

The Arizona Supreme Court has held that an insurer impliedly waived the attorney-client privilege in a first-person bad-faith case in which the insurer expressly disavowed any defense of the advice of counsel but asserted a defense that its personnel, in rejecting stacking claims, relied on their reasonable understanding of the law at the time the claims were rejected.* ***State Farm Automobile Insurance Company v. Lee,*** CV-99-0407-PR, 12/8/00.

In this case, a class of policyholders who had more than one policy covering several cars sued their insurer for breach of contract, fraud, bad faith, consumer fraud and other unlawful acts based on its decision that they could not apply the uninsured and underinsured motorist coverages of those multiple policies to a single loss. The class alleged State Farm's position was based on an antistacking clause in the policies that did not comply with Arizona statutes. The Supreme Court ultimately ruled that the policy language did not comply with the statutory conditions in *State Farm Mut. Ins. Co. v. Lindsey,* 182 Ariz. 329, 332, 897 P.2d 631 (1995).

In *Lee*, State Farm contended that until *Lindsey* was decided it acted reasonably in interpreting the statute. Although State Farm denied it intended to show good faith based on reliance on advice of counsel, it also stated that its reasonableness defense had both subjective and objective components because of what its policies, the statute and the case law actually said and because of what its personnel actually knew and did, not what its lawyers told them to do.

When plaintiffs sought to discover communications from State Farm's counsel on these issues, the insurer raised the attorney-client privilege. The trial court allowed discovery to proceed because the advice of counsel was a part of the basis for State Farm's position. The Court of Appeals reversed by characterizing the insurer's defense on an objective assessment of the case law, statute and policy language. The Court of Appeals reviewed Arizona law prohibiting a party from asserting the privilege if it would place the claimant in a position with reference to that evidence that would be unfair and inconsistent by using the privilege as both a sword and shield. It then adopted the majority tripartite test stated in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975) that an implied waiver will be found if (1) assertion of the privilege was a result of an affirmative act by the party asserting the privilege, such as raising an affirmative defense; (2) by that act, the asserting party puts the protected information at issue by making it relevant to the case; and (3) application of the privilege would deny the opposing party access to information vital to his claim or defense. The Court of Appeals held the first two prongs of that test had not been met because State Farm's denial that it acted in bad faith was not an affirmative act.

The Supreme Court reversed the Court of Appeals and found an implied waiver. The Court agreed that Arizona generally followed the *Hearn* and fairness tests, but disagreed with the Court of Appeals' application of that test to the facts presented. It characterized State Farm's position, claiming it evaluated the statute, the policies and case law, as including information obtained from counsel. Although State Farm argued that it did act on its counsel's advice, it did not deny that its personnel's evaluation included its lawyers' advice on the state of the law.

The Court concluded that under the *Hearn* test, where "the litigant claiming the privilege relies on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law—but an evaluation that necessarily incorporates what the litigant learned from its lawyer—the communication is discoverable and admissible" (*Id.* at ¶15). The Court held that although the mere denial of allegations or an assertion that the denial was in good faith is not an implied waiver, the defense of its own interpretation of the law including what its employees knew amounted to an affirmative act and an implied waiver of the privilege. Reviewing prior Arizona cases, the Court held that "when a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question. [It] . . . cannot assert a defense based on the contention that it acted reasonably because of what it did to educate itself about the law, when its investigation and knowledge about the law included information it obtained from its lawyer, and then use the privilege to preclude the other party from ascertaining what it actually learned and knew" (Opinion at ¶23). In so holding, the Court approved the third approach found in the *Restatement (Third) Law Governing Lawyers* § 80 that the privilege is waived "for any relevant communication if the client asserts as to a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct" (Opinion at ¶27). The Court stated that the mere filing of a bad faith claim does not constitute an implied waiver of the privilege.

Justices Martone and McGregor dissented. Justice Martone contended that it was the plaintiffs, not State Farm, that injected the issue of privileged communications into the litigation by asserting bad faith, which necessarily includes a subjective component. Justice McGregor joined in Justice Martone's dissent and emphasized what she saw as the introduction of an intolerable uncertainty into the question of whether attorneys and clients can regard communications as privileged.

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**the State had not "induced" the inmate to use the representative to prepare for a parole violation hearing** and the inmate made the confession in the presence of a third person unrelated to such representation. *State v. Foster*, 1 CA-CR-99-0518, 11/30/00 . . . Division Two of the Court of Appeals held that **pointing an unloaded gun at an individual constituted a substantial "threat" of death or physical injury so that the defendant found "guilty except insane" pursuant to A.R.S. § 13-502 was properly committed to the jurisdiction of a psychiatric review board** for duration of the sentence pursuant to A.R.S. § 12-3994(B). *State v. Flynt*, 2 CA-CR-98-0498, 11/30/00.

*indicates a dissent

**The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continuously. Readers may visit the sites for the Supreme Court (www.supreme.state.az.us/opin) and the Court of Appeals (www.state.az.us/co).**

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