THE UPDATE

SAN DIEGO
DEFENSE LAWYERS

SPRING 2009

In this Issue

THE BOTTOM LINE

Case Title: Jassim v. Village Builders

Case Number: 06CC0095

Judge: Stock

Plaintiff's Counsel: Andy Weiss

Defendant's Counsel: Elizabeth Skane Jampol Zimet Skane and Wilcox

Type of Incident/Causes of Action: Construction defect case involving a large single family custom home located in Laguna Beach. Plaintiff sued the general contractor and a number of subcontractors including Antis Roofing and Waterproofing. The general contractor also sued for breach of contract and attorneys fees pursuant to a Crawford type indemnity provision. We argued unenforceability of contract due to a forged signature. General contractor argued enforceability through ostensible agency and ratification.

Settlement Demand: $200,000 CCP 998 from Plaintiff. $450,000 demand from the general contractor.

Settlement Offer: $100,000.

Trial Type: Jury

Trial Length: 12 weeks

Verdict: Defense verdict by Antis as to both the general contractor's case and the Plaintiff's direct action.

THE BOTTOM LINE

Case Title: Sheila Jaimes v. Jon and Tamra Williams

Case Number: 37-2007-00078453-CU-WT-CTL

Judge: Hon. Timothy Taylor

Plaintiff's Counsel: Megan Hutchins, Esq. and Jonathon C. Tam, Esq., of the Law Offices of Michael L. Tracy

Defendant's Counsel: Robert F. Tyson, Jr. of Tyson & Mendes

Type of Incident/Causes of Action: Employment Law, Harassment and Wrongful Termination.

Plaintiff Sheila Jaimes, a 56 year-old Mexican woman, was a housekeeper for Defendants Tamra and Jon Williams since June 2000. In August 2005, Defendants employed a house manager to supervise plaintiff. For eight months, the house manager allegedly made racially motivated statements to plaintiff. The house manager also physically pushed plaintiff and would often make her cry. The house manager threatened to deport plaintiff back to Mexico unless plaintiff learned better English.

On March 31, 2006, plaintiff complained of the harassment in writing. That same day, Defendants terminated plaintiff's employment. Defendants never investigated plaintiff's claim.

Plaintiff claimed she was harassed by Defendants' house manager because of her national origin, Mexico. Plaintiff also claimed she was wrongfully terminated by Defendants

PRESIDENT'S ★★★ MESSAGE

Here Comes Summer...Finding Balance

By Darin J. Boles

As we consider the three tenets on our logo, we find ourselves dealing with civility and integrity on a daily basis in our practices. We pride ourselves in maintaining our integrity and acting with civility in all we do.

With respect to balance, this area can sometimes be overrun with the press of business. Additional correspondence must be knocked out or depositions squeezed in that may replace the one empty time slot left in one's day. Whether it is a moment of solace, such as a lunch alone away from the office, a brief trip to the gym or a chance to get the car washed, the little things can add a lot to a day.

With summer upon us, it is important as defense lawyers to seek out that balance in our lives again. Not only is life short, but summer is shorter. You should make plans now for trips to the beach, drives up the coast and getaways with the family or with friends. We plan early in our cases so we can accomplish the necessary before the discovery cutoff. Likewise, we should get the fun stuff set up, too, long before the summer is over.

By taking time off, you will feel reinvigorated and recharged. Yes, the in-box will continue to grow in your absence, but you will be better equipped to tackle those new tasks with renewed energy when you give yourself a break.

Anyone can work all the time. You should set yourself apart by not only diligently taking care of your work, but also finding the balance to make it all the more worthwhile. Once you find the balance in the summer, keep it for the rest of the year, too.

UPCOMING BROWN BAG SEMINARS

Peterson Reporting
530 "B" Street, Suite 350, San Diego, CA 92101
with lunch included

June 9 - How to Select Experts

July 14 - Are you Crazy? Defending Psychiatric Claims

August 11 - Biomechanics for the Defense of Injury Cases

September 15 - Mediation for One, Mediation for All

October 13 - Crawford's Friends and Foes

November 10 - It's Big and It's Bad Faith

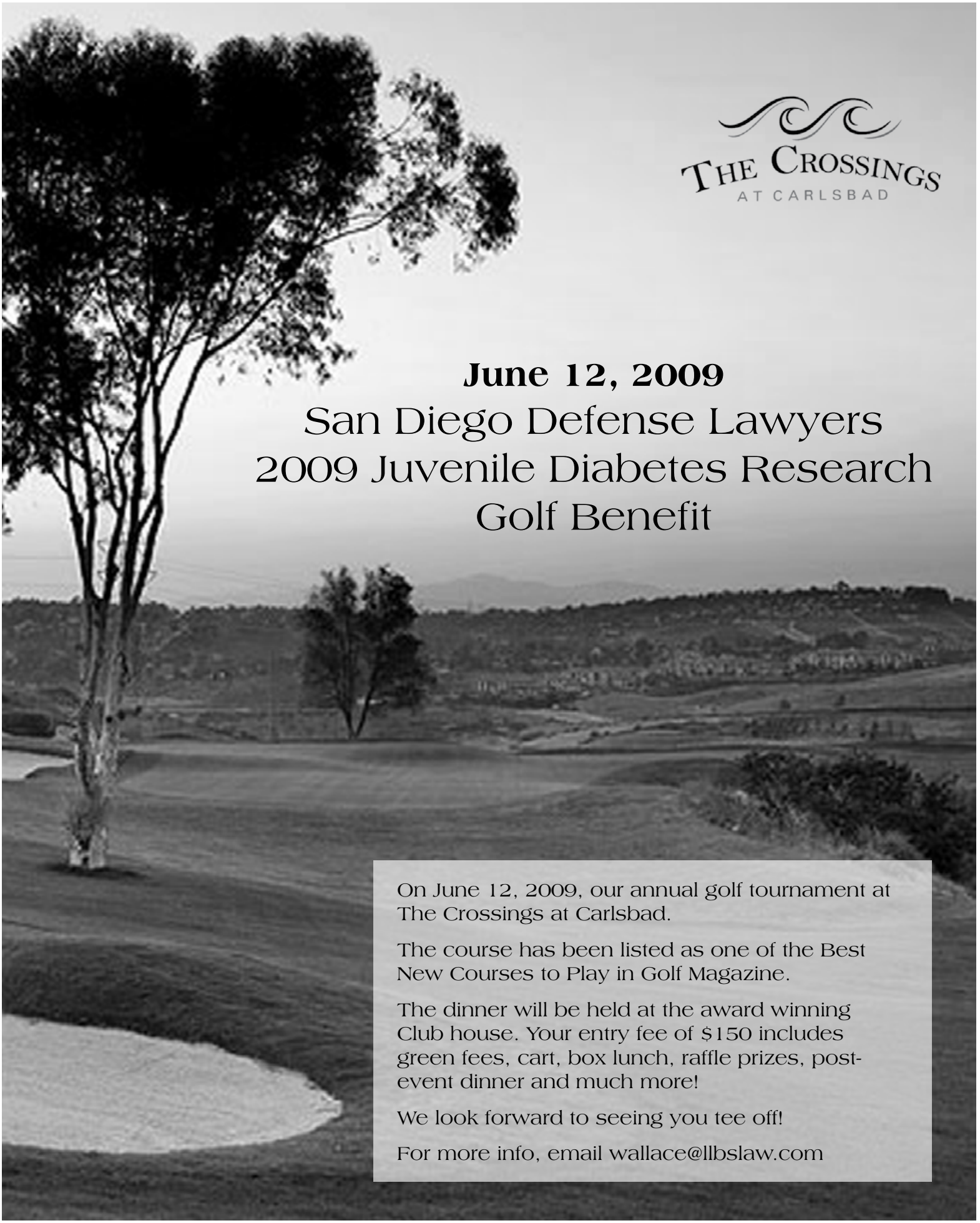
December 8 - Watch Out: Avoiding Evidentiary Pitfalls

EVENING SEMINARS

June 25 - Don't Let It Blow...Diffusing Damages

September - Mastering Opening Statements and Closing Arguments

December - Assume the Position: The Designated Driver DUI



June 12, 2009
San Diego Defense Lawyers 2009 Juvenile Diabetes Research Golf Benefit

On June 12, 2009, our annual golf tournament at The Crossings at Carlsbad.

The course has been listed as one of the Best New Courses to Play in Golf Magazine.

The dinner will be held at the award winning Club house. Your entry fee of $150 includes green fees, cart, box lunch, raffle prizes, post-event dinner and much more!

We look forward to seeing you tee off!

For more info, email wallace@llbslaw.com

because she reported this harassment. Defendants denied liability and damages. The house manager did admit telling plaintiff she needed to learn English and often tried to help her learn English. The house manager, of German origin, denied being a racist or ever physically abusing the plaintiff.

Due to the harassment and termination, plaintiff allegedly suffered from depression, sleeplessness, panic attacks, crying fits, and stress. She also lived in constant fear of similar harassment at her subsequent employment. Plaintiff underwent treatment for approximately one year.

Plaintiff suffered both economic and non-economic damages as a result of Defendants' conduct. Specifically, plaintiff sought to recover past lost earnings from April 1, 2006 to February 1, 2008. These earnings were over $50,000. Plaintiff also sought to recover an unspecified amount for emotional distress, but certainly more than $100,000. Finally, plaintiff's counsel intended to recover attorney's fees and costs as prevailing party of over $100,000.

Settlement Demand: $100,000

Settlement Offer: $15,000, with indications of more money to settle

Trial Type: Jury

Trial Length: 3 days

Verdict: Defense Verdict on March 18, 2009

The jury found Jon and Tamra Williams were not responsible for harassment or wrongful termination of their former housekeeper, plaintiff Sheila Jaimes. The jury voted 9-3 in Defendants favor on the harassment cause of action and 12-0 on the wrongful termination cause of action. (Despite the fact defendant Tamra Williams did not appear for trial and only plaintiff was allowed to introduce select deposition testimony for her; the jury was persuaded the alleged harassment never occurred. The jury agreed with various defense themes which questioned the credibility of plaintiff and stressed the importance of "home.")

Post Trial Motions: Defendants will file a post-trial motion for attorney's fees and costs of over $100,000.

THE BOTTOM LINE

Case Title: Richard A. Lyons et. al. v. Wawanesa General Insurance Company

Case Number: E044086/E045236

Trial Court Judges: Kyle S. Brodie, Kurt J. Lewin, and Michael A. Sachs

Court of Appeal Justices: Barton C. Gaut, Art W. McKinster, and Douglas P. Miller

Counsel for Plaintiffs/Appellants: Law Offices of Brian S. Ostler, Brian C. Ostler and William L. Smith.

Counsel for Defendant/Respondent: Law Of-

CALIFORNIA SUPREME COURT HOLDS THAT PRE-DISPUTE BINDING ARBITRATION AGREEMENTS BETWEEN ATTORNEYS AND CLIENTS ARE ENFORCEABLE

Alan Greenberg

By Alan E. Greenberg
Wood Smith Henning & Berman

On January 26, 2009 the California Supreme Court held in *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 2009 Cal. LEXIS 125 that clients in fee disputes with lawyers do not necessarily have a right to a trial if they agreed beforehand to binding contractual arbitration.

The case arose out of an agreement between Dr. Richard Schatz and Allen Matkins, which had represented him in a partnership dispute and an unrelated easement dispute. Schatz paid about $ 180,000 of fees but stopped making payments prior to a trial over the easement. The firm billed him for another $170,000 in fees which he did not pay because of alleged conflict of interest in that the firm also represented his title insurer in an unrelated suit.

Allen Matkins moved to enforce a written agreement for binding arbitration that the client had signed when firm first agreed to represent Schatz, but yielded when Schatz insisted on nonbinding arbitration under California's Mandatory Fee Arbitration Act ("MFAA"), Bus. & Prof. Code, §6200 et seq. The arbitration conducted by the San Diego County Bar Association went against Schatz, who then demanded a trial de novo. The law firm then insisted that Schatz comply with the original contractual agreement by submitting to binding arbitration instead.

The San Diego Superior Court ruled in Schatz' favor, relying on *Alternative Systems Inc. v. Carey* (1998) 67 Cal. App. 4th 1034, which held that the MFAA allowed a client who rejected a nonbinding arbitration award to proceed to trial. That ruling was affirmed by the Fourth District Court of Appeal. Justice McConnel, writing for the Court of Appeal, held that the legislative intent in adopting the MFAA was to give the client the right to decide whether to litigate or arbitrate a fee dispute, and to make arbitration nonbinding absent a post-dispute agreement to the contrary, as a matter of public policy.

In rejecting Justice McConnel's rationale, the California Supreme Court appeared to disapprove the ruling in *Alternative Systems*, relying instead on Justice Ming Chin's concurring opinion in *Aguilar v. Lerner* (2004) 32 Cal. 4th 974 which was joined in by Justices Marvin Baxter and Janice Rogers Brown. Justice Ming Chin wrote in *Aguilar* that the client was required to arbitrate not only because he waived his rights by suing his lawyer for malpractice but "for a far more fundamental reason: An agreement for binding arbitration between an attorney and a client is enforceable under the California Arbitration Act whether or not the client requests and receives nonbinding arbitration under the MFAA."

The unanimous opinion by Justice Carlos Moreno now clarifies that while an arbitration under the MFAA is nonbinding and lets either party seek a trial de *novo* it also allows binding arbitration if both parties agree in writing. "The subdivision [subdivision (a) of Bus. & Prof. Code, §6204] does not purport to speak to whether the parties to a *nonbinding* MFAA arbitration may otherwise agree, or have agreed, on how to resolve the case if the MFAA leaves one or both parties dissatisfied. The subdivision does not foreclose the possibility that, under a general agreement between the parties, the nonbinding MFAA process should be followed by *binding* arbitration, rather than by a lawsuit." (Emphasis in original) The Court also rejected Schatz' argument that the MFAA impliedly repealed the California Arbitration Act ("CAA").

The Court remanded the case to the Fourth District Court of Appeal to determine whether Allen Matkins could actually compel contractual arbitration under the facts of this case.

Timing is Everything: Scheduling Expert Depositions to Your Advantage

By Deborah Cumba, Esq.
Wilson Elser Moskowitz Edelman & Dicker

Even a slight advantage can help defense counsel ultimately prevail in a case. Particularly in product liability cases, defense counsel usually has the experience of representing the same manufacturer with the same or similar product lines, allowing defense counsel to have an arsenal of experts available for each product type. On occasion, defendants can also outspend plaintiffs in terms of expert fees.

While plaintiff's counsel often has the advantage at the outset of litigation with respect to experts, the tables turn when it comes to expert depositions. Before litigation commences plaintiff typically has possession and control of the allegedly defective product. This allows plaintiff counsel to retain expert witnesses even before filing the complaint. Initially, time is in plaintiff's favor because experts may examine the product, even before the defense is aware a lawsuit is forthcoming. Having unfettered access to the product, plaintiffs' counsel and their experts may perform inspections and/or testing on plaintiff's own timetable. Moreover, plaintiff's expert can use this information to guide plaintiff's counsel through discovery, allowing plaintiff counsel to focus on the key issues.

Because plaintiff has a distinct advantage with the use of expert witnesses at the outset, the issue of the timing of expert depositions is critical not only for defense counsel's strategic purposes, but also for an efficient litigation timetable. Since most plaintiffs' counsel view producing their own experts for deposition last as an advantage, they often send expert deposition notices as soon as allowed so that they can take defense experts first. However, early on in products liability cases and other technical cases, defense counsel should strive to come to a general agreement with plaintiff counsel to take plaintiff's experts before defendant's experts are deposed.

Under the current rule, upon receipt of an expert witness list, any party may depose the other party's experts. (C.C.P. §2034.410.) While there is no code section setting the priority of depositions based on when a notice is served, the Los Angeles Superior Court has a local rule stating "[w]hen a deposition is noticed by another party in the 'reasonably near' future, counsel ordinarily should not notice another deposition for an earlier date without the agreement of opposing counsel." (L.A. Sup. Ct. Rule 7.12 (e)(2) (emphasis added).) This general rule is what parties rely on when arguing the priority of depositions based on notice. Unfortunately, this argument does not take into consideration the reality of highly technical products liability cases that are dependent upon expert testimony.

In a product liability case, plaintiff has the burden of proving that a defect existed and that this defect caused plaintiff's injuries. Consequently, because the burden of proof is on plaintiff, it should be plaintiff's experts who provide expert opinions via deposition to support the alleged defect or contention that a particular event occurred. Only after plaintiff's experts have provided their opinions should defense experts be deposed.

Although there is no case law that mandates this practice, defense counsel should make arrangements early on with plaintiff's counsel either by formal stipulation or written agreement to set the deposition order so defense experts will be deposed only after plaintiff's experts have provided their opinions. Setting expert deposition schedules this way reduces time and expense and promotes judicial economy. Additionally, this approach avoids multiple depositions and forces plaintiffs to conduct an early evaluation of plaintiff's own strengths and weaknesses of the case.

Scheduling expert depositions in this order also allows defense experts to learn about plaintiff's theories regarding accident reconstruction or alternative designs before being deposed. Subsequently, defense experts may analyze plaintiff's accident reconstruction or alternative design theories and perform their own necessary testing to confirm, challenge or rebut plaintiff's accident reconstruction or alternative design. Knowing plaintiff's theories and opinions allows defense experts to adequately and effectively respond and address plaintiffs' experts'opinions at the time of the defense expert's deposition.

The order of expert depositions is important because without understanding plaintiff's expert's opinions regarding an alleged defect, it is impossible for the defense experts to respond or formulate any specific opinions. As a result, defense experts would be subject to being deposed twice: once *before* plaintiff's experts where only background information could be ascertained; and a second time *after* plaintiff's experts' depositions where the defense expert is in a position to actually respond to plaintiff's theories. It is inherently unfair and unduly burdensome to allow plaintiff to depose defense experts twice. This is the proverbial "two bites at the apple," which severely prejudices the defendant and causes unnecessary delays.

An additional advantage of such a deposition schedule is that it forces plaintiff's experts to evaluate the case early and may lead to a favorable settlement for the defense. Early evaluation may reveal that plaintiff's alternative design or accident reconstruction theory is not as strong as originally believed. Consequently, early settlement negotiations may be explored prior to costly and time-consuming expert depositions. Even if the case does not settle, this sequence of expert depositions encourages effective expert depositions and ensures that the defense experts are properly prepared. Additionally, this approach allows defense counsel to use the last thirty days before trial wisely instead of coordinating additional depositions of experts who have already been deposed.

Therefore, deposing plaintiff's experts prior to defense experts significantly reduces delays, expert fees, and scheduling nightmares. It also fosters more productive depositions of defense experts. As such, defense counsel is encouraged to make arrangements early in litigation for plaintiff's experts to be deposed before the defense experts.

fices of Kenneth N. Greenfield, Kenneth N. Greenfield and Alexandra N. Selfridge

Type of Incident/Causes of Action: Breach of Insurance Contract/Breach of the Implied Covenant of Good Faith and Fair Dealing

Facts:

Wawanesa issued the Lyons a homeowner insurance policy for the period of November 7, 2003 to November 7, 2004. In May of 2004, the east side of the Lyons' home sustained heat and smoke damage when their neighbor's home caught on fire. The Lyons argued that Wawanesa was required not only to pay for repairs to the damaged portion of their home, but for the undamaged portions as well. Wawanesa disagreed.

Believing that Wawanesa had underpaid their claim, the Lyons filed a civil complaint (Lyons I) alleging Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing (insurance "bad faith"). The trial court granted Wawanesa's Motion for Summary Adjudication as to the Lyons' cause of action for insurance "bad faith" and their request for punitive damages, finding that the disagreement between Wawanesa and the Lyons had centered around a "genuine dispute."

Shortly after the Motion for Summary Adjudication was granted, Wawanesa made a $5,000 Offer to Compromise regarding the remaining cause of action for Breach of Contract. (Code Civ. Proc. §998.) Relying upon White v. Western Title Insurance Co. (1985) 40 Cal.3d 870, the Lyons argued that the "unreasonably low" statutory offer entitled them leave to file a Supplemental Complaint, reinstating their cause of action for insurance "bad faith." The trial court disagreed.

Although the Lyons' remaining cause of action for Breach of Contract was still pending in Lyons I, the Lyons filed another civil complaint for Breach of the Implied Covenant of Good Faith and Fair Dealing, alleging additional post-complaint "bad faith" litigation tactics on the part of Wawanesa (Lyons II). Wawanesa's demurrer to the Lyons' First Amended Complaint in Lyons II was sustained without leave to amend.

The Lyons subsequently appealed Lyons I, arguing that the trial court erred in granting the Motion for Summary Adjudication, and that they should have been permitted to file a Supplemental Complaint. The Lyons also appealed Lyons II, contending that the trial court erred in sustaining Wawanesa's demurrer. The two appeals were later consolidated.

Appellate Decision: The Court of Appeal concluded that the trial court's three rulings were proper, and awarded Wawanesa its costs on appeal.

BROWN BAG PROGRAMS

Brown Bag Series Summary – April 14, 2009

Bias - Get Rid of It! Preventing Bias in the Law Office

By Michael Parme, Esq.
Lorber Greenfield & Polito LLP


Wendy Tucker

Wendy Tucker, Esq. is an expert on bias in the workplace. As a litigator, her practice encompasses all phases of litigation, including discovery, mediation, arbitration, trial, writs, and appeals. In addition, she provides a broad range of counseling services, such as assisting employers with hiring decisions, presenting seminars, reviewing employee handbooks and company policies, overseeing employee discipline, conducting investigations, and participating in the termination process. San Diego Defense Lawyers invited Ms. Tucker to speak about the issue of bias in the legal profession to help attorneys obtain the mandatory one hour MCLE credit on this topic.

Her presentation, entitled "Bias-Get Rid of It!" focused on the sources of bias in the workplace, the legal and practical consequences of failing to address the problem, and strategies for stimulating awareness of the bias problem. Ms. Tucker's presentation emphasized that lawyers, as supervisors and leaders, are uniquely poised to promote a healthy bias-free working environment.

What Is Bias?

While bias has several definitions, it most commonly refers to a preference or an inclination, especially one that inhibits impartial judgment. Bias exists in many contexts, but it is most prevalent in the areas of gender, race, religion, sexual orientation, age, and disability. Ms. Tucker stressed that bias in the workplace is rarely deliberate. Rather, it often stems from either a failure to recognize bias or a failure to advocate corrective action.

To illustrate how the bias problem has impacted the legal profession, Ms. Tucker focused on how gender bias has shaped the character of the legal profession. Most of us are familiar with anecdotal evidence of bias against women, such as stories of unequal treatment, insulting or dismissive comments, lack of mentoring and lower pay for equivalent positions. Indeed, Ms. Tucker shared that opposing counsel often mistake her for a court reporter because she is female. She also provided compelling statistical support. A national poll showed more than 40% of first year law students enrolled in the past 20 years have been female. Yet, females make up only 17% of law firm partners. Moreover, females make up only 16% of U.S. District Court judges, 17% of U.S. Court of Appeal judges, and 23% of state court judges. According to Ms. Tucker, this evidence suggests a pervasive trend of gender bias within the legal community.

Ms. Tucker also discussed bias in the context of sexual harassment and emphasized common misconceptions about harassment. For example, it need not be motivated by sexual desire or directed at the victim. Harassing conduct may even occur between individuals of the same sex. The vast majority of cases involve a "hostile work environment," which may be created through verbal or nonverbal conduct. Repeated requests for dates, sexual jokes, inquiries into a person's personal life, and comments regarding appearance and anatomy constitute verbal harassment. Nonverbal conduct such as suggestive eye contact, circulating inappropriate pictures or emails, and physical touching also create a hostile work environment.

Since bias is not always easy to recognize, it is necessary to implement strategies specifically aimed at eliminating it. Ms. Tucker stressed the consequences of failing to take proactive measures.

What Are the Consequences of Bias?

Emphasizing that bias has a broad range of consequences, Ms. Tucker focused her analysis on the separate ramifications flowing from

(1) the lawyer's employment relationship with his or her law firm, (2) State Bar rules governing professional conduct, and (3) the professional reputation of the attorney or law firm in the community.

An attorney can be held individually liable for discrimination or harassment. According to Ms. Tucker, an inappropriate email sent by a lawyer to a secretary or paralegal could trigger civil liability. Moreover, since lawyers direct the manner in which paralegals and secretaries carry out their responsibilities, most lawyers are supervisors. Accordingly, a law firm can be held strictly liable where an attorney engages in improper conduct. It is critical that lawyers interact with co-workers in a manner commensurate with their professional relationship while in the workplace. Furthermore, they must be proactive in preventing non-employees, such as clients or vendors, from harassing or discriminating against employees of the firm. Thus, in order to minimize the risk of civil liability, lawyers must not only refrain from bias conduct, they must safeguard co-workers from bias.

A lawyer can also be disciplined by the State Bar for engaging in bias conduct. For instance, Rule of Professional Conduct 2-400 authorizes the commencement of disciplinary investigation or proceedings where an attorney is adjudicated by a competent court.

Finally, bias in a law office could potentially damage the professional reputation of a lawyer or law firm. Especially in smaller legal communities, a tarnished reputation may have long-lasting effects. It can make the internal work environment of the law firm uncomfortable, adversely impact client relationships, and negatively affect recruiting.

For these reasons, it is imperative that law firms implement effective policies to prevent bias from entering the workplace.

How Do We Get Rid of Bias?

According to Ms. Tucker, we can never fully eliminate bias. Nevertheless, we can stimulate dialog about the problem by proactively building awareness of the issue on both the institutional and individual level.

On the institutional level, management can build awareness of bias by implementing equal opportunity policies, anti-harassment policies, and routine training seminars. However, Ms. Tucker emphasized such programs must be effective. For example, a diversity committee should set goals, hold regular meetings, and accomplish objectives. Likewise, policies and regulations implemented to eliminate bias must do more than pay "lip service" to the problem. They must be followed and enforced as necessary.

As leaders in the workplace, lawyers can eliminate workplace bias by setting a positive example. Ms. Tucker emphasized that subtle words or actions are sometimes the most effective tools for correcting bias statements or conduct. Furthermore, lawyers should be conscious about treating all co-workers equally, even if it means extending beyond one's comfort zone to forge relationships with less familiar colleagues. As Ms. Tucker suggested, offering a lunch invitation to co-worker you do not know well is an excellent way to cultivate new relationships and vitiate bias.

While bias will probably never be fully eliminated, there are many approaches that may potentially minimize its prevalence. However, all these strategies begin with a fundamental commitment to achieving this goal. When this commitment is nurtured through prudent employment policies and strong day to day leadership, bias in the law office can be marginalized.

THE BOTTOM LINE

Case Title: Richard Rogers v. Nancy Peterson

Case Number: 37-2007-00061885-CU-PA-EC

Judge: Hon. Laura Halgren

Plaintiff's Counsel: John B. Little, Esq.

Defendant's Counsel: Cherie A. Enge, Esq.

Type of Incident/Causes of Action: Plaintiff had three level cervical fusion performed by Dr. Sanjay Ghosh following a low speed sideswipe collision. Defendant exited a driveway onto a two lane road and almost completed her left turn when plaintiff struck her. Independent witness and defendant contend plaintiff did not attempt to slow down to avoid collision. We obtained subrosa on plaintiff two weeks before trial and used it as rebuttal evidence. Plaintiff claimed damages for past medical expenses, future expenses in form of medication, pain pump and/or neuro-stimulator implant and past and future lost earnings and earning capacity. He also had several hundred thousand dollars for loss of household services.

Settlement Demand: $1,100,000

Settlement Offer: $50,000; ($30,000 to plaintiff and $20,000 to plaintiff in intervention - Workers Compensation Insurer)

Trial Type: Jury/Judge Jury

Trial Length: 7 days

Verdict: Defense (11-1 on causation)

THE BOTTOM LINE

Case Title: Dorry Rada & Mark Peterson v. Cox Communications & Darno DeJohnette

Case Number: 37-2007-00054790-CU-NP-NC

Judge: The Honorable Michael B. Orfield

Plaintiff's Counsel: Khashayar Law Group, Daryoosh Khashayar, Esq.

Defendant's Counsel: Lorber, Greenfield & Polito, LLP, Steven M. Polito, Esq. & Renata H. ElWardani, Esq.

Type of Incident/Causes of Action: Negligence and False Arrest causes of action alleged against Defendants following a citizen's arrest of Plaintiffs by Cox investigator, for Plaintiffs' theft of cable services. Damages claimed: pain and suffering and punitive damages.

Settlement Demand: $75,000.00 demand at start of litigation; CCP Section 998 Offers of $5,900.00 per Plaintiff, served one week prior to trial.

Settlement Offer: At start of litigation, Defendants offered a waiver of defense fees and costs.

Trial Type: Jury

Trial Length: 6 days

Verdict: Defense

Notices for Entry of Judgment in the 21st Century -- What is the Effect of E-service?

By Lisa Willhelm Cooney

With complex litigation growing and a rise in the use of electronic service providers, the procedural impact of electronic service is becoming increasingly important to litigation practice. The courts and the Judicial Council are analyzing the impact of electronic service on the time for filing a notice of appeal. Two recent cases denied motions to dismiss the appeal as untimely based on electronic service, but they offer different perspectives.

In *Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158 (*Citizens for Civic Accountability*), the First Appellate District, Division Five, held that electronic service of a judgment by a court clerk does not trigger the 60-day appeal period prescribed by California Rules of Court, rule 8.104(a)(1).

The Contra Costa Superior Court designated the matter complex litigation and issued a standing order mandating electronic filing and service. LexisNexis File & Serve sent the parties an e-mail message indicating service of a judgment. The e-mail directed the parties to a website where they signed in to open the document. The document bore an "electronically filed" file stamp.

The Court of Appeal analyzed California Rules of Court, rule 8.104(a)(1), which requires a clerk of the court to mail either a "Notice of Entry" or a file-stamped copy of the judgment showing when it was mailed. (*Citizens for Civic Accountability, supra*, 167 Cal.App.4th at pp. 1160-1161.) The court narrowly construed the term "mail" to apply only to postal delivery. (*Id.* at p. 1163.) The court rejected the idea that this holding is inconsistent with the e-filing and e-service order as a practical matter. It concluded that in the ordinary case, a party triggers the time to appeal by serving a notice of entry of judgment. The court was concerned that allowing a clerk's e-mail to trigger an appeal period would create a trap for the unwary. (*Id.* at p. 1164.)

In *Insyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, the Sixth Appellate District held that electronic service of a notice of entry of judgment or a file-stamped copy of a judgment *can* trigger the deadline for appeal.

As in *Citizens for Civic Accountability*, the Santa Clara County Superior Court deemed the action to be complex litigation and issued a standing order authorizing electronic filing and service of documents via an electronic service provider. After a jury trial, the court entered judgment, which was electronically filed on the court's web site. An e-mail notice was transmitted to the attorneys of the parties identifying the judgment and giving instructions for accessing the document on the web. (*Insyst, Ltd. v. Applied Materials, Inc., supra*, 170 Cal.App.4th at p. 1133.) Thereafter, the clerk of the court mailed a document entitled "Notice of Entry of Judgment and Certificate of Mailing" to the attorneys. Plaintiff filed a notice of appeal 60 days after the mail service of the notice of entry, but 61 days after the e-mail notice.

The court acknowledged the holding of *Citizens for Civic Accountability* that "mails" in rule 8.104(a)(1) means employing postal delivery, not e-mail. However, the *Insyst* court examined Code of Civil Procedure section 1010.6, allowing for electronic filing and service. The court focused on the phrase "'electronic service . . . may be authorized' '[w]here notice may be served by mail.'" The court concluded this language "intended to authorize electronic service of notice as an alternative to service by mail and thereby to equate these methods of service." (*Id.* at p. 1138.) The *Insyst* court rejected the notion that while party could trigger the appeal time under rule 8.104(a)(2) by using electronic service, a court could not similarly trigger the time with electronic service. (*Id.* at p. 1139.)

Even though the *Insyst* court held that electronic service of a document may trigger the appeal time, it went on to hold that electronic notice simply providing a website with a document description and a hyperlink to an image of the document does not trigger the time to appeal under rule 8.104. The court suggested the document

should be attached to the e-mail. The court concluded, "We see no provision in the new statute, section 1010.6, or its implementing rules that authorizes serving a document by giving a party notice of where he or she may find it. Rule 8.104 insists that certain formalities be observed in order to create a triggering document, either proper titling of a notice of entry of judgment, or obtaining a file-stamped copy of the judgment itself. We do not regard an e-mail explanation of where to electronically locate a judgment as the equivalent of the electronic transmission of the document. [Citation omitted.] Absent evidence that 'a file-stamped copy of the judgment' was electronically transmitted to plaintiff, we conclude that its notice of appeal was timely. . .." (*Insyst, Ltd. v. Applied Materials, Inc., supra*, 170 Cal.App.4th at p. 1140, emphasis added.)

In response to the *Citizens for Civic Accountability* case, the Judicial Council is proposing an amendment to rule 8.104(a)(1) to provide that the time for filing a notice of appeal runs from when the superior court clerk "serves," rather than "mails," a judgment or notice of entry of judgment. The proposal also would amend the advisory committee comment to clarify that service can be made in any manner permitted by the Code of Civil Procedure, including electronic service when permitted under Code of Civil Procedure section 1010.6 and rules 2.250-2.261. The proposed rule may be found at http://www.courtinfo.ca.gov/ invitationstocomment/documents/spr09 03.pdf.

The deadline for comment is June 17, 2009.

The current proposed rule amendment does not directly address the issue of whether or not an e-mail giving notice, without attaching the actual document, is sufficient to trigger the appeal deadline. Therefore, until this issue is clarified either by the courts or the Judicial Council, when you get a favorable judgment and you want to trigger the time for appeal, be careful about relying solely on electronic service providers to give notice. Even if your case uses electronic service, you may consider sending opposing counsel an e-mail *attaching* the notice of entry of judgment or the conformed copy of the judgment–or simply use the tried and true method of service by snail-mail.

Ms. Cooney, a partner with Lewis Brisbois Bisgaard and Smith LLP, is a Certified Specialist in Appellate Law as recognized by the State Bar of California Board of Legal Specialization. Her practice focuses on civil appeals, writs and administrative mandamus matters. Her e-mail is cooney@lbbslaw.com.

Multiple Parties in an Action May Limit Enforcement of Arbitration Agreements

By Lisa Willhelm Cooney

A recently published California opinion from Division Two of the Second Appellate District, *Birl v. Heritage Care LLC* (2009) 172 Cal.App.4th 1313, held that the trial court has broad discretion under Code of Civil Procedure section 1281.2, subdivision (c), to deny a petition to compel arbitration when the following criteria are met: (1) there are third parties (either co defendants or plaintiffs) who are not bound by the arbitration agreement (2) there is a pending court action arising out of the same transaction or series of transactions and (3) there is a possibility of conflicting rulings on common issues of fact or law.

In the *Birl* case, decedent's wife and adult daughters sued Kaiser and its various entities, along with three residential nursing facilities, for care rendered to the decedent allegedly resulting in his death. Plaintiffs sued in distinct capacities as successors in interest, as persons having a statutory right to pursue a wrongful death action, and as individuals. One of the nursing facilities, Heritage Care LLC, appealed the denial of its petition to compel arbitration of the following causes of action: elder abuse, wilful misconduct, negligence, breach of contract, fraud, unfair business practices, loss of consortium and negligent infliction of emotional distress. Heritage did not petition to compel arbitration of the claims for wrongful death or breach of statutory duties and resident's rights.

The appellate court analyzed each of the elements of section 1281.2, subdivision (c). As to the first element, the court held that "third parties" include not only co-defendants, but also plaintiffs who sue in various legal capacities. (*Birl v. Heritage Care LLC, supra*, 172 Cal.App.4th at pp. 1320-1321.)

As to the second element, the Court of Appeal held that all of the defendants were involved in "a series of related transactions" because the complaint alleged that all defendants contributed to the injuries. It made no difference to the court that Heritage's services were separated by time from the sequential services provided by other facilities. "A temporal separation does not necessarily negate the existence of the requisite 'series of related transactions.' . . ." (*Birl v. Heritage Care LLC, supra*, 172 Cal.App.4th at pp. 1318-1319.)

The court found the third element was met because a "myriad of conflicting rulings are possible" unless all of the defendants are joined in one action. (*Birl v. Heritage Care LLC, supra*, 172 Cal. App.4th at p. 1320.) "Different triers of fact in different proceedings could come to different and conflicting conclusions as to which party or parties were liable, and also could arrive at different conclusions in apportioning the amount of damages." (*Ibid*.)

Thus, in multi party cases, trial courts will have broad discretion to deny petitions to compel arbitration unless you can make an argument that the issues to be arbitrated are entirely severable from the matters to be litigated. An open issue may be whether or not one could successfully argue that elder abuse claims and intentional tort claims are sufficiently severable from wrongful death and negligence claims to require arbitration of those claims in the appropriate cases.

Ms. Cooney, a partner with Lewis Brisbois Bisgaard and Smith LLP, is a Certified Specialist in Appellate Law as recognized by the State Bar of California Board of Legal Specialization. Her practice focuses on civil appeals, writs and administrative mandamus matters. Her e-mail is cooney@lbbslaw.com.

CIVILITY, INTEGRITY, BALANCE & THE JANUARY 24 INSTALLATION DINNER

Ken N. Greenfield, Esq.
Law Offices of Kenneth N. Greenfield

The 25th Annual Installation Dinner at the Hard Rock Hotel this year was a complete success. More than 200 people were in attendance; thousands of dollars was raised for the American Cancer Society; SDDL installed its new President, Darin Boles and his Executive Board, as well as the entire new Board of Directors for the year 2009; and, this year's special honorees made the event an occasion not soon to be forgotten.

Celebrating 25 years since its inception, SDDL honored the group of young lawyers whose idea it was long ago to create the Organization. Hon. Adrienne Orfield, Hon. Michael Orfield, Hon. David Danielsen, Hon. Ron Johnson, and attorneys Buz Sulzner and Jack Winters arrived, tuxedos and all (except Adrienne, of course, who was wearing a beautiful bejeweled dress!) looking just as good as they did a quarter century earlier. Still full of spunk, zeal, wit and wisdom, these six pioneers of SDDL also showed emotion. They were truly touched by the recognition given to them by the Organization.

They spoke passionately about the importance of the practice of law and how meaningful the SDDL Organization was to the defense lawyers in the early days. They were pleased to see that the Group was thriving after all these years. They were particularly impressed with the fact that the membership numbers had reached nearly 400.

They told us about the early days of the insurance defense practice and the camaraderie the defense community had at that time. They discussed the importance of professional behavior among lawyers (Civility), as well as the need for lawyers to be trustworthy and honest and to keep one's word (Integrity).

Incoming president Darin Boles and his wife, Sharon Lawrence

Cocktails begin a wonderful evening

Danielle and Earl Nelson. Ms. Nelson as the chair of the installation dinner was instrumental in it's success

Mary Pendleton of Balestreri, Pendleton & Potocki raises her glass to 'cheers' another 25 years!

Kim Rawers, Sheila Trexler and Helen Larchmiller

There was a bit of confusion over the meaning of the third of our slogan words, however. This was probably due to my failure to explain the concept as I was supposed to do in my speech at the Installation Dinner. I forgot to do so in my haste to hand over the crown to the next President, go back to my seat and start drinking.

Darin Boles is sworn in by Judge Herbert Hoffman (ret.)

In any event, one Honoree thought the word "Balance" in our "Civility, Integrity, Balance" slogan was meant to reference some sort of emotionally healthy state of mind. Yet another Honoree thought the word focused on the need to extend equal time to our personal and work lives. All good thoughts and all good ideas. However, lest we forget the original purpose behind our use of the word "Balance" in our slogan, here were the thoughts:

"We are San Diego's defense lawyers. We are an essential part of the legal system. Although we rarely, if ever, get the kind of glory that consumer attorneys get with their million dollar verdicts, we do something equally important. We provide the balance. We temper the system by rejecting the frivolous claims, and we provide the funds to respect the genuine ones. And, we do it all with a sense of professionalism. Ask any judge. The defense lawyer is known in town for his/her respect for both the system and its players, including judges, court personnel, and opposing counsel. That's who we are. It's all about Civility, Integrity, and Balance." President's Message, The Update, Spring 2008

So, there you have it. Yes, we can only hope to be emotionally balanced, and yes, we should certainly be spending equal time with our families. But we do our best service to justice and the legal community when we take to trial the good cases and we settle the bad ones. Therein lays the Balance.

The Outstanding Young New Lawyer Award Recepients - Patrick Kearns of Wilson Elser Moskowitz Edelman & Dicker, Bethsaida Obra White of the Law Offices of Kenneth N. Greenfield, and Kevin Gupta of Lorber Greenfield & Polito

The steering commitee

The incoming board of directors is sworn in

A full house

The Ledbetter Effect: Staying on the Right Side of the Fair Pay Act

By Natasha L. Wilson,
Greenberg Traurig, LLP

On January 29, 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (the Ledbetter Act), the first real piece of legislation of his administration. The Ledbetter Act amends Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973 to clarify that a discriminatory compensation action occurs each time a discriminatory paycheck is issued. What this means for employers is the likelihood of more pay discrimination lawsuits looming on the horizon. Indeed, more individuals will be able to continue their lawsuits instead of having their cases thrown out because they are time-barred. However, this does not mean that employers must pay all their employees in the same job classifications the same from this point forward to avoid a pay discrimination lawsuit. Some simple actions by employers now will help curb the effects of the Ledbetter Act going forward.

Background on the Supreme Court's Ledbetter Decision

Plaintiff Lilly Ledbetter retired in 1998 after working for 19 years at Goodyear in Gadsden, Alabama. She filed a complaint with the EEOC in March 1998, alleging that men in her plant doing similar work were paid 15 to 40 percent more throughout her employment. Ultimately, she filed a Title VII gender discrimination lawsuit against Goodyear. Ledbetter argued that the cumulative effect of the alleged discrimination over many years led to her being paid significantly less than her male counterparts by the time she retired from Goodyear. Ledbetter claimed that she did not become aware of this alleged pay disparity until the end of her tenure when someone left an anonymous note in her mailbox indicating that she was getting paid less than her male counterparts. Goodyear argued that Ledbetter's claims were time-barred because they were predicated on decisions that occurred more than 180 days before she filed her EEOC charge. Ledbetter argued that the issuance of each paycheck constituted a distinct discriminatory act that should trigger a new statute of limitations period.

In a 5-4 decision, the Supreme Court rejected Ledbetter's argument and held that "a pay setting decision is a discrete act that occurs at a particular point in time." Thus, according to the Court, Goodyear's initial decision to pay Ledbetter less than her male counterparts was the discriminatory act that triggered the 180-day filing requirement with the EEOC, and Ledbetter's claims were therefore time-barred. The Court expressly held that the subsequent acts of issuing paychecks to Ledbetter did not constitute new Title VII violations and did not commence new charge-filing periods because the issuance of the paychecks were not, by themselves, discriminatory acts.

The Ledbetter Act Effect

The Ledbetter Act expressly overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) by expanding the statute of limitations for claims alleging discrimination under the above statutes in the provision of pay, benefits or other compensation. The Ledbetter Act focused on correcting the perceived inequity of the Supreme Court's *Ledbetter* decision by expressly stating that "[t]he Ledbetter decision undermines [the statutory protections against discrimination in compensation] by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."

However, the Ledbetter Act does more than overturn the Supreme Court's decision in providing a longer period in which to bring a discrimination claim. The Ledbetter Act also provides employees with new substantive protections by broadening the definition of an unlawful employment practice to include any occurrence "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid."

Employers also need to be mindful that the Ledbetter Act applies to benefits and other forms of compensation, not just wages. Although the Ledbetter Act has a provision stating that it does not change the current law as to when "pension distributions" are deemed paid, that exclusionary provision does not apply to pension contributions (including contributions to a 401(k) plan), pension benefit accrual formulas, or any other type of non-pension benefit.

Moreover, the Ledbetter Act has a retroactive date of May 28, 2007 (the day before the Supreme Court's decision in the Ledbetter case), and applies to all disparate pay claims pending on or after that date. Though the Ledbetter Act will undoubtedly increase an employer's exposure for the continuing effects of past acts of discrimination, employees can only go back two years to recover damages.

What Employers Should Do Now

Curbing the effects of the Ledbetter Act does not mean that employers must pay all its employees the same from here on out to avoid a pay discrimination lawsuit. Now is the time for employers to audit their benefits and compensation practices to identify pay differences between similarly situated individuals, and then determine whether the reason for the disparities are based on valid business reasons. Indeed, the Equal Pay Act permits employers to pay wages to employees at a rate less than the rate at which the opposite sex is paid for comparable work if the employer can prove the difference in the rate of pay is based on any of the following: a seniority system; a merit system; a system that measures earnings by quantity and quality of production; and a differential based on any factor other than gender (for example, an individual's experience, salary history, salary negotiations, and market conditions). Employers should use these factors as a guide in analyzing differences in pay.

Employers should also create and retain documentation explaining the self-audit process and justifying compensation decisions. Keep copies of the information used during the self-audit and the results of the analysis in case your pay practices are challenged legally. For example, an employee who sues a company 10 years from now for a pay decision made today is going to rely on his or her own recollection. However, 10 years later, an employer is not likely to remember this pay decision as readily. The company personnel may have turned over two or three times by then. As a result, the company personnel may not even know the person making the claim and may not be the people who actually performed the past pay evaluations. Additionally, the Act means employers will need to evaluate their records and retention policies. It will be important for employers to have records for defending against decisions made years before.

Finally, employers also should take care in how they proceed in auditing their benefits plans and pay practices. Consider using in-house or outside legal counsel to review the plans and practices and for legal advice that will be protected by a legal privilege. Employers who find, and wish to correct, any past discriminatory pay or benefits disparities should work with legal counsel in designing and implementing changes.

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PRO PER TRIALS

By Patrick Kearns, Esq.
Wilson Elser Moskowitz Edelman & Dicker

Nearly everyone reading this has been involved in defending a lawsuit brought by a *pro per* plaintiff and has thus navigated the often frustrating and occasionally humorous events that such cases inevitably entail. (See, Complaint written entirely in green crayon.) Most of these cases tend to resolve early on due to one legal deficiency or another. (e.g. a complete lack of merit.) Some however, make it all the way to trial.

I recently had the opportunity to defend a client at trial in such a case. Although I was well-aware of the common difficulties in dealing with *pro per* litigants, I naively presumed that once we began preparing for trial, unlike the litigation leading up to trial, the process would actually be easier than a typical trial preparation; that somehow because of the Plaintiff's *pro per* status the trial would go smoothly. I was wrong of course. As I should have suspected, the Plaintiff's *pro per* status made every task more difficult, nearly twice as costly, and significantly increased the workload for both myself and ultimately, the Court. After the trial concluded, I made notes of the many things I would do differently, those which I would do the same, or those which I would simply not do at all in the event I have to try another case against a *pro per* adversary. If you happen to find yourself in such a situation, here are just a few of the highlights which may help to reduce the time and cost, or perhaps not, but will could help reduce the frustration of trying a case with a *pro per* Plaintiff:

PRE-TRIAL PREPARATIONS: DO BOTH SIDE'S WORK YOURSELF

There are many things that must be done before trial begins and many of them start with the word "joint"—*e.g.* Joint Trial Readiness Conference Report; jointly submitted jury instructions; joint witness lists; joint exhibit lists and party/witness/court binders; jointly agreed-upon verdict forms, and so on. These pre-trial preparations take time, money, and knowledge of not only the case but also the intricacies of trial work. They also take, to some extent, cooperation. The concept that pre-trial issues can be both disputed between the parties but still submitted "jointly" to the court is one of those finer points of legal practice typically lost on the *pro per* Plaintiff. As a result, "Joint" anything is not very likely in your case and my recommendation is to just do everything yourself. Certainly try to include the Plaintiff if possible, but in the end, be prepared to do it all.

Ultimately, doing this is to your advantage. You will not only save time and headaches, but preparing both sides of the required pre-trial documents ensures that *your version* of everything gets in the way you want it to. For example, if you prepare all of the pre-trial documents, you can prepare *your* version of the preliminary statement that is read to the jury pool. Although you still need to provide a copy to the Plaintiff for his input, his or her objections to the way you have phrased the statements/instructions/verdicts will almost certainly be disregarded if they do not have a viable alternative ready to go. This "do it yourself" recommendation applies with particular force to the jury instructions and special verdict forms. Not only should you prepare all the necessary sets of instructions yourself, but identify and prepare the Plaintiff's necessary instructions as well and make sure you include the minimum instructions required to begin the trial. Why you ask? Why would you do work *for the other side*? Why would you *help* the Plaintiff figure out what he needs at trial? Consider the following scenario:

It's a breach of contract case and you show up for trial with a set of your proposed jury instructions, in triplicate, that contain only the *defenses* for a breach of contract and a few of the standard "you are free to take notes" instructions for the jury. You have <u>not</u> however, included or prepared any instructions for what constitutes a breach of contract, or for that matter, what a "contract" means, because these instructions are the responsibility of the Plaintiff to propose.

The *pro per* Plaintiff also arrives at trial, (probably in attire that is, well, ill-advised) with his or her set of proposed jury instructions that consists entirely of a single, dirty, cocktail napkin with a drawing on it depicting what he or she remembers the contract to have looked like.

In this scenario, the judge is going to blame **you** for not being ready to proceed. Yes, that's right: You will be to blame for the delay that will inevitably ensue, the doubt the Judge will be feeling about your readiness to begin the next time you arrive for trial, and even though it may not be your fault, it is a poor way to begin the trial. The better scenario: You arrive at trial will a complete set of all *necessary* documents; including a thoughtfully prepared preliminary statement and the most defense-favorable sets of instructions and verdict forms that you can create within reasonable bounds. Come the day of trial, even if there is an objection from the Plaintiff, your properly formatted, properly copied sets of instructions, exhibits, and verdict forms will look significantly more attractive than another continuance. Keep in mind, this is not to say that you need to create brilliant special jury instructions for the Plaintiff which, if read by the jury will most certainly result in a Plaintiff's verdict. To the contrary, simply prepare the minimum needed to move forward with the trial.

In my case this worked to my advantage. The Plaintiff's proposed instructions were so objectionable there was virtually no way they would make it past the Judge. I even tried to explain this to the Plaintiff. (The reason they were objectionable is because they were simply the Plaintiff's conclusions —e.g. Plaintiff's Proposed Instruction No. 1: *"You must find Defendant Liable if he: (1) is named Defendant or (2) Is named."*) The Plaintiff however, refused to consider that the instructions might not be used. I prepared alternative instructions which could be used by the Jury to find liability (i.e. the basic elements of the claim), in the likely

event the Judge rejected the Plaintiff's. To do this however, I used the exact language from the statute itself—verbatim, which was undoubtedly confusing, complex, difficult language. These instructions were complete, accurate statements of the law—but set forth in the best possible way for my client.

MOTIONS IN LIMINE

File as many motions in limine as you can. Motions in limine do not have a lot of statutory guidance or clear rules regarding their content or their scope. This makes it very difficult for a *pro per* Plaintiff, or anyone who has not had much exposure to trial work, to fully understand the purpose, or the best way to use (or oppose) motions in limine. Thus, the *pro per* litigant heading to trial is unlikely to properly or timely oppose your motions in limine.

Moreover, although anyone who has ever had a case with a *pro per* litigant has as some point cited to Rappleyea v. Campbell (1994) 8 Cal.4th 975; or perhaps Gamet v. Blanchard (2001) 91 Cal.App.4th 1267, 1284, or any one of the many similar cases which stand for the well-settled precept that a *pro per* litigant must follow the Rules of Court and the Code of Civil Procedure—it is just not going to work out the way you hope. The rules of evidence, the rules of civil procedure, and generally speaking, both the spoken and unspoken rules of courtroom etiquette and decorum are largely going to be ignored by the *pro per* Plaintiff throughout trial and although this may often be to your advantage, its best to eliminate some of the more dangerous possibilities at the outset via a motion in limine.

To illustrate, I filed a motion in limine to preclude the Plaintiff from testifying in the narrative. The basis of the motion was quite simple—an opposing attorney must be allowed to object during trial testimony to ensure their client is afforded a fair trial. A long-winded, one-sided discussion between a rather upset *pro per* litigant and the members of the jury could be, if unchecked, very damaging and is legitimately unfair.

The Court agreed and ordered the Plaintiff to proceed in a self-question and answer format. This ruling was crucial. Not only did it allow me to interpose an objection when necessary (believe me though, it is often better to just let them go without objection), but the process of asking oneself a question and then answering it was incredibly disrupting to the "flow" of Plaintiff's information. Try it yourself. Even the simplest discussion becomes more difficult when you need to ask yourself a question first and even when you get it right, it looks and sounds ridiculous. (e.g. Q: Is this article droning on endlessly? A: It might be.) Generally speaking, looking and sounding ridiculous are not tools of persuasion.

Moreover, when I needed to object, I was able to object on "motion in limine" grounds which stopped the proceeding, forced the Plaintiff to consider how to re-phrase a question, and overall delayed the story he was trying to convey—all from a short, non-specific objection from me. This was preferable to a steady stream of more specific objections which could have resulted in the jury thinking I was being the "bad-guy" by badgering the Plaintiff. On a few occasions, even the Judge reminded the Plaintiff of his obligation to ask a question of himself before he answered it.

Motions in limine are always useful tools in any trial but can have particular usefulness if you are against a *pro per* adversary. The motion in limine I filed regarding the narrative testimony described above was not very scientific, but I am happy to provide it to those of you who find yourself heading to such a trial and would like a copy.

PAY ATTENTION TO THE FORMALITIES BECAUSE THE PLAINTIFF WON'T

At the conclusion of the trial, the jury returned a unanimous defense verdict in favor of my client. After the ruling was read, most of the jury waited in the hallway and were willing to discuss the trial with me. I found many of their comments particularly informative.

First, the jury unanimously felt there was no merit whatsoever to the Plaintiff's case—that much was clear and not wholly unexpected. The jury's other comments and observations were more interesting though. For example, the entire jury found the Plaintiff to be rude. Why? Because every time the Jury entered the room I stood up; my client stood up; the bailiff assisted with the door; the Judge stopped what he was doing, looked up at the members and smiled; the court staff stopped what they were doing, looked up and smiled; all waiting quietly for the jury to enter and sit. The *only* person who did not stand up nor even look up was the Plaintiff; who instead remained at the table with his back to the jury and his face down, writing something on a notebook. (See, Manifesto.) The importance of this formality had been lost on me to some extent in the past when everyone was doing it; but when one person in the room is not doing it (and that person is the Plaintiff) you can almost feel the jury "noticing" it.

The jury also commented on how the Plaintiff never spoke with respect; that is, the Plaintiff never referred to my client as "Doctor" (It was not a malpractice case but my client was, incidentally, a doctor.) In fact, the Plaintiff didn't even use "sir" and rarely even used my client's name. Instead, the Plaintiff usually went right into questioning and more often than not used "you" to address my client. The Plaintiff never said "Good morning" or "Good Afternoon" to the jury; never thanked anyone for their testimony, and rarely used the term "your honor" when speaking to the judge. These may, by themselves, appear to be minor concerns; however, like the standing-up when the jury enters the room, when you are the only one throughout the trial not doing something everyone else is doing, the contrast is stark and apparently well-recognized by the jury.

The jury was extremely receptive to these sorts of details and it was on their minds throughout the trial.

Ultimately, despite the added frustration and some of the bumps in the road, trying a case against a *pro per* was actually quite fun and an excellent learning experience for a number of reasons, particularly if you are, like me, a relatively young attorney trying to gain whatever additional trial experience you can.

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Fort Zackary
Robert Zickert

Member News

Shelby G. Flowers

Farmer Case & Fedor is pleased to announce the addition of Shelby G. Flowers to its staff of attorneys. Ms. Flowers has several years of insurance defense experience, most recently serving for seven years as in-house counsel for 21st Century Ins. Co. Prior to attending Whittier Law School, Ms. Flowers was a Senior Claim Representative for State Farm.

THE OTHER BAR

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Membership Information:

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are $145/year. The dues year runs from January to December. Applications can be downloaded at: www.sddl.org

THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers.

We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:

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SAN DIEGO
DINING GUIDE

By Peter S. Doody,
Higgs, Fletcher & Mack

The restaurants discussed in this article have one thing in common, they consistently serve exceptional food and have first class service. Counsel visiting the downtown San Diego area for business or pleasure can't go wrong with any of these local favorites.

Dobson's Bar & Restaurant

956 Broadway Circle
San Diego, CA 92101
Phone: 619-231-6771
www.dobsonsrestaurant.com

Dobson's is located a block from the downtown branch of San Diego Superior Court and is an excellent choice for either lunch or dinner. The food is California cuisine with a touch of Italian, French, and Spanish influence. Dobson's is an intimate and friendly restaurant where you will feel right at home. If the tables are full at lunch, Paul Dobson will be happy to set a place for you at the bar where you can eat with the regulars. Paul Dobson is a fixture at his namesake restaurant and is considered one of the finest restaurateurs in the city. The landmark appetizer is a mussel bisque covered by pastry baked over the bowl. Prime flat iron steak and sautéed sea bass are main features on the menu. Other well known fares include oven roasted wild salmon, veal chop stuffed with mushrooms and bistro chicken.

Dobson's Bar & Restaurant is frequented by trial lawyers, judges, and politicians. The atmosphere is causal and friendly, and a great place to go for a drink after your trial. The bar is adorned with small brass plaques with the names of favorite customers. On the walls are bull fighting posters and photographs of Paul "Pablo" Dobson who is an actual matador and has fought in the finest bull rings in Mexico.

Rainwater's

1202 Kettner Boulevard
San Diego, CA. 92101
Phone: 619-233-5757
www.rainwaters.com

Rainwater's is a five minute walk from the courthouse and is next to the historic Santa Fe Depot. It is a classic steak and chop house suitable for both lunch and dinner. Rainwater's has been a steak house institution in San Diego for over two decades. In addition to steaks and chops Rainwater's also offers a wide selection of delectable gourmet dishes ranging from Eastern lump crab meat, roast rack of Colorado lamb, and it's famous three cheese meatloaf. As an appetizer try the black bean soup with a waiter's generous pour of Madiera. The owners Laurel and Paddy Rainwater make sure each customer leaves satisfied, and the service is impeccable. The wine list specializes in large-bottle formats, but still finds room for eclectic picks under $50.00.

Lou & Mickey's

"Famous Steaks, Choice Sea Food and Exotic Drinks"
224 Fifth Avenue
San Diego, CA 92101
Phone: 619-237-4900
www.louandmickeys.com

Lou & Mickey's is located in the popular and busy Gaslamp Quarter. The one problem with the Gaslamp Quarter is the multitude of new restaurants which makes it difficult to keep up with all the dining options. However, one can never go wrong with Lou & Mickey's. The restaurant has something for everyone and given its large floor space it can accommodate bigger groups. If some of your guests are yearning for red meat, while others are clamoring for fish, Lou & Mickey's is the place since the steaks and seafood are equally delicious. Entrees include baseball cut culotte steak, broiled twin lobster tails, Alaskan halibut, and bone-in rib eye "cowboy" cut steak.

The restaurant is known for its exotic drinks reminiscent of the glory days of the original Trader Vic's. Be careful of the Witch Doctor, a dangerous prescription of banana, passion fruit juice and a blend of four island rums. Hailed by the British Navy, the drink known as "Navy Grog" is sure to stave off any hint of scurvy and is mixed with tropical fruit juices and a captain's portion of Meyers' Rum.

Since this is American cuisine, the desert menu includes old-fashioned classics such as root beer float, New York cheesecake, and black cow.

Lou & Mickey's is located right at the entrance of the historic Gaslamp Quarter on Fifth Avenue and is a short five minute walk to Petco Park if the Padres happen to be in town.

Hob Nob Hill

2271 First Ave.
San Diego, CA 92101
Phone: 619- 239- 8176
www.hobnobhill.com

Every lawyer needs a good start to the day and Hob Nob Hill has mastered the art of the power breakfast. The "Hob Nob" is located two miles from the court house straight up First Avenue. It is a San Diego institution and has been serving San Diego since 1944. The restaurant is reminiscent of the 1950's with its dark-wood booths and friendly wait staff dressed in uniforms. The food is down to earth and includes breakfast favorites such as corn beef hash, pecan waffles, and bacon, lettuce, tomato and egg ("BLT&E") sandwich. "Home cooked" is the best way to describe the food and the portions are tremendous.

The Fish Market

750 North Harbor Drive
San Diego CA 92101
Phone: 619-232-3474
www.thefishmarket.com

Your client has flown in from the land-locked Midwest and has his or her heart set on fresh Pacific Seafood. You can trust that The Fish Market will come through every time. It is located at the end of the Embarcadero near the G Street Pier. The Fish Market sits over San Diego Harbor and guests have wonderful views of the harbor's nautical activity including tacking sailboats, U.S. Navy Seals training on twin engine Zodiacs, and pleasure cruisers plying the waters toward Coronado Island.

The Fish Market presents numerous dining options all under one roof. There is a friendly cocktail bar with tables right on the water. If you want to catch just a quick bite there is a dining bar with a short order chef who will shuck a dozen raw oysters or cook a dish of pasta del mar as you sit and watch. In one corner of the restaurant is a small sushi and sashimi bar with well trained sushi chefs. Sushi specialties include the caterpillar roll which is a combination of cooked sea eel and avocado, as well as the soft-shell crab roll. The restaurant on the main floor is casual dining and serves a variety of fresh fish all cooked on a Mesquite grill. Because the fish is fresh and recently caught the menu is printed daily. The second story of the establishment houses the Top of the Market which is an upscale restaurant with more expensive fish and wine list. Specialties include locally harpooned swordfish, wild Pacific red abalone, Dungeness crab cioppino and spiny lobster caught off the kelp beds of San Diego.

The view from the Top of the Market extends from Point Loma to the Coronado Bridge. Just outside The Fish Market is an unusual 25 foot public art statute entitled "Unconditional Surrender." This statute is a three dimensional interpretation of the famous photo of a sailor kissing a nurse in Times Square on August 14, 1945 following the announcement of Japan's World War II surrender.

Please send a review of your favorite restaurant to tracey.vansteenhouse@wilsonelser.com to be published in the next edition of The Update.

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