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BKCG

BURKHALTER KESSLER CLEMENT & GEORGE LLP

Appellate Court Knocks Out COVID-19 Business Interruption Claims

Since the outbreak of COVID-19 and the associated shutdowns, businesses have attempted to recoup some of its financial losses and expenses by asserting claims under property insurance policies. Most claims have been denied which, in turn, has resulted in an uptick of lawsuits being filed against insurers. With a few exceptions, courts at the trial level have generally found that COVID-19 does not trigger coverage and have ruled in favor of insurance companies. The Appeals have followed. While decisions at the trial court level are not binding on other courts, appellate court decisions carry greater weight and can create binding precedent. Recently, appellate court decisions on the COVID-19 coverage issues have been handed down. The most recent decision was issued on February 23, 2022 by the United States Court of Appeals for the 6th Circuit which includes Michigan, Kentucky, Ohio, and Tennessee. The Appellate Court held in

favor of the insurance company. Although California is in the 9th Circuit, the 6th Circuit cites to cases from around the nation including California to reach its conclusion.

Brown Jug, Inc. et al v. Cincinnati Insurance Company (6th Cir. No. 21-2644/2715/2718) involved a consolidated appeal by businesses that operate Michigan based restaurants and entertainment venues. As a result of business closures due to COVID-19, the various companies submitted insurance claims seeking coverage for business interruption losses. The claims were made under three different policy provisions – Business Interruption, Extra Expense, and Civil Authority. All three provisions were triggered if there was a "Covered Cause of Loss" which the insurance policy defined as direct "accidental physical loss or accidental physical damage." The key issue is whether COVID-19 caused a "physical loss" or "physical damage."

The complaints filed by the plaintiff businesses alleged different types of damage. For instance, one business alleged it spent money on cleaning supplies, barred customers from entry due to Stay At Home Orders, and lost income due to the public health restrictions imposed by the government. Another business alleged that one of its restaurants was the source of a COVID-19 outbreak and was forced to close. (continued on page 6)

Columbo Case Update –"Big Case, Top Talent"

Late last month, the Court Of Appeal heard oral argument on the Columbo appeal, with Alton Burkhalter representing BKCG and the writers.

A week prior to oral argument the Court issued a tentative ruling, indicating that it was likely to affirm the partial new trial on the $70 million distribution fee issue, meaning this aspect of the case will be retried to a jury with new instructions.

The Court also indicated that it was likely to affirm the jury's unanimous verdict in favor of the writers on Universal's affirmative defense of statute of limitations, and that it would likely revive the writers' fraud claim. Although the appellate Court will allow the partial retrial on distribution fees, the Court made clear that the retrial would be before a jury, where last time BKCG received two unanimous 12-0 verdicts on similar disputed facts.

We will know for sure when the Court issues its formal opinion, which will be posted to BKCG's website for your perusal. (continued on page 6)

In This Issue

New Ninth Circuit Case Slams Door On Manufacturer's Compelling Arbitration

A new Ninth Circuit decision, *Ngo v. BMW of North America, LLC et. al*., published on January 12, 2022, stands to have a significant effect on civil cases brought in federal court against vehicle manufacturers and new vehicle dealers alike. In *Ngo*, automaker BMW tried to compel a consumer case against it into arbitration, relying upon the standard arbitration provision on the back of a Retail Installment Sales Contract (RISC). Although the parties to the RISC were the selling BMW dealership and the vehicle's purchaser, BMW attempted to rely upon the purchaser's agreement to arbitrate claims concerning the vehicle by arguing BMW was a third-party beneficiary under the contract. The district court granted BMW's motion to compel arbitration, but the Ninth Circuit reversed that decision on appeal finding that BMW was not a third-party beneficiary of the arbitration provision in the RISC.

Specifically, the Court found that a third-party must not only benefit from the contract at issue but that "'a motivating purpose of the contracting parties was to provide a benefit to the third party.'" The *Ngo* Court found that BMW only benefitted under the RISC in a "secondary" or "incidental" manner as "any benefit that BMW might receive from the [arbitration] clause is peripheral and indirect because it is predicated on the decisions of others to arbitrate." The Court went on to further conclude that the RISC's primary purpose was for securing benefits for the dealership, the bank acting as the dealer's assignee, and the vehicle's purchaser. "BMW's relative proximity to the contract confirms the parties easily could have indicated that the contract was intended to benefit BMW – but did not do so. … BMW was not a party to the [RISC] and its [warranty based] obligations to Ngo arose independently of her agreement with the dealership." The Court then remanded the case so that, presumably, the consumer could pursue her claims against BMW in district court.

The *Ngo* decision comes at time when vehicle manufacturers have been becoming more creative about how to ensure arbitration is available to them in consumer cases. Some new vehicle manufacturers are now providing dealerships with stand-alone warranty agreements for the vehicle purchaser to sign that expressly provide for arbitration of claims involving the factory. Check with counsel if a manufacturer asks your dealership to include such an agreement with the dealership's standard sales and lease deal documents as there are measures the dealerships will want to take to guard against potential liability under state and federal law.

Please contact Ros Lockwood at rlockwood@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

You Prevailed In Your Lawsuit And Obtained A Judgment – What Comes Next?

Some inexperienced litigants are surprised to discover that at the conclusion of a trial, the prevailing party does not receive a big check (or a briefcase full of cash) from the losing side. Rather, the goal for the plaintiff at the end of a lawsuit is generally to obtain a document known as a "judgment". A judgment cannot be deposited at a bank or used as currency to buy something. Rather, in the vast majority of cases, a judgment is a document signed by a judge that essentially says that party "A" owes party "B" some specified amount of money.

Accordingly, the question for prevailing parties in litigation often becomes how does one turn this judgment into money, or stated another way, how do litigants recover on their judgments? Legal experts have drafted entire treatises on this subject and this article is not intended to, nor possibly could it, provide a comprehensive analysis on judgment collection. Rather, this article describes in general terms some of the most common methods by which prevailing litigants recover money from their judgments.

Probably the most common (and inexpensive) procedure to recover on a judgment is to record in the applicable county record's office an "Abstract of Judgment", which is a document that puts the world on notice that the judgment exists. Once an Abstract of Judgment is recorded, a lien attaches to all real property that the Judgment Debtor (i.e., the person against whom the judgment was issued) owns at that time, or even later comes to own, in the county in which the abstract was recorded, such that he will not be able to sell any real property in that county without first paying off the judgment. As such, it is not uncommon for a Judgment Creditor (i.e., the person who obtains a judgment in her favor against the Judgment Debtor) to learn that a Judgment Debtor desires to sell his home, but cannot do so without first paying off the judgment. Many judgments get satisfied in this manner.

Wage garnishment is another popular method used to enforce judgments. If a Judgment Debtor is employed, the Judgment Creditor can usually require the Judgment Debtor's employer to pay a portion of the Judgment Debtor's paycheck each pay period to the Judgment Creditor.

Another common and effective tool to enforce judgments is to depose the Judgment Debtor through a process known as a "Debtor's Exam". A Debtor's Exam is similar to a deposition (a procedure through which a party/witness must answer a lawyer's questions under oath), but the difference is that in a Debtor's Exam, the questions pertain to the Judgment Debtor's financial condition and location of assets, such as the identification of all real and personal property she owns, where she banks and how much money she has on deposit, information regarding brokerage accounts, life insurance policies, vehicles, boats, jewelry, etc.

Once the Judgement Creditor discovers what assets a Judgment Debtor owns and where those assets are located, the Judgment Creditor can levy on those assets via a procedure known as a writ of execution, which allows the Judgment Debtor to literally take (via a Sheriff) specifically identified property that the Judgment Debtor owns, including personal property (i.e., jewelry, vehicles, etc.) and real property (including even a Judgment Debtor's personal residence if equity in excess of the applicable homestead exemption exists). While this particular debt collection procedure is usually the most complex and expensive to implement, it also can be the most effective.

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Paying for Missed Meal And Rest Breaks Is Not As Easy As It Seems

California law requires that employers provide meal and rest breaks for their employees. Most employers are required to provide 10-minute rest breaks to anyone working more than 3.5 hours in a day and at least one 30-minute meal break to anyone working more than five hours in a day. Breaks must be uninterrupted, and employees must be completely relieved of all their work duties during their breaks. When an employee misses (or has been denied) a meal or rest break, California Labor Code Section 226.7 states that he or she is entitled to "one additional hour of pay at the employee's regular rate of compensation" for each workday that a break is not given. The "regular rate of compensation", however, is seldom as straight-forward as it would seem.

The recent California Supreme Court case of *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, case clarifies what that extra hour of pay should look like. Ferra was an hourly employee who worked as a bartender at the Loews Hotel, and she received compensation of hourly wages and also "quarterly nondiscretionary incentive payments." Non-discretionary payments are extra payments that come from an agreement between an employer and an employee. There are many kinds of non-discretionary payments, including commissions, bonuses, and incentive payments.

After missing certain meal and rest breaks, Ferra filed a class action lawsuit alleging that the payments she received were insufficient. Ferra contended that her "regular rate of compensation" included both the hourly rate and her incentive pay. Ferra's argument was a parallel to Labor Code Section 510, which states that "regular rate of pay" for purposes of computing overtime wages include the hourly rate and also the non-discretionary payments they receive.

Loews argued that Ferra's "regular rate of compensation" meant just her hourly rate of pay. Loews argued that the regular rate of compensation for missed breaks should not be calculated in the same manner as for determining the regular rate of pay for overtime, basing its argument on the statutes' use of different words (i.e., "pay", rather than "compensation").

The Supreme Court found no logical distinction between the words "pay" and "compensation" and held in Ferra's favor. Specifically, the California Supreme Court held that the regular rate of compensation for missed breaks should include the employee's base hourly rate and her incentive pay.

The Supreme Court ruling in *Ferra* is particularly striking because the Court ruled that it applies retroactively. Therefore, even though this decision is less than a year old, it potentially impacts meal and rest break payments that may have been made years prior. If the employer has paid compensation in the form of commissions, bonuses or other incentive payments, determining the "regular rate of compensation" for the purposes of paying for a missed meal or rest break can be very challenging to calculate. BKCG can help make sure you make these calculations correctly and avoid legal issues down the road.

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Righting The Suretyship

Businesses regularly find themselves in need of additional financing, for example to cover operating expenses while they struggle to survive the pandemic. Fledgling businesses in particular may find securing financing to be difficult given the stringent criteria that lenders use in vetting prospective borrowers. One mechanism that businesses often use in these scenarios is what is known as a personal guarantee or suretyship (California law has done anyway with any legal distinction between the two terms).

A suretyship is merely a contract, subject to the same rules that govern all other contracts, whereby an individual (the surety) agrees to answer for the debts or obligations of the primary borrower (the principal). Usually, owners, officers, or other individuals who have an interest in the business succeeding, will provide these suretyships. Having a surety who is contractually obligated to pay any debt that the principal fails to pay himself is a powerful tool to induce potential lenders into providing a loan, such as when a business is very new or does not have adequate credit to otherwise secure the loan.

If all goes well, the principal will operate their business at a profit and will have no problem satisfying their obligations under any loans. However, it is not uncommon for businesses to encounter unexpected obstacles that prevent them from fulfilling their contractual obligations (such as a global pandemic). That is when the suretyship comes into play. Once the business defaults, the surety must answer for the debt. This scenario is simple and straightforward enough when there is just one surety, but becomes rather complicated the more sureties there are. (continued on page 4)

Righting The Suretyship (continued from page 3)

In these situations, where there are multiple sureties who have agreed to answer for a principal's debt, it is important to keep in mind that each suretyship agreement is separate. That means that it is possible for six owners of a business to each provide a separate suretyship for a loan, and as such it is possible (however unlikely) that the terms of the separate suretyships may be slightly different. Close attention must be paid to any differences regarding the rights and obligations among the sureties.

Despite the fact that each suretyship agreement is separate, courts interpret the underlying financing agreement (the loan) and all associated suretyship agreements as merely different parts of one larger contract. Here again, each surety must pay close attention to the rights and obligations provided in all other agreements provided by any co-sureties. To provide a concrete example, many suretyship agreements include waivers of rights to seek reimbursement. This aspect of a suretyship agreement may have an enormous impact on the respective rights of the co-sureties of a loan, because co-sureties are generally allowed to seek reimbursement from their co-sureties for any payment made due the principal's default.

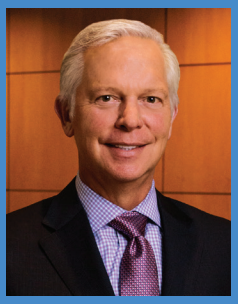
In other words, when the principal borrower defaults on the loan, the sureties must answer for the loan and pay any amount in default. However, when there are multiple sureties, only one of them may come forward to satisfy the principal's obligation. In that case, the surety is generally allowed to bring an action to seek contribution from his fellow co-sureties for their share of the payment that was made as a result of the default. To provide a (simple) concrete example, if a principal defaults on a loan by missing a payment of $10,000 where there are four sureties for that loan, one of those sureties may pay the full $10,000 in default before his co-sureties act. In that case, the surety could sue the co-sureties for reimbursement of $2,500 from each of them (so that each surety ends up paying an equal amount of $2,500.) Accordingly, any provisions in *any* of the suretyship agreements that waives a right to reimbursement could have enormous financial consequences for the surety that comes forward to pay a debt on his own. Indeed, if a waiver of reimbursement rights appears in even one of the suretyship agreements, it may be held to apply to all of the sureties if the court construes all of the agreements as part of one and the same contract.

In short, a carefully reading of all of the provisions of all suretyship agreements is necessary before furnishing any such suretyships to secure a loan. Failure to do so could, among other things, result in the waiver of an important right that could cost a surety enormous sums of money.

If you or your business needs advice regarding any financing agreements, suretyship arrangements, or requires representation in any matter, BKCG's experienced attorneys can assist with any issues your business faces.

Please contact Michael McConnell at mmconnell@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

Two BKCG Partners Listed in SuperLawyers Top 50 for Orange County



There are now over 260,000 attorneys licensed in California, with over 17,000 in Orange County. A small subset of those are named SuperLawyers based on peer recommendations. From there, SuperLawyers conducts its own independent review and selects 50 lawyers for special recognition.

For 2021, Alton Burkhalter and Dan Kessler were named to Superlawyers' list of Top 50 lawyers in Orange County. This is the second consecutive year that Alton and Dan have received this honor.

The full list can be viewed at this website: *https://www.superlawyers.com/california-southern/toplists/top-50-2021-orange-county-super-lawyers*.

Changes to California Law Require Updating of Employee Severance and Settlement Agreements

Effective January 1, 2022, Senate Bill No. 331 ("SB 331"), the "Silenced No More Act", went into effect and revised California law in a manner that will require most, if not all, employers, to make revisions to their "standard" employee severance agreements. SB 331 will also require that settlement agreements drafted to resolve employment-related claims adhere to the same requirements described below.

The new law requires the following: If the severance or settlement agreement seeks to release a claim, or potential claim, under the Fair Employment and Housing Act (in other words, a claim based on discrimination, retaliation or harassment in employment), which was filed with a court, a dispute resolution service, or was the subject of the employer's internal complaint process, it may not restrict the disclosure of factual information related to the claim. Accordingly, any non-disparagement provision in the agreement must include language such as the following: "**Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.**"

The agreement must state that the employee (or former employee) has the right to consult an attorney regarding the severance agreement (which BKCG's standard agreement already says) and that the employee has at least five days to review and consider the agreement. Note that, as a practical matter, this new five-day consideration period requirement only applies to employees under 40 years of age, since severance and settlement agreements for employees aged 40 and older are already required to provide for a 21-day consideration period. However, in both cases, the employee may sign the agreement earlier, provided that the employee does so in a "knowing and voluntary manner", and not due to the employer's improper conduct, for example, the employer's threat to withdraw the offer if it not executed in a period shorter than the 5-day legal minimum review period. As a practical matter, when presenting a severance agreement to an employee under 40 years of age, I still advise clients to have a check for the net severance amount available (and in plain sight during an employee's face-to-face exit interview), since in many cases the employee will sign the agreement on the spot and take the check – and, unlike for employees aged 40 and older, there is no post-execution rescission period that allows the employee to nullify his or her severance agreement. If you do this, however, be careful not to say or do anything that might lead the employee to feel as if he or she is being pressured or coerced into signing the severance agreement then and there. In addition, as with all employee exit interviews, if at all possible, have a second person present to serve as a witness, if later needed, as to what was said and what transpired during the interview.

The good news is that SB 331 confirmed the validity of several items customarily included in severance agreement, such as the permissibility of including a general release or waiver of all claims; prohibiting the employee's use or disclosure of trade secrets and confidential and proprietary employer information (subject to the "unlawful acts" exclusion described above) and the confidentiality of the amount paid to the employee as severance.

For those clients already using a form of separation agreement provided by BKCG, the new required revisions are relatively minor, yet remain very important, since an agreement not in conformity with the new law could be invalidated by a court in its entirety.

Please contact Greg Clement at gclement@bkcglaw.com or (949) 975-7586 if you would like to have your company's current severance agreements reviewed or updated to comply with the new law, or have any questions about this article, or any other related matter.

BKCG Welcomes A New Team Member, Cody Franklin

Cody graduated from Emerson College in Boston, Massachusetts with a B.S. in Political Communications and went to receive his J.D. from the University of California, Irvine School of Law. During his time at UCI, Cody competed in the Moot Court competition and engaged in various pro bono activities.

Prior to joining BKCG, Cody worked as a Deputy District Attorney for the Orange County District Attorney's Office prosecuting criminal matters. During this experience, Cody gained invaluable courtroom and trial experience. Before attending law school, Cody was an insurance broker who effectively protected companies and individuals from liabilities ranging from worker's compensation to general liability. With experience in transactional matters as well as litigation, Cody can address any legal issue your business may face.

Please contact Cody Franklin at cfranklin@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

Columbo Case Update – "Big Case, Top Talent" (continued from page 1)

At the conclusion of the morning session, in which seven appeals were heard, the presiding justice of Division 8 went out of its way to laud BKCG, its appellate co-counsel and opposing counsel for the quality of the briefs as well as the professionalism displayed during oral argument. She closed by noting, "Big case, top talent."

This marks a significant event in Round 2 of this heavyweight fight, which started in November 2017. The three phase trial (jury, bench and accounting reference) took place in 2019, and the appeal started in 2019, lasting almost 2 ½ years. A retrial will likely not take place until 2023, and will likely be followed by a second appeal which, in turn, could spawn a third trial in the far off future.

Please contact Alton Burkhalter at aburkhalter@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

Appellate Court Knocks Out COVID-19 Business Interruption Claims (continued from page 1)

A third business alleged that COVID-19 causes physical loss and damage by attaching to surfaces and rendering property unusable. In rejecting the claims, the Appellate Court held that physical loss "requires the loss or damage to have some manner of tangible and measurable presence of effect in, on, or to the premises." In so ruling, the Appellate Court examined law from around the country including the 9th Circuit (i.e., which includes California) and found that courts interpreting the phrase "physical loss" have ruled similarly. (See *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* 15 F.4th 885 (9th Cir. 2021). Applying its definition of "physical loss" to the allegations in the various complaints, the Appellate Court concluded that there was no property damage alleged and, therefore, no coverage. Cleaning and reconfiguring the space in a building does not constitute tangible, physical loss; only economic loss. Similarly, the fact that employees or customers tested positive for COVID-19 after exposure to the virus by a live band that played at a restaurant does not mean there is any physical damage to property.

The Appellate Court did, however, acknowledge that there might be circumstances under which a loss of use, "unaccompanied by any physical alteration to property, might be so pervasive as effectively to qualify as a complete physical dispossession of property and thus a 'direct physical loss.'" It seems clear that the Appellate Court was trying to reconcile its conclusion with existing case law where gasoline vapors, carbon monoxide levels, and methamphetamine odors were all found to constitute physical loss thereby triggering coverage. See *Western Fire Ins. Co. v. First Presbyterian Church* (1968) 165 Colo 34, *Matzner v. Seaco Ins. Co*. 1998 WL 566658 (Mass Super. 1998) and *Farmers Ins. Co. of Oregon v. Truitanich* (1993) 123 Or.App. 6.

The decisions in *Brown Jug* and other appellate court opinions seem to suggest a slightly different analysis emerging for COVID-19 losses than for other types of losses. For COVID-19 losses, coverage is not triggered by a virus; for losses involving the loss of use of property due to gasoline vapors or other odors, coverage might be triggered. Coverage issues can be tricky. The outcome is dependent on context, the specific facts, and the particular policy language at issue.

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