THE BKCG BULLETIN

FALL 2022 EDITION

California Supreme Court Affirms Treble Damages And Attorney's Fees In Civil Case Applying Penal Code §496

The California Supreme Court recently affirmed and clarified the propriety of awarding treble damages and attorney's fees in a civil case applying Penal Code §496. Section 496(a) defines the criminal offense of what is commonly referred to as receiving stolen property. Section 496(c) allows any person who has been injured by a violation of Section 496(a) to bring an action for three times the amount of actual damages, plus reasonable attorney's fees.

Despite the clear language of the statute, appellate courts struggled when applying the law to business disputes. However, with the state Supreme Court's ruling in *Siry Investment, L.P. v Farhondehpour*, Penal Code §496 will now be in play in many business disputes.

In *Siry*, the parties created a limited partnership to renovate and lease space in a mixed-use building in downtown Los Angeles. The Defendants, who were partners with the Plaintiff, created a separate entity called DTLA and required the building's tenants to pay their rent to DTLA. The Defendants then began to improperly divert rental income away from the partnership and into

DTLA, and two of the Defendants also commenced charging personal and other nonpartnership expenses to the partnerships. The Court concluded that "the net effect of these actions was to … underpay plaintiff its cash distributions. [Defendants] ensured that plaintiff remained unaware of the underpayments by misrepresenting to plaintiff the building's rental income and the partnership's expenses, effectively lying to plaintiff about what its cash distributions should have been. "

The Court found that "Section 496(c) applies to the conduct at issue in the present case. The unambiguous relevant language covers fraudulent diversion of partnership funds. Defendants' conduct falls within the ambit of section 496(a): They received 'property' (the Diverted partnership funds) belonging to plaintiff having 'obtained' the diverted funds 'in a manner constituting theft". Defendants also 'concealed' or 'withheld' those funds… from plaintiff. They did all of this 'knowing' the diverted funds were so obtained."

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Arbitrator Awards BKCG Clients $13 Million In Partnership Dispute

Alton Burkhalter and Joshua Waldman recently concluded four years of litigation in arbitration (which spilled over into multiple superior court cases and two bankruptcy filings) with a $13 million arbitration award for the firm's clients.

The award includes punitive damages and attorney's fees. In doing so, the arbitrator noted: "This was a complex case doggedly fought in multiple forums over four years. Throughout the litigation Respondent's counsel (i.e., BKCG) showed admirable skill, preparation and organization."

The arbitration award will soon be converted into a judgment. As with virtually all binding arbitration awards, the losing parties' rights on appeal are extremely limited. For more information on the underlying facts of the dispute, contact Alton Burkhalter or Joshua Waldman.

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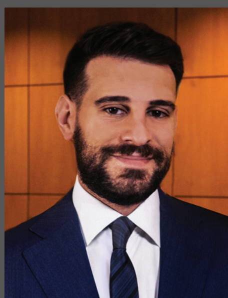
"The Art Of (Leaving) The Deal"

In BKCG's last newsletter, my colleague Michael McConnell discussed the "poison pill" the Twitter board tried to implement to prevent billionaire plutocrat Elon Musk from purchasing the social media platform. What has happened since Mr. McConnell's article came out has been nothing but a rollercoaster of accusations, rebuttals, and, shaky legal arguments. Musk and Twitter's board eventually agreed to a sale price of $44 billion, only for Musk to announce he was putting the deal "on hold" (through a Tweet, no less) because of the number of bots and fake spam accounts polluting Twitter's platform. Twitter pushed back, stating that only approximately 5% of its userbase were bot accounts, and that this number had been disclosed to Musk before the parties agreed to the sale. However, Musk disputes this claim and thinks the number of bot and spam accounts may be substantially higher. Musk has since refused to consummate the purchase and Twitter ended up filing a lawsuit against him to enforce their contract. While the numbers and consequences at play in the Twitter/Musk deal are almost unfathomable, we at BKCG deal with the same exact issues on a near daily basis, though usually involving a substantially lower sum of money. I saw this feud between Musk and Twitter as a perfect example to review some basic contract principles that every business deals with, even if it goes unnoticed.

One of the most common terms BKCG sees in our contract dispute litigation is "meeting of the minds." This is a foundational principle in contract law and individuals or businesses who want to renege on a contract will usually say that the parties had no "meeting of the minds." Essentially what this means is that a contract must be sufficiently defined "upon the essential features of the agreement, and … the scope of the duty and limits of acceptable performance" in order to provide a basis for damages in case of breach. *(Cheema v. L.S. Trucking, Inc.* (2019) 39 Cal.App.5th 1142, 1149). This concept is why it is so important, in any contract, to have clear and definable terms that encompass the rights and duties of each party.

Musk doesn't seem to take issue with any "meeting of the minds" type problems in his contract dispute with Twitter. Instead, he might be setting up a claim of what's called "fraudulent concealment." In a claim of fraudulent concealment, the plaintiff must prove five essential elements: (1) The defendant must have concealed or suppressed a material fact; (2) the defendant must have been under a duty to disclose that fact to the plaintiff; (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff must have been unaware of the fact and would not have acted as they did had they known; and (5) the plaintiff suffered damages as a result of the concealment. In the Twitter case, Musk may argue that Twitter fraudulently and intentionally concealed the number of bot/spam accounts to artificially inflate Twitter's userbase, and, in turn, its value. This is a common defense to contract enforcement, especially in land deals where buyers remain unaware of some significant defect in the acquired property that the seller may have been aware of and concealed on purpose. The potential to get into a contract that may involve fraudulent concealment shows the importance of due diligence before negotiating and signing a final contract.



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PAGA vs. Class Actions

Unfortunately, California is a state that has made it increasingly difficult for employers to avoid employment lawsuits. The most expensive of these for our clients can be Class Action suits and Private Attorney General Act ("PAGA") suits. And incredibly, sometimes both of these types of "representative" actions are pursued simultaneously by the same plaintiff in the same case. So what is the difference?

Most of us are probably already more familiar with Class Actions than a PAGA suit. In a Class Action, a single plaintiff (the Class Representative) attempts to represent an entire class of plaintiffs with allegedly similar claims. Class Actions can deal with employment issues, but they can also deal with any number of consumer issues. The reason for allowing class actions is the general idea that its a way to resolve a lot of smaller claims more efficiently than making each individual engage in their own litigation. "'By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress [.]'" *Bradley v. Networkers Internat, LLC* (2012) 211 Cal.App.4th 1129, 1141, *as modified on denial of reh'g* (Jan. 8, 2013) (quoting *Richmond v. Dart Industries Inc.* (1981) 29 Cal.3d 462, 469.

In Class Actions there is also normally a process whereby class members who are notified of the Class Action can opt-out of the litigation, thus preserving their own individual right to litigate their own potential claim. Additionally, in a Class Action in order to be entitled to a judgment and remedies for the entire class, the Class Representative must first prevail on a motion for class certification. "The 'ultimate question' ... is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Brinker Restaurant Corp. v. Sup. Court* (2012) 53 Cal.4th 1004, 139. In fact, one of the most frustrating aspects of a Class Action is that before the court even allows examination of whether the legal claims have merit, the court allows broad discovery of information from the defendant to allow the Class Action plaintiff to make the case for class certification. Obviously, Class Actions become very expensive, very quickly as even before addressing the legitimacy of the legal claims, defendants are forced to spend considerable resources trying to defeat class certification.

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LIV v. PGA: Where Is The Damage?

By now, many of you have heard about the lawsuit filed by LIV Golf against the PGA Tour. The lawsuit, filed on August 3, 2022 in U.S. District Court, Northern District of California, was initially brought by eleven former PGA Tour players who joined LIV Golf. The lawsuit alleges various causes of action – primarily involving anti-trust, anti-competitive causes of action. Assuming there is no settlement, this lawsuit will take years to get to trial as the parties wind their way through a myriad of issues. In a broad context, one of the bigger issues will be whether LIV and its players can demonstrate that they sustained damages. After all, civil lawsuits are about damages and LIV players will need to show, among other things, that they have sustained damage.

First, what is LIV? LIV Golf is a new golf tournament series funded by the Saudi Arabian Public Investment Fund that started in 2022. LIV is attempting to compete with the PGA Tour much like the AFL competed (and subsequently merged) with the NFL, the ABA competed with the NBA, and the USFL competed with the NFL. LIV is much the same – a competitor to the PGA Tour. The biggest difference is that the LIV has money – lots of it. In fact, the payouts are massive - $25M to $50M to the competing golfers. These payouts are aside from the enormous signing bonuses paid to players as an enticement to join LIV. And LIV has also made a few innovative changes to the tournaments such as individual and team competition, three rounds instead of four rounds, no cuts during a tournament, and guaranteed payouts to name a few.

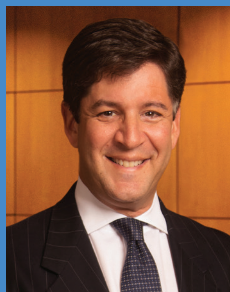
So what happened? By offering huge sums of money to the players and a novel approach to its tournaments, a number of the top PGA players as well as several of the more popular PGA Tour players signed contracts with LIV and began to play in LIV tournaments in July. The PGA responded by suspending from PGA events any player who decided to play in an LIV event.

The response by the suspended players? A lawsuit. The initial lawsuit by the players asked the Court to enjoin their suspensions which prevented them from playing in PGA Tour events such as the FedEx Cup tournaments and other lucrative events. According to the lawsuit, the LIV players alleged that the PGA's suspension caused them financial as well as commercial harm. For instance, Bryson DeChambeau alleged that the PGA's suspension denied him the right to earn compensation playing on the PGA tour and the public exposure that comes with playing on the PGA tour which, in turn, cost him endorsement dollars. Phil Michelson, another LIV player who was suspended, similarly alleged financial harm caused by the inability to play on the PGA tour thereby causing him to also lose endorsement deals and sponsorships. In other words, the players wanted the best of both worlds – to continue to play in PGA events as well as the LIV events. The PGA, however, forced the players to make a choice.

Can the LIV players show any damages? To have a viable complaint, the LIV players need to demonstrate they sustained damages. The difficulty for the players is that they are earning more money playing for LIV and at LIV events than what they could earn at a PGA event. According to news reports, Mr. DeChambeau reportedly received $125 million as a signing bonus to join the LIV Tour. In addition, he earned $560,000 from the first LIV event – more than he earned playing at the seven prior PGA events in 2022 where he played. Mr. Michelson reportedly received $200 million to join the LIV Tour. The other plaintiff players also received substantial sums. This raises the question of whether any of the plaintiff players were actually damaged by the PGA suspension and, if so, what is that damage?

Three of the plaintiff players took the first shot and asked the Court for a Temporary Restraining Order (TRO) to allow them to play in the PGA's FedEx events this past August 2022. The Court denied the TRO on the basis that the three players were not able to show any "irreparable harm," a requirement for the granting of a preliminary injunction and a TRO. In the Judge's opinion, the amount of money the players were paid by LIV essentially dwarfed what any of them could earn in a PGA event. Moreover, even assuming there was damage, money could make them whole; that is, there was no irreparable harm.

While the Judge's opinion pertained solely to the TRO, several statements in her opinion raise serious issues for the players claims against the PGA Tour on a go forward basis. After all, LIV is holding tournaments, the players are getting paid more money, and the players made a choice as to where they wanted to compete. So what harm have the players really sustained? LIV – the organization – must have taken the Judge's statements to heart as an amended complaint was recently filed adding LIV as a plaintiff. Realizing the players might not be the best plaintiffs, LIV is now attempting to articulate how its tour has sustained damages from alleged anti-competitive behavior by the PGA. Whether it will be able to do so is an issue.



A trial in the lawsuit is several years away. There are many issues that pertain to whether the PGA is unlawfully maintaining a monopoly over the market for the services of golfers and unreasonably restraining trade. However, when it comes to the key issue of damages, LIV players and the LIV have an uphill battle.

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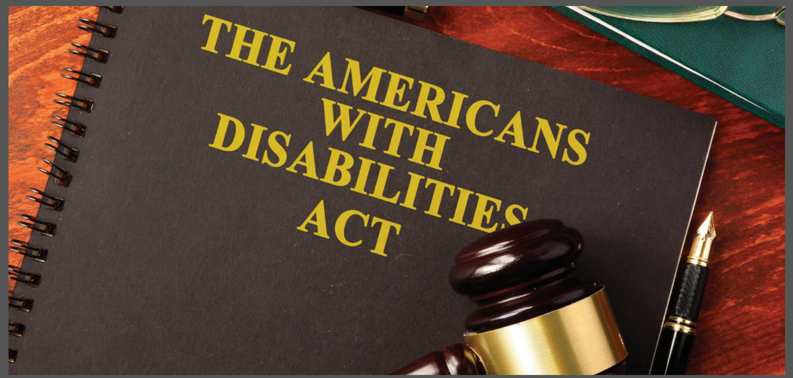
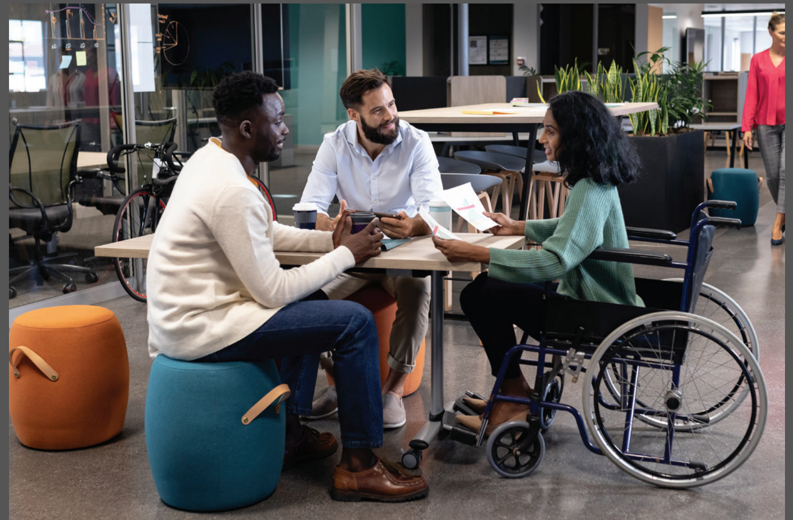
Supervisors Are The Front Line Of Defense Against Failure To Accommodate Disability Claims





Under state (FEHA) and federal (ADA) laws, employers must make reasonable accommodations for the *known disabilities and medical conditions* of applicants and employees to enable them to perform a position's essential functions, unless doing so would produce undue hardship to the employer's operations. Supervisors and managers play a critical role in the employer's obligation to engage in an "interactive process" to identify the accommodations that can be reasonably provided.

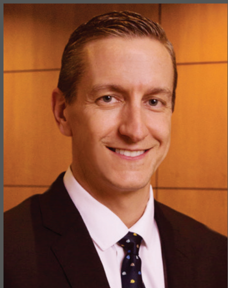
The FEHA and FEHA regulations provide a *nonexhaustive* list of possible accommodations. Employers and supervisors must have an open mind toward any of the following: making facilities readily accessible to and usable by disabled individuals; job restructuring; offering part-time or modified work schedules; reassigning to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials or policies; providing qualified readers or interpreters; allowing assistive animals on the worksite; and altering when and/or how an essential function is performed.

A supervisor is the employer's agent for purposes of this duty. If a supervisor has acquired knowledge of a medical condition or disability, he or she has a duty to communicate that information to the employer, and a conclusive presumption arises that the supervisor has done so. In other words, the company cannot hide behind the supervisor who learns of a potential need for an accommodation but does nothing further.

Without question, employers must strictly comply with any and all limitations on work duties prescribed by an employee's treating physician on a return to work notice. However, under the law, the duty to accommodate does not end there. Employers who become aware of a disability or medical condition have an affirmative duty to identify reasonable accommodations, even if the employee has not requested any accommodation. Thus, what the supervisor observes in his or her daily interactions with employees can put an employer on notice of a need to *initiate* the interactive process. However, the duty to provide reasonable accommodations includes more than the obvious accommodations, such as providing assistance with physical tasks. In a case brought by a postal worker with AIDS, the Ninth Circuit held that the post office failed to reasonably accommodate the employee, who had requested a transfer to another location where he could obtain better medical treatment. (See *Buckingham v. United States* (9th Cir.1993) 998 F.2d 735.)

The employer also has an affirmative duty to inform a disabled employee of other job opportunities within the company and to determine whether the employee is qualified for any of them. (See *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 949-950.) *Prilliman* concerned pilots with AIDS who were disqualified from flying because, at that time, the FAA prohibited individuals with AIDS from piloting an aircraft. When the employer learned that the plaintiffs had AIDS, the pilots were grounded and put on disability leave without offering them a different job. The lesson here is that employees should not just automatically be put on disability leave as a kneejerk reaction; supervisors should be trained to help the company affirmatively investigate other opportunities that may exist within the company for disabled employees.

Although the duty is broad and all-encompassing, diligent companies *can* comply with their obligations, and the occasional "unicorn" does still exist where an employer succeeds at knocking out a nebulous failure to accommodate claim before trial. In *Goos v. Shell Oil Co.* (N.D. Cal. 2010) 2010 WL 1526284, the U.S. District Court dismissed plaintiff's disability discrimination claims because the plaintiff did not communicate the specific accommodation she sought, she obstructed the employer's efforts to identify the specific nature of her disability, and her own doctor asserted that she was "completely disabled" and therefore no accommodation was even possible.



Goos is instructive in that it provides a roadmap and a gameplan for a successful defense to any disability discrimination or accommodation claim. However, it shows that the employer must be responsive and thorough in its efforts to identify an accommodation, even when the employee is obstructive or resists those efforts. Supervisors who are well-informed of the company's duty to accommodate will ensure compliance with all applicable laws and provide an excellent first line of defense against these claims.

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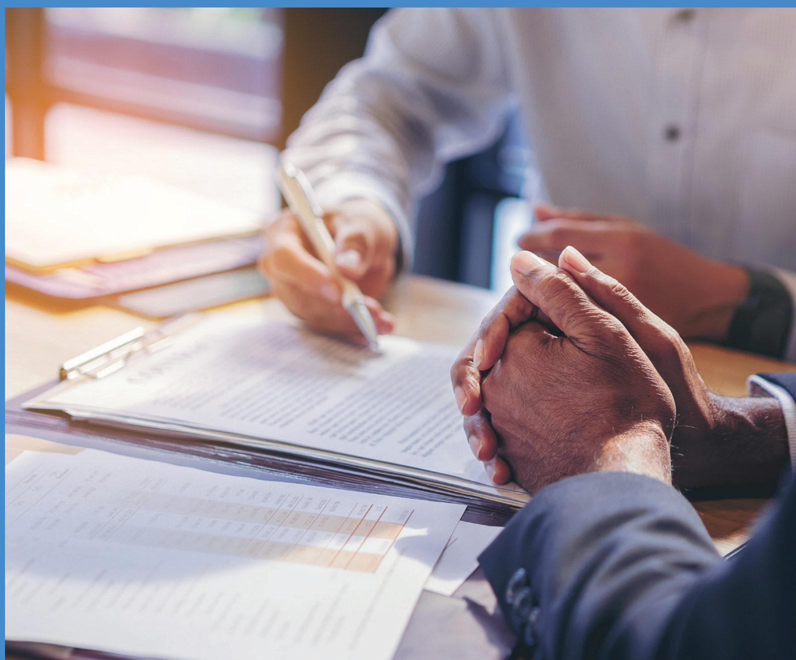
Jones Day Wins The Day In Dispute Over Arbitration Subpoenas



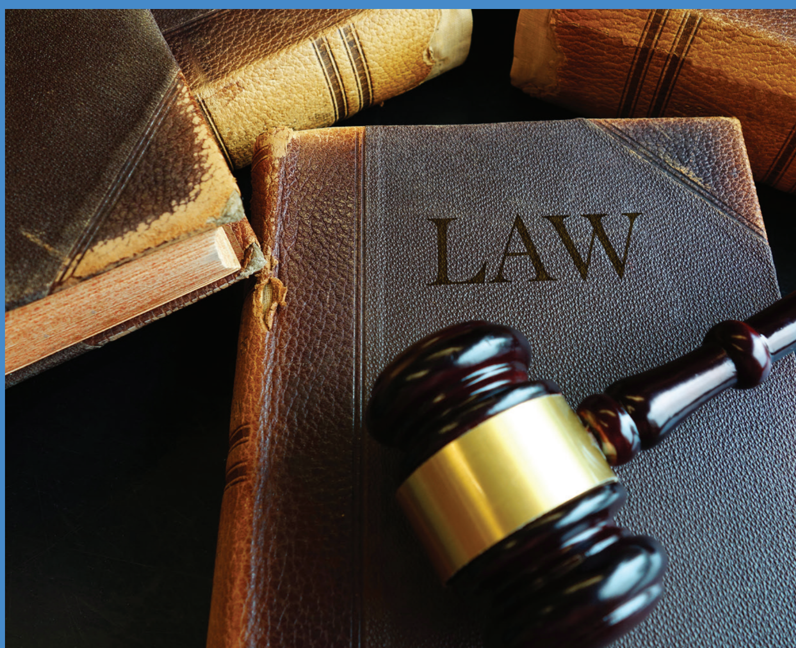
Arbitration provisions have become a standard feature in many formal contracts entered into today. The point of such agreements to arbitrate are to streamline the litigation process should any disputes arise. To accomplish this, arbitration has more relaxed rules in some respects (such as regarding rules of evidence), whereas other procedures are more stringent to prevent the parties from incurring too many costs and wasting too much time (such as allowing for less discovery).

For example, if in the course of an arbitration you need testimony or documents from a third-party who did *not* sign the contract featuring the arbitration agreement, your options may be limited. The recent Ninth Circuit decision just certified for publication in *Jones Day v. Orrick, Herrington & Sutcliffe, LLP, et al.*, D.C. No. 4:21-mc-801810JST, No. 21-16642, sheds some light on this question.

In *Jones Day*, a dispute arose between two very large law firms, Jones Day and Orrick, Herrington & Sutcliffe, regarding a partner–who lived in Paris–leaving Jones Day to join Orrick. That partner's partnership agreement with Jones Day called for arbitration of any dispute in Washington, D.C. However, two important witnesses resided in California and they were refusing to comply with the arbitrator's subpoenas.

Jones Day initially attempted to enforce the subpoena in a Washington, D.C. court, but that court found that it lacked jurisdiction over the California witnesses. As a workaround, Jones Day asked the arbitrator to sit for a hearing in California and issue new subpoenas to the California witnesses. When the witnesses refused to comply, Jones Day sought to enforce the subpoenas in federal court in California.

The federal District Court in California ruled that the actual location of the underlying arbitration was in Washington, D.C., and that Jones Day could not get around that by merely asking the arbitrator to go to California to issue the subpoenas. As such, the District Court found that it also lacked jurisdiction to enforce the subpoenas. With no other options for compelling the testimony of these key witnesses, Jones Day appealed the decision to the Ninth Circuit.



The Ninth Circuit overturned that decision, instead focusing on the international nature of the arbitration itself. The Ninth Circuit reasoned that because the arbitration concerned the resolution of an international dispute, that arbitration fell under the provision of the Federal Arbitration Act (FAA) that governs international arbitrations. As a result, the Ninth Circuit ruled that in international arbitrations where a particular federal district court lacks jurisdiction to enforce a subpoena over a witness (such as a Washington, D.C. court lacking the jurisdiction to compel appearance from a California resident), the proper procedure is to seek enforcement from whichever district court would be appropriate for enforcing the subpoena. Accordingly, the Ninth Circuit remanded the case back to the District Court in California and ordered it to enforce the subpoena.

This decision flows from the general jurisdiction that federal courts have regarding international arbitrations under the FAA. As such, the procedure would be different–and likely much more difficult–in domestic arbitrations because the jurisdiction of any particular court would likely be much more limited. However, this decision provides a guide for successfully compelling testimony from recalcitrant witnesses in distant jurisdictions, even if only in the international arbitration context, and this procedure may be affirmatively expanded as the issue continues to plague modern arbitration proceedings.

If you or your business needs advice regarding the arbitration of a dispute, or requires representation in any matter, BKCG's experienced attorneys can assist with any issues your business faces.

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PAGA vs. Class Actions (continued from page 2)

PAGA cases, while also "representative" actions, are a different animal. First of all, PAGA cases only deal with employment claims – specifically alleged violations of California's Labor Code. The named plaintiff in the case is known as an "aggrieved employee" allegedly representing other "aggrieved employees" of the same employer. The idea is that this employee steps into the shoes of the Labor and Workplace Development Agency, and litigates alleged violations of the Labor Code on behalf of that state agency. An action under PAGA "is fundamentally a law enforcement action [and relief is] designed to protect the public and not to benefit private parties." *Arias v. Sup. Court* (2009) 46 Cal.4th 969, 986 (citations omitted). Because of this, "aggrieved employees" cannot opt-out of a PAGA suit- once that suit is resolved it is resolved for all the aggrieved employees in the action. The other significant difference between a Class Action and a PAGA action, is that the only recovery available in a PAGA action is the recovery of penalties under the Labor Code and 75% of those recovered penalties must be paid to the State of California. The reason, however, that PAGA litigation is so popular in this state is that attorneys who represent an "aggrieved employee" in a PAGA action are entitled to recover their attorney's fees and costs from the defendant employer if the "aggrieved employee" prevails. Also, PAGA has no "certification" requirement like Class Actions do, so moving the litigation forward and demanding sensitive information and documents about alleged "aggrieved employees" from a defendant employee can be much easier.

Abuse of the PAGA statute is rampant in California. With very little effort or evidence, plaintiff's attorneys (mainly motivated by the recovery of their own fees) can force an employer to agree to a settlement just because defending such a case would be so expensive. That attorney's client recovers very little (as 75% of the settlement would be owed to the state of California) and the reality is that the plaintiff's attorney profits more than anyone else.

The good news is that in November 2024's General Election, legislation will be on the ballot that should put a stop to PAGA abuse. The California Fair Pay and Employee Accountability Act would replace PAGA and restrict the Labor Commissioner from allowing private enforcement of alleged Labor Code violations on behalf of the state.

Instead, employees would seek redress of alleged violation through the Labor Commissioner once again. It would also allow employers to cure violations should there be a violation of the Labor Code and it would provide for increased penalties should it be determined that the employer has willfully violated the Labor Code.

It's obviously a Hobson's choice right now as to whether it is better for an employer to be sued in a traditional Class Action or a PAGA action, but at least some relief could be on the way in the future. Until then, employers should talk to their attorneys about ways to decrease the likelihood of ending up a defendant in a representative action.

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California Supreme Court Affirms Treble Damages And Attorney's Fees In Civil Case Applying Penal Code §496 (continued from page 1)

The Court observed that not all commercial disputes alleging that a defendant obtained money or property through fraud, misrepresentation, or breach of a contractual promise will amount to a theft. To prove theft, a plaintiff must establish criminal intent on the part of the defendant beyond "mere proof of nonperformance or actual falsity" and distinguished a nonviable case where the defendant's misrepresentations or promises were made innocently or inadvertently.

With the California Supreme Court's ruling, Penal Code §496 is now clearly back in play in commercial disputes.

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