THE BKCG BULLETIN

SPRING 2023 EDITION

How Do California Employers Spell Relief From PAGA? F-P-E-A-A

As many of our employer clients know, California's Private Attorney General Act ("PAGA") has mutated over the years from a well-intentioned statute to protect employees from the relatively few employers ignoring wage laws, to a cottage industry of plaintiff attorneys preying upon just about every employer in the state. That may change in 2024 with the Fair Pay and Employer Accountability Act on the ballot to repeal PAGA. And, while "FPEAA" may not be as catchy as "PAGA", it certainly promises to be just as impactful.

For the lucky companies that are unaware of PAGA, here is a brief history. In 2003, the California legislature enacted PAGA as a way to allow employees to enforce their rights under the Labor Code without having to rely on the overworked, underfunded Labor Commissioner's office (the Labor and Workforce Development Agency, or "LWDA"). A PAGA case can be brought on behalf of a group of employees and thus can be similar to a class action lawsuit, but PAGA has some very material differences (see BKCG Bulletin Fall 2022 Edition for a comparison).

PAGA's framework allows an employee to sue an employer in Court for *any violation* of the Labor Code and recover penalties from the employer, with 75% of these penalties going to the LWDA, and 25% going to the employee. Before filing a lawsuit, the employee must send a 60-day notice

to the employer and the LWDA. The idea was for the LWDA to actually review and investigate the claims and take action if needed. The desired result was that unintentional violations could be cured by the employer, while more egregiously noncompliant employers would face stiff penalties (paid to the state) and the lost wages would be paid to the aggrieved employees.

Unfortunately, that is not at all how things worked out. Over the last two decades, PAGA has been manipulated by employee plaintiff lawyers into a cudgel wielded indiscriminately against all employers in the state. The Labor Code consists of hundreds of individual statutes, some of which are extremely technical. Finding a violation against even the most conscientious employer is not a difficult task. Armed with the legislative permission to enforce these myriad rules, the plaintiff's bar deluged the LWDA and the courts with these claims. (continued on page 8)

BKCG Partners Listed In SuperLawyers Top 50 For Orange County-Top 100 For So Cal

Four partners of BKCG have been recognized as SuperLawyers for 2023, with two making the Top 50-Orange County list and one landing on So Cal's Top 100.

Greg Clement, Joshua Waldman, Dan Kessler and Alton Burkhalter were recognized as SuperLawyers for 2022. Dan and Alton were placed on SuperLawyer's Top 50 – Orange County list, and Alton was additionally recognized as one the Top 100 SuperLawyers in Southern California.

This is the second consecutive year that Alton and Dan made the Top 50 list.

The full lists can be viewed at:
https://www.superlawyers.com/top-lists/california-southern/top-100-2023-southern-california-super-lawyers/f474573a89a8f1da580cbfd9b0fecd33/

And

https://www.superlawyers.com/top-lists/california-southern/top-50-2023-orange-county-super-lawyers/f41ba39ddd5e6fba9016468c5964b05a/

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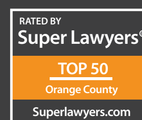
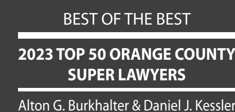
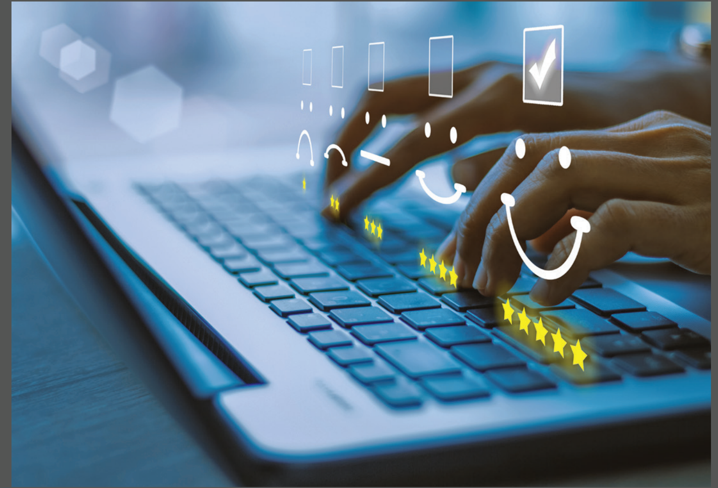
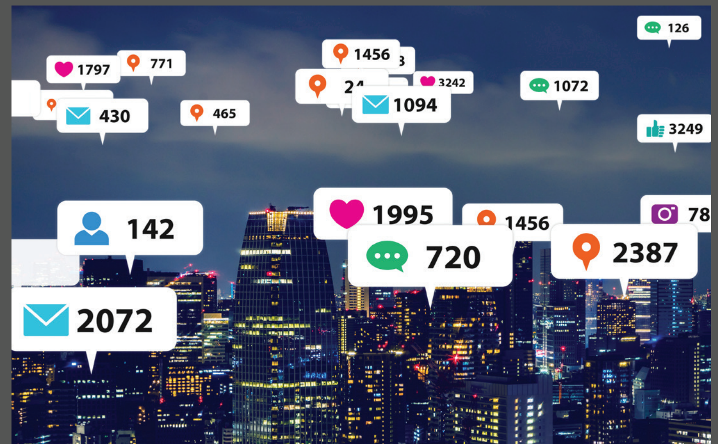




The Case That Could Change The Internet





From time to time, business owners are forced to deal with social media posts concerning their product or services that, on occasion, might be objectionable or even untruthful. The angry business owner then asks whether any action can be brought against the social media platform to either take down the post or face liability for allowing such posts on its platform. The typical answer is that the platform is shielded from liability under the law. However, on February 21 and 22, 2023, the U.S. Supreme Court ("SCOTUS") heard oral argument in two cases that have the potential to change the internet as we know it.

The two cases concern the same law - a law that shields websites from liability for what third parties post on a particular platform such as Facebook, Yelp, or Twitter. The law at issue is Section 230 of the Communications Decency Act passed by Congress in 1996 ("§230"). The start of §230 says: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." These 26 words protect online platforms by: (1) stating that they shall not be "treated as the publisher or speaker" of any content posted by third parties; and (2) regardless of whether the online platform moderates or removes content, the immunity applies. Additionally, §230 also allows online platforms to "restrict access" to any content it deems objectionable. In other words, a company like Twitter gets to choose what is and what is not acceptable content, and it can also decide whether to host the content or moderate it. In a nutshell, although a third party that posts a comment on social media may be subject to a defamation lawsuit, the online platforms are shielded from liability for hosting that content. Therefore, while users may post untruthful reviews of a restaurant on Yelp or a fabricated complaint about a company's product on Twitter, the host online platform is shielded from liability. Until, maybe, now.

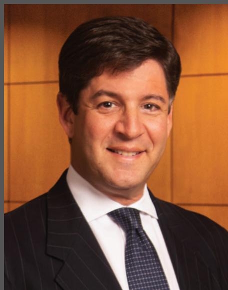
The first case, Gonzalez v. Google, concerns whether online platforms can assert immunity against claims alleging that Google's algorithms facilitated a terrorist act. The facts involve the 2015 ISIS terrorist attack in Paris that killed 130 people including a 23-year old American exchange student. The student's family sued YouTube (owned by Google) seeking to hold Google partially responsible for radicalizing the terrorists who perpetrated the attack and violating the Anti-Terrorism Act ("ATA"). Gonzalez's main argument was that by creating and using algorithms as well as generating thumbnails to sort and recommend content to users, Google is itself communicating its own content. In other words, by taking a third party's content, running it through an algorithm, and making recommendations to certain individuals who might share a similar interest, Google has become the author of the content instead of just being a host. Therefore, Gonzalez argued that § 230's liability shield should not apply.

Google countered with the argument that creating algorithms and sorting posts so that people with similar interests can view the posts is exactly what makes the internet useful – not to mention valuable. According to Google, it is this liability shield that has allowed the internet to thrive. Websites like Facebook and YouTube have hundreds of millions (or billions) of users and could not monitor and approve every post. Taking away the shield §230 provides would essentially gut the internet. Moreover, Google argued that there was no proof provided in the lower court evidencing that YouTube purposely pushed ISIS content to people.

The Department of Justice ("DOJ") filed an amicus brief. The DOJ first argued that §230 does not protect illegal activity such as sorting information in a manner that would violate a discrimination law. The DOJ then further sought to distinguish between speech on a platform and the platform's conduct. Essentially, the DOJ was attempting to get SCOTUS to set some limits on §230 – although it was not entirely clear about where that line should be drawn.

A day later, oral arguments were heard in Twitter v. Taamneh, a case that concerns the issue of whether online platforms can be held liable for failing to remove content and accounts promoting terrorism. In other words, can social media platforms be held liable for not removing certain content quickly enough? The facts of the case arise out of a 2017 terrorist attack at a nightclub in Istanbul, Turkey. Taamneh, a U.S. citizen, was one of the 39 people killed in the attack. Taamneh alleged that Twitter was aware of ISIS's presence on its platform, used Twitter to recruit, and therefore aided and abetted the terrorists in violation of the ATA. Put simply, by not removing the content, Twitter violated the law.

In response, Twitter argued that the ATA requires Twitter to know the specific user accounts and that the account substantially assisted the terrorist(s) in the attack. According to Twitter, it should not be responsible for aiding and abetting terrorism unless it is directly aware of the specific post or the account in question. Twitter further argued that for there to be liability, it would have to be proven that the post or account provided substantial assistance to the act of terrorism and that it knew its actions (or inactions) would provide such assistance.



In both Gonzalez and Taamneh, SCOTUS tested hypotheticals and attempted to find out whether a narrowing of the liability shield was necessary and, if so, where to draw that line. SCOTUS also questioned whether Congress and not the Courts might be the better arbiter of where to draw the line.

Exactly what SCOTUS will do, if anything, will not be known until later this year. That said, readers should keep in mind that with certain limited exceptions, SCOTUS is not required to take any case which is appealed from the lower circuits. For SCOTUS to take a case, there needs to be at least four Justices who vote that they want to hear the appeal. In this instance, SCOTUS voted to hear the challenge to Section 230. This alone suggests that at least four Justices have a desire to inject the SCOTUS into the issue and decide whether the liability shield is too broad. Any substantive decision could have serious implications for internet platforms.

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

Actions Speak Louder Than Words: Forming Contracts And Partnerships By Your Actions

One of the most common discussions I have with new clients has to do with utter shock at being sued. Phrases such as " I didn't form a contract, I didn't sign anything!" or "How can I be someone's partner? We never agreed to anything" are all too common. Most of the time, unbeknownst to them, the clients I speak to in fact *did* form a contract with the person suing them, or actually *did* form a partnership relationship. The problem arises not from the actions our clients take, but from the law guiding contracts and partnerships. It is surprisingly easy to form a contract with someone, even if there is no signed writing to support a contract claim. Even easier, however, is forming a partnership with another person, putting you in a business relationship you never meant to get into. Hopefully by reading this article, you may be able to avoid jumping into the deep end of a pool you never meant to enter.

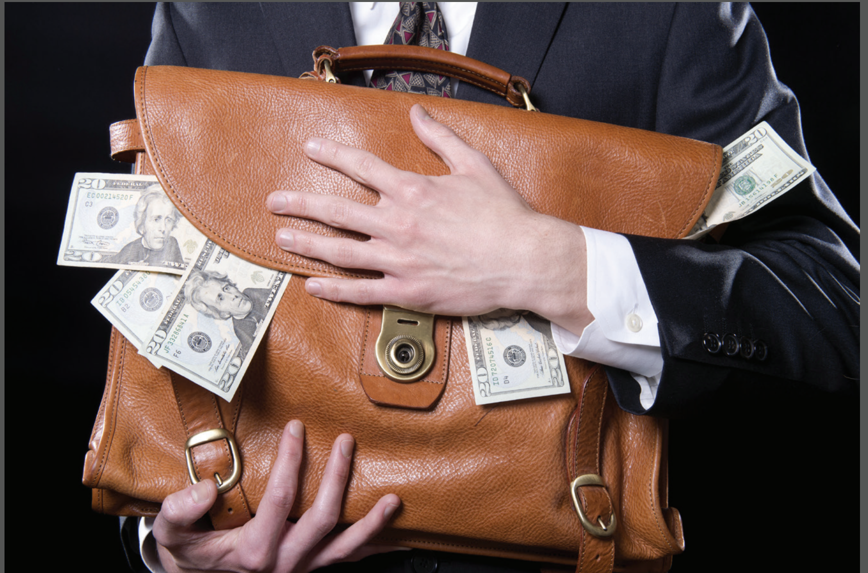
The type of contract most people are familiar with are, of course, written contracts. We might not encounter written contracts in our day-to-day lives, but almost every major life event, from buying a home to acquiring a job, involves engaging with a written contract of some sort. However, a form of contract that often catches my clients unaware is what's called an "implied in fact" contract. The California Civil Code defines an implied contract as one where "the existence and terms … are manifested by conduct." (California Civil Code § 1621). The California Supreme Court once stated, "'Contracts may be express or implied. These terms, however, do not denote different kinds of contracts …. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in light of the subject matter and of the surrounding circumstances, then the contract is an implied one.'" (*Marvin v. Marvin*, (1976) 18 Cal.3d 660, 678). The ultimate point here is that just by engaging with someone as if you have a contract for goods and/or services, even if a definite written or oral contract does not exist, that can be enough in a court of law to show the parties formed an implied contract.

Partnerships are even more simple to form than implied contracts. The California Corporations Code defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit" formed under section 16202 of the Corporations Code. Section 16202 is where things get interesting, because that statute governs the formation of a partnership. Section 16202 states that an association of two or more persons can form a partnership "*whether or not the persons intend to form a partnership*." For instance, a person who does not work for a business, but, for whatever reason, is given shares of the profits will be *presumed* to be a partner in the business. Importantly, California courts have found that "it is immaterial that the parties do not designate the relationship as a partnership or realize that they are partners, for the intent may be implied from their acts. (*Eng v. Brown* (2018) 21 Cal. App.5th 675, 694).

What I hope the main takeaway from this article is, is that words matter, but actions tend to matter significantly more. The common phrase "actions speak louder than words" is especially true when engaging in business dealings with another.

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

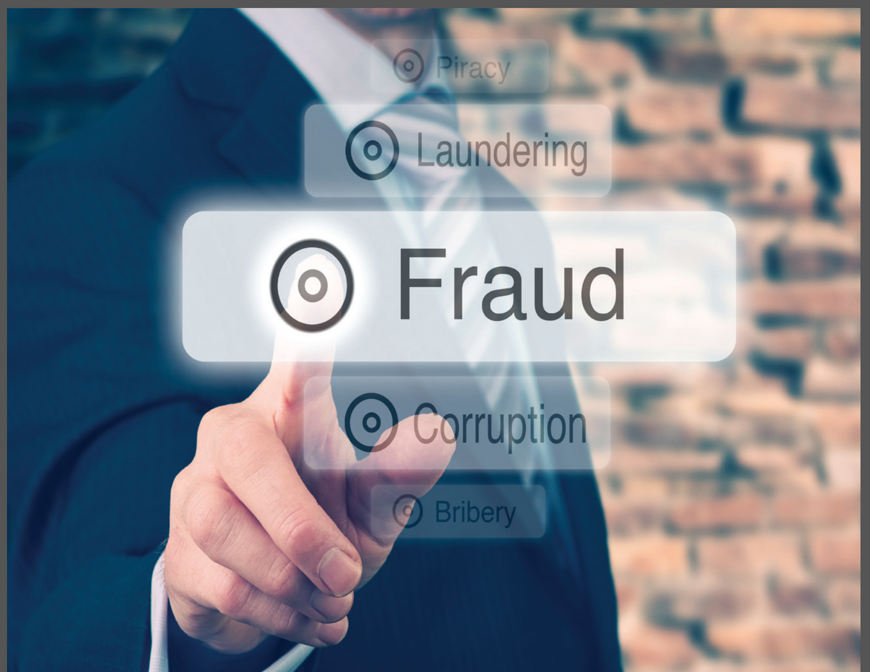
Pleading Fraud: Be Precise And Particular



In February 2023, formerly-prominent California attorney Tom Girardi was brought up on charges relating to his alleged embezzlement of more than $15 million from various clients. Recently, some of Girardi's former clients who allege that they are victims of Girardi's embezzlement scheme filed a lawsuit against a New York law firm and one of its partners alleging that the New York firm worked with Girardi to embezzle settlement funds. These former clients, Joseph Ruigomez, Kathleen Ruigomez, and Jamie Ruigomez, suffered injuries stemming from a natural gas pipeline explosion. They retained Girardi's firm, Girardi Keese Law Frim, to represent them. The case settled at mediation, but Girardi allegedly failed to tell them any details regarding the settlement, including how much the settlement was for or when they would receive their settlement funds.

The utility company wired $28,000,000 to the appropriate trust account, but the Ruigomezes allege that Girardi sent substantial amounts of that money to a New York-based law firm called the DiNardo Law Firm. The Ruigomezes allege that Girardi made out one check for nearly $6 million and another for $500,000 to the DiNardo Law Firm, both drawn from the settlement trust account. The Ruigomezes allege that the DiNardo Law Firm deposited those checks and then transferred that money to Joseph DiNardo, among others.

However, the Ruigomezes allege that they never retained the DiNardo Law Firm, and that they had never authorized Girardi Keese to share any contingency fees with the DiNardo Law Firm or DiNardo himself.



The Ruigomezes filed a lawsuit based on these allegations in November 2022. The DiNardo Law Firm moved to dismiss the lawsuit in December, and that motion was granted in January 2023. So, as of now, the case is dismissed (until the Ruigomezes file an amended Complaint in the lawsuit). The reason that the court granted the motion and dismissed the case–at least temporarily–was because of the allegations that the Ruigomezes failed to include in their lawsuit.

California law requires that any suit alleging fraud do so with heightened particularity that is not generally required of other types of claims. As described above, the Ruigomezes alleged extensive misconduct by Girardi in concert with the DiNardo Law Firm and DiNardo, but the focus of the allegations was on Girardi. Importantly, the Ruigomezes did *not* name Girardi as a defendant in the lawsuit, only DiNardo and the DiNardo Law Firm. In addition, the Ruigomezes failed to allege specifics regarding the DiNardo Law Firm's fraudulent activity, such as how the DiNardo Law Firm caused the funds to be transferred to it, what wrongful activity they engaged in regarding the acceptance of that money, and what the DiNardo Law Firm actually did with the money.

Without specific allegations regarding the particulars of what the DiNardo Law Firm did that was fraudulent, the court concluded that the lawsuit as-drafted had to be dismissed. However, in making its ruling, the court provided some suggestions to the Ruigomezes. The court suggested that the problem could be solved by altering the allegations to make clear that only Girardi allegedly engaged in fraudulent conduct, while making it clear that the DiNardo Law Firm did not engage in any fraudulent conduct. This would eliminate the requirement that the Ruigomezes have to plead specific allegations regarding the DiNardo Law Firm, which would resolve the issue and allow the suit to move forward.

Whatever the Ruigomezes choose to do, the lesson for other parties and litigators is clear: if you are going to allege that someone engaged in fraud, you must include as many factual details as possible and plead those allegations with as much specificity as possible. If a party fails to adhere to these nuanced rules, then even a case that seems like an unequivocal winner can still be defeated at its earliest stages.

If you or your business needs advice regarding any type of fraud in a transaction that has caused harm to you or your business, or requires representation in any matter, BKCG's experienced attorneys can assist with any issues your business faces.

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

The Employee-Independent Contractor War Is Far From Over

Before COVID-19 shut down the world, a major war was waged across California courts over the classification of "gig" economy workers as independent contractors vs. employees. The war continues to be fought on a number of fronts.

In 2019, the Legislature enacted Assembly Bill No. 5, which established a new test for distinguishing between employees and independent contractors for the purposes of the Labor Code and Unemployment Insurance Code. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 274–277.)

In response, a group called Protect App-Based Drivers and Services ("Protect Drivers"), proposed Proposition 22. Supported by Uber, Lyft and DoorDash, Protect Drivers, in Prop 22, wanted to define an "app-based driver" as a person who works as a driver or courier for transportation or delivery network companies, and that app-based drivers would be *independent contractors* and not *employees or agents* if the company does not control the drivers in certain specified ways. App based drivers would be entitled to certain quasi-employee benefits, such as a minimum earnings guarantee and occupational accident insurance, but would not be entitled to full employee protections under California law.

California voters approved Prop 22 with 58.6 % of the voters in favor. In January 2021, a group of Unions and employee rights organizations filed a lawsuit, entitled *Castellanos v. State of California*, 2023 WL 2473326, asking the Court to invalidate Prop 22 for violating the California Constitution. The trial court granted the petition, ruling that the proposition (1) is invalid in its entirety because it intrudes on the Legislature's exclusive authority to create workers' compensation laws; (2) is invalid to the extent that it limits the Legislature's authority to enact legislation that would not constitute an amendment to Proposition 22, and (3) is invalid in its entirety because it violates the single-subject rule for initiative statutes.

Proposition 22's proponents and the state appealed, arguing the trial court was mistaken on all three points. On March 13, 2023, the Fourth District Court of Appeal issued its ruling, which was a bit of a mixed bag for both sides. On one hand, the Court agreed that Proposition 22 does not intrude on the Legislature's workers' compensation authority or violate the single-subject rule. However, the Court also concluded that the initiative's definition of what constitutes an amendment violates separation of powers principles. The Court's consideration of this final issue included a detailed analysis of several interesting questions, such as 1) what matters are properly reserved for voters and determine as ballot initiatives, 2) what matters are properly reserved for "amendment" by the legislature, and 3) what matters are to be reserved for the judiciary to determine.

The Court determined that the unconstitutional provisions can be severed from the rest of the initiative, meaning that it could strike the parts of the proposition that violated the Constitution, while preserving the remainder. Accordingly, the Court affirmed the trial court's judgment insofar as it declares those provisions and reversed the remainder of the rulings.

Prop 22 awaits its next test. Meanwhile, lawyers on both sides will huddle up in war rooms to decide the next move in this contest, which will undoubtedly find its way back into a court room this year.

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

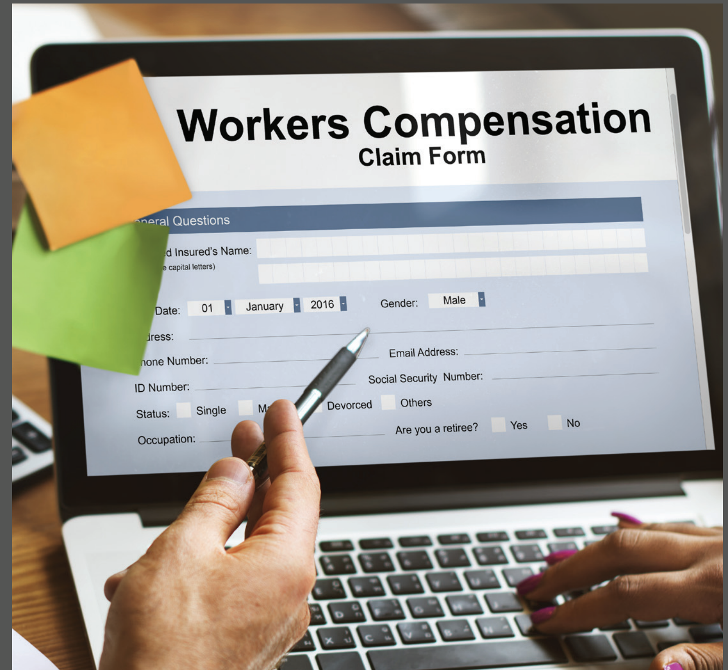
Dropping The Hammer – The Court In Gormley v. Gonzalez Enforces A Settlement Agreement's "Hammer" Provision

Settlement agreements that obligate a defendant to pay the plaintiff money to settle a case often permit the defendant to pay the amount due via periodic installment payments. For example, if a settlement agreement required the defendant to pay the plaintiff the total sum of $120,000, the agreement may permit the defendant to make $10,000 monthly installment payments for one year.

In situations like the example above, a plaintiff may want to include terms in the settlement agreement to incentivize the defendant to timely make the installment payments and punish a defendant who fails to do so. To accomplish this, plaintiffs commonly seek to include terms that increase the amount owed if that defendant defaults (i.e., what lawyers sometimes refer to as "hammer provisions"). Thus, using the example above, a plaintiff could include language in a settlement agreement permitting the plaintiff to enter judgment against the defendant in the amount of $240,000 if the defendant defaulted with respect to any of the twelve monthly $10,000 installment payments (i.e., enter judgment against the defendant for an amount that is double what the defendant would have owed had no breach occurred).

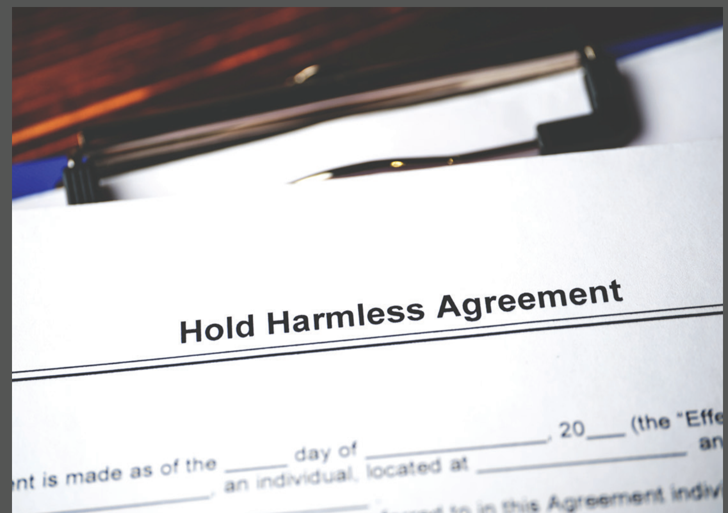
Although plaintiffs often desire to include provisions in settlement agreements that increase the amount owed if a defendant breaches, until recently California law generally deemed such provisions unenforceable. For example, in *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, the parties' settlement agreement obligated the defendant to pay the plaintiff the total amount of $20,000 via two installment payments, but permitted the plaintiff to enter judgment against the defendant in the amount of $61,232 if the defendant failed to timely pay the $20,000. The defendant breached and pursuant to the settlement agreement, the plaintiff attempted to enter judgment against the defendant for the full $61,232. Even though language in the settlement agreement expressly entitled the plaintiff to enter judgment for $61,232 (or $41,232 more than the amount owed under the settlement agreement had the defendant performed), the court nonetheless refused to enforce the provision in the agreement because the court considered the approximate $40,000 of additional money owed as an unenforceable "penalty". A near identical result occurred in a similar case, *Viatech Inter., Inc. v. Sporn* (2017) 16 Cal.5th 796, wherein the plaintiff sought to enforce a provision in the settlement agreement that permitted the plaintiff to enter judgment against the defendant in the amount of $303,620 if the defendant failed to timely pay $75,000. (continued on page 7)

Beware Of Potentially Disastrous Contractual Clauses Waiving Statutory Immunity Under Workers' Compensation Statutes



As a contract lawyer, I read indemnity clauses in agreements all the time, but have recently noticed a disturbing trend that clients may well not realize can create enormous uninsured legal risk for their businesses. In a nutshell, an indemnity clause is a clause in which one contracting party agrees to defend and pay to resolve a legal claim asserted against another contracting party if a claim is made against the latter as a result of something that the former did wrong – for example, a negligent act resulting in bodily injury, or a financial loss arising from the first contracting party breaching its contract with the other contracting party. A typical indemnity provision might look something like this:

Service Provider shall indemnify, defend and hold harmless Client and its Affiliates, and each of their officers, shareholders, directors, employees and agents (collectively, the "**Client Indemnified Parties**"), from and against any and all third party claims, demands, proceedings, suits and actions, including any related liabilities, obligations, losses, damages, fines, penalties, judgments, settlements, expenses (including attorneys' and accountants' fees and disbursements) and costs (each, a "**Claim**" and collectively, "**Claims**"), incurred by, borne by or asserted against any of the Client Indemnified Parties to the extent such Claims relate to, arise out of or result from: (i) any intentional or willful misconduct or negligence of any employee, agent or subcontractor of Service Provider; or (ii) breach of any representation or warranty of Service Provider contained herein.



This is a pretty standard contractual provision and a fair one: if one party causes another party to get sued because of the former's wrongdoing, the former should step in and resolve the claim. However, lately I have been seeing, with increasing frequency, an insidious addition to contractual indemnity provisions (for example, in service agreements and commercial leases), such as the following:

Service Provider's indemnifications and obligations under this Section, or any other provision of this Agreement, shall not be limited by the provisions of any workers' compensation act or similar act. Service Provider expressly waives its statutory immunity under such statutes or laws as to the Client Indemnified Parties

What does this mean and why is this such a big deal, I hear you ask? I will explain.

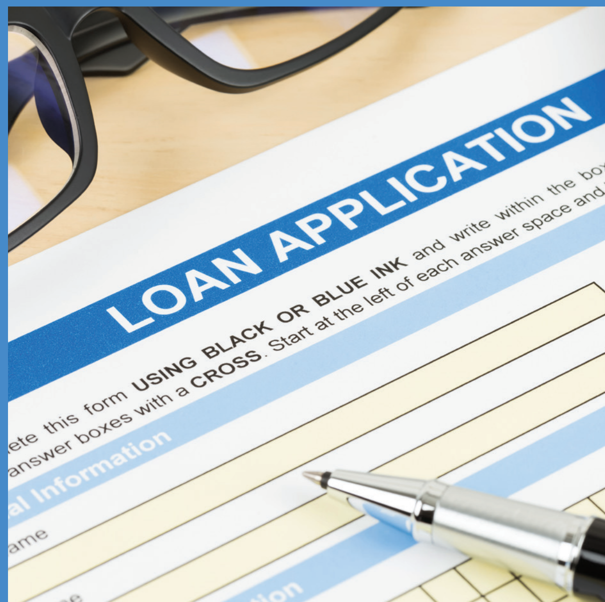
The workers' compensation program in place in California and many other states is a "no fault" program in which an employer assumes the liability that results from on-the-job injuries to its employees, regardless of whether the employee, the employer or a third party was to blame or at fault for the injury. When the employee is injured, the employer's workers' compensation insurance policy pays the employee's medical bills and pays statutory benefits to the employee based on the employee's lost wages and the nature, severity and permanence of the employee's injury.

In return, under California Labor Code §§3600-3602, with a few exceptions that are not relevant here, the employer is shielded from liability against the larger range of potential recoveries afforded to plaintiffs in a civil claim through the exclusive remedy doctrine, which limits the employee's recovery to the workers' compensation system. In addition, the employer has immunity against indemnity claims brought by a third party arising from personal injury or other claims brought by an injured employee against the third party, alleging that the third party's negligent act or omission caused the on-the-job injury. In other words, if the third party were to file a cross-complaint for indemnity against the employer, alleging that it was actually the employer's negligence towards its employee that caused the employee's injury, that lawsuit would be barred under California Labor Code § 3602, since the workers' compensation system is a "no fault" system.

It is this immunity from suit that a contracting party is giving up in the second contractual indemnity provision I have quoted. Why does this matter? It matters because, **to my knowledge, there is no insurance policy an employer can even purchase that would provide coverage to defend this lawsuit and to pay the injured employee if it were determined that the employer's negligence or breach of the contract with the third party was, in fact, responsible for the employee's injury**.

Business owners need to be aware that just because an indemnity obligation is contractually assumed, it does *not* automatically mean that the contractual indemnity endorsement in a typical commercial general liability policy will cover the claim and, as a general rule, indemnity claims arising from injuries to employees are excluded. Why? Because the employer is generally covered through its workers' compensation policy and benefits from the exclusive remedy doctrine, so there is no reason for a commercial general liability insurer to cover that risk. Here is a hypothetical example of the potentially calamitous result of a business agreeing to waive its workers' compensation immunity. (continued on page 8)

California Appellate Court Refuses To Enforce Adverse Forum Selection Clause In Usury Dispute



The Fourth District of the California Court of Appeal has recently ruled that "since California's usury law reflects a significant public policy designed to protect its citizens, our law precludes enforcement of a forum selection clause that will deprive a California resident of that protection."

In *G Companies Management, LLC v. LREP Arizona LLC* (2023 WL 2011816), a California resident entered into a loan agreement in which it submitted to jurisdiction in Arizona. The borrower later defaulted, and a judgment was entered against it and two guarantors in Arizona. The guarantors sued the borrower seeking reimbursement from the borrower for the judgment obtained against them by the lender, including the interest accruing at the rates specified in the loan agreement.

The borrower, in turn, filed a cross-complaint against the lender, seeking legal and equitable relief, all based on the lender's alleged conduct of "collecting usurious interest against the Guarantor Plaintiffs (and indirectly but certainly against the Borrower … as well.)"

The lender moved to dismiss or stay the cross-complaint based upon the loan agreement's mandatory forum selection clause, arguing that the clause was not unfair or unreasonable because the chosen Arizona forum was closely tied to the transaction, the parties were sophisticated and they agreed to it.

The borrower opposed the motion, arguing that California law precluded enforcement of the forum selection clause because to do so would deny a California resident the protection of California's fundamental public policy regarding usury, which is not available to them under Arizona law.

The trial court granted the motion, and the borrower successfully appealed. The appellate court noted that "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." The Court also held that when such claims are raised, the party seeking to enforce the forum selection clause bears the burden to show that litigating the claims in the contractually designated forum "will not diminish in any way the substantive rights afforded … under California law."

The Court found "the inclusion of the usury law in our Constitution reflects an important public policy."

"Our usury law protects 'the necessitous, impecunious borrower who is unable to acquire credit from the usual sources and is forced by his economic circumstances to resort to excessively costly funds to meet his financial needs.' [citations omitted]. Such borrowers are, by definition, the most likely to default on their obligations."

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.

Dropping The Hammer – The Court in Gormley v. Gonzalez Enforces A Settlement Agreement's "Hammer" Provision (continued from page 5)

Again, despite language in the settlement agreement that permitted the plaintiff to enter judgment in an amount for $303,620, the court refused to enter judgment in excess of $75,000 because the court concluded the additional money would constitute an unenforceable penalty.

BKCG's creative lawyers created strategies designed to address the court's holdings in *Greentree Financial Group* and *Viatech* referenced above so that BKCG's clients *could* enforce settlement agreements that included provisions to incentivize a defendant's performance and punish breaches. For example, if BKCG's client entered into a settlement that entitled it to receive $120,000 payable via 12 monthly installment payments, BKCG may include a provision that obligates the defendant to pay BKCG's client $240,000, but the agreement would forgive $120,000 of that obligation if the defendant timely pays the twelve $10,000 installment payments. In this way, the settlement agreement accomplishes BKCG's client's intended objective, but does not run afoul of the court's unwillingness to enforce penalty provision.

However, a recent 2022 case, *Gormley v. Gonzalez* (2022) 84 Cal.App.5th 72, may have rendered BKCG's creative lawyering detailed above obsolete. In *Gormley v. Gonzalez*, a plaintiff and defendant entered into a settlement agreement that required the defendant to make installment payments totaling $575,000, but if the defendant breached, the agreement entitled the plaintiff to enter judgment against the defendant for $1,500,000. The defendant breached, but this time, the court *permitted* the plaintiff to enter judgment against the defendant for the full $1,500,000. The court determined that the additional $925,000 in this case was not an unenforceable penalty because the case involved a commercial dispute amongst sophisticated parties with equivalent bargaining power, they were both represented by counsel, and that the $1,500,000 amount was a reasonable estimate of the damages the plaintiff would suffer from the defendant's breach of the settlement agreement.

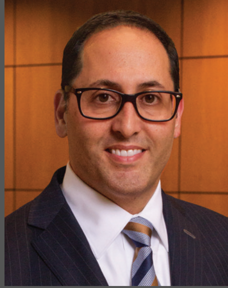
As a result of the holding in *Gormley v. Gonzalez*, *supra*, plaintiffs entering into settlement agreements that require the defendant to make installment payments should try to negotiate for the inclusion of provisions that permit the plaintiff to enter judgment against the defendant in an amount far greater than the amount due under the agreement to incentivize performance. Although such a provision would likely have been unenforceable before *Gormley v. Gonzalez*, it may be enforceable now in a post-*Gormley v. Gonzalez* world.

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

How Do California Employers Spell Relief From PAGA? F-P-E-A-A (continued from page 1)

According to recently published news article, plaintiff employee lawyers have leveraged over **8 billion dollars** from California employers just in the last six years using PAGA. In its 2019-20 request to increase its budget, the LWDA admitted that "The substantial majority of proposed private court settlements in PAGA cases reviewed by the Unit fell short of protecting the interests of the state and workers." In that same budget report, LWDA indicated that of the nearly 5,400 PAGA notices it received in 2017-18, LWDA reviewed only 1,339 of them (less than 25%). And so, today, it is not uncommon for an average California employer to receive a boiler-plate PAGA letter from an aggressive attorney based on some small unintentional violations (e.g., a paystub that is missing some information, or a time clock that sometimes rounds in favor of the employer), and to be facing six or seven figure potential exposure. That was certainly not the result the Legislature stated when it enacted PAGA.

In November 2024, the California Fair Pay and Employer Accountability Act is on the ballot. Backed by virtually every California industry association, the proposal would repeal and replace PAGA with a new structure. On its website (https://cafairpay.com), the Californians for Fair Pay and Accountability cite to some extreme examples of how PAGA has failed to protect employees and ultimately benefited a predatory plaintiff bar. "In a recent settlement, for example, attorneys made $21 million while the wronged employees only received $108 each." The group goes on to state that "Family-run businesses and nonprofits have become major targets for predatory lawsuits that are often for minor technical violations of the 800+ page labor code." The proposed structure would return primary enforcement to LWDA (not civil lawsuits). And, if violations are found, 100% of the penalties go to the aggrieved employee(s). Only after LWDA has investigated and made a determination, can an employee then file a suit to appeal a decision it does not agree with. Notably, the new law would allow well intentioned employers to correct identified labor code violations without penalties. All of this is potentially good news for California employers.



So, California employers, until November 2024, keep your fingers crossed (and be sure to have us look at your PAGA waivers).

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

Beware Of Potentially Disastrous Contractual Clauses Waiving Statutory Immunity Under Workers' Compensation Statutes (continued from page 6)

Whilst your employee is working on a job in your customer's warehouse, she is struck and badly injured by a forklift driven by one of your customer's employees. Your workers' compensation policy pays for the employee's medical bills and provides the employee with the statutory benefits under that policy. You then learn that your employee, who it turns out is paralyzed for life, has hired a personal injury lawyer who has filed a multimillion-dollar personal injury lawsuit against your customer, alleging negligence on the part of the customer's forklift driver. Your customer, citing the indemnity clause in its signed contract with your company, then tenders the defense and indemnity of the personal injury lawsuit to you, alleging that your company negligently trained the injured employee on how to mitigate the dangers of working in facilities in which forklifts are operated. It transpires that your employee, in fact, received no such training, contrary to standard industry procedures. Your company then tenders this personal injury lawsuit to its commercial general liability insurer and, a week later, the carrier declines coverage, citing the employee claim exclusion to your CGL policy. The upshot? Your company now has to defend a $5 million lawsuit with no insurance coverage, in other words, out of its own pocket. Your company does not have cash reserves of $5 million and insolvency looms.

The moral to this tale is simple: push back hard if asked to sign a contract containing a waiver of your company's rights under the workers' compensation statutes, and demand that the waiver be removed. If not, understand that your business is assuming a potentially limitless, uninsured and uninsurable risk.

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

The BKCG Bulletin is Published By:
Burkhalter Kessler Clement & George LLP

2020 Main Street
Suite 600
Irvine, CA 92614
Attn: Alton G. Burkhalter
949.975.7500
949.975.7501 fax

340 North Westlake Blvd.
Suite 110
Westlake Village, CA 91362
Attn: William C. George
805.373.1500
805.373.1503 fax

Please review our firm at
www.bkcglaw.com

Visit our web site at www.bkcglaw.com

Be sure to visit us on LinkedIn

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