ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
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How Does *Sanchez v. Valencia Holding Co.* Change the Arbitration Equation in California?

By Alan M. Mansfield and Michael Klitzke

Alan M. Mansfield, Esq.

Michael Klitzke

Arbitration has always been touted as an efficient and voluntary alternative to resolving disputes outside the judicial system, presumably being entered into knowingly and after negotiation by all parties. Trying to take advantage of the "take it or leave it" nature of most business-consumer/employee contracts, businesses have been inserting arbitration provisions in all manner of contracts. In many cases, consumers and employees have argued with some degree of success that such provisions were unconscionable because the consumer did not know that somewhere buried at the end of the contract was a provision that took away their right to a jury trial or the right to proceed on a class-wide basis. Addressing numerous appellate decisions reaching varying results in response to these arguments, on August 3, 2015 the California Supreme Court in *Sanchez v. Valencia Holding Company, LLC*, 190 Cal.Rptr.3d 812, 2015 WL 4605381 (Aug. 3, 2015), tried to provide courts and litigants with guidance as to what types of arbitration provisions were enforceable. How-

(see "Sanchez v. Valencia Holding Co." on page 9)

"Not Merely Specious, but Nonsensical": Lessons in Law and Professionalism in *Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc.*

By Robert G. Knaier

Robert G. Knaier

Appellate opinions do more than resolve disputes. They also teach. Often, they provide the parties and the broader legal community with a better understanding of the law. Occasionally, they also provide lessons in professionalism. The recent decision in *Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc.*, 236 Cal. App. 4th 243 (2015), does both. It clearly states the law regarding permissible solicitation of a competitor's employees, clarifies the standard for sealing records "alleged" to be trade secrets, and carefully

(see "Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc." on page 4)

Inside

The Causes of Wrongful Convictions:
Stories from the Trenches

Founded in 1999, the California Innocence Project (CIP) is dedicated to freeing the innocent and protecting the integrity of our judicial system. Working alongside students from California Western School of Law, CIP's staff attorneys have secured the release of many innocent people who otherwise may have spent the rest of their lives in prison.

CALIFORNIA INNOCENCE PROJECT

Please join us on December 8, 2015 for a fascinating evening with CIP's Co-founder and Director, Professor Justin Brooks, as he shares some of CIP's greatest success stories and the main causes behind wrongful convictions.

Professor Justin Brooks.
Professor Brooks is the Director and Co-Founder of the California Innocence Project. Before coming to California, he practiced as a criminal defense attorney in Washington D.C., Michigan, and Illinois and over the course of his career he has served as counsel on several high profile criminal cases. He has been recognized several times by the Los Angeles Daily Journal as one of the Top 100 Lawyers in California. In 2010 and 2012, California Lawyer Magazine recognized him with the "Lawyer of the Year" award.

EVENT DETAILS

DATE: Tuesday, December 8, 2015

TIME: 5:00 p.m. – 6:00 p.m. cocktails | 6:00 p.m. – 8:00 p.m. dinner

PLACE: U.S. Grant Hotel, 326 Broadway, San Diego, CA

COST: ABTL Members $65; Non-Members $85; Judicial/Public Sector $40

INFORMATION: Contact Maggie Shoecraft at abtlsd@abtl.org

REGISTER ONLINE AT: www.abtl.org/sandiego.htm

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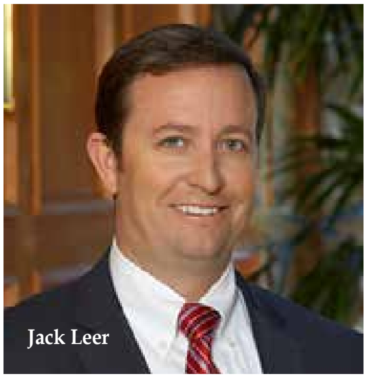
President's Letter

By Jack Leer



One of the great things about serving as President of ABTL is that I consistently get to see first-hand how the ABTL's mission statement is put into practice. State-wide, the ABTL is "dedicated to promoting a dialogue between the California bench and bar on business litigation issues." That ideal is reflected in our own San Diego chapter's mission statement, which states:

"The mission of the Association of Business Trial Lawyers - San Diego is to promote the highest ideals of the legal profession — competence, ethics, professionalism and civility — through uniquely relevant and interesting educational programs and frequent informal interaction with other members of the bar and bench who embrace these ideals."

This summer, two great ABTL events really exemplified the goal of promoting those core ideals through both CLE programs and informal interaction.

On July 9, 2015, Vice President Brian Foster hosted our annual Judicial Mixer at DLA Piper's downtown office. The Judicial Mixer may be the best example of the type of "informal interaction" that the ABTL provides as a means of encouraging dialogue between the business litigation bench and our judiciary. This year's Judicial Mixer was the biggest and best ever, with more judges participating and more total attendees than in any prior year. That success is due in large part to our talented Leadership Development Committee, which organizes the Judicial Mixer each year. LDC members Mark Rackers, Ryan Caplan and Nate Smith worked closely with Judge Randa Trapp, the chair of ABTL's Judicial Advisory Board, to plan the event. All of them deserve a big "Bravo Zulu" for actualizing the ABTL's goal of promoting professionalism and civility through informal interaction between the bench and bar.

Just as the Judicial Mixer is a great example of the "informal interaction" prong of our mission statement, the September 9, 2015 dinner program demonstrates how "uniquely relevant and interesting education programs" can be used to promote the same goals. Over twenty of our local judges from both State and Federal courts guided individual table discussions on recent trends in litigation and they provided valuable practice tips to attorneys. Led by an expert panel of Judge Jeffrey Barton, Judge Cynthia Bashant, and Judge Janis Sammartino, each table had its own breakout discussion on topics ranging from the effects of a national decline in the number of civil trials to effective strategies and tactics in law and motion practice. It is hard to imagine a program that could better promote the ideals of competence and professionalism. We thank all of the judges who participated, and again must give a special thank you to Judge Trapp for helping sign them up!

I cannot close without plugging our 2nd Annual ABTL Mock Trial Competition. This is the only competition that pits our three local law schools - Cal Western, Thomas Jefferson, and USD - against each other for local bragging rights and the coveted "ABTL Cup." This year's tournament will be held November 13th, 14th and 16th at Thomas Jefferson. The Community Outreach Committee that puts on the tournament can always use volunteer judges, so if you're interested in getting involved please contact Co-Chair Randy Grossman at rsgrossman@jonesday.com. Last year we were all blown away by the incredible talent of these future trial lawyers, so even if you cannot volunteer as a judge please come out to one of the rounds and root for your favorite team!

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applies the statutory requirements for obtaining an award of attorneys' fees under the California Uniform Trade Secrets Act ("CUTSA").

But further, in repeatedly criticizing the behavior of the plaintiff and its counsel—and indeed holding that the claims asserted were "based upon theories of liability that were not merely specious, but nonsensical"—*Cypress Semiconductor* offers lessons of perhaps the most valuable kind: examples of how *not* to behave, and of the economic consequences of misbehaving.

When "Secrets" Are Not Secret: Suing for Employee Solicitation

Cypress Semiconductor Corporation ("Cypress") and Maxim Integrated Products, Inc. ("Maxim") are competitors in the field of touchscreen technology. *Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc. (2015)*, 236 Cal. App. 4th 243, 246. In early 2011, through a recruiter, Maxim solicited a number of Cypress employees. In response, Cypress accused Maxim of "seeking to obtain . . . proprietary information illegally by targeting Cypress employees skilled in touchscreen technology."

> *"The Cypress Semiconductor opinion offers guidance on the meaning of both 'bad faith' and 'prevailing party,' in the context of evaluating claims of employee solicitation among business competitors."*

Two months after the parties began exchanging correspondence, Cypress sued. It first sought a temporary restraining order "prohibiting Maxim . . . from soliciting Cypress touchscreen employees and requiring them to immediately return all Cypress trade secret and confidential and proprietary information . . ., including specifically any list or roster of Cypress employees working on touchscreen technology." In opposition, Maxim filed a declaration showing that Cypress's "touchscreen specialists" could easily be identified in public, non-confidential ways—such as by searching LinkedIn. Indeed, that declaration *named* a number of publicly-identified Cypress employees. *Id.* at 251. For that reason, and out of "consideration for the employees' privacy rights," Maxim moved to seal the declaration. The trial court ordered it sealed, but only during the term of a 30-day "mutual standstill," under which the parties agreed to halt any employee solicitation (thus obviating the need for a ruling on Cypress's request for injunctive relief).

During the standstill, Maxim moved forward with efforts to show that Cypress's claims had no merit. It first demanded, under section 2019.210 of the Code of Civil Procedure, that Cypress identify the trade secrets it alleged had been misappropriated. Maxim then demurred to the Complaint, arguing, among other things, that "the identities of Cypress touchscreen employees were not a trade secret because the information was publicly available." Cypress nevertheless subsequently identified the trade secrets at issue as (1) a "compilation or list of Cypress employees who worked with Cypress's touchscreen technology"; and, somewhat vaguely, (2) "Cypress's substantive confidential information regarding its proprietary touchscreen technology and high performance products."

Given Cypress's position that the identity of its employees constituted a trade secret, it then filed its own motion to seal the declaration Maxim filed, which listed employees identified through LinkedIn. Maxim opposed the motion, arguing, perhaps unsurprisingly, that "the identities of these employees . . . could not possibly be protectable trade secrets . . . since that information was available from, and indeed had been taken from, publicly available sources." In response, Cypress contended that because section 3426.5 of the Civil Code provides that a trial court shall preserve the secrecy of an *alleged* trade secret by reasonable means, the bare fact that Cypress *alleged* its employee list was a trade secret entitled it to protection. *Id.* (emphasis added). After confirming that the "gist" of Cypress's argument was that "even though information may be accessible to the general public, the fact that it's being claimed as a trade secret" entitles it to the protection of being sealed—the trial court denied the motion.

Cypress's lawsuit against Maxim then quickly unraveled. Cypress briefly avoided a ruling on Maxim's demurrer by filing an amended Complaint—which "differed little from its predecessor." Maxim demurred again—and filed yet another declaration showing that nearly 100

(see "Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc." on page 5)

(continued from page 4)

relevant Cypress employees could be "identified from Web sites and patent office records." One week later, Cypress voluntarily dismissed its Complaint, without prejudice. Maxim then moved for an award of attorneys' fees under section 3426.4 of the Civil Code—CUTSA's fee-shifting provision—arguing that Cypress brought and maintained its misappropriation claims in "bad faith." The trial court granted the motion, and awarded Maxim over $180,000.00 in attorneys' fees.

"Bad Faith" and "Prevailing Party": Legal Lessons Learned

The Court of Appeal for the Sixth District affirmed, providing valuable legal lessons along the way. Under CUTSA, if "a claim of misappropriation is made in bad faith . . . the court may award reasonable attorneys' fees and costs to the prevailing party." Cal. Civ. Code § 3426.4. The *Cypress Semiconductor* opinion offers guidance on the meaning of both "bad faith" and "prevailing party," in the context of evaluating claims of employee solicitation among business competitors.

The Court of Appeal explained that, under CUTSA, a finding that a party brought or maintained a trade-secrets claim in "bad faith" requires evidence of both "'(1) objective speciousness of the claim, and (2) subjective bad faith in bringing or maintaining the action, *i.e.*, for an improper purpose.'" *Cypress Semiconductor*, 236 Cal. App. 4th at 260 (quoting *FLIR Systems, Inc. v. Parrish*, 174 Cal. App. 4th 1270, 1275 (2009)). It then found that both elements were met.

The court began by making it clear that Cypress's attempt to protect the "trade secret" of its employees' identities had no support in the law, and was therefore objectively specious. The court specifically found that (1) there was no evidence that the identity of Cypress's touchscreen employees was in any way "secret," and thus entitled to protection; and thus (2) the only colorably actionable conduct" that Cypress attributed to Maxim was its attempt to recruit Cypress's employees. But this conduct, the court stressed, is "entirely lawful." It is simply not actionable conduct for one competitor to solicit another competitor's employees, who are not under contract—so long as in doing so the soliciting party does not commit an independent wrong, such as *actually* misappropriating trade secrets.

"It is simply not actionable conduct for one competitor to solicit another competitor's employees, who are not under contract—so long as in doing so the soliciting party does not commit an independent wrong, such as actually misappropriating trade secrets."

The Court of Appeal further explained that given California's strong public policy in favor of employee mobility, even soliciting an employee who is reasonably likely to have knowledge of trade secrets is *not actionable*. The court then found that Cypress's claims, lacking as they were any evidence of actual misappropriation, amounted to claims of "inevitable disclosure," a doctrine that (1) allows a plaintiff to state a trade secrets claim by alleging that a solicited employee's new position will "inevitably lead him to rely on the plaintiff's trade secrets," and (2) has been *rejected by California courts*. Accordingly, the court affirmed the trial court's finding of objective speciousness. Indeed, the court ultimately found that Cypress filed a complaint that was meritless on its face, based upon theories of liability that were not merely specious, but nonsensical.

The Court of Appeal then turned to the question of whether Cypress brought and maintained its claims in "subjective bad faith" or for an "improper purpose." The court first noted that under the leading cases on the subject, these concepts essentially collapse into the latter. Although a genuine belief that one's claim has merit may be relevant to the analysis, and weighs against a finding of bad faith, it is not dispositive. Rather, "the test is not what the plaintiff believed about its objectively specious claim, but for what *purpose* it pursued such a claim." Thus, even if a plaintiff believes its claim has merit, it can be found to have acted in bad faith so long as the evidence indicates that "'the action was commenced or continued for an improper purpose, such as harassment, delay, or to thwart competition.'"

The court then had little difficulty in finding that Cypress brought and maintained its claims for an improper purpose, finding the evidence on that issue even stronger than the evidence

(see "Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc." on page 6)

Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc.

(continued from page 5)

of objective speciousness. The court first found that "the parties' pre-suit correspondence supports a reasonable inference that [Cypress's] actuating motive . . . was to scare Maxim away from attempting to hire *any* of Cypress's touchscreen employees under *any* circumstances, lawfully or otherwise." *Cypress Semiconductor*, 236 Cal. App. 4th at 268 (emphases in original). The court then found that the evidence "support[ed] an inference that the purpose of the lawsuit was to impose a financial penalty upon, and thereby deter, Maxim's attempts to hire Cypress technical employees"—and perhaps also to "inhibit . . . other competitors as well from attempting to engage in the same, entirely lawful conduct." *Id.* at 269.

Further, the Court of Appeal found that "the trial court was . . . entitled to conclude that that litigation was conducted in a manner calculated to magnify Maxim's legal expenses," insofar as Cypress engaged in "dilatory" tactics, such as waiting until the eleventh hour to amend its complaint, providing an "evasive response" to Maxim's demand to identify the trade secrets at issue, asserting boilerplate objections to discovery, and attempting to seal a declaration containing information compiled from "*public sources*." *Id.* at 270-71 (emphasis in original). For all of these reasons, the Court of Appeal affirmed the trial court's conclusion that Cypress had acted in bad faith.

Finally, the Court of Appeal's finding of bad faith also supported a finding that Maxim was the prevailing party. The court first suggested that because an award of attorneys' fees under CUTSA is authorized only under circumstances in which a party is found to have acted in bad faith, a "liberal construction" of "prevailing party" is warranted. *Cypress Semiconductor*, 236 Cal. App. 4th at 254. The court further ex-

(see "Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc." on page 7)

(continued from page 6)

plained, however, that even under the authority preferred by Cypress, Maxim had clearly "'prevailed on a practical level,'" and was thus the prevailing party. *Id.* at 254 (quoting *Heather Farms Homeowners Assn. v. Robinson*, 21 Cal. App. 4th 1568, 1574 (1994)). As the court noted, "Maxim's litigation objective, like that of every defendant, was to avoid the imposition of liability." *Id.* at 257. Despite Cypress's dismissal without prejudice, Maxim achieved that objective: it remained "as free to contact Cypress employees as it was before the suit." *Id.*

Ultimately, the court explained, the "only plausible explanation for Cypress's dismissal of the action is that it feared a determination on the merits," and "[h]ad Maxim's demurrer been heard, it would almost certainly have been sustained[.]" *Cypress Semiconductor*, 236 Cal. App. 4th at 258. Indeed, according to the court, Cypress "[a]t most . . . succeeded in notifying the labor marketplace that it would resort to spurious litigation to prevent 'poaching' of its employees." *Id.* at 255. But its "lawsuit . . . achieved no legitimate objective," and "Maxim, in contrast, walked away with all of the rights it had when it was served with the complaint—and all the money, save the attorney fees Cypress had forced it to expend." *Id.* at 258. For all of these reasons, Maxim "prevailed"—and was entitled to recover those fees.

"The Court of Appeal repeatedly noted instances in which Cypress's counsel harmed its own credibility—and supported a finding of 'improper purpose'—by advancing evasive and implausible legal arguments, mischaracterizing the record below, and engaging in unprofessional 'tactics.'"

"Grotesque" and "Unnatural": Professional Lessons Learned

The decision in *Cypress Semiconductor* also offers valuable lessons in professionalism. The Court of Appeal repeatedly noted instances in which Cypress's counsel harmed its own credibility—and supported a finding of "improper purpose"—by advancing evasive and implausible legal arguments, mischaracterizing the record below, and engaging in unprofessional "tactics."

Indeed, in finding that its claims were "specious" and "nonsensical," the Court of Appeal implicated not just Cypress, but also its *counsel.* As the court explained, "the original complaint, which was amended only inconsequentially, is a model of evasive, equivocal, and circumlocutory pleading," consisting largely of "wholly extraneous matter," reading "like a press release promoting Cypress's touchscreen technology" and otherwise violating "rules of pleading as old as the Field Codes." *Cypress Semiconductor*, 236 Cal. App. 4th at 261; *see also id.* at 265 (finding that Cypress produced no evidence below to "add any flesh to the evasive and conclusory assertions of liability in [Cypress's] pleadings"). The court sharply described the content of the complaint as mere "dross." *Id.*

The Court of Appeal further described several of Cypress's legal interpretations as inaccurate and implausible. It criticized not only such details as Cypress's misinterpretation of the introductory signal, "Cf.," in the trial court's order, but also, more substantively, the contention that Cypress dismissed the underlying action only to keep sealed the "trade secrets" contained in Maxim's evidentiary offerings. *Cypress Semiconductor*, 236 Cal. App. 4th at 254-55. The court described the latter argument as a "kind of carnival fun house in which the facts of the case are distorted into grotesque and nearly unrecognizable shapes," finding that there was nothing, in fact, "secret" about the information that Maxim compiled. *Id.* (emphasis in original). Indeed, the court further rejected Cypress's strained reading of section 3426.5 of the Civil Code, under which merely *alleging* a trade secret would be sufficient to warrant sealing the record, and held that an allegation that information is a "trade secret" must be at least "colorable." *Id.* Cypress's allegations failed that test.

The Court of Appeal also repeatedly indicated other ways in which Cypress's counsel failed to accurately characterize the record. According to the court, Cypress relied on "distortions of the record," and took certain remarks by the trial court "out of context," to support an argument that the court improperly placed on it

(see "Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc." on page 8)

(continued from page 7)

the burden of proving that its claims were "*not* pursued in bad faith." *Cypress Semiconductor*, 236 Cal. App. 4th at 258 (emphasis in original). Furthermore, in affirming the finding that Cypress acted in subjective bad faith, the Court of Appeal stated that Cypress's counsel relied on an "unnatural construction of the record"; and, by failing to provide certain evidence on appeal, left the court to "ponder fruitlessly" over its arguments. *Id.* at 266, 269.

Finally, the court supported its finding that Cypress acted with an improper purpose by pointing to certain "tactics" of its counsel. As the court explained, the trial court had before it evidence that Cypress's counsel engaged "dilatory" conduct that was "discourteous and inconsiderate at best, and vexatious and oppressive at worst." *Cypress Semiconductor*, 236 Cal. App. 4th at 270. Indeed, among its efforts to prolong the litigation and impose unnecessary costs on Maxim were Cypress's "transparently unsound" attempts to seal a document containing *public* information. *Id.* at 271.

"Transparently Unsound": Law and Professionalism Collide

The legal lessons of *Cypress Semiconductor* are undoubtedly helpful to business competitors and their counsel. It is useful to know that given California's strong policy in favor of employee mobility, it is not unlawful to solicit a competitor's employees—even employees who are likely to be privy to sensitive, proprietary information—so long as in doing so neither the solicitor nor the prospective employee actually uses or discloses trade secrets. It is also useful to know that if a client believes that its competitor has, in fact, misappropriated trade secrets, it matters greatly the *manner* in which a claim for misappropriation is made and pursued. Absent an objective basis for claiming theft of trade secrets, a party may not seek to shield evidence from public view by merely "alleging" that it is entitled to such protection. And should a court ultimately find that the claim has no objective basis, even a client's "genuine belief" in its merits may not prevent an attorney-fee sanction—if the claim was pursued for an "improper purpose."

It is here that law and professionalism intersect, and why *Cypress Semiconductor*'s guidance on the latter is perhaps even more important than its lessons on the former. The Court of Appeal found that Cypress's claims were not "merely specious"; they were also "nonsensical." Had they been merely the former, and had there been no evidence of pursuing the litigation for an improper purpose, Cypress may have escaped sanctions. But there *was* evidence of improper purpose—and much of it was laid at the feet of *Cypress's counsel*: evasive pleading; "grotesque" and "unnatural" distortions of the record; and "discourteous," "vexatious," and "transparently unsound" efforts to impose unnecessary costs on an adversary. As professionals, we should, of course, never engage in this sort of behavior. But it is worth also noting that if we do, we risk not only our own reputations—but also our clients' pocketbooks.

Robert Knaier is a partner at Fitzgerald Knaier LLP. His practice concentrates in complex business and commercial cases, mass torts, personal injury, and appeals.

Sanchez v. Valencia Holding Co.

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ever, in the end the guidance provided by the Court may have limited applicability except in very unique contexts, and may simply raise more issues.

The Background of *Sanchez*

Plaintiff Gil Sanchez purchased a used 2006 Mercedes-Benz in 2008 from Valencia. As most everyone has experienced at some point, he was presented with a series of documents to sign in order to finance and purchase the car, including a pre-printed one page (8-1/2 inch by 26 inch) document, with provisions on both sides that occupy the entire page. The last provision on the back of this document was an arbitration clause that also included a class action waiver provision. The contract also contained a provision that stated if the class action waiver provision was found unenforceable, the arbitration provision would be unenforceable. An updated version of this form document is currently used by almost every car dealer in California.

Mr. Sanchez filed a class action lawsuit against Valencia in March 2010 alleging, among other things, violations of the Automotive Sales Finance Act, Cal. Civ. Code Section 2981 *et seq.* ("AFSA") and the Consumers Legal Remedies Act, Cal. Civ. Code Section 1750 *et seq.* ("CLRA"), claiming the sales contract violated California law by failing to separately itemize the amount of the down payment and failed to distinguish registration, transfer, and titling fees from license fees. Valencia filed a motion to compel arbitration based on the arbitration clause, which Mr. Sanchez admittedly did not read. The trial court held the class action waiver was unenforceable under the CLRA. The CLRA expressly provides for class actions and Civil Code § 1751, provides "[a]ny waiver by a consumer of the provisions of [the CLRA] is contrary to public policy and shall be unenforceable and void." As a result, the whole arbitration clause was unenforceable.

(see "Sanchez v. Valencia Holding Co." on page 10)

Sanchez v. Valencia Holding Co.

(continued from page 9)

While the matter was on appeal, the United States Supreme Court decided *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), which held that the Federal Arbitration Act ("FAA") preempts state law that supposedly undermines the enforcement of arbitration clauses. Effectively, *Concepcion* made class waivers in arbitration agreements enforceable unless the whole arbitration clause was unconscionable under state law.

Referencing *Concepcion*, the *Sanchez* appellate court avoided the class action waiver issue and instead found several provisions of the arbitration clause, and as a result the whole arbitration clause, unconscionable: (1) The arbitrator's award "shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration . . . by a three-arbitrator panel"; (2) In the case of an appeal to a three-arbitrator panel, the appealing party "shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs"; and (3) "You and we retain any rights to self-help remedies, such as repossession."

The California Supreme Court accepted review of *Sanchez* on March 21, 2012. Over three years later, in a 6-1 decision (with Justice Chin dissenting) the Court reversed the decision of the Court of Appeal. In doing so, the Court considered, but did not change, the standard for determining unconscionability. The Court reaffirmed that a provision that is unconscionable is one that "shocks the conscience," as used in *Sonic-Calabasas A., Inc. v. Moreno*, 57 Cal. 4th 1109 (2013) (regularly referred to as "*Sonic II*"), but also that other formulations such as "unduly oppressive," "unreasonably favorable," and "unfairly one-sided" as used in other appellate court decisions are equivalent. In a broad sense, the unconscionability doctrine is concerned "with terms that are unreasonably favorable to the more powerful party," but not "a simple old-fashioned bad bargain." *Sanchez*, 2015 WL 4605381, at *4. In addition, "[t]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

The Court's Ruling as To Procedural and Substantive Unconscionability

While the contract in *Sanchez* was indisputably an adhesive contract because it came preprinted and Mr. Sanchez had no option but to accept it or not purchase a car, which was sufficient to establish "some degree of procedural unconscionability" (*Sanchez*, 2015 WL 4605381, at *8), the fact Mr. Sanchez did not read the contract before signing could not constitute surprise because it is generally considered "unreasonable" to not read a written contract before signing. *Id.* at *7. There was also no obligation to highlight the arbitration clause in any way, as any state law imposing such an obligation would be preempted by the FAA. *Id.*

(see "Sanchez v. Valencia Holding Co." on page 11)

Sanchez v. Valencia Holding Co.

(continued from page 10)

The Court then evaluated each of the terms in the arbitration clause to determine if they were substantively unconscionable. As to the appellate rights provision, the Court found arbitration agreements do not need to provide the right to appeal, but where they are provided, the agreements cannot unreasonably favor one side or the other. *Id.* at *12. According to the Court, the ability to appeal a $0 award favors the buyer, while an appeal of an award of $100,000 or greater favors the seller. The fact that the average purchase price of an automobile is around $30,000 makes awards over $100,000 outliers; presumably awards of $0 are also outliers. Thus, the risks imposed on the parties are not one-sided and that term was not unconscionable. *Id.* at *9.

The right to appeal grants of injunctive relief favored the seller because buyers typically seek injunctive relief. The Court explained that the additional arbitral review of injunctive relief furnishes a "margin of safety" that provides the seller a type of extra protection for which it has a legitimate commercial need. *Id.* at *9. Thus the right to appeal grants injunctive relief, though one-sided in favor of the seller, was also not unconscionable. The Court thus expressly avoided addressing its holding in *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066 (1999), that claims for injunctive relief designed to protect the public by stopping ongoing unlawful practices under the CLRA and California's Unfair Competition Law are not subject to arbitration because of their public nature. Whether *Broughton*'s reasoning is preempted by the FAA remains unresolved, although as noted below, the answer may come soon.

As to the issue of imposing appellate costs, under *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), an arbitration clause in an employment case involving unwaivable statutory rights cannot require an employee to bear any type of expense that would not be required in a lawsuit. Thus,

(see "Sanchez v. Valencia Holding Co." on page 12)

(continued from page 11)

a term requiring an employee to front the cost of a three arbitrator panel for appeal may well be unenforceable. By contrast, according to the Court in *Sanchez*, Code of Civil Section 1284.3, provides that a consumer who does not prevail in arbitration cannot be required to pay the opposing party's fees and costs and requires a fee waiver for indigent consumers. However, requiring consumers to pay for an appeal is not prohibited. *Sanchez*, 2015 WL 4605381, at *11. To address this potential disparity, the Court adopted an "affordability" approach for consumer arbitrations. Under this approach, any term imposing fees on a consumer could be invalidated if it imposes "unaffordable fees." However, in determining affordability, courts are to consider what the parties reasonably expected the consumer to be able to afford at the time the parties entered the contract. *Id.* at *12. In this particular case, even though with three arbitrators on an appellate panel a consumer could be looking at an average of $7,200 to $21,000 for an 8 hour day, the Court focused on the fact (not addressed at either the trial or intermediate court) that the contract involved a "high-end luxury item". Based on Mr. Sanchez's alleged ability to afford that vehicle (even though he took out a loan to do so), the Court determined that a three arbitrator panel was "affordable" and thus the provision was not unconscionable.

"As to the appellate rights provision, the Court found arbitration agreements do not need to provide the right to appeal, but where they are provided, the agreements cannot unreasonably favor one side or the other."

The last term to be considered was the exclusion of self-help remedies, such as repossession, from the arbitration clause. Repossession is a remedy only used by the seller. Thus, this term is one-sided in favor of the seller. However, the unconscionability of an arbitration agreement is viewed in the context of the rights and remedies that otherwise would have been available to the parties. According to the Court, the exclusion of self-help remedies from the arbitration clause, while admittedly favorable to sellers, is not unconscionable *per se* because such remedies are, by definition, sought outside of litigation and thus would generally not be subject to arbitration as a practical matter. They also are an integral part of the business of selling automobiles on credit and thus fulfills a "legitimate commercial need." *Id.* at *14.

Finally, the Court in *Sanchez* concluded that the CLRA's prohibition of class action waivers, relied on by the trial court to invalidate the arbitration clause but not addressed by the Court of Appeal, is pre-empted by the FAA under *Concepcion*. *Id.* at *15.

(see "Sanchez v. Valencia Holding Co." on page 13)

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Sanchez v. Valencia Holding Co.

(continued from page 12)

Lessons From *Sanchez*

Sanchez, while thought initially to be groundbreaking, may end up being of limited application. First, the *Broughton* issue remains outstanding. However, the U.S. Supreme Court may address it in *DirectTV, Inc. v. Imburgia*, *cert granted*, 135 S. Ct. 1547 (2015), and the California Supreme Court may also do so in *McGill v. Citibank*, 232 Cal. App. 4th 753, *rev. granted* April 1, 2015.

Second, the issue of apportioning appellate costs, if driven in part by the price of the item purchased, could go the other way in terms of this type of weighing analysis for the vast majority of consumer products, as it creates a case-specific (and undefined) test of when an appeal would be "affordable" to a particular plaintiff and when it would not. During the lengthy appeal, the form document used by the industry was updated to remove the provision apportioning appellate costs. Thus, any development of this affordability test will likely not involve cases where high cost items are at issue.

Third, the issue of self-help remedies is in many respects unique to the automobile finance industry and thus gives little guidance to courts in an unconscionability analysis addressing other types of consumer-focused transactions.

The main take away from *Sanchez* may be that in light of *Concepcion*, the California Supreme Court appears to be taking a more moderate approach in the analysis of the issue of unconscionability and may give less deference to the findings of the trial and appellate courts.

Alan Mansfield is of counsel at Whatley Kallas, LLP. Since 1991 he has practiced primarily in the area of national consumer class action, focusing on healthcare, telecommunications, and consumer privacy issues.

Michael Klitzke is an attorney at Rosner, Babbitt & Barry LLP. He represents consumers in Lemon Law and Auto Fraud cations against car defects.

Having Your Day In Court And Eating It Too: Summary Judgment & Appeal

Rupa G. Singh

Rupa G. Singh

Trial by jury has been described as essential to vindicating a party's right to its "day in court."[1] What, then, to make of summary judgment, the procedural vehicle that bypasses this quintessential "American birthright?"[2] In the third of this four-part series, I discuss key appellate issues at the summary judgment stage, and the litigator's resulting "do's and don'ts" list of summary judgment procedure.[3]

Historically viewed as unfairly encroaching on the jury's sacrosanct role, summary judgment is now a mainstay of civil actions, a welcome hedge against the uncertainty that twelve jurors bring to the table. Generally appealable when it adjudicates all claims in an action or at least all claims between two parties, summary judgment is reviewed de novo. This means that, just like the trial court, the appellate court must identify the issues framed by the pleadings, and, viewing the evidence in the light most favorable to the nonmoving party, determine whether the moving party has established undisputed, material facts which negate the opponent's claim under the applicable substantive law. The court of appeal's *independent* consideration of the facts to determine their effect as a matter of law, as if the trial court had rendered no decision, essentially allows litigants to have that rare second bite at the apple. The savvy litigator should therefore start to position each case for summary judgment in all but the rarest of instances.

> *"The court of appeal's independent consideration of the facts to determine their effect as a matter of law, as if the trial court had rendered no decision, essentially allows litigants to have that rare second bite at the apple."*

The trial court looks to the moving party to identify those parts of the record that indicate the absence of a genuine issue of material fact, and the nonmoving party to show the opposite through admissible evidence (other than uncorroborated, self-serving testimony). Similarly, the appellate court does not examine the filings for evidence of a genuine triable issue, but relies on the parties to point to affidavits, depositions, interrogatory responses, and admissions on file to vacate or affirm. Thus, it is imperative that counsel provide both the trial court and the appellate court with adequate references to relevant evidence that can be conveniently located to prevail on or defeat summary judgment.

Matters of evidence are where the trial and appellate paths diverge in the context of summary judgment. A trial court's decision to exclude or consider evidence related to summary judgment is reviewed for an abuse of discretion, even when this could determine the ultimate outcome of the motion that is otherwise reviewed de novo. This means that objections to the admissibility of evidence must be streamlined in the trial court to allow for a meaningful ruling that will be given deference on appeal. While issues related to the admissibility of evidence may be waived if counsel does not both object and request a ruling on the objection, this is not sufficient reason to burden the trial courts with "innumerable objections . . . as part of the all-out artillery exchange that summary judgment has become."[4] Federal cases and a recent California bill[5] authorize trial courts to rule on evidentiary objections related to summary judgment only to the extent that they are material to its ruling, while preserving for appeal objections that are not ruled upon. Even if they

(see "Having Your Day In Court And Eating It Too" on page 15)

(continued from page 14)

are preserved for appeal, litigants should avoid filing "blunderbuss objections to virtually every item of evidence submitted."[6]

To avoid summary judgment based on the need to complete or conduct additional discovery, a party must establish diligence in pursuing discovery and identify specific facts hoped to be discovered that would raise a triable issue and defeat summary judgment. The same showing is required on appeal if summary judgment is granted after an application for continuance to permit discovery is denied, or was not ruled upon. The lesson is obvious; litigators should structure their discovery strategy around the elements of each claim that will be the subject of trial and summary judgment, and only seek additional discovery pending summary judgment if it can uncover facts that will create a genuine issue for trial.

While the appellate court may affirm summary judgment on any ground or correct legal theory that has support in the record, whether or not relied upon by the lower court, it must be a basis that both parties have had an opportunity to address in the trial court or through supplemental briefing on appeal. Without throwing in the kitchen sink of legal theories, this means that counsel should try to address all arguments in the trial court and on appeal, or offer supplemental briefing on certain issues, if necessary, to maintain focus on the main issue but preserve the right to respond substantively to what may serve as grounds for the appellate court's ruling.

Moreover, unless the grounds are raised again in a post-trial motion challenging the sufficiency of the evidence at trial, the denial of summary judgment is generally not appealable (with limited exceptions).[7] This is because the ensuing trial, at which the trier of fact can weigh conflicting pieces of evidence and assess the credibility of witnesses, renders the denial of summary judgment moot. Thus, prudent counsel should renew the grounds on which summary judgment was sought in a motion for judgment as a matter of law at the close of all the evidence, and again, if necessary, after the verdict.

Given the strong public policy favoring trials, summary judgment entails an exacting evidentiary showing before the trial court, followed by an independent non-deferential review on appeal. When planned strategically, briefed thoughtfully, and prepared with an eye towards trial and appellate considerations, it not only tees up the issues for your client's day in court, but preserves them for a second look on appeal too—the proverbial opportunity to have your cake and eat it too.

Rupa G. Singh is a partner at Hahn Loeser & Parks LLP ("HLP"), where she co-chairs the firm's appellate practice and litigates complex commercial disputes in state and federal court. Thanks to Aaron Schu, an associate at HLP, for his research contributions to this column.

(Endnotes)

1 *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

2 Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141 (2000), available at http://scholarship.law.marquette.edu/mulr/vol84/iss1/4 .

3 Unless otherwise noted, these principles apply to summary judgment in California state court (Cal. Civ. Proc. Code § 437c) and federal court (Fed. R. Civ. P. 56).

4 *Mamou v. Trendwest Resorts, Inc.*, 165 Cal. App. 4th 686, 711–12 (2008).

5 Governor Brown signed SB 470 on August 10, 2015 to amend CCP § 437c effective January 1, 2016 (https://leginfo.legislature. ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB470).

6 *Demps v. San Francisco Housing Auth.*, 149 Cal. App. 4th 564, 578–79 n.6 (2007)

7 These include denial related purely to legal issues (e.g. issue or claim preclusion doctrines), or where immediate interlocutory review is available (e.g. denial based on qualified immunity).

Analyzing Failure to Accommodate Pregnancy Claims in Light of the Supreme Court's Decision in *Young v. UPS*

Daniel C. Gunning

By Daniel C. Gunning

Passed by Congress in 1978, the Pregnancy Discrimination Act requires employers to treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Thirty-seven years later, the United States Supreme Court in Young v. United Parcel Service, Inc., determined the framework for addressing litigation over what it means to treat pregnant employees "similar in their ability or inability to work."

The Facts and History of *Young v. UPS*

Peggy Young, a part-time UPS driver, became pregnant and received restrictions from her doctor of no lifting more than 20 pounds during her first 20 weeks of pregnancy and no lifting more than 10 pounds for the remainder. UPS requires its drivers lift up to 70 pounds individually and up to 150 pounds with assistance, so based on Young's restrictions, it determined she could not perform her regular job as a driver, and placed her on an unpaid leave of absence. Young filed suit under the Pregnancy Discrimination Act, claiming her employer had intentionally discriminated against her on the basis of pregnancy by not accommodating her lifting restrictions.

Young argued she could prove intentional pregnancy discrimination because UPS had accommodated other non-pregnant employees with similar lifting restrictions. Specifically, UPS had a policy that accommodated workers (1) injured on the job, (2) who lost their Department of Transportation (DOT) Licenses, or (3) suffered from a disability within the meaning of the Americans with Disabilities Act (ADA).

Since none of these enumerated categories applied to Ms. Young, the district court granted summary judgment in favor of UPS, and the Fourth Circuit Court of Appeals affirmed, finding Ms. Young was not "similar in her ability or inability to work," and more closely resembled that of an employee who had been injured off the job and was ineligible for accommodation under the employer's policies.

"No longer may an employer rely on claiming the policy is 'pregnancy-blind' without evaluating its real-world implications."

The Supreme Court Applies McDonnell-Douglas Framework To Failure to Accommodate Claims Under Pregnancy Discrimination Act

The Supreme Court reversed the lower court's order granting summary judgment, but rejected the positions of both parties and remanded the case for further review in light of the new standards it announced. The Supreme Court first rejected Young's argument that pregnant women should be accommodated the same as any other worker for any condition that similarly impairs their ability to work, reasoning this would create a "most favored nation" status inconsistent with the text of the statute. The Supreme Court also rejected UPS's argument that an employer does not engage in pregnancy discrimination if it treats pregnant employees consistent with its pregnancy-blind accommodation policy.

Instead, the Supreme Court announced a familiar framework for analyzing failure to accommodate pregnancy claims, namely the *McDonnell Douglas* burden-shifting framework. Under this standard, an employee alleging the employer failed to accommodate her pregnancy must first establish a *prima facie* case of pregnancy discrimination by showing she belongs to a protected class, she sought an accommodation, the employer did not accommodate her, and the employer accommodated others "similar in their ability or inability to work." The burden then shifts to the employer to state a "legitimate, nondiscrimina-

(see "Young v. UPS" on page 17)

Young v. UPS

(continued from page 16)

tory" reason for denying her accommodation. If the employer offers a legitimate, nondiscriminatory reason for denying her accommodation, the burden shifts back to the employee to show the employer's reasons were pretextual.

The Supreme Court went on to say that an employee may show pretext (and thereby defeat summary judgment) with sufficient evidence the employer's policies impose a "significant burden" on pregnant workers without "sufficiently" strong justification. For example, where an employer accommodates a large percentage of non-pregnant workers while not accommodating a large percentage of pregnant workers, this may give rise to an inference of discrimination. Or where an employer has multiple policies that accommodate non-pregnant employees with lifting restrictions, it may suggest that its reasons for failing to accommodate pregnant employees with the same lifting restrictions, is not sufficiently strong.

Employer's Obligations Following *Young v. UPS*

Employers are cautioned to review how their accommodation policies apply in practice towards pregnant employees. No longer may an employer rely on claiming the policy is "pregnancy-blind" without evaluating its real-world implications. Moreover, employers should beware of the interplay between the Pregnancy Discrimination Act and the ADA. Statutory and regulatory changes to the ADA suggest temporary restrictions may be substantially limiting to qualify for an accommodation. The EEOC has taken the position that while pregnancy itself is not a disability, pregnancy-related impairments that impose work-related restrictions may be substantially limiting, and therefore trigger the duty to accommodate, even if only temporary.

Finally, as Justice Kennedy wrote in his separate dissent, California and other states have statutes and regulations that place affirmative duties on employers to accommodate pregnancy-related limitations. For example, California's Fair Employment and Housing Act makes it unlawful for an employer to deny a request for reasonable accommodation and recently amended regulations require employers to engage in a good faith interactive process to identify and implement a pregnant employee's request for reasonable accommodation. Thus, California employers should review their policies to ensure compliance with *Young v. UPS*, the ADA, and California's pregnancy discrimination laws.

Daniel C. Gunning is an associate at Wilson Turner Kosmo LLP, where he specializes in employment law representing employers. He is a member of the ABTL's Leadership Development Committee.

California Court of Appeal Certifies Class Based on Alleged System-Wide Failure to Pay Meal Period Premiums

Jesse C. Ferrantella

Jesse C. Ferrantella

On July 22, 2015, the California Court of Appeal issued a decision on meal period claims that may provide another theory supporting class certification. In *Safeway v. Superior Court* (2015) 238 Cal. App.4th 1138 (Case No. B255216), the Second Appellate District affirmed class certification of an unfair competition claim based on Safeway's alleged failure to pay meal period premiums to employees under the California Labor Code.

The California Labor Code provides that non-exempt employees are to be given the opportunity to take a duty-free, uninterrupted 30-minute meal break before their end of the fifth hour of work. Where this does not occur, that employee is to be paid an hour of "premium pay" at their regularly-scheduled compensation rate for the missed meal break. An hour of "premium pay" is also owed to an employee who is not given the opportunity to take a 10-minute rest break for every four hours worked or major fraction thereof. Employees alleging violations of the meal and rest provisions of the Labor Code may also pursue these violations under California's Unfair Competition Law (UCL).

"Although the court did not rule on the merits of Plaintiff's UCL claim, the Safeway decision is problematic for any employer who cannot show that it at least occasionally paid its employees meal period premiums."

In *Safeway*, plaintiffs contended that prior to June 17, 2007, Safeway had a uniform policy of not paying meal premiums "under any circumstances," even if the employee missed a meal break. Plaintiffs argued Safeway's failure to pay meal period premiums alone constituted an unlawful or unfair business practice under the UCL. Plaintiffs claimed that since Safeway had a uniform practice of failing to pay meal premium wages, class certification was appropriate on this issue. They also contended the issue of damages, which Plaintiffs sought in the form of restitution under the UCL, could be decided on a class-wide basis. Plaintiffs sought damages not for unpaid accrued premium pay, but instead for the lost benefits of the statutory protection of premium pay guaranteed by the Labor Code, which they felt Safeway was not providing. Plaintiffs contended such damages could be measured under a "market value" approach.

Safeway made several arguments against class certification. It first presented substantial evidence—including some 2,000 declarations—that it had a legally compliant meal period policy, and that nearly all of its employees regularly took their meal breaks. Safeway contended that absent evidence of missed meal periods, there was no statutory violation of the Labor Code, and plaintiffs' UCL claim for premium pay must fail. Safeway further argued that even if there were some isolated missed meal periods, any violations were subject to an individualized inquiry and proof. In short, Safeway argued there was no companywide practice of depriving employees of meal periods and no question of damages that was susceptible to class-wide certification.

The trial court was unpersuaded by Safeway's arguments. It found that during the relevant time period, Safeway uniformly did not pay meal break premiums when required by law. It noted that Safeway failed to dispute that it did not pay meal period premiums. The court found that this common issue—whether Safeway's "system-wide failure" to pay meal premiums gave rise to liability under the UCL—made class certification appropriate.

Safeway appealed the ruling, raising several arguments. Safeway again argued the alleged failure to pay meal premiums was not "separately actionable" under the UCL if there was no underlying failure to provide lawful meal breaks. The Court of Appeal sidestepped this argument, noting this was not plaintiffs' theory of recovery. It instead concluded that plaintiffs had identified an allegedly unfair business policy, namely,

(see "Failure to Pay Meal Period Premiums" on page 19)

Failure to Pay Meal Period Premiums
(continued from page 18)

the "alleged practice of failing to pay [premiums] *when required.*" Although the Court of Appeal did not rule on the merits of plaintiffs' UCL theory, it found that the class could be certified due to evidence of a "system-wide" failure of Safeway to pay meal premiums when required. The Court of Appeal believed this failure to pay premiums for any missed or shortened breaks could give rise to a UCL claim, and was capable of common proof due to Safeway's failure to pay such premium wages.

Safeway also argued that there were individualized damages questions precluding certification, including whether an employee was entitled to a meal period premium for a particular shift. In this respect, Safeway argued it had no common practice of denying its employees meal breaks that was susceptible to common proof. The Court of Appeal again sidestepped this argument. It noted that Plaintiffs were not seeking damages for accrued meal premium wages, but instead were seeking restitution for the loss of the "compensation guarantee and enhanced enforcement" promised to Safeway employees. In other words, plaintiffs were arguing that as a class, they had lost the statutory benefits of the Labor Code due to Safeway's system-wide policy of not paying premiums guaranteed by law. Without commenting on the merits of this theory, the Court of Appeal found these alleged damages were suitable for class treatment because the amount of damages could be calculated using a "market value" approach. The Court of Appeal did not directly address how such damages could be calculated.

The *Safeway* decision has important implications, particularly for the labor and employment bar. Although the court did not rule on the merits of Plaintiff's UCL claim, the *Safeway* decision is problematic for any employer who cannot show that it at least occasionally paid its employees meal period premiums. It creates a risk that a class could be certified if the employer did not pay premium wages, even if that company had a lawful meal period policy and its employees generally took their meal breaks. As a result of the *Safeway* ruling, employers will likely emphasize having policies in place for the payment of premium wages, and systems to ensure they are actually paying premium wages if an employee misses a meal break. Conversely, one can expect the plaintiffs' bar will carefully review the *Safeway* decision. Given the evolving nature of UCL claims and the Court of Appeal's suggestion that there may not have to be a finding of an underlying Labor Code violation to certify a UCL class, it seems likely that plaintiffs will allege more UCL claims in wage and hour lawsuits in the future.

Jesse Ferrantella is an associate in the San Diego office of Ogletree Deakins, focusing his practice on labor and employment law. He represents employers on a wide range of employment issues, including discrimination, wrongful termination, whistleblower retaliation disputes, wage and hour violations, and arbitration disputes

While Sick Leave Legislation, Regulations and Ordinances Abound, California Amends Recently-Enacted Paid Sick Leave Law, Effective Immediately

By Michael S. Kalt and Emily J. Fox

Michael S. Kalt

Emily J. Fox

Paid sick leave at the local, state, and now federal level is gaining considerable attention. Very recently, the White House informed the nation that it was reviewing a draft Executive Order that would require federal contractors and subcontractors to provide employees working on federal contracts up to seven days of paid sick leave per year. Further, while Connecticut, California, Massachusetts, Washington D.C., and other counties and municipalities already have paid sick leave laws, other states like Alaska, Hawaii, Illinois, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Carolina, and Washington face pending paid sick leave legislation. And, in addition to legislation that would mandate paid sick leave for employees, paid sick leave advocates in several states are fighting legislation that would preempt the right of localities to pass their own paid sick leave ordinances.

"With several local ordinances and sweeping state-wide sick leave legislation already on the books, California has become a focal point for sick leave advocates, opponents and observers."

With several local ordinances and sweeping state-wide sick leave legislation already on the books, California has become a focal point for sick leave advocates, opponents and observers. Last year California enacted its Healthy Workplaces, Healthy Families Act of 2014, which took operational effect July 1, 2015. One of the most significant features of the Act was its scope, in that it applies to all California employers, regardless of size, and that it applies to almost every "employee" except for specifically-enumerated exceptions. And California employers hardly had a chance to familiarize themselves with and make possible policy and operational changes based on the new law, before early July, when California's governor signed "urgency" legislation (AB 304) that was immediately effective and amended many paid sick leave-related provisions. Some of the more significant amendments are discussed below.

Narrow Exemptions Modified, Including for CalPERS Retired Annuitants

As initially enacted, the Healthy Families Act applied to nearly every "employee" except for the four specifically-enumerated exceptions to the definition of employee contained in Labor Code section 245.5(a)(1)-(4) (e.g., CBA-covered employees, CBA-covered construction employees, in-home support service workers, and flight crew employees covered by the Federal Railway Labor Act).

AB 304 created a fifth exception (Labor Code section 245.5(a)(5)) for certain public sector employees who are a recipient of a retirement allowance and employed without reinstatement into his or her respective retirement system.

AB 304 also amended the exemption for construction industry employees covered by a CBA (Labor Code section 245.5(a)(2)) to remove the "onsite work" referenced in the initial definition of "employee in the construction industry." This change was intended to clarify that "employees in the construction industry" for purposes of this exemption means an employee performing work.

(see "Failure to Pay Meal Period Premiums" on page 21)

Alternative Accrual Methods

As originally enacted, the Healthy Families Act required a fairly rigid accrual method that did not necessarily correspond with the accrual methods employers used for providing paid sick leave in their pre-existing policies. Specifically, the Act required non-exempt employees to accrue paid sick leave at the rate of one hour for every thirty hours worked, even though employers might have used another rate or an alternative method (i.e., per pay period rather than hours). In response to these concerns, AB 304 amended Labor Code section 246(b) to enumerate two additional accrual methods.

Under new subsection (b)(3), an employer may utilize a different accrual method provided the accrual is on a regular basis so that the employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment, or each calendar year, or each 12-month basis; or

Under new subsection (b)(4) states an employer may satisfy the accrual requirements by providing not less than 24 hours or three days of paid sick leave that is available to the employee to use by completion of his or her 120th calendar day of employment. As a practical matter, this second new option means employers will not need to track hours worked for accrual purposes if they simply provide the statutorily-required minimum paid sick leave (24 hours/3 days) by the end of the fourth month of employment.

Front-Loaded Policy Clarifications

Labor Code section 246(d) initially provided that no accrual or carryover is required if the employer provides the full amount of leave at the "beginning of each year," but it did not specify how "each year" is determined nor did it contain the language in other subsections allowing an employer to use a "calendar year, year of employment or 12-month basis." AB 304 cured this discrepancy and specified that no accrual or carryover is required if the employer provides the full amount of leave "at the beginning of each calendar year, year of employment or 12-month basis." It also specified that "full amount of leave" means three days or 24 hours.

Grandfather Provision for Pre-2015 PTO Plans

In response to employer concerns the new paid sick leave mandate would negatively impact pre-existing paid time off (PTO) plans, the Healthy Families Act initially created section 246(e) to state employers would not need to provide additional sick leave if their PTO plans allowed paid time off on the same conditions and for the same purposes as AB 1522 and met one of two specific conditions. As initially enacted, the PTO plan either: (1) had to satisfy the accrual, carry-over and use requirements of section 246; or (2) it had to provide no less than 24 hours or three days of paid sick leave or PTO for each year of employment, calendar year or 12-month basis. Notably, this second basis was silent as to when during the 12-month period the PTO needed to be provided, and AB 304's initial proposal that the entire 24 hours of PTO had to be provided at "at the beginning" of each year (however defined) generated considerable protests this would require many employers to modify pre-existing PTO policies.

AB 304 retained the first exception for PTO plans (i.e., those satisfying the accrual, carry over and use requirements of section 246) but substantially modifies the second exception, including providing a "grandfather" provision for PTO plans existing prior to January 1, 2015. As amended, section 246(e)(2) approves PTO policies that provided paid time off to "a class of employees" before January 1, 2015 under an accrual method other than the one hour for 30 hours worked if the accrual is on a regular basis such that the employee (including employees hired into the class after January 1, 2015) has no less than one day/eight hours of accrued time off within three months of employment of each calendar year or each 12-month period, and the employee is eligible to earn at least three days/24 hours of paid time off within nine months of employment. However, this new subsection also provides that if the employer subsequently modifies the pre-January 1, 2015 PTO policy, the modified policy must comply with any of the four accrual methods in subsection (b) or provide the full amount of PTO at the beginning of each year of employment, cal-

(see "Failure to Pay Meal Period Premiums" on page 22)

(continued from page 21)

endar year, or 12-month period. It also states that this section will not prohibit the employer from increasing the accrual amount or rate for a class of employees covered by this section.

As a practical matter, this new subsection means employers with PTO policies prior to January 1, 2015 need not ensure the entire amount of statutorily-required paid time off be provided "at the beginning" of each year provided the grandfathered PTO plan meets the newly-identified requirements (eight hours by 90 days, and 24 hours by nine months), but once any changes are made to the grandfathered PTO plans, they must either satisfy an alternative accrual method or provide the entire PTO amount "at the beginning" of each year.

Notice Requirements for 'Unlimited' Time-Off Policies

Labor Code section 246(h) requires employers to provide written notice to employees of available paid sick leave balances, either through the itemized wage statements required under Labor Code section 226 or a separate writing provided on the designated pay date. Responding to employer concerns about how to track balances and provide these notices if the employer provides "unlimited" paid sick time—, particularly as these policies are gaining popularity—AB 304 specified such employers may satisfy this notice obligation by indicating "unlimited" on the notice or wage statement.

Calculating Pay Rates

The Healthy Families Act initially stated that paid sick leave shall be paid at the employee's hourly wage, but then articulated a very confusing formula for determining this rate if the employee has received different hourly rates in the preceding 90 days before paid sick leave is used. Somewhat helpfully, AB 304 substantially amended Labor Code section 246(k) to delete this formula, and identified guidelines for paying paid sick leave, including distinguishing between exempt and non-exempt employees.

As amended, for non-exempt employees, the employer may now choose between two options.

The employer may calculate paid sick leave in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, regardless of whether the employees actually works overtime in that workweek; or

The employer may calculate paid sick leave by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Michael Kalt is a partner in the Employment Law Practice Group of Wilson Turner Kosmo LLP. His employment law practice emphasizes the litigation and trial of wrongful termination, harassment, discrimination cases in state and federal court. Michael also provides advice and training to employers on employee discipline and investigations, employment policies and procedures, and fair employment practices.

Emily Fox is an associate at Wilson Turner Kosmo LLP. She represents private and public employers, large and small, in all aspects of labor and employment litigation. This includes suits for discrimination, failure to accommodate, defamation, harassment, wrongful termination, wage and hour, violation of leave laws and other matters.

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