ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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The California Supreme Court Closes a Loophole Around the Right to Repair Act's Statutes of Repose

Marisa C. Marxen

By Marissa C. Marxen, Marxen Law

The Right to Repair Act, (Civ. Code, §§ 895-945.5), provides homeowners the statutory framework to seek remedies from damages caused by construction defects. It "establishes a prelitigation dispute resolution process that affords builders the notice of alleged construction defects and the opportunity to cure such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury." (*McMillin Albany LLC v. Super. Ct.* (2018) 4 Cal.4th 241, 247.) Where plaintiffs fail to comply with the applicable prelitigation procedures, the builder may seek a stay to proceed with them. (Id. at pp. 247-48 [McMillin moved for a court-ordered stay]; see also Civ. Code, § 930, subd. (b).)

Section 896 of the Right to Repair Act applies to all lawsuits filed alleging construction defects for homes sold and completed after *January 1, 2003* and provides certain shorter time periods for defects pertaining to specific construction defects. (See, e.g., 896, subd. (e) [providing that no action for violation of section 896 may be brought more than four years after close of escrow[1] for plumbing defects].) However, Civil Code, section 941, another section of the Right to Repair Act, provides the general statute of repose for construction defect claims brought under the Right to Repair Act, stating, "Except as specifically set forth in this title, no action may be brought to recover under this title more than 10 years after substantial completion of the improvement but not later than the date of recordation of a valid notice of completion."

Since 2013, homeowners could bypass the Right to Repair Act's shorter time periods for bringing suit with respect to certain defects by pursuing common law claims for damages. This allowed homeowners to avoid the prelitigation process of the Right to Repair Act as well as to circumvent the shorter statute of repose for certain alleged defects by pursuing claims for negligence or strict liability. (Compare Civ. Code, §§ 941, subd. (a), 896, subd. (e) ["With respect to plumbing and sewer issues . . . no action may be brought for a violation of this subdivision more than four years after close of escrow"] with, *inter alia,* Civ. Code, §§ 335 [requiring claims for negligence to be brought within two years from the date of injury], 338 [requiring claims for injury to real and personal property to be brought within three years from the date of damage to the property].) However, on or about *January 18, 2018*, more than two years granting the petition for review, the California Supreme Court issued a decision resolving the previous split of authority among four of the California Courts of Appeal and closing this loophole. The Court held that the California Legisla-

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President's Letter

By Michelle Burton, Shoecraft Burton LLP


Michelle Burton

As we look toward Fall and the end of the year, I wanted to provide and update on two of our main projects this year and highlight some upcoming events.

First, regarding our "Restoration of Civility in the Law" project, I am pleased to report that our Civility Committee, chaired by ABTL Vice President, Randy Grossman of Jones Day, recently completed its final review of the proposed Civility Guidelines with the San Diego County Bar. The SDCBA incorporated our committee's final comments and recommendations part of which was to ensure that the guidelines were applicable to attorneys practicing in both federal and state courts. We are hopeful that the final Civility Guidelines will be rolled out by the end of the year and then we can work with the other chapters to retool to create some uniformity with adherence to Civility Guidelines across the state.

Second, our inaugural Wine & Beer tasting event was held at Coasterra Restaurant on the floating barge on the evening of September 13th. We had a great turn out. The location was beautiful, the food was excellent, and the event received positive feedback. Our speakers were Josh Weiss, General Counsel of Stone Brewery and Chris Celentino from Dinsmore in San Diego. Mr. Weiss spoke about the challenges of taking a local brewing company international and Mr. Celentino discussed his representation of wineries and starting his own wine import export business. While there were some challenges to hearing the speakers in this venue overall, the event was a huge success. Thank you to Stone Brewery and Dinsmore for donating their time and beer and wine for the event. We don't have the final numbers yet, but believe we will be able to make a substantial donation to the Veteran's Assistance programs for our three law schools. I want to personally thank our Executive Director, Lori McElroy, our committee members chaired by Alan Mansfield of Whatley Kallas, Jon Brick of Greco Traficante Schulz & Brick, Anne Wilson of Duckor, Spradling, Metgzer & Wynee, Elizabeth Atkins, clerk to the Hon. Anthony Battaglia and Jenny Dixon of Robbins Arryo who helped to organize this event. I also want to thank our gracious hosts at Coasterra Jeff Pitroff, General Manager and Samantha Minnema, Catering Sales Manager. A special shout out also to Rebecca Fortune of Kimball Tirey & St. John LLP for securing the venue and to the firm of Kosmo, Turner and Wilson for donating an entire case of wine for the raffle!

Third, I am excited about our Mock Trial Competition which is coming up November 2-5. This year the law students will be using Trial Pad during the competition. Please take time to either sign up to judge the competition or to come out and support the teams. The students work really hard and they are impressive to watch.

Finally, our last dinner event of the year will be held on November 14th, 2018. Please sign up early for the event and help make our last dinner event of the year a success - see event details below.

Michelle Burton

November Dinner Details

Title: First Amendment: From the Pentagon Papers to the Twittersphere

Speakers: Ninth Circuit Court of Appeals Judge Margaret McKeown; UCSD Professor Emeritus Sam Popkin, and Lorie Hearn, Executive Director and founder of a nonpartisan investigative journalism organization in San Diego.

Date: Wednesday, November 14, 2018

Time: 5:00 – 6:00 p.m. cocktails; 6:00 – 8:00 p.m. dinner

Place: The Westin San Diego, 400 West Broadway, San Diego, CA

Cost: ABTL Members $75; Non-Members $95; Judicial/ Public Sector $55; Parking $10 after 5:00 p.m.

Information: abtlsd@abtl.org

California To See Rise In International Arbitrations

By Keith Cochran, Fitzgerald Knaier LLP

California has long been disfavored as a venue for international commercial arbitration. In *Birbrower, Montalbano, Condon & Frank v. Superior Court,* 17 Cal. 4th 119 (1998), the California Supreme Court held that non-California lawyers violated the California Business & Professions Code if they participated in California arbitrations. This meant that only California-licensed lawyers could act in California-seated international arbitrations (even if California law did not govern the merits of the dispute). Despite California's economic prominence, sophisticated business climate, and highly developed legal infrastructure, foreign parties have been reluctant to arbitrate in California as a result of *Birbrower*. Instead, foreign parties have opted for foreign jurisdictions – such as London, Paris, Geneva, Singapore, and Hong Kong – and other U.S. states that allow foreign lawyers to appear in international arbitrations.

In February 2017, the California Supreme Court formed the "Supreme Court International Commercial Arbitration Working Group" to evaluate California's position as a venue for international commercial arbitrations. The Working Group found that the *Birbrower* decision and the inability of foreign companies to be represented by their existing counsel has given California a reputation as hostile to international commercial arbitration. While international commerce constitutes roughly one quarter of California's $2.4 trillion economy, the state lags behind other jurisdictions as a venue for international commercial arbitration. The Working Group found that in 2015 there were 777 arbitrations conducted before the International Centre for Dispute Resolution, JAMS, and International Chamber of Commerce (ICC). Only 124 were conducted in California. New York and Florida, states that welcome foreign attorney participation in international commercial arbitrations, had 338 and 182 arbitrations respectively. The Working Group also found that foreign jurisdictions outperformed U.S. jurisdictions on the whole, with London and Paris each regularly hosting more ICC international commercial arbitrations annually than California, New York, Florida, and Texas combined. Based on these findings, the Working Group recommended authorizing foreign and out-of-state attorneys to represent parties in international commercial arbitrations in California.

In July 2018, Governor Brown signed into law SB 766, which is based on the Working Group's proposal. SB 766 permits foreign lawyers who are not members of the California bar to appear in international arbitrations in California without local counsel, provided the lawyer meets certain conditions. The bill is intended to enable California to compete with other arbitration venues (U.S. and foreign) and to strengthen California's local economy. The new law will put California on par with other arbitration venues such as New York and Florida, and leading international venues such as London and Paris.

Chris Poole, JAMS President and CEO, praised the new bill in a press release: "The passing of SB 766 will position California as a leading market for international arbitration proceedings by allowing the participation of out-of-state and non-U.S. lawyers. It will not only bring advantages to California, our businesses, and the statewide economy, but it provides a sophisticated legal market for businesses and attorneys participating in international arbitration proceedings."

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California To See Rise In International Arbitrations

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Under the new law, foreign attorneys are deemed "qualified" to participate in international arbitration if they are:

(a) …a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent.

(b) Subject to effective regulation and discipline by a duly constituted professional body or public authority of that jurisdiction.

(c) In good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice.

Many lawyers from foreign jurisdictions will likely meet SB 766's "qualified attorney" test. A qualified attorney may provide legal services in an international commercial arbitration if any of the following conditions is satisfied:

(1) The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter.

(2) The services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice.

(3) The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice.

(4) The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice.

(5) The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction.

A "qualified attorney" providing legal services in international commercial arbitration will be subject to the California Rules of Professional Conduct and the laws governing the conduct of attorneys to the same extent as a member of the State Bar. Further, the State Bar may report complaints and evidence of disciplinary violations against the attorney to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted.

In sum, SB 766 should enhance California's position as a venue for international commercial arbitration. California has a strong economy (viewed as the sixth largest economy in the world), and is home to many global companies. It has a strong judiciary without regional bias, and is ideally suited to resolve international disputes. SB 766 should provide additional bargaining power to California companies doing business in foreign countries, or seeking financing from abroad, to negotiate for international arbitration in California. Under the new law, foreign lawyers can now be certain that they will be able to represent their foreign clients in a California arbitration.

Keith Cochran is an attorney with Fitzgerald Knaier LLP, practicing in the areas of intellectual property and commercial litigation.

Clearing the Haze: What Employers Can Do When Recreational Marijuana Use Impacts the Workplace

By Heather N. Stone, Dinsmore & Shohl LLP

This year, California joined the ranks as one of nine states plus the District of Columbia to legalize the personal recreational use of marijuana by adults. It is also one of many states that permit some form of medicinal marijuana use. In fact, only a handful of states plus the federal government still impose a complete ban on all uses of the substance, which remains a Schedule I drug under the federal Controlled Substances Act.[1]

What is the driving force behind the growing acceptance of recreational marijuana use? One study suggests that over half of adults in the United States have tried marijuana at least once,[2] with fifty-six percent reporting that they find marijuana use socially acceptable.[3] Of those who identified themselves as marijuana users, fifty-five percent were male and a majority of them were millennials.[4] The growing national acceptance of social marijuana use coupled with the decriminalization of both recreational and medical marijuana in California has emboldened some marijuana users to believe that their private conduct is now untouchable.

Particularly in the employment context, that is not the case. Employers in California must balance the employees' right to privacy in their ostensibly lawful off-duty conduct with the employer's duty to maintain a safe and effective workplace.

Federal and State Government Contractors

Certain employers who contract with the federal government or California state government may be subject to either the federal Drug-Free Workplace Act of 1988[5] or the California Drug-Free Workplace Act.[6] As a condition of contracting with the government, those employers need to prepare and file a certification stating that they provide a drug-free workplace. Falsifying that statement or failing to maintain a drug free workplace can result in the suspension or termination of the government contract.

Therefore, it is important that employers who contractually agree to maintain a drug-free workplace inform employees in writing of the company's drug-free workplace policy and the potential consequences for violating it. Employees must also be reminded that under federal law it is unlawful to use, possess, sell, or distribute marijuana and other controlled substances in the workplace.

Employer Policies

Where the employer is not subject to a government contract requiring the maintenance of a drug-free workplace, a California employee could easily, yet mistakenly, believe that his/her individual rights with respect to marijuana are paramount to that of the employer.

However, nothing in the California's new marijuana law prohibits employers from enacting or enforcing substance abuse policies that include a prohibition against the use of marijuana in the workplace. Indeed, the law explicitly states that it is not intended to amend, repeal, affect, restrict, or preempt:

> The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state or federal law.[7]

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Thus, employers may continue prohibiting marijuana in the workplace, even though recreational and medical uses are permitted. To avoid any confusion, employers should review their existing policies and make clear that they expressly apply to marijuana, alcohol, and other controlled and illicit substances.

Drug Testing

A well-crafted substance abuse policy will not only explain the forms of conduct prohibited by the policy, but also the circumstances under which the employer may subject an employee or applicant to testing. Because individuals in California have a constitutional right to privacy,[8] drug testing may occur only in a limited number of circumstances: (1) pre-employment drug screening; (2) as part of a physical examination; (3) under reasonable suspicion; and (4) in the very limited circumstances where the position justifies randomized drug testing.

Unlike a blood alcohol test that shows the level of alcohol intoxication at an exact moment in time, marijuana testing is far less precise. It usually shows detectable amounts of marijuana in bodily fluids for one to thirty days after the last use.[9] This can prove problematic for an employer who wants to discipline an employee after test results show recent use of the drug. Due to the imprecision of the drug test, the employee could argue that his/her use did not occur during working hours, and instead took place when the employee was off duty and legally permitted to use marijuana. Employers should anticipate this type of "legal off-duty conduct" excuse and carefully evaluate potential responses.

Recommendations for Employers

Companies who do not want to be left in the haze when considering whether to hire or continue employing marijuana users should consider the following:

- Conducting pre-employment drug testing of all applicants;
- Voluntarily adopting a drug-free workplace;
- Drafting a comprehensive substance abuse policy that identifies: types of prohibited conduct and circumstances for sending an employee to drug or alcohol testing; consequences of negative drug/alcohol test results; and options for requesting drug/alcohol treatment (if permitted);
- Training managers and supervisor to reasonably identify suspected drug or alcohol activity in the workplace; and
- Educating the entire workforce regarding the company's position on marijuana, alcohol, and illicit drug use.

Heather N. Stone is an associate of counsel at Dinsmore & Shohl LLP.

ENDNOTES

1 Under the Controlled Substances Act, Schedule I drugs are those that (a) have a high potential for abuse; (b) have no accepted medical use in treatment in the United States; and (c) lack accepted safety for use of the drug. 21 U.S.C. § 812(b)(1).

2 Yahoo News/Marist Poll: *Weed & The American Family,* April 17, 2017, available at: http://maristpoll.marist.edu/yahoo-newsmarist-poll/, last visited August 29, 2018.

3 Yahoo News/Marist Poll: *Weed & The American Family,* April 17, 2017

4 Yahoo News/Marist Poll: *Weed & The American Family,* April 17, 2017

5 Any organization that enters into a federal contract for the procurement of property or services valued at $100,000 or more or receives any federal grant must follow the regulations of the Drug-Free Workplace Act of 1988. 21 U.S.C. §801, *et seq.*

6 Cal. Gov't Code § 8350.

7 Cal. Health & Safety Code §11362.45(f).

8 California Constitution, Article 1, sec. 1.

9 Healthline.com: *"How Long Does Marijuana (Weed) Stay in Your System?"* available at: https://www.healthline.com/health/how-long-does-weed-stay-in-your-system#detection-time-by-drug-test, last visited August 29, 2018.

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ture made the Right to Repair Act the "virtually exclusive remedy not just for economic loss but also for property damage arising from construction defects." (*McMillin,* supra, 4 Cal.4th at p. 247.) Thus, it affirmed the California Courts of Appeal's holding that (1) the plaintiff-homeowners' suit for property damage was subject to the Right to Repair Act's prelitigation procedures, and (2) the court shuold stay the case until those procedures have been followed. (Ibid.)

Thus, the *McMillin* decision's holding that plaintiff-homeowners cannot plead around the Right to Repair Act's prelitigation procedures by pleading common law causes of action such as negligence and strict liability will apply to all pending litigation. (See *Penn v. Prestige Stations, Inc.* (2000) 83 Cal.App.4th 336, 341.) Further, the *McMillin* decision also cited approvingly of *KB Home Greater Los Angeles, Inc. v. Super. Ct.* (2014) 223 Cal.App.4th 1471, 1478, which held that where plaintiff-homeowners not only failed to comply with the Right to Repair Act's pre-litigation procedures but also allowed their insurer to undertake repairs before notifying the builder, the builder could not be held liable. (See also id at p. 1479 ["The failure to give KB Home timely notice and an opportunity to inspect and offer to repair the construction defect excuses KB Home's liability for damages under the Act"].) Between the *McMillin* and *KB Homes* holdings, plaintiff-homeowners must comply with the Right to Repair Act in order to recover and can no longer attempt to avoid its pre-litigation procedures or statutes of repose.

HOW WILL THIS AFFECT MY CASE?

Because the Right to Repair Act Represents a Statute of Repose (as Opposed to a Statute of Limitations), the Delayed Discovery Rule Will Not Apply.

The Right to Repair Act explicitly states that "Sections 337.15 and 337.1 of the Code of Civil Procedure *do not apply* to actions under this title." (Civ. Code, § 941, subd. (d); see also Statutes of limitation or repose in construction defect litigation, Cal. Comm. Int. Dev. L. & Prac. § 21:87 (2017 ed.) ["The traditional statutes of repose for construction defects for patent defects, stated in Code of Civil Procedure § 337.1, and for latent defects, stated in Code of Civil Procedure § 337.15, have been superseded for

newly constructed residences by the provisions of SB 800"].) With respect to tolling, Section 941 provides: *"Existing statutory and decisional law regarding tolling of the statute of limitations shall apply to the time periods for filing an action or making a claim under this title."* (Civ. Code, § 941, subd. (d).) However, because the Right to Repair Act qualifies as a statute of repose, rather than a statute of limitations, this means (1) where the Right to Repair Act provides for a shortened time period—e.g., four years for plumbing claims, that represents that maximum period of time for filing such a claim, and it is not subject to tolling or the delayed discovery rule, and (2) absent application of the Right to Repair Act's statute of repose, other "statutes of limitation"—such as those applicable for breach of contract and negligence—may apply with the Right to Repair Act providing the "outside deadline" for filing a claim. (See 43 Cal. Jur. 3d Limitation of Actions § 1 [*"A statute of limitations normally sets the time within which proceedings must be commenced once a cause of action accrues but a statute of repose limits the time within which an action may be brought and is not related to accrual"*].) "Unlike statutes of limitations, *statutes of repose are not subject to tolling."* (Statutes of limitation, supra, § 21:87.)

Thus, as a statute of repose, the Right to Repair Act "has nothing to do with the date of injury, but bars all suits after the expiration of a specified time . . . it does not cut off an existing

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right of action, but rather provides that nothing which happens thereafter can be a cause of action." (43 Cal. Jur. 3d Limitation of Actions § 1.) As a result, "[t]he Right to Repair Act specifically replaces past statutes of repose with its own 10-year period." (§ 33:4. The Right to Repair Act—Scope and defenses, 9 Cal. Real Est. § 33:4 (4th ed.).) *However*, "the failures of some specified functionality systems are not actionable after shorter periods of time measured from the close of escrow," such as the shorter limits for plumbing systems. (Ibid.) More importantly, after *McMillin*, plaintiffs cannot circumvent those shorter time limits through artful pleading.

In sum, defense attorneys litigating construction defect cases should pay attention two main issues when first analyzing plaintiffs' claims in a new construction defect case: First, because *McMillin's* holding that the Right to Repair Act provides the exclusive remedy for construction defect claims will apply to pending and future cases, it may bar certain claims arising as early as one year after the close of escrow. (See, e.g., *McMillin*, supra, 227 Cal.Rptr.3d at p. 197 ["The Van Tassels *also object that if section 896 is read to apply broadly, the shorter limitations periods it imposes for certain types of defects (e.g., § 896, subds. (e)-(g)) may limit homeowners' ability to recover.* But there is nothing absurd about accepting these limitations periods at face value, and they supply no special reason to disregard the import of the remainder of the statute"].) Thus, defense counsel should review each alleged defect to determine whether the Right to Repair Act's statutes of repose bar the claim, and if so, file a demurrer or motion for judgment on the pleadings. On a related note, those defending subcontractors should advance this argument with equal force, encouraging any developers/general contractors that cross-complain against the subcontractors to aggressively assert a statute of limitations argument against the plaintiffs' claims as well. (See, e.g., Civ. Code, § 941 subd. (b); see also *Acosta v. Glenfed Development Corp.* (2005) 128 Cal.App.4th 1278, 1285, 1290 [noting that where a defendant developer cannot be held liable for plaintiff's claims because they are barred by the statute of limitations, neither can the subcontractor cross-defendants]; *Centex Homes v. Super. Ct.* (2013) 214 Cal.App.4th 1090, 1099 ["on matters of substantive law, the doctrine [of equitable indemnity] is 'wholly derivative . . . [and] . . . there can be no indemnity without liability"].)

Second, where repairs have already been undertaken—whether by the homeowners or the insurer—without complying with the Right to Repair Act's notice and pre-litigation procedures, a general contractor, developer, and/or subcontractor should not be held liable for the damages they were not afforded the ability to repair. Where repairs have not been undertaken, but the plaintiffs have failed to comply with the Right to Repair Act's pre-litigation procedures, the builder should move for a stay.

ENDNOTES

1 "Close of escrow" is defined for purposes of the Right to Repair Act to mean the date of the close of escrow upon sale of a lot or unit between the builder and the original homeowner. (Civ. Code, § 895, subd. (e).)

Marissa Marxen is the founder of Marxen Law.

California Case Summaries ADR™ September 24 to October 5, 2018

By Monty A. McIntyre, ADR Services, Inc.

CALIFORNIA COURTS OF APPEAL

Arbitration

Uber Technologies v. Google (2018) _ Cal.App.5th _ , 2018 WL 4658745: The Court of Appeal reversed the superior court's discovery order (in favor of Uber) that overruled an arbitration panel's discovery order (in favor of Google). The case arose from an arbitration proceeding by Google against its former employees who had started a self-driving vehicle company, Ottomotto LLC, that was acquired by Uber. The Court of Appeal overruled Uber's motion to dismiss the appeal. Because the superior court's order determined all pending issues in the special proceeding between Google and Uber, it was a final appealable order. The Court of Appeal reversed the trial court's discovery order. Due diligence-related documents prepared by the law firm Stroz Friedberg LLC were not protected attorney-client communications, nor were they entitled to absolute protection from disclosure under the attorney work product doctrine. While the materials had qualified protection as work product, denial of the materials would unfairly prejudice Google's preparation of its claims. (C.A. 1st, September 28, 2018.)

Attorney Fees

Schulz v. Jeppesen Sanderson, Inc. (2018) _ Cal. App.5th _ , 2018 WL 4718836: The Court of Appeal reversed the trial court's order awarding plaintiff attorneys only 10% attorney fees on a settlement they obtained of $18,125,000 in a wrongful death action. The contingent fee agreement provided for a fee of 40%, and the plaintiff attorneys requested a fee of 31%. The Court of Appeal ruled the trial court gave too little consideration to California Rules of Court, rule 7.955(a)(2), which required it to take into account the terms of the engagement agreement with the clients from the perspective of when the agreement was signed. In addition, the court did not acknowledge the factors listed in California Rules of Court, rule 7.955(b). Instead of balancing the relevant factors, the court gave overwhelming weight to a single concern: the expense of the plaintiff children's extensive medical needs. The Court of Appeal agreed that a child's needs are a relevant and important factor in determining a reasonable attorney fee, but this single factor cannot overwhelm all other considerations. Considering the difficulties in the case at the beginning, the fact that other attorneys would not take the case on a contingent fee basis, and the significant costs advanced by the lawyers, the trial court abused its discretion in awarding fees of only 10% percent. (C.A. 2nd, filed September 5, 2018, published October 2, 2018.)

Attorneys

Lofton v. Wells Fargo Home Mortgage (2018) _ Cal. App.5th _ , 2018 WL 4659692: The Court of Appeal affirmed the trial court's order denying approximately $5.5 million of attorney fees to Initiative Legal Group, APC (ILG) and instead directing the payment of this amount to class members in Lofton v. Wells Fargo Home Mortgage (Lofton). The trial court properly issued this order as the result of ILG concealing from the Lofton court and its class member clients a $6 million settlement with Wells Fargo for payment of ILG's attorney fees in violation of California Rules of Court, Rule 3.769(b). The Court of Appeal also directed that a copy of its opinion be sent to the State Bar of California. (C.A. 1st, September 28, 2018.)

Civil Procedure

Martinez v. Eatlite One, Inc. (2018) _ Cal.App.5th _ , 2018 WL 4765268: The Court of Appeal reversed the trial court's award of pre-998 and post-998 attorney fees of $60,000 and costs of $4,905.07 to plaintiff after a jury found in her favor on her employment discrimination claim and awarded her damages of $11,490. Before trial, defendant had made a Code of Civil Procedure section 998 offer for $12,001 which plaintiff did not accept. The Court of Appeal ruled that the trial court should have compared the jury's award plus plaintiff's pre-offer costs and fees, with the amount of the 998 offer, plus plaintiff's pre-offer costs and fees. Had it done this, it would have concluded that plaintiff did not obtain a better recovery. The Court of Appeal therefore reversed the portions of the postjudgment orders awarding post-offer costs and fees to plaintiff and denying post-offer costs to defendant. (C.A. 4th, October 3, 2018.)

Employment

Atempa v. Pedrazzani (2018) _ Cal.App.5th _ , 2018 WL 4657860: The Court of Appeal modified part of the trial court's judgment but otherwise affirmed it in a wage and hour action. Defendant Paolo Pedrazzani (Pedrazzani) was the owner, president,

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secretary, and director of Pama, Inc. (Pama), which did business as Via Italia Trattoria, a restaurant in Encinitas, California. Following a bench trial, the trial court entered judgment against Pama and Pedrazzani for wage and hour violations. Pama filed a bankruptcy proceeding after the entry of judgment. The trial court properly assessed civil penalties, under Labor Code sections 558(a) and 1197.1(a), individually against Pedrazzani because he qualified as a person other than the corporate employer who either violated the overtime pay and minimum wage laws or caused the statutory violations. However, because plaintiffs sought to recover the civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA; Labor Code sections 2698 et seq.), the Court of Appeal ruled that the penalties had to be distributed 75 percent to the Labor and Workforce Development Agency and 25 percent to the aggrieved employees according to section 2699(i). The trial court's judgment was modified to do this. The Court of Appeal also affirmed the trial court's award of attorney fees ($315,014) and costs against Pedrazzani. (C.A. 4th, September 28, 2018.)

I now offer a new product called ***California Case Summaries: Civil Update 2018 Q1™***. It has my short, organized summaries of every California civil case published in the first quarter of 2018, with the official case citations. This issue is missing 17 other new published California civil case summaries that are included in my subscription publication.

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Bond, Appeal (Not Bond, James)

By Rupa G. Singh, Niddrie Addams Fuller Singh LLP

Could there be anything more boring than a CLE on whether, how, and when to post an appeal bond? Let's just agree that these are not topics that will ever be discussed over "shaken, not stirred" cocktails. But, ask yourself this: could there be anything more disturbing than an opponent executing on a wrongful judgment pending your appeal? For once, you, your client, and your malpractice insurer will agree that such high jinx are not worth the excitement. So, here's a short list to help you seek your thrills outside post-judgment missteps in state or federal court.

Under What Circumstances is an Appeal Bond Necessary? Repeat out loud—there are as many exceptions to the rule that filing an appeal automatically stays all matters embraced by the judgment on appeal as there are exceptions to the hearsay rule.[1] For starters, money judgments, including an award of damages, sanctions, or attorneys' fees and costs (with some exceptions) plus injunctions are not stayed by filing an appeal, but only by posting a bond.[2] In California, a mandatory injunction that changes the status quo is automatically stayed on appeal, but mandatory and prohibitory injunctions are not stayed by filing an appeal in federal court.[3]

Why Should an Appeal Bond be Posted? The rationale of requiring an "appeal" or "supersedeas" bond is to protect the prevailing party's ability to execute on its judgment after appeal, even if, for example, the losing party becomes judgment-proof pending appeal, including by becoming unable to comply with an injunction.[4] For example, if a spouse is ordered to sell community property and divide the proceeds in a family law action, he or she must post bond to stay the order pending appeal so neither the party's actions nor market fluctuations devalue the property pending appeal. Because of the costs involved, this arguably discourages not just frivolous appeals, but also meritorious appeals in which a losing party cannot afford to post bond. Hence the saying that the best place to win your appeal is in the trial court.

Who Should Post an Appeal Bond? At a purely technical level, the appeal bond is as necessary to an appeal as Money Penny's flirtation with 007 is to the film's plot—not required, but rather a preferable way to proceed. In other words, the losing party does not need to post bond to pursue an appeal, but the prevailing party can then also execute on the judgment pending appeal.[5] This means that any victory on appeal will require a separate action to recover the now-collected judgment, making the appellate victory all but symbolic without further litigation.

When Should An Appeal Bond be Posted? There is no grace period in California, and any judgment not automatically stayed by filing an appeal—such as a money judgment or prohibitory injunction—can be enforced as soon as judgment is entered, absent posting a bond or securing a discretionary stay.[6] In federal court, however, money judgments are automatically stayed for 14 calendar days after the entry of judgment,[7] while the losing party must seek a stay of a mandatory or a prohibitory injunction for good cause.[8]

How Should an Appeal Bond be Posted and in What Amount? The most common way to satisfy the bond requirement is to do so through an admitted surety insurer.[9] Otherwise, parties can also post bonds through personal sureties (individuals who guarantee payment of the judgment by offering their personal assets as collateral) or a personal bond (the party deposit-

(continued on page 15)

Bond, Appeal (Not Bond, James)

(Continued from page 14)

ing cash, a letter of credit, or other acceptable financial instrument in lieu of a bond).[10] In the case of money judgments in California, the bond amount is one and a half times the judgment if posted by a surety, while in other cases—such as those involving real property—the trial court retains discretion to set the bond amount.[11] The bond amount is always in the federal court's discretion.[12]

What to Expect after Appeal? Diamonds may be forever, but appeal bonds are not. At least most of the time. If appellant prevails on appeal, the bond is released, and the fees and premiums to procure the bond can be recovered as an allowed cost to the prevailing party. If appellant loses, it must arrange to pay the judgment, plus accrued post-judgment interest, or else the appeal bond is enforced, and appellant loses its collateral, in addition to fees and premiums already paid to the surety.

Appeal bonds may not be the stuff of Bond films, but we fail to factor them into our litigation or appeal strategy at our client's—and our own—peril. There is a Quantum of Solace® in knowing that everything costs more than it should, from spy adventures to appeals, but advance preparation may just help us let our appeal Die Another Day®.

Rupa Singh handles complex civil appeals and critical motions at Niddrie Addams Fuller Singh LLP, San Diego's only appellate boutique. She is founding president of the self-proclaimed historic San Diego Appellate Inn of Court, former chair of the County Bar's Appellate Practice Section, and a subdued Bond fan.

ENDNOTES

1 Edward W. Cleary, McCormick on Evidence §§ 244, 252–324 (2d ed. 1972) (describing hearsay rule's history and numerous exceptions developed over three centuries).

2 Code Civ. P. §§ 916(a), 917.1(a)(1), 917.2, 917.5, 917.15, 917.65 *et seq*.; Fed. R. Civ. P. 62.

3 *Compare Agric. Labor Relations Bd. v. Superior Court (Sam Andrew's Sons)* (1983) 149 Cal.App.3d 709, 712–713 *with* Fed. R. Civ. P. 62(a)(1) & (c).

4 *Grant v. Superior Court (Bank of Am.)* (1990) 225 Cal. App.3d 929, 934; *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1505, n. 1 (9th Cir. 1987).

5 Richard G. Stuhan and Sean P. Costello, "The Appeal Bond–What It Is, How It Works, et seq." (Spring 2008) (available at https://www.jonesday.com/files/Publication/983c1326-51c1-4ebc-9e6e-001ef4268418/Presentation/PublicationAttachment/daa0a1a0-c224-4cde-a744-64d80a235d12/Spring_2008_The_Appeal_Bond.pdf.)

6 Code Civ. P. § 916(b); *id*. § 918 (trial court can stay judgment that would otherwise require posting bond pending appellant's perfecting of appeal).

7 Fed. R. Civ. P. 62(a).

8 Fed. R. Civ. P. 62(a)(1), 62(c); Ninth Cir. Civ. App. Prac., Ch. 1-E, ¶1:156 (Rutter Group 2018) (proposed rule amendments set to take effect in December 2018 would extend the automatic stay to 30 days, eliminate the "supersedeas" name, codify appellants' right to offer security other than bonds, and allow prevailing appellants to recover cost of providing security other than bonds).

9 David M. Axelrad, "The Statutory Framework for Appeals Bonds," 28-Jun. L.A. Law 16 (LACBA 2005)

10 *Ibid*.

11 Code Civ. P. §§ 917.1(b), 917.4.

12 *Rachel v. Banana Republic, Inc*., *supra*, 831 F.2d at 1505, n. 1.

Ninth Annual Judicial Mixer Recap

By Hang Alexandra Do, Seltzer Caplan McMahon Vitek

On July 10, 2018, the Judicial Advisory Board and Leadership Development Committee hosted the Ninth Annual Judicial Mixer providing ABTL members an exclusive opportunity to meet and interact with many of our local state and federal judges in an informal setting.

As in past years, the judicial mixer did not disappoint. Judge Alksne was kind enough to emcee the event and kicked it off with a game of bingo! And of course, it was bingo with a twist. Each "contestant" was provided a bingo card filled with anonymous fun facts provided by and about each attending judge. Players were then set off to mingle with the judges and attempt to match the fun facts to the judges. This gave all of us, myself included, a unique chance to get to know the judges outside of the courtroom.

Did you know that Judge Pamela Parker met Dr. Martin Luther King, Jr. on a plane ride from Chicago to New York? Or that Judge Joel Wohlfeil ran an ultra-marathon of 50 miles? I surely did not, but was very intrigued and impressed by all the stories they had to tell. In particular, two facts stuck out to me.

As an animal lover, I was fascinated to learn that Judge Irma Gonzalez raised a canine companion for the disabled that would often sleep under the bench during her court proceedings. The dog was so well trained and silent, nobody appearing before her ever knew.

And Judge Timothy Taylor's fact was so interesting that it was covered by the La Canada Valley Sun. At the age of 13 Judge Taylor hiked a mountain in the Sequoia National Park and placed a message in a metal film canister: "Tim Taylor climbed to this peak, Thursday, August 17, 1972. Age 13 yrs. Anyone finding this note please write." 40 years later, another hiker found that canister with the note inside and tracked down Judge Taylor to discuss the discovery.

These are just a few of the many interesting facts we all had the chance to learn about our diverse group of judges. I had such a fun time playing the game and getting to know the members of outstanding local judiciaries (of course, being one of the bingo winners was a fun bonus). Thank you to the Judicial Advisory Board, along with all the ABTL members and judges who dedicated their time to making this event a success. Until next year!

Hang Alexandra Do is an associate with Seltzer Caplan McMahon Vitek and is a member of ABTL San Diego's Leadership Development Committee.

9th Annual Judicial Mixer **ONE event**

Judges: They're Just Like Us!

By Rachael Kelley, Shoecraft Burton, LLP

As I am sure is true with many ABTL members, I'll always remember my first court appearance as a new lawyer. I spent the entire night before preparing and rehearsing my script – constantly restating my appearance, explaining my position, even thanking the judge for his time. I was a nervous wreck. However, as a sat in the courtroom, watching the other matters on calendar before me, the judge made a comment I'll never forget. "I was a young lawyer once too, you know?"

I don't even recall the context of the statement, but after the judge said those words, I began to imagine him as a young lawyer, getting ready to make his first court appearance. I vividly remember thinking he must have been nervous too and then I stated to wonder how he handled the stress of his first year as an attorney. My nerves subsided almost immediately as in that moment, I somehow felt I was able to relate to the judge, despite our vast difference in experience and position.

This is exactly why ABTL San Diego's annual Judicial Mixer is an event I look forward to every year. This year's event took place on July 10 and saw a huge turnout from both the bar and the bench. ABTL's Leadership Development Committee planned the event as a bingo-game, whereby each participant received a bingo card containing various facts about the participating judges in each of the bingo squares. The attendees then mingled with the judges in order to discover each judge behind each fact. The facts varied from various musical talents to run ins with celebrities and ability to speak different languages. Other examples included a judge who owns multiple chickens, one who surfs regularly, and my personal favorite, a woman judge who walked in to a big law firm back East in a pant suit for the first time in history. While the facts on the bingo cards were interesting, what I most loved about the event was the opportunity I had to talk with the judges on a more personal level. Playing the game allowed the attendees to approach the judges and also facilitated discussion between them. Not only did the attendees get to know the judges through this event, they were also able to relate to them, something that is so important for attorneys - especially young attorneys. Each year after watching the interactions between the attendees, I grow further convinced that allowing for discussion between the bar and the bench regarding those things that make us most human will only yield positive results both in an out of the court room.

Rachael Kelley is an associate with Shoecraft Burton, LLP and is a member of ABTL San Diego's Leadership Development Committee.

TWO viewpoints

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