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BURKHALTER KESSLER CLEMENT & GEORGE LLP

Supreme Court Reverses Ninth Circuit-Dealership Service Advisors Exempt From Overtime-Pay

Last year, we wrote about a Ninth Circuit Court of Appeal decision that attempted to prohibit vehicle dealers from treating service advisors as exempt from federal law overtime-pay requirements. The Ninth Circuit's decision in *Navarro v. Encino Motorcars, LLC* (9th Cir. 2017) 845 F.3d 925, upended a reasonable practice of dealers which had been supported by the Department of Labor for over 30 years prior to the *Navarro* decision. Thankfully, the United States Supreme Court reversed that Ninth Circuit decision last month in *Encino Motorcars, LLC v. Navarro* (2018) __ U.S. __, 138 S.Ct. 1134, once and for all endorsing the practice of dealerships across the nation that service advisors fall within the statutory exemptions of the Fair Labor Standards Act ("FLSA") and are exempt from federal overtime-pay.

The Supreme Court's April 2, 2018 decision shows a practical understanding of the role service advisors play in a dealership as well as a relatively simple analysis of the ordinary meaning of Section 231(b)(10)(A), the FLSA provision which, prior to the Ninth's Circuit decision in *Navarro*, had always been understood to exempt service advisors from overtime. The Supreme Court looked at the language of Section 231(b)(10)(A) which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." These dealership employees are exempt from federal overtime. The Supreme Court reasoned that a service advisor is "obviously a 'salesman'" and is also "'primarily engaged in … servicing automobiles.'" *Encino*, 138 S.Ct. at 1140. The Supreme Court noted, "True, service advisors do not spend most of their time physically repairing automobiles. But the statutory language [of the FLSA] is not so constrained. All agree that partsmen, for example, are 'primarily engaged in … servicing automobiles' …. But partsmen, like service advisors, do not spend their time under the hood." Id. at 1141. The Court concluded that a "natural reading" of the exemptions under Section 231(b)(10)(A) supported a finding that the exemptions covered service advisors.

Notably, the Supreme Court also tipped its hat to how lower courts should interpret other exemptions to the FLSA. It wrote, "The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. … We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no "textual indication" that its exemptions should be construed narrowly … [t]hose exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement… We thus have no license to give the exemption anything but a fair reading."

In sum, therefore, the *Encino* decision should be heartening to not just our dealership clients, but all of our clients relying upon exemptions to the FLSA's overtime requirements. Please contact our office for more information regarding whether your business is properly classifying its employees exempt from overtime-pay.

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It's High Time To Learn About California State Trademark Registrations

You may have heard that California recently legalized cannabis. No matter how you feel about that, the legal cannabis business is going to be a multi-billion dollar industry. Investors who put millions of dollars into a developing brand are going to want to be able to protect their investment and their intellectual property.

Thus, it was a major development for this industry when the California Secretary of State announced this year that it would accept applications for cannabis-related trademarks. Until this year, one of the biggest hurdles for California cannabis brand owners had been the inability to secure California state trademark registrations for their marks, meaning anyone could rip off a trending product's name and mark.

Before investors in this industry can exhale with relief over this news, there are some conditions. First, the applicant must be using the proposed trademark in commerce at the time of the application. Some trademark applications – including many Federal registrations – only require an "intent to use" at the time of the registration. California, for now, requires that the brand is out there in commerce, so applicants may experience some paranoia while their product is on the market without formal registration.

Second, the applicant must correctly identify each classification of goods that it is selling, according to the classifications determined by Federal Trademark Law. This presents a problem, of course, because cannabis is still a controlled substance under Federal law, and there are no classifications that fit perfectly. At some point, California may establish a specific class under which businesses can register their marks for cannabis products. Until then, the best investors may be able to do is submit trademark applications with hazy or vague specifications of goods and services, which in turn may only provide limited protection. (cont. page 6)

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USING BRACKETS TO BREAK THROUGH A MEDIATION IMPASSE

Mediation is an effective and efficient way for parties to end contested litigation. Too often, however, there comes a point in the mediation where both sides have become entrenched by making competing offers presumably intended to send a message of resolve, but which are unrealistic given the nature of the claims at stake. This can lead to a pattern of reactive negotiation in which incremental moves are mirrored by each party, ultimately slowing the process to a halt and ending the dialogue in frustration.

When a mediation comes to a standstill, a mediator will often propose "bracketing" as a technique to break the impasse. Bracketing is the process of negotiating the high and low of a range in which further bargaining will take place. Understanding how brackets work can help parties use this tool effectively and wisely.

By the time the mediator proposes a bracket negotiation, the mediator will have had in-depth discussions with both parties and their counsel to explore the claims, the defenses to the claims, and also the parties' needs, interests, priorities and risks. This information informs the mediator to begin a discussion about a range within which productive bargaining is likely to occur. Often, the mediator will suggest using brackets at a stage in the mediation where an impasse has arisen, or when there is a monumental spread between the parties' offers, but it is too early in the day for the parties to reveal their last, best and final numbers.

It works like this. A mediator will propose a conditional range: "if the other side offers X, would you be willing to counter with Y?" Neither side has committed to a binding demand – you've only agreed to lower your ceiling (or raise your floor, depending on your side) if the other side makes a similar, reciprocal move. From a plaintiff's perspective, offering a bracket allows the party to make a significant reduction in its demand because "accepting the bracket" would result in a significant corresponding increase in the defendant's offer.

When brackets are proposed, the other side has several options to carefully weigh: it can accept the bracket, propose a different set of brackets, or reject the bracketing concept and respond simply with a number. If the bracket is accepted, the party who made the bracket offer must then make a new demand within the agreed-upon bracketed range.

When deciding whether to make (or accept) a bracketing proposal, and when deciding what the two ends of the range will be, negotiating parties are wise to consider the midpoint of the two ends as a likely indicator of where the continued negotiation may conclude. Therefore, it is vital to make an opening bracket offer (or response) using numbers that will move the other side to an acceptable common ground while, at the same time, keeping the discussion moving.

To avoid the bracketing process from devolving into a march to the midpoint, each party should calibrate its offers and counter-offers to communicate to the mediator and to the other side how much it is committed to its position. An unexplained shift in positions or a large change in the bracketed numbers may send an unintended message to the other side.

Importantly, brackets can be used to break through a negotiating impasse and then set aside once negotiations have picked up steam again. Exploring brackets may be psychologically liberating for the parties, as they can exchange theoretical numbers without actually having to commit to a certain position. A party might be willing to offer a higher settlement offer as part of a bracketed move than they might if they know that their move will not be met with a reciprocal move from the other party.

In sum, bracketing has become a trusted part of a negotiator's tool kit. Knowing how they work, the messages they can deliver, and when to implement them can help you obtain the maximum value from your settlement negotiations. The litigators at BKCG can help you understand and apply this valuable tactic at your next settlement negotiation.

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What If A Party Cannot Afford To Arbitrate?

Arbitration has become a favored method for resolving disputes in commercial matters. For the most part, businesses view arbitration as an efficient way to resolve contractual disputes. Moreover, arbitration offers more of a confidential setting than litigating in federal or superior court. The flip side, however, is that arbitrations can be costly – something typically not considered at the time of contracting. Unlike a case in superior court where the salary of the Judge is picked up by the taxpayers, in an arbitration the litigants pay the arbitrator's fee – whether there is one arbitrator or a panel of three. In many contracts, the parties agree to split the costs equally. As you can imagine, the cost of the arbitration adds up quickly and payment must be made as the case progresses. The added cost raises an interesting question: what happens if one of the parties to a contract that requires arbitration cannot pay its share of the arbitration costs?

In *Weiler v. Marcus & Millichap Real Estate Services Inc., et al.*, (opinion filed 04/30/18), the California Appellate Court held when a party who has engaged in arbitration in good faith is unable to afford to continue in such a forum, that party may seek relief from the superior court. *Weiler* concerned a plaintiff and her husband who were represented by defendants in a 1031 property exchange transaction. The representation contract signed by the parties required that all disputes be resolved through arbitration with the arbitration costs to be split equally. As it turned out, the real estate transaction did not produce the anticipated income and plaintiff ultimately sold the real estate for one half of her purchase price. Plaintiff then filed a lawsuit in Orange County Superior Court and defendant successfully obtained a court order compelling arbitration.

The case was heard by a three-person arbitration panel at an hourly rate of $1,450. The cost of the arbitration was anticipated to be $100,000 exclusive of expert witness and discovery related fees. The arbitration proceeded slowly and, after three years, plaintiff asserted she was unable to afford her share of the arbitration costs. Plaintiff then filed a declaratory judgment action in the Superior Court seeking relief. Plaintiff argued that regardless of what the contract required, defendants should either pay the full cost of the arbitration or proceed in superior court. The trial judge ruled against plaintiff and sent the case back to arbitration. Plaintiff appealed.

In overturning the lower court, the Appellate Court recognized it did not have the authority to order the arbitrators to waive their fees or order the defendant to pick up the full cost of the arbitration. However, if plaintiff was unable to pay her half of the fees, it would lead to the possibility that the arbitrators would not continue with the case and she might be deprived of a forum to resolve her dispute against the defendant. The Appellate Court believed such an outcome to be intolerable.

In finding for the plaintiff, the Appellate Court looked to basic contract law and public policy. Basic contract law dictates that "hindrance of the other party's performance operates to excuse that party's nonperformance." Further, from a public policy standpoint, a defendant should not be permitted to avoid potential liability by forcing the matter to arbitration and then making it so expensive that plaintiff has no choice but to give up. While there is a strong public policy of enforcing arbitration agreements, the Appellate Court held that if a party is unable to afford an arbitration, that party may seek relief from the court and a court may order that either: (1) the arbitration can continue so long as the non-moving party agrees to pay for the arbitration; or (2) the case can proceed in Superior Court.

Arbitration provisions in business contracts have become almost second nature. Parties to a contract, however, often times do not anticipate what an arbitration costs and do not appreciate the fact that the arbitrator(s) must be paid as the case progresses. If a party to the contract cannot afford to arbitrate, the litigation might wind up in court – despite the contractual agreement to arbitrate.

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How Auto Dealers Can Effectively Use CCP § 998 Settlement Offers In Consumer Lawsuits

A small but industrious group of "lemon law" lawyers have made a cottage industry out of suing car dealers for alleged technical violations of finance disclosure and documentation laws, or for other problems that can and should be easily resolved short of filing a lawsuit. However, these lemon law lawyers nevertheless tend to sue the dealer in order to drive up their attorney fees, which wind up eclipsing the value of the consumer's claim and ultimately make it virtually impossible for the dealer to settle under any reasonable terms.

A recent Court of Appeals decision now gives dealers a powerful weapon to cut-off the further accrual of such outlandish attorney fees– a clear interpretation of the CCP § 998 offer to compromise. Often referred to as a "998 Offer", the Defendant notifies the Plaintiff that it will allow the Plaintiff to take judgment against the Defendant in accordance with the terms and conditions set forth in the offer. In a consumer vs. dealer case, such a 998 Offer might include a) return of the vehicle to the dealership; b) return of the down payment to the consumer; c) payoff of the consumer's loan on the vehicle; and d) some token payment, say $2,500 in cash to the consumer. Since the claims are usually based on statutes that provide for payment of the consumer's legal fees, the offer should also provide that the offer is "exclusive of reasonable costs and attorney fees, if any". This last part of the offer means that if the consumer accepts the offer, items (a) through (d) are to be performed by the dealership and the issue of how much in attorney fees should be awarded to the lemon law attorney is to then be decided by the trial court. Now, the only fight left is how much should a reasonable award of attorney fees be where the case settled quickly and for a relatively small amount.

More important is what happens when the lemon law lawyer rejects the 998 Offer. CCP § 998(c)(1) provides that if the Plaintiff rejects the offer and thereafter fails to obtain a more favorable judgment, the Plaintiff cannot recover his/her post-offer costs and attorney fees.

In a recent appellate court ruling, the Second Appellate District found that a Plaintiff who sued for misappropriation of her likeness was barred from any post-998 offer attorney fees because after she rejected the 998 Offer of $12,500 "exclusive of reasonable costs and attorney fees, if any", she and her attorney proceeded to trial where the trial court awarded her $4,483.50. Her claim included a statutory right to attorney fees and costs to the "prevailing party". The Court found Plaintiff to be the prevailing party and therefore entitled to her attorney fees, but only up to the point where she rejected the 998 offer. The Court also found that from and after the date upon which Plaintiff rejected the 998 Offer, the Defendant was entitled to its post-offer costs and attorney fees. The trial court analyzed the parties' respective attorney fee and cost bills and awarded Plaintiff $29,820 in pre-offer attorney fees and Defendant $31,395 in post-offer attorney fees, which resulted in a net award of $1,575 in attorney fees to the Defendant.

In order to make an effective 998 Offer, the amount and terms of the offer must be one the Defendant is confident it can do better than should the case go to trial. A low ball 998 Offer is virtually meaningless because the Plaintiff's lawyer knows he can do better at trial, and by doing so, vitiates the intended strategy of cutting off the continuing accrual of Plaintiff's right to further attorney fees. Also, the 998 Offer must be unambiguous. In 2015, Mercedes Benz USA LLC botched a 998 Offer when it offered to repurchase the car "in an undamaged condition, save normal wear and tear." The Court held that the offer was ambiguous and therefore invalid because the term "undamaged condition" was not defined in the 998 Offer and because the trial court could not readily determine who obtained the more favorable recovery. As the Court noted, "we fail to see how, following trial, the court could compare the value of obtaining the repurchase of the car without regard to its condition to the offer requiring that the car be 'undamaged' in order to determine whether [the consumer] received a more favorable judgment than the offer. Such an evaluation would require a factual determination of whether the car was damaged, which was not an issue relevant to the proceedings."

Having legal counsel experienced in dealing with these kind of cases, and in sizing up the exposure to the dealer, can ensure that the 998 Offer accomplishes its intended objective.

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California Supreme Court Tightens Definition Of Independent Contractor

On April 30, 2018, the California Supreme Court unanimously issued a ruling in *Dyamex Operations West, Inc. v. Superior Court* making it more difficult for employers to classify workers as independent contractors as opposed to employees. This decision has potentially far-reaching implications for all California employers who classify their workers as independent contractors.

When a worker is categorized as an independent contractor, they are exempt from minimum wage laws, payroll taxes, overtime, rest breaks, and other labor laws that apply to employees. Typically, when deciding if an independent contractor designation is appropriate as compared to an employee, courts will look to the level of control the employer exerts over the worker, such as control over the methods the worker uses when performing their job, schedule, skill required, independence of the worker, and other similar factors.

The California Supreme Court's decision on April 30 effectively restricts the circumstances in which a worker can be classified as an independent contractor with respect to wage orders. Under the new decision, the hirer has the burden to prove that a worker is an independent contractor and in order for a worker to be classified as an independent contractor, the worker must be: (continued on page 5)

California Supreme Court Tightens Definition Of Independent Contractor (continued from page 4)

(A) "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

(B) that the worker performs work that is outside the usual course of the hiring entity's business; and

(C) that the worker is customarily engaged in an independently established trade,occupation, or business of the same nature as the work performed for the hiring entity."

The Court went on to state that because of the risk that the employer is attempting to evade the wage and hour laws or other employee requirements, a worker may only not be qualified as an employee "if the worker is the type of traditional independent contractor – such as an independent plumber or electrician – who would not reasonably have been viewed as working in the hiring business."

The Court gave the example of a plumber who is hired by a store to replace a plumbing line which is not related to the store's business, which would clearly be an independent contractor. On the other hand, a seamstress who works from home for a clothing manufacturer making dresses that are designed by the company should be classified as an employee.

While it will take some time for the impact of the decision to be felt, all employers should take a look at the workers they currently have and how they are classified. Our firm would welcome the opportunity to discuss and review with you.

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Initial Coin Offerings: Navigating The Wild West Of Capital Formation With Cryptocurrencies

Cryptocurrencies have soared in popularity in the past couple years, drawing special attention to so-called Initial Coin Offerings, or ICOs. ICOs have become an innovative way to raise capital and exchange funds in an efficient manner by utilizing the technological advantages of cryptocurrencies' blockchain ledger systems. However, whether you are an investment professional, casual investor, or a company interested in holding an ICO, there are critical factors to consider in any investment or capital formation endeavor involving cryptocurrencies.

Unlike an Initial Public Offering of equity securities, an ICO is not currently expressly governed by the initial registration and mandatory disclosure requirements imposed by the Securities Act of 1933, or the ongoing disclosure and registration requirements of the Securities Exchange Act of 1934. In the landmark case *Securities and Exchange Commission v. W. J. Howey Co. et al.*, the Supreme Court of the United States defined a security to be an investment of money into a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. The determination of whether a financial instrument is subject to registration with the Securities and Exchange Commission, or SEC, in accordance with federal securities laws hinges on whether that instrument is considered a security under what is casually referred to as the Howey test.

While a strong argument can be made that a cryptocurrency offered in an ICO would fit within the definition of a security as set forth in *Howey,* such ICOs are not currently explicitly required to register with the SEC. However, in recent public statements by the SEC, it has warned the gatekeepers of the financial industry (including securities lawyers, accountants, and consultants) that they must proceed with caution regarding such ICOs, particularly in their determination of whether federal securities laws apply to the transaction. Calling such instruments "coins" or "currencies" does not preclude their classification as securities under federal securities laws, nor does it prevent the serious consequences of non-compliance with the same.

For example, on April 2, 2018 the SEC filed a complaint in the Southern District of New York against the officers of Centra Tech, Inc. for violations of the federal securities laws' anti-fraud and registration provisions in connection with the company's ICO. Centra Tech, Inc.'s ICO raised over $32 Million from thousands of investors in an effort to raise capital to fund a suite of financial products. According to the SEC's complaint, it alleges the officers of Centra Tech, Inc. went to extraordinary lengths to promote its fraudulent securities, including creating fictional corporate officers with impressive biographies and posting false, materially misleading information in the ICO's marketing materials on the company's website. Centra Tech, Inc. also allegedly paid celebrities to promote the ICO on their social media pages.

Steve Peikin, Co-Director of the SEC's Division of Enforcement commented about the Centra Tech, Inc. matter, "as we allege, the defendants relied heavily on celebrity endorsements and social media to market their scheme . . . endorsements and glossy marketing materials are no substitute for the SEC's registration and disclosure requirements as well as diligence by investors." Mr. Peikin really points to the crux of the issue, that being the notion that the federal securities laws' mandatory disclosure requirements serve the fundamental purpose of investor protection by facilitating the availability of material information necessary to ensure efficient capital markets.

While a startup company may be tempted to circumvent the arduous process of an initial public offering or private placement of equity securities by holding an ICO instead, it must remember that if the instrument it is marketing is likely considered a security within the meaning articulated in *Howey*, it better tread lightly. In an effort to protect investors from fraudulent capital formation schemes similar to the one allegedly perpetrated by Centra Tech, Inc., the SEC is likely to continue to increase its enforcement of the seemingly unregulated cryptocurrency space. While the current ICO landscape may seem like the wild west of finance, one must not forget the pitfalls of non-compliance with federal securities laws.

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The Villainous Wine Dealer And The Unsuspecting Collector

Relying on basic principles of insurance law (and Shakespeare), the California Appellate Court ruled that there was no coverage under an all-risk property insurance policy for a claim submitted by a plaintiff wine collector who learned that his valuable wines were actually counterfeit.

Plaintiff had a large collection of wine. Most of his purchases over an 8-year period were from a single dealer – Rudy Kurniawan. While plaintiff thought he was purchasing rare, vintage wine, he subsequently learned that Kurniawan had been arrested for fraud. As it turns out, Kurniawan was filling empty wine bottles with his own wine blend and affixing counterfeit labels to the bottles. Kurniawan then sold his wine to unsuspecting wine collectors such as plaintiff. Over an 8-year period, plaintiff purchased $18 million in wine from Kurniawan. Although Kurniawan was convicted of fraud and sent to prison for 10 years, plaintiff was still out $18 million.

Not to go away quietly, plaintiff submitted a claim to his property insurance carrier under his Valuable Possessions coverage form. The insurance carrier investigated and then denied the claim. Plaintiff filed suit arguing that the property policy provided "all-risk" coverage which means that all-risks of loss are covered unless specifically excluded. Since the policy did not exclude "fraud," there was coverage. The trial court disagreed and found in favor of the insurer. The case was appealed and the Appellate Court upheld the decision.

The Appellate Court began its opinion by quoting Shakespeare's Othello: "O though invisible spirit of wine, if thou hast no name to be known by, let us call thee devil." It went downhill from there for the plaintiff as the justices held that the plaintiff was "stuck with the devil wine without recompense." Like most every all-risk property policy, the insuring provision requires that the covered property sustain direct physical loss or damage. When plaintiff purchased the wine from Kurniawan, it was counterfeit. The wine remained counterfeit throughout the entire coverage period. Nothing changed. Although plaintiff certainly sustained a financial loss, he was unable to show he sustained any type of physical property loss or damage as diminution of value does not constitute "physical property loss or damage" under California law.

With respect to plaintiff's argument about "fraud" being a covered peril, the Appellate Court stated that the insured has the initial burden of proving that the claim falls within the insuring provision of the policy. In this instance, plaintiff had to first show that he sustained physical loss or damage to his wine. Because he was unable to satisfy his initial burden, the "fraud" argument was moot. Reverting back to Shakespeare, the court offered plaintiff a small piece of wisdom from the Bard of Avon: "The robbed that smiles steals something from the thief."

The case is *David Doyle v. Fireman's Fund Insurance Company* (filed 03/07/18).

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It's High Time To Learn About California State Trademark Registrations

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A state trademark registration will give the holder many of the same rights and protections that a federally registered mark provides, just within the State of California and subject to California's state laws. It won't protect the brand across state lines or federally, but obtaining some brand protection in the California marketplace is sufficiently valuable to incentivize many entrepreneurs in the industry to meet with their IP lawyers and hash out their options.

If you are developing a new product, even one that's in a more traditional industry, contact us to protect your investment and brand.

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