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BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

Don't Take Less Than What You Are Owed From Your Insurance Company

The California wildfires in November 2018 were devastating. Thousands of homes and businesses were destroyed as well as the infrastructure of certain municipalities. More than 18,000 structures were destroyed in the Camp Fire alone making recovery a long and arduous process. As a consequence, many business owners and home owners have decided to re-locate rather than rebuild at the same location. This raises an issue as to the amount of indemnity owed when an insured decides to purchase a building or rebuild at a different location.

Thanks to changes in the California Insurance Code made in 2018, insurers are now required to indemnify its insureds on a replacement cost basis even if they decide not to rebuild at the damaged site but, rather, purchase a new structure or rebuild at a different location. (California Insurance Code section 2051(c).) Indemnity is still capped at the amount it would have cost to rebuild at the damaged site. Id. Unfortunately, however, some insurers take the position that when a structure is purchased or built at a new location in lieu of rebuilding at the damaged site, the indemnity owed is limited to the purchase price less the value of the land. Insurers reason that if the damaged structure was re-built at the same location, it is only required to pay indemnity for the cost to rebuild the structure. It does not pay for any damage to the land itself.

Therefore, if the insured decides to purchase a building at a new location, it should only be responsible to pay for the building and not the land. This reasoning typically results in providing the insured with less than what they originally had prior to the loss.

A simple example illustrates the point. Assume a business is destroyed by a fire and the cost to rebuild the building is $1 million. The business owners, however, decide to purchase a new building at a different location rather than rebuild. The insurer is obligated to pay the actual amount its insured spends to replace its building up to the $1 million hypothetical rebuild cost.

Now assume the business owners purchase a new building for $1 million. Instead of paying its insured $1 million, some insurers allocate the purchase price between the land and the building. If $600,000 of the purchase price is allocated to land, the insurer would then only pay $400,000 leaving its insured with far less than what they had prior to the fire. This is hardly indemnity.

California Department of Insurance issued a bulletin addressing the issue of deducting the land value when an insured decides to purchase a new home elsewhere. The bulletin points out that by deducting the value of the land under a purchased replacement home at a new location, the insurer is paying less than the full replacement cost of the destroyed home had the structure been replaced at the damaged site. Insureds should not be penalized for exercising their right to replace their destroyed property by purchasing an existing home at a different location. While the bulletin is directed toward homeowners, the underlying reasoning applies to businesses as well.

Learning Point: Recent changes to the California Insurance Code require insurers to pay full replacement cost even if the insured decides to relocate. In the event that you sustain a total loss to your home or business, you should not be required to take less from your insurer because you decide to relocate rather than rebuild.

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Penal Code Penalizes Fraudsters

In California, Penal Code section 496(c) allows for the recovery of not only treble damages (three times the amount of the damages), but also reasonable attorney's fees and costs as well. Penal Code section 496, while typically utilized as a criminal penalty for theft under false pretenses and receiving stolen property, is becoming more common in civil complaints as a means of seeking statutory treble damages, attorney's fees, and costs. However, the big question has always been whether a person who suffered damages by someone stealing money from them can recover from that person in civil court without a previous criminal conviction under section 496.

One of the most important advantages of the civil damages for theft under Penal Code section 496(c) in California is that the treble damages under Penal Code section 496(c) are a fixed penalty, and require no showing of the net worth of the defendant or other ability to pay the damages, as would be required for a typical award of punitive damages.

In *Bell v. Feibush*, the plaintiff loaned money to the defendant who did not repay the loan. The complaint included a cause of action for civil damages for theft under Penal Code section 496 and alleged that the defendant used a false pretense when he told the plaintiff that he allegedly owned a certain valuable trademark, and that the money from the licensing of that trademark would be used to repay the loan. The complaint also alleged that the defendant did not own the trademark and did not make any money from its licensing. The trial court entered a judgment in favor of the plaintiff for $607,500.00 which was three times the value of the money that she had loaned to the defendant, plus her attorney's fees and costs.

The defendant appealed the treble damages aspect of the judgment that was entered and claimed that the Penal Code did not apply because he had to first be criminally convicted, and that as the party that allegedly stole the money, he could not be convicted for receiving it.

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Watch Out! Federal Appeals Court Holds Dynamex Applies Retroactively

As this newsletter has discussed before, last year, the California Supreme Court changed the way employers can identify their workers. In *Dynamex v. Superior Court*, the California Supreme Court radically altered the test that applies to determine whether a worker must be classified as an independent contractor or employee for the purpose of California's wage orders. In May 2019, the federal Ninth Circuit Court of Appeals decided in *Vazquez v. Jan-Pro Franchising* that the *Dynamex* decision applies retroactively – meaning employers can be held liable for misclassifying its workers before the more stringent *Dynamex* standard even existed.

As a reminder, in *Dynamex*, the California Supreme Court set forth a much stricter "ABC" test to determine whether a worker is properly classified as an independent contractor, and therefore, exempt from California's wage orders. Now, all workers are presumed to be employees unless the employer establishes each of the following three factors:

A. The worker is free from the control and direction of the hiring entity;
B. The worker performs work outside the usual course of the employer's business; and
C. The worker is customarily engaged in an independently established trade or business the same nature as the work performed for the company.

The California Supreme Court did not address whether the "ABC" test applied retroactively, or only applied to new cases going forward. After the *Dynamex* decision was issued, several lower California state courts applied the test and held that it did apply retroactively.

Cue the Ninth Circuit's *Vazquez* decision. In Vazquez, the Court of Appeals was asked to determine if California law required the "ABC" test to apply retroactively – meaning the test would be applied to workers and cases that took place *before* the "ABC" test even came into existence. *Vazquez* involved a janitorial company who was sued by its workers because they were classified as independent contractors and sought damages based on minimum wage and overtime claims. The case was thrown out by the lower court, but on appeal, the Ninth Circuit held that California only clarified existing law, and without any indication that the "ABC" test should only be applied in the future, the "ABC" test applied retroactively.

The effect of this decision in the case was to revive the workers' employment claims, but its effect could be far-reaching for all California employers. Under this decision, employers who classify independent contractors (or have used independent contractors in the last few years) could potentially face claims from workers who now claim that they were improperly classified as independent contractors – even if several years have passed. It remains to be seen how this decision will be applied going forward, but it is a good reminder for all employers to examine their classification of their workers and think about how to minimize potential risk arising from misclassification going forward.

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CALIFORNIA LEGISLATURE WANTS TO ESTABLISH A CALIFORNIA ESTATE TAX

Prior to January 1, 2005, when the estate of a decedent was subject to estate taxes, the estate tax return determined how much estate taxes a particular estate owed and the majority of the tax burden was sent to the Internal Revenue Service and a smaller amount was provided to the State of which the decedent was a resident. This type of tax was referred to as a pick-up tax. As of January 1, 2005, the federal rules were changed such that the entire tax liability was payable to the IRS, with the States receiving nothing. States had to decide whether to simply do without this revenue or to charge an independent estate tax that would be in addition to the federal estate tax.

California, up until now, has not instituted an independent estate tax. That may be about the change. California Senate Bill 378 imposes an estate tax on certain estates for decedents dying after January 1, 2021. If the bill passes the California Legislature and is signed by Governor Newsom, it must be put to the voters in the November 2020 election.

The current federal estate tax exemption is $11,400,000 for a single individual and $22,800,000 for a married couple. Estates that exceed these limits are taxed 40% on the excess. In 2009, the federal estate tax exemption was $3,500,000 for single individuals and $7,000,000 for a married couple.

The proposed California Estate Tax calls for a 40% estate tax to be imposed on individual estates exceeding $3,500,000 and estates of married couples exceeding $7,000,000. The tax would only apply on the amount of the estate between the $3,500,000 exemption and the current federal limit of $11,400,000.

To illustrate, assume a single individual living in California has an estate of $10,000,000. Under current law, since the estate is under the $11,400,000 federal exemption amount, no federal estate tax would be due at death and since there is currently no California estate tax, no California tax would be due either. However, under the proposed law, there would be a 40% California State estate tax imposed on the amount between $10,000,000 and $3,500,000, which would result in a $2,600,000 estate tax owed to Sacramento. A married couple with a $20,000,000 estate would owe $5,200,000 of State estate taxes.

On a percentage basis, this tax would apply to a relatively small group of taxpayers. The language of the bill states that it is the intent of the Legislature to address the racial wealth gap by enacting legislation that would create California Social Inheritance Accounts to counterbalance the uneven effects of intergenerational wealth transfer and to reverse California's record level of inequality.

A concern is that if the California Estate Tax can be avoided by moving out of the State, not owning real estate in California and not operating a business in California, then wealthy taxpayers may leave California and take all of that tax revenue with them. The top 1% of California earners pay 48% of all income taxes in the State. Will the imposition of this tax cause a significant number of wealthy taxpayers to establish residency in another State? We will see.

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Court Binds Employee to Agreement to Arbitrate That Employee Refused To Sign

As regular readers of the BKCG Bulletin know well, BKCG generally believes that arbitration is a better dispute resolution forum than court for employers in disputes with their employees. Among many other benefits to employers, arbitration enables the employer to avoid adjudication by a jury that is more likely to be comprised of "employees" than "employers" that tends to be biased towards the plaintiff employee with whom jurors often sympathize. For this reason and others, BKCG frequently recommends that its employer clients request that their employees sign agreements that mandate all disputes between the employer and employee must be resolved through binding arbitration. However, what is the legal result if the employee refuses to sign such an agreement but continues working for the employer?

A recently decided case, *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, answered this very question. In *Diaz*, the employer, Sohnen Enterprises, provided arbitration agreements to all of its employees and advised them that their continued employment with the company would constitute their acceptance of the agreement to arbitrate. An employee named Diaz refused to sign the agreement, but continued working for Sohnen Enterprises. Shortly thereafter, she filed a lawsuit against her employer alleging a claim for discrimination. The employer filed a motion seeking to compel arbitration and Diaz opposed the motion on the grounds that she never signed the agreement and thus she had refused to agree to arbitrate her employment disputes.

Although the trial court accepted Diaz's argument that no "meeting of minds" occurred as between the employer and employee because the employee purportedly rejected the employer's arbitration agreement, the appellate court reversed the trial court's decision. Because the employer expressly told Diaz that her continued employment with Sohnen Enterprises constituted her assent to arbitrate her employment disputes, the appellate court concluded that Diaz was bound by the agreement to arbitrate, despite her refusal to sign the agreement.

This case presents a roadmap for many employers that present arbitration agreements to their employees, because the law now makes clear that if the agreement clearly specifies that the employee's continued employment constitutes her acceptance of its terms, then employers likely need not worry if employees refuse to sign the agreement but remain employed. Under the holding of *Diaz v. Sohnen Enterprises*, courts will likely bind those employees to the agreement to arbitrate, regardless of their refusal to sign. If you have questions about this new law or want to ensure that your company's agreement to arbitrate remains current and as effective as possible under the law, please contact Joshua Waldman for a consultation.

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Class Action Settlement Exposes An Unexpected Risk In Pregnancy-Related Leave Policies

A recent settlement of a paternity rights class action lawsuit has jolted employers nationwide to examine their paid parental-leave policies and has plaintiffs' attorneys smelling fresh blood in the water. The case arose from a simple request from a JP Morgan Chase employee, named Derek Rotondo, for paid parental leave as the "primary caregiver" for his newborn child. The employer denied his request on the ground that its policy held that only mothers were considered primary caregivers and were eligible for the full 16 weeks of leave that the company offered new parents, unless he could prove that his wife had returned to work or was medically incapable of caring for the baby. Instead of 16 weeks, his employer offered two weeks.

Rotondo filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming the company's paid-leave policy discriminated against men. In 2014, the EEOC issued guidelines warning that employers should distinguish between "pregnancy-related medical leave" or disability-related maternity leave -- the typically six to eight weeks of leave offered to mothers to recover from childbirth -- and any additional paid leave that's designed to care for or bond with a new child. "If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth ... it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose," states the EEOC guideline.

Represented by the ACLU, Rotondo also sued JP Morgan in a Cincinnati federal court. In the lawsuit, Rotondo alleged that JPMorgan's policy violated federal and state laws that prohibit employers from discriminating against employees based on gender or gender-based stereotypes. On May 30, JPMorgan Chase agreed to pay $5 million to settle the class-action lawsuit filed on behalf of male employees who said they were denied access to the same paid parental leave as mothers between 2011 and 2017. JPMorgan also agreed to train its employees on how to administer its gender-neutral policy on paid parental leave.

Rotondo's lawsuit highlighted the inherent potential for disparate treatment in leave policies that give employers discretion to determine whether the parent is a "primary" or "secondary" caregiver, and then to determine the amount of leave based on that decision. Although these policies were usually designed to be gender-neutral, often set up by employers trying to navigate the expansion of benefits to adoptive parents or same-sex partners, experts say it hasn't always worked that way in practice. Sometimes, policies will have gone so far as to pre-designate the mother as the primary caregiver and the father as the secondary caregiver, thereby perpetuating gender stereotypes.

If your pregnancy-related medical leave distinguishes between "primary" or "secondary" caregivers, or if it predesignates the mother as the primary caregiver, it may be a very good idea to have your leave policy reviewed by an attorney.

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Non-Competes/Non-Solicitation Agreements

A majority of us believe that when we enter into a written contract, the terms of that agreement obligate us to do, or not do (as the case might be), certain things. That's "contracts 101". However, California has statutes that sometimes drastically alter how the parties are allowed to act pursuant to a contract- irrespective of the contract's language. One striking example of this occurs when written employment agreements contain "non-compete" and or non-solicitation provisions. With rare exception, these types of provisions are unenforceable.

California Business and Professions Code Section 16600 renders unenforceable any contract provision that attempts to restrain a person from engaging in a profession, trade or business – these are commonly referred to as "non-competes." Similarly, non-solicitation provisions in contracts are also generally unenforceable as they can prevent employees from moving from one company to another and are, hence, also a restraint on trade. The policy behind Section 16600 is best summed up from the seminal case of *Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, 945-46, as follows:

In the years since its original enactment …, our courts have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility. The law protects Californians and ensures "that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." It protects "the important legal right of persons to engage in businesses and occupations of their choosing."

There are a few statutory exceptions to the general prohibition against non-compete and non- solicitation agreements (mainly dealing with an employer's right to protect trade secret information). For the most part, however, a court will not uphold such a provision if challenged by a former employee.

Additionally, California's prohibition on non-compete and non-solicitation provisions can also impact other provisions of an employment agreement. For example, an employer who tries to contract around Section 16600 by providing a choice of law provision and attempting to apply a law other than California's to a Californian employee will likely have that provision struck from the agreement also. See *American Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 12-13 ("California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy."); *Hall v. Superior Court* (1983) 150 Cal.App.3d 411, 416-17 (noting same).

In short, both employers and employees in this state should take a close look at their respective employment agreements and if those agreements contain non-compete and/or non-solicitation provisions should discuss with their counsel when those provisions might indeed be enforceable.

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Penal Code Penalizes Fraudsters

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In 2013, the Court of Appeal rejected defendant's arguments, and affirmed the judgment. The Court found that the Penal Code means exactly what it says and agreed that theft by false pretense is still a theft, and that even the person who steals the money is still liable for receiving it. The Court of Appeal also ordered that the plaintiffs were entitled to their costs, including attorney's fees incurred during the appeal.

More recently, in 2019, the Court of Appeal reaffirmed a similar decision in *Switzer v. Wood*. In Switzer, the non-managing member of limited liability company brought direct and derivative claims against its managing member, alleging claims of breach of contract, fraud, and conversion. Following a jury trial, the trial court entered judgment in favor of the non-managing member and awarded damages, but denied the non-managing member's motion for attorney fees.

On appeal, the Court of Appeal reversed the trial court's ruling denying the non-managing member attorney's fees, holding that a criminal conviction is not a prerequisite to recovery of treble damages and attorney's fees under Penal Code section 496.

If you have ever been the victim of fraud or theft by false pretenses, you may be able to recover punitive damages, as well as your attorney's fees and costs under Penal Code section 496, regardless of whether any criminal case has been filed.

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