THE BKCG BULLETIN

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BKCG

BURKHALTER KESSLER CLEMENT & GEORGE LLP

Columbo Update- BKCG Files Opening Brief In Court Of Appeal

As many of our readers know, in 2019 BKCG won a $70 million judgment for the creators of the epic television series Columbo. In December 2019 that judgment was vacated by the trial court, which ordered a partial new trial on a key issue of contract interpretation. BKCG appealed that order to the Court of Appeal for the Second Appellate district.

In January 2021 BKCG filed its Appellants' Opening Brief, which can be viewed or downloaded from https://bit.ly/3uUHmx0. The Defendant Universal City Studios will file its Respondent's Brief combined with its cross-appeal Opening Brief in April. BKCG will then file its final brief with the Court of Appeal in June. Universal's Reply Brief is expected to be filed by August 2021, at which point the case will be ready for oral argument before a panel of four appellate justices from the Court of Appeal's Division 8.

The de novo standard of review for the primary issue- contract interpretation – is the most favorable one available to an appellant. BKCG expects the Court of Appeal to reinstate the $70 million judgment and to also order the trial court to reconsider an additional $40 million of claims that were presented to accounting referees without properly instructing the accounting referees that the burden of proof was shifted to Universal.

The case stemmed from an agreement Universal made with Plaintiffs in which Universal promised to pay them 10% of the net profits from the television series Columbo. Although the series generated almost $600 million, Universal paid Plaintiffs less than $5 million. BKCG successfully argued that net profits were artificially depressed through Universal's practice of "Hollywood accounting", including arbitrary fees that were bore no relation to any actual cost or expense, plus imputed interest added to the alleged deficit caused by the made-up expenses.

If the judgment is reinstated, it will have earned interest at 10% per year for the duration of the appeal, adding as much as $15 million to the award.

Please contact Alton Burkhalter at aburkhalter@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

Burkhalter Kessler Clement & George LLP Is Pleased To Announce Our Newest Attorney, Drew S. Levine

Drew S. Levine is an associate with the firm's litigation department. Prior to joining BCKG, Mr. Levine owned and managed his own solo law practice specializing in civil litigation, basic corporate transactions, and removal defense of refugees in U.S. Immigration Court.

Mr. Levine was born and raised in Orange County, spending most of his childhood in Tustin. He received his Bachelor's of Science in Philosophy at University of California, Berkeley. He went on to receive a Master's in Science of Management from N.Y.U. Polytechnic's extension campus in Rishon L'Zion, Israel, and then received his Juris Doctorate from Cornell Law School in Ithaca, New York. During his time at Cornell, Mr. Levine participated in various prestigious competitions on behalf of the school's organizations for Moot Court, Mock Trial, and the Alternative Dispute Resolution Society.

In This Issue

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Alton G. Burkhalter & Daniel J. Kessler

Gathering The Evidence: Enforcing Subpoenas In Arbitration

Arbitration clauses have become a mainstay of modern contracts, used in everything from terms of service agreements to employment contracts. Arbitration agreements provide an efficient and cost-effective alternative to traditional litigation should any dispute arise relating to a contract. To achieve this efficiency, the rules of evidence are relaxed in arbitration and procedures are streamlined. However, careful attention must be paid in drafting arbitration clauses to maximize the benefits of any eventual arbitration proceedings and reduce the obstacles to winning a favorable outcome. Without the proper language, an arbitration agreement may not equip the parties with the mechanisms to investigate their cases as fully as they would like due to the streamlined, default procedures of arbitration.

One powerful tool often used in litigation to investigate a case and gather evidence is the third-party subpoena, which requires individuals not involved in a case to turn over documents or testify under oath. There are two different types of subpoenas which arbitrators can issue: discovery subpoenas and arbitration hearing subpoenas. A discovery subpoena is issued before the arbitration hearing (which is similar to a trial) in order to investigate the matter in preparation for the hearing. An arbitration hearing subpoena, on the other hand, is a subpoena which requires attendance or the production of documents at the hearing itself. The California Code of Civil Procedure governs arbitration proceedings when there is no agreement otherwise, and provides that arbitrators have the power to issue arbitration hearing subpoenas by default.

However, if the arbitration agreement does not specifically provide for more expansive discovery, then an arbitrator only has the power to issue arbitration subpoenas unless the arbitration agreement incorporates Code of Civil Procedure section 1283.05 which, among other things, allows for the issuance of discovery subpoenas in arbitration proceedings. Thus, it is very important to consider ahead of time what type of arbitration discovery procedures should be included in the arbitration agreement so as not to eliminate any important mechanisms like the discovery subpoena if arbitration ever does ensue. While a general reference to the Code of Civil Procedure and its discovery mechanisms may be enough to furnish the arbitrator with the power to issue discovery subpoenas, a specific reference to Code of Civil Procedure section 1283.05 would eliminate any ambiguity.

Given that an arbitration agreement provides the arbitrator with the power to issue discovery subpoenas, the next issue that may arise is the non-compliance of third parties. It is not uncommon for individuals not involved in a matter to fail to comply with discovery subpoenas for a variety of reasons. In such a case, it becomes necessary to compel that third party's compliance with the subpoena. The first step in securing compliance with the discovery subpoena is to obtain an order from the arbitrator compelling the third-party's compliance.

Since arbitrations are contract-based proceedings, however, arbitrators lack the power to issue orders that bind individuals who were not parties to the underlying arbitration agreement. Thus, a party seeking to compel compliance with a discovery subpoena must seek an order from the Superior Court compelling such compliance in the arbitration. In order to do this, the party may initiate a special proceeding to enforce the arbitrator's order to compel. Again, it is crucial to draft arbitration agreements carefully because a court will refuse to enforce an arbitrator's order compelling compliance with a discovery subpoena if the arbitration agreement did not actually provide the arbitrator with the power to issue discovery subpoenas.

It is important to remember that arbitrations are creatures of contract, and so the powers of an arbitrator are limited by the arbitration agreement itself. In order to ensure that an arbitration agreement provides for investigative tools similar to those that one would expect in normal litigation, an arbitration agreement simply needs to incorporate the discovery procedures detailed in Code of Civil Procedure section 1283.05. Adding this language to an arbitration agreement may seem like a rather small change, however it can have an enormous effect on how any potential arbitration may be conducted by allowing the parties to seek the issuance of discovery subpoenas. In addition, more issues may arise should any third-parties not comply with such subpoenas. Thus, it is critical to approach the drafting of arbitration agreements with these potential issues in mind to create the most favorable arbitration procedures possible.

If your business needs advice regarding the drafting of arbitration agreements, or requires representation in an arbitration proceeding, BKCG's experienced attorneys can assist with any issues your business faces.

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

Yes, You Can Require Employees To Get Vaccinated Against COVID- With Some Caveats

With new COVID infections in California, once again, declining and vaccine availability increasing, many employers and employees alike are anxious to return to their brick-and-mortar workplaces. Coming up with a safe reopening plan will be a requirement for all employers and one frequently asked question is whether, as part of that reopening plan, employers can require employees be vaccinated against COVID-19 prior to returning to the workspace. The short answer is, yes. But as with most things, an employer must understand that if it implements a vaccine requirement, it must comply with state and federal law when an employee refuses vaccination.

On December 16, 2020, the Equal Employment Opportunity Commission (the "EEOC") confirmed that requiring employees be vaccinated would not violate the American With Disabilities Act. (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws). The questions and answers provided by the EEOC in Section K of its December 16 report, titled "Vaccination", lead to the general conclusion that the vaccine requirement in and of itself is lawful. However, the EEOC notes that to the extent that the vaccination requirement "screens out" or identifies individuals with a disability or a "sincerely held religious practice or belief" that prevents vaccination, that unvaccinated employee may not be simply excluded from the workplace or terminated. (continued on page 4)

Case Law Update: COVID-19 Business Interruption Insurance Litigation

As we approach the one-year anniversary of the COVID-19 pandemic and the forced business closures, there has been a flurry of activity in courts across the nation as businesses have sought coverage for their business interruption losses. While the majority of the courts at the trial level have dismissed the lawsuits by holding that COVID-19 does not constitute "direct physical loss or damage" – a requirement contained in most insuring clauses of most insurance property policies - there have been a couple of notable cases of late where courts have allowed the lawsuits to proceed past the motion to dismiss stage. And, of course, the appellate courts should be issuing opinions in the upcoming months. Most likely, the appellate court decisions will provide the final word on the issue.

In *Salon XL Color & Design Group LLC v. West Bend Mutual Insurance Co.*, (2:20-cv-11719), the U.S. District Court for the Eastern District of Michigan allowed a hair salon's COVID-19 lawsuit for business interruption to proceed. The policy at issue had a "virus" exclusion as well as a coverage for "communicable disease". The Court held that while the virus exclusion bars business interruption coverage, the communicable disease provision might extend coverage for the hair salon's losses. According to the Court, the salon alleged "a causal nexus" between COVID-19 at its premises and the government shutdown orders. Further, the Court stated that the insurer was wrong in claiming that the state closure orders were not issued due to "dangerous physical conditions resulting from the damage." Salon XL plausibly alleged that the COVID-19 particles infected its property, exposed its staff and patrons, and the business lost the use of its property. As the Judge pointed out, this is enough to survive a motion to dismiss.

The interesting part of the case is that the Court held that the policy language regarding "damage" and "loss" in the insuring provision is ambiguous. An insured has the initial burden of demonstrating that there has been "direct physical loss or damage" to covered property; thereafter, the burden shifts to the insurer. While many court decisions have dismissed cases on the basis that the insured could not sustain its initial burden of proof, the instant case is notable because the insured did sustain its initial burden which then put the onus on the insurer to prove that there was no coverage.

Similarly, in Philadelphia, a U.S. District Judge declined jurisdiction over a case brought by a clothing boutique against its insurer, Selective Insurance. While other Federal Courts have dismissed cases finding that COVID-19 and the pandemic do not constitute "direct physical loss or damage," the Judge in *Jul-Bar Associates Inc. v. Selective Insurance Co. of America* 2:20-cv-04477 ruled that it was still unclear how state courts interpret Pennsylvania law on whether the pandemic caused "direct physical loss". Recognizing the uncertainty in the outcome due to the "disjointed patchwork of decisions," the Judge ordered the plaintiff to refile the case in state court on this issue of first impression.

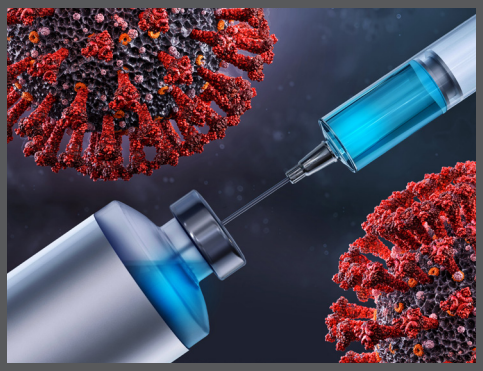
Meanwhile, the first batch of challenges to the lower court rulings are being briefed in the appellate court. In the 9th Circuit, briefs have been filed in *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America* 20-16858, a case where the plaintiff – like thousands of retailers across the state – were forced to close due to the shutdown orders as a result of COVID-19. The trial judge held that there were no allegations that COVID-19 directly caused the loss and no physical force led to the business closure.

Briefs have also been filed in the 9th Circuit case of *Plan Check Downtown III LLC v. AmGuard Insurance Company* 20-56020, a case where the trial judge dismissed a restaurant's claim for COVID-19 business interruption losses under its property policy. These 9th Circuit cases are likely to provide some guidance to insureds on whether they can seek indemnity under their property insurance policies.

There is much uncertainty as to how the issues surrounding COVID-19 business interruption claims will ultimately be resolved. In the event your business was forced to shut down during the pandemic, your insurance policy should be carefully reviewed as well as the written court decisions in your jurisdiction to determine whether you have coverage for your business loss.

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

Yes, You Can Require Employees To Get Vaccinated Against COVID- With Some Caveats (continued from page 2)



The EEOC notes that the employee may not be excluded from the workplace unless the employer can demonstrate that the employee creates a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation." The EEOC has established four factors that must be considered to answer whether an unvaccinated employee would pose a "direct threat" to the workplace and thus can be excluded from the workplace. These four factors are, "the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm." And even then, the employer may not terminate the employee if without "undue hardship" the employee can perform the job with an accommodation- such as working from home.

Myriad other issues arise under both state and federal law from a mandatory vaccination requirement and many of these issues have yet to be dispositively answered. Additionally, how an employer implements a vaccine requirement also is fraught with potential liability. For example, an employer who simply asks an employee if they have been vaccinated doesn't trigger concerns under the Genetic Information Nondiscrimination Act – but an employer eliciting information during pre-screening for that vaccination could, if not careful, elicit protected genetic information. In sum, it is complicated and for this reason, it is essential that any employer consult an attorney before implementing any type of COVID-19 vaccination requirement for its employees.

Please contact Ros Lockwood at rlockwood@bkcglaw.com or call (949) 975-7500 if you have any questions regarding COVID related claims against your business.

Skeletons In The Closet: Classification Decisions From The Past May Haunt California Employers For Years

Less than three years ago, the California Supreme Court created mass confusion and concern among California businesses with the landmark *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (Dynamex), which established an onerous, nearly impossible three part test that must be fully satisfied for an employee to be properly classified as an independent contractor.

Dynamex established the "ABC test" and requires the presence of all the following conditions to classify a worker as an independent contractor: (1) the worker is completely free from control and direction of the company in the performance of the work; (2) the worker performs work that is outside the usual course of the company's business; and (3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.
While the Dynamex decision was ominous enough, businesses across California held hope that its ruling would only be applied prospectively, as the Supreme Court left that question unanswered. Those hopes were crushed earlier this year, when in *Vasquez v. Jan-Pro Franchising, Inc.*, 2021 WL 127201 (Cal.) (Vasquez), the Supreme Court decided that Dynamex applies retroactively to all non-final cases that predate the Dynamex decision.

In Vasquez, the plaintiffs were janitor-franchisees of defendant, Jan-Pro, an international janitorial cleaning business. In mid-2017, the district court granted summary judgment in favor of Jan-Pro, concluding that the individuals performing cleaning services were independent contractors. Plaintiffs appealed, and soon thereafter Dynamex was decided.

Consequently, the Court asked the parties to brief the effect of Dynamex on the merits of the case, and specifically, whether Dynamex applied retroactively. The Court rejected all of Jan-Pro's argument against retroactivity. The California Court held that there was no reason to depart from the "well-established general principle" that judicial decisions "interpreting legislative measures" are retroactive.

The Court attempted to diminish the severity of its decision by opining that "given the constraints imposed by the statute of limitations, the retroactive application of Dynamex will in practice affect a limited number of cases." While this may be true for some cases, it is still a bitter pill for employers to swallow, as the pressures of the pandemic continue to wreak havoc on the economy.

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