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Personal Foul? Does Jerry West Have A Defamation Case Against HBO?

If the readers of the BKCG Bulletin share the same taste for television shows as several of BKCG's lawyers, then they too were likely engrossed by the HBO series "Winning Time – The Rise of the Lakers Dynasty". This series, which HBO contends was inspired by Jeff Pearlman's book "Showtime, Magic, Kareem, Riley and the Los Angeles Lakers Dynasty of the 1980's", depicted the Los Angeles Lakers during a season in the 1980's after Jerry Buss purchased the team. Although the series centers around certain events that actually occurred, such as Jerry Buss's purchase of the Lakers, the Lakers' drafting of Magic Johnson and the Lakers run to the NBA championship in Magic's first season, HBO nonetheless presents viewers with a disclaimer with each episode that reads "This series is a dramatization of certain facts and events. Some of the names have been changed and some of the events and characters have been fictionalized, modified, or composited for dramatic purposes."

In the series, Jerry West's character plays a significant role, at times as a Lakers player (in flashbacks), as the team's head coach and then later as a Lakers executive. The series depicted Jerry West's character as rageful, out of control, and with a serious drinking problem. Scenes show Jerry West's character drink heavily at the office during business hours, smash golf clubs over his knee and throw an MVP trophy out of a window in fits of rage, among other unflattering scenes.

Jerry West, clearly unhappy with HBO's depiction of him in the series, demanded that HBO issue a retraction and apologize to him, or if it will not, he has threatened to file a lawsuit against HBO on the alleged grounds that the show is defamatory. Because defamation is a cause of action that frequently arises in litigation involving BKCG clients, this article discusses the basic elements of a defamation claim and whether Jerry West likely has a case.

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Columbo Lawsuit To Be Retried In Part

On March 30, 2022, the Court of Appeal for the Second Appellate District (Los Angeles) published its opinion on the appeal of BKCG clients, Foxcroft Productions and Fairmont Productions as well as on the cross-appeal of Universal City Studios, LLC. While not the home run BKCG was shooting for, on balance the decision favored BKCG's clients.

In a unanimous opinion the Court found no merit in any of Universal's arguments on its cross-appeal. Notably, the Court affirmed the jury's unanimous verdict that the Columbo writers had brought their lawsuit within the applicable statute of limitations, which means that on retrial Universal will not be able to assert this affirmative defense. The Court also reversed summary adjudication of the writers' fraud claim against Universal. So, the writers are entitled to a trial on this issue along with the partial retrial of the distribution fees issues.

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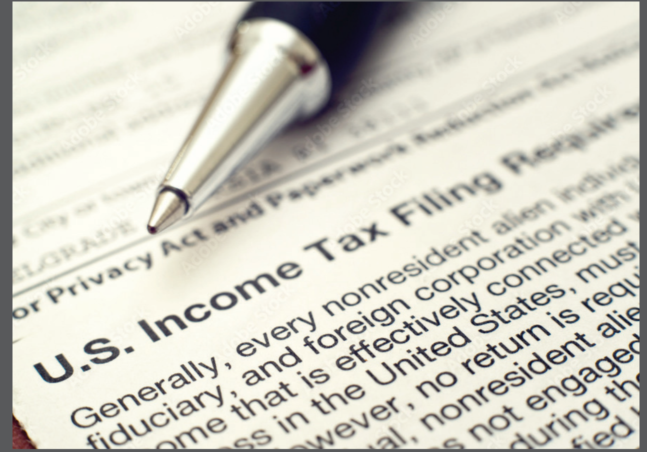
To Withold Or Not? A Taxing Question.



Employers in California know well that paying a terminated employee a severance in exchange for a full release is generally money well spent. And, so too, is it wise to pay for well negotiated settlements of costly employment lawsuits. However, must the employer withhold taxes from these severance and settlement payments? As advisors to employers, we are asked this question often. The answer (of course) is: it depends.

There is no question that employers must withhold taxes from wage payments. Among other federal and state regulations, the Internal Revenue Code specifically requires that "every employer making payment of wages shall deduct and withhold upon such wages a tax…." [26 U.S.C. § 3402(a)(1).] The issue arises, however, as to what constitutes "wages"–or, more precisely, what will the IRS deem to be "wages." In the context of a severance agreement–an agreement made in connection with the termination of employment providing the employee with additional compensation in exchange for a full release to the employer–there is little ambiguity that the severance payment will be considered "wages" for withholding purposes. Indeed, even the U.S. Supreme Court has made this clear.

The trickier issue is what to do when a former employee has sued the employer for a litany of claims (which is common), including wage claims along with allegations of discrimination, torts like defamation and infliction of emotional distress, etc. Unlike a severance, that is often paid out right after termination, and sometimes even in payroll increments over time like wages, a settlement is more typically paid in a lump sum years after the employee has been terminated. And, plaintiff employees almost always demand that the settlement be paid without withholding. What then? For some time, in California at least, there was some clarity for employers. Based on a 1992 Court of Appeal ruling, even if there was a "wrongful termination" claim alleging economic damages for lost wages, "In the context of the narrow issue of withholdability, only, we determine that the economic damages award won by [the employee plaintiffs] does not constitute 'wages' for 'services performed' and therefore is not subject to withholding of state and federal income or social security taxes." [*Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1507.]

Since that time, however, there has been a shift that all employers should take note of. Anecdotally, several employer clients of BKCG have noticed taxing authorities viewing employment related settlements and judgments (that even partially contain wages) requiring some withholding. In 2015, this view was made clear by the Courts, specially rejecting the holding in the *Lisec* case cited above. In that case, after losing a wrongful termination trial, Costco paid the judgment but withheld taxes from the total amount (and paid it to the proper tax agencies). The plaintiff employee wanted the full amount of the judgment though. Settling the issue, the Court held: "In the 23 years since *Lisec*, the Internal Revenue Service (IRS) and the vast majority of federal appellate courts have broadly interpreted the applicable Internal Revenue Code (IRC) provisions as requiring an employer to withhold payroll taxes for all 'wages' arising from the employer-employee relationship, even after that relationship has terminated. Persuaded by these authorities, we adopt this prevailing view and conclude Costco properly withheld the payroll taxes." [*Cifuentes v. Costco Wholesale Corp.* (2015) 238 Cal.App.4th 65, 68.] So, it certainly appears prudent to withhold taxes from any payment–whether by severance, settlement or judgment–if that payment is for lost wages.

What, then, about the settlement of a lawsuit or demand based on a whole host of claims that we so often see as employment defense counsel? A recent unpublished California appellate case offered some sage guidance. The court there noted that the *Cifuentes* case "does not answer the question presented here, namely, the extent of required withholding when a settlement amount is for both lost wages and emotional distress damages." The upshot is that employers should be sure to apportion the part of the settlement that is for wages and withhold accordingly. Plaintiff employees will certainly bristle, but it is the employer that is on the hook for failure to withhold. Thus, the employer should stand firm that some reasonable apportionment of the settlement for wages be made, and then withhold accordingly.

If you are an employer facing an employment related claim, we encourage you to contact BKCG to assist you in navigating these cases.

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

Twitter And The "Poison Pill"

Elon Musk's attempt to acquire Twitter has dominated headlines for months, and has provided a prime case study for numerous issues that businesses and investors may face in the context of a potential takeover. One such issue is the use of a so-called "poison pill." In the lead up to the tentative deal struck by Musk to acquire Twitter, the Twitter board of directors adopted what is widely known as a "poison pill" to defend against such a takeover. While a "poison pill" may be effective at staving off a hostile takeover, it also comes with some significant risks.

The "poison pill" is another name for a shareholder rights plan, which essentially aims to dilute the value of the company's shares in order to make it significantly more expensive for an investor to acquire enough shares to take over the target company. For example, Twitter, when faced with the prospect of a takeover by Musk, adopted a form of the "poison pill" called a "limited duration shareholder rights plan," whereby if any one person–or group–purchased 15% of Twitter's common stock without the board's approval, then the remaining shareholders would be allowed to purchase additional preferred stock and common stock at a discount. By issuing more shares for the other shareholders to acquire at a discount, the purchase becomes much more expensive for Musk who now has to purchase far more shares to accomplish a takeover, and without the benefit of a discount. (continued on page 3)

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So how effective is this tactic, and is it worth it? By making the acquisition of a company much more expensive, the hope is that it will entirely discourage a potential investor from trying to acquire the company in the first place. If a "poison pill" can entirely stave off a potential hostile takeover that the board of directors believes would harm the company, then a "poison pill" seems like an effective option.

However, in the case of Musk and Twitter, the calculus is far different given that Musk seems to have no issue organizing the necessary financing whatever the cost may be. Indeed, it appears that the deal is virtually inevitable at this point, although there have already been numerous bumps along the road. So, the goal of Twitter's "poison pill" almost certainly was not to prevent a takeover altogether, but rather to delay the transaction to formulate a long-term strategy or drive up the price in a negotiated sale. In any case, the "poison pill" is an expensive and risky gamble, that may not always pay off.

Aside from the inherent risks of a company intentionally diluting the value of its own stock, implementing a "poison pill" also poses another potentially expensive risk: litigation. While a company's board of directors, such as Twitter's board, may not want for an outside investor to take over the company unilaterally, preventing such a takeover by way of a "poison pill" will almost always anger ordinary shareholders who will see the value of their shares diluted. While those shareholders may be able to purchase more shares at a discount, not all shareholders may see the value in acquiring more diluted stock. In addition, if a potential takeover could have yielded higher stock values and the board of directors refused to entertain such a deal, the board's decision may expose the company to a suit for breach of fiduciary duty.

Simply put, a board of directors must place the shareholders' and the company's interests above their own. While a board of directors may feel that adopting a "poison pill" is ultimately in everyone's best interests, some shareholders are almost certain to disagree and view the board as pursuing their own interests over maximizing the value of the company's shares. If the shareholders decide that their shares have been unduly diluted, and that the board sacrificed the value of their shares in order to protect the board's own interests, those shareholders will likely bring a lawsuit against the company for the directors' alleged breach of their fiduciary duties. In such a suit, many complex legal doctrines (such as the "business judgment rule") will come into play, which will likely result in expensive and protracted litigation. As such, in addition to the other risks inherent in adopting a "poison pill," a company must also carefully weigh any potential benefits against the risk of litigation from unhappy shareholders.

If you or your business needs advice regarding a shareholder rights plans or a board of directors' fiduciary duties, or requires representation in any matter, BKCG's experienced attorneys can assist with any issues your business faces.

Please contact Michael McConnell at mmcconnell@bkcglaw.com if you have any questions about the issues in this article, or any related matter.

State Supreme Courts Begin To Weigh In On Covid-19 Business Interruption Claims

A string of three recent state supreme court decisions does not bode well for businesses seeking to recover business interruption revenue lost due to shut downs and slow downs as a result of COVID-19 restrictions. While most decisions up to this point in time have gone against business owners, the decisions have primarily been issued in lower courts and have relatively little value when it comes to precedent. The three new state supreme court rulings, however, are more problematic for business owners across the nation who filed lawsuits seeking billions in lost revenue from their commercial property insurer.

The opinion in *Colectivo et al v Tandem Restaurant et al* was issued on June 1, 2022 (Wisconsin Supreme Court, No. 2021AP000463). Similar to what occurred in California, the Wisconsin Department of Health Services issued emergency orders starting in March 2020. The order prohibited certain activities including in-person dining. A group of several chain cafes filed a lawsuit against their insurance carriers seeking business interruption coverage. While the business owners had success in the lower court, the Wisconsin Supreme Court had a different analysis and overturned the lower court's decision. The bottom line for the Wisconsin state supreme court is that a virus does not alter a property's appearance or structure so the mere presence of the virus does not cause any physical loss or damage. According to the Court, "[o]ne may think of the business-income provision as indirect loss-of-use coverage, but that does not change the fact that a prerequisite for that provision is still a direct physical loss or damage."

In *Verveine Corp & Others v. Strathmore Insurance Company* (MA Supreme Court, No. SJC-13172 April 21, 2022), the Massachusetts Supreme Judicial Court unanimously ruled that restaurants could not recover for lost revenue for its business closures and stay at home orders as a result of COVID-19 shut downs. The court held that the losses did not stem from a "direct physical loss of or damage to property" within the meaning of the policies. The restaurants argued that its property was rendered unsafe and unusable due to the presence of the virus. In a 6-0 opinion, the court stated that there needed to be a distinct physical alteration of the property that, in turn, makes the property unusable, damaged, or in need of repair. Relying on rulings by nine federal appeals courts from across the country, the Court held that the virus did not cause any distinct physical alteration of the property. Therefore, there was no coverage for the restaurants' lost revenue.

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BKCG Vaccinates Ralphs And Defeats COVID-19 Class Action Claims

The COVID-19 pandemic brought with it a rash of lawsuits across the country, as opportunistic plaintiffs' lawyers sought to blame someone – anyone – for the spread of an aggressive and evolving disease. A few months after the pandemic began, BKCG client Ralphs was sued by a group of employees claiming that Ralphs's response to the pandemic (e.g., the protective measures and contact tracing practices it implemented) was inadequate. The claims alleged in this lawsuit evolved as rapidly as the disease itself, as BKCG mounted one successful legal challenge after another, and what remains to be litigated is an empty shell of what Plaintiffs had hoped would garner widespread legal attention and notoriety.

When the pandemic began, Ralphs implemented protective measures at distribution centers, which remained open during the pandemic and worked closely with the CDC, Cal/OSHA and the Los Angeles Department of Public Health to prevent the spread of COVID-19 at the workplace. Ralphs quickly implemented agency guidance to prevent the spread, but nearly 100 of the approximately 800 employees at the Compton distribution center employees had already tested positive for COVID-19 before any real guidance issued. Ralphs's protective measures and contact tracing quickly gained traction, and the rate of positive tests at the distribution center has reflected the general public's positivity rates since then.

The facts did not stop a group of opportunistic employees – some of whom, ironically, are repeat violators of the social distancing and protective measures Ralphs adopted and posted in signs throughout its facility – from seeking a windfall disguised in a plea for justice and immediate action. These employees first sued Ralphs and sought injunctive relief, asking the Court to be a watchdog over Ralphs's protective measures and safeguards. The Court denied their request based upon overwhelming evidence that Ralphs's safeguards were preventing the spread of COVID-19 at the distribution center.

Like the disease evolved with the Delta and Omicron variants, the plaintiffs in this case amended and evolved their complaint to add new claims and a new plaintiff who alleged a non-related termination claim. BKCG challenged that complaint with a demurrer asking the Court to dismiss the claims seeking injunctive relief under the theory of judicial abstention, which states that a court may refuse to take a case that seeks equitable relief if granted that relief would require the court to assume, or interfere with, the functions of an administrative agency. The trial court agreed and recognized that it "would likely be called upon to create guidelines for how a distribution center should be properly run during a global pandemic" and that its efforts could "improperly interfere with the functions of administrative agencies like Cal/OSHA and the Los Angeles Department of Public Health."

After the Court's ruling, the plaintiffs had two potential class action lawsuits left: 1) a potential class was represented by the girlfriend of a Ralphs's employee, who alleged that Ralphs created a public nuisance by operating during the pandemic; and 2) a potential class represented by one former employee, who alleged that Ralphs violated the Emergency Sick Pay Act by somehow discouraging employees from reporting their potential COVID-19 symptoms to Ralphs.

Undaunted, Plaintiffs' lawyers received permission from the Court to conduct class discovery and sent notices to hundreds of Ralphs's employees seeking information about potential class members and inviting their participation on the class claims alleged against Ralphs. The notices yielded virtually nothing, as almost no employees returned the notices indicating an interest in participation.

With the class discovery results in hand, BKCG then filed a preemptive motion to deny certification of each of the two classes alleged in the lawsuit. With respect to the first class claim ostensibly represented by the employee's girlfriend, BKCG argued that Plaintiffs cannot satisfy any of the requirements of ascertainability, community of interest or superiority because the members of this class were impossible to identify, and establishing that they contracted COVID from a Ralphs employee, and not from some other source in their lives, would be impossible to achieve. As to the second class ostensibly represented by the employee who allegedly was too afraid to report his COVID symptoms (even though he actually, admittedly, did report his symptoms and received sick leave), Ralphs successfully argued that this class could not be certified since 12 of the 13 other employees named as plaintiffs in the case did not share the same allegations. BKCGs also argued and proved that the plaintiffs could not satisfy the class requirements of numerosity and well-defined common interest.

BKCG's legal position was unassailable. Plaintiffs conceded as much and did not even oppose the motion to decertify their two classes. Unsurprisingly, the Court granted the motion, leaving Plaintiffs with a withered husk of a lawsuit that has no teeth and even less merit. Where Plaintiffs once thought they would be pursuing claims on behalf of a large class of people who purportedly contracted COVID-19 because of Ralphs, they have only the claim of the girlfriend of one employee, who was repeatedly caught on camera violating the protective measures Ralphs implemented. Whereas Plaintiffs thought they would be representing hundreds of employees who were "too afraid" to report their COVID-19 symptoms to Ralphs for fear of retribution, they have only the claim of one employee who reported his symptoms and received all time off required by the law. These remaining claims pale in comparison to what was alleged and sought two years ago, when Plaintiffs sought nothing short of shutting Ralphs down completely when it had been determined to be an essential operating business that must remain open.

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

To Test Or Not To Test: Ensuring Compliance With California Laws Permitting Drug Testing of Employees

The regulatory framework under which the federal and state governments classify certain narcotics is in the midst of its largest change in a generation. Indeed, though it is already legal in California, there are increasingly prevalent calls to legalize marijuana on a federal level. Even drugs such as psilocybin, more commonly known as "magic mushrooms," are currently being used to treat post-traumatic stress disorder amongst veterans, as well as alleviating certain side effects of cancer treatment. However, even with the change in the legalization of certain drugs, something that has remained constant is an employer's right to drug test their employees to ensure a drug-free workplace.

An important point to keep in mind, California goes to great lengths to protect the privacy interests of individuals. This is notable because the collection and testing of urine and/or blood for purposes of detecting drug use directly implicates privacy interests protected by California's State Constitution. Given that the collection and testing of bodily fluids might not only reveal the presence of drugs in an individual's system, but could also reveal a whole host of other medical facts about the person being tested that they would otherwise like to remain private. That being said, it is perfectly legal for an employer to require job applicants to undergo mandatory drug testing as part of a "pre-placement medial examination," as long as the same drug test is administered to *all applicants*. California courts have specifically held that these blanket drug-testing requirements are legal and do not violate an individual' right to privacy under our State Constitution. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034. As long as an employer informs their applicants of the drug-testing requirement, the testing procedures are minimally intrusive, and the results are confidential, an employer is well within their rights to actively drug test job applicants. One important distinction to keep in mind, however, is that drug testing programs for applicants must come *after* the employer has extended a "bona fide" offer of employment. Seeking an examination as a condition of or prior to extending an employment offer violates multiple state and federal laws.

Where things get a little tricky is when employers consider drug-testing current at-will employees, not just applicants. California law grants current employees a greater expectation of privacy than job applicants. As such, California courts reflect this distinction. There are only two scenarios in which our courts have found drug testing of current employees appropriate: (1) testing an employee based on a reasonable suspicion they are using illegal drugs or are conducting their jobs under the influence; and (2) employers engage in random, suspicionless testing.

When an employer chooses to drug test an employee under the first scenario, caution is highly warranted. An employer must have a "reasonable" suspicion to believe that an employee is under the influence of illegal drugs to warrant a test. Further, the method of testing must be reliable. That being said, employers may require drug testing of employees whose job responsibilities implicate public or workplace safety. For instance, courts have upheld drug tests for employees who operate machinery on oil rigs (*American Federation of Labor v. Unemployment Ins. Appeals. Bd.* (1994) 23 Cal.App.4th 51).

An employer who drug tests their employees with random, suspicionless testing may do so under limited circumstances. California courts rely on a balancing test to determine whether a particular drug testing program is constitutional. Courts balance the employer's legitimate goals in administering drug tests, with an employee's reasonable expectation of privacy in their medical information. Our Supreme Court held that an employer need only demonstrate a "legitimate" or "important" interest to justify random drug testing. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1. Importantly, courts have found random drug tests of current employees unlawful where circumstances did not implicate safety or security-sensitive concerns.

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

Columbo Lawsuit To Be Retried In Part (continued from page 1)

Although the Court found an error in the jury's other verdict and ordered a partial new trial on the issue of the amount, if any, Universal was entitled to deduct in distribution fees, it laid out a favorable road map on the issue, stating: "… how was Universal to calculate these fees? The Rider, said, with our emphasis, these fees 'shall not exceed those charged by [Universal] according to its then existing standard practices….' What were those? Universal said Exhibit 9 set out its 'standard practices.' The writers disagreed, saying Exhibit 9 was not attached to their 1971 contract and Universal could not explain why, which proved Universal had no standard practice."

On retrial, BKCG will be able to present at least three arguments on why its clients should prevail: 1- there was no "then existing standard practices" at Universal with respect to its vast portfolio of photoplays; 2- the contract required that Universal negotiate the rider in "good faith" which Universal failed to do; and 3- to enforce the contract as Universal advocates would result in an unconscionable agreement, which would be unenforceable.

The Court did not consider the writers' appeal of an additional $20 million in damages, finding that those issues were not yet ripe. This means that following the next trial there will be a second appeal.

The case will be remanded to the Los Angeles County Superior Court, and has been assigned a new trial judge, the Honorable Gail Killefer. No trial date has been set.

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.

Personal Foul? Does Jerry West Have A Defamation Case Against HBO?

In order for West to prevail on his defamation claim, he would have to demonstrate that HBO's portrayal of him in Winning Time is: (1) assertions of fact, (2) actually false or creates a false impression about him, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice.

If Jerry West were to follow through with his threat and sue HBO, presumably HBO's first line of defense would be to argue the show's depictions of Jerry West are true (or substantially true). Truth is an absolute defense to defamation, so if HBO could convince a jury that its depiction of Jerry West in the series was substantially truthful, then HBO would successfully defend against West's threatened action.

However, even assuming HBO could not prove that its depiction of Jerry West was substantially truthful, West would still need to overcome significant obstacles to prevail. For example, because West is a public figure, he would need to prove that HBO acted with "malice" when it depicted his character in the way that it did. In simplest terms, this means that West would need to convince a jury that HBO either knew it was portraying him in a false and negative light but aired the show regardless, or he would need to prove that HBO was reckless in determining the truth or falsity of his presentation on the show. This could prove challenging for West if HBO can show that it relied on research or interviews of people who informed HBO that West really was like the character portrayed in the series. If such research exists, then HBO would have a strong argument that it did not intentionally or recklessly depict West in a false, defamatory light.

The disclaimer that HBO presents with each episode could also create a serious problem for West because he would also need to prove that an average viewer of the series believed it was portraying him in a factual manner, as opposed to a fictional dramatization. While West would undoubtedly argue that HBO presented the series as a depiction of true events (the Lakers dynasty *did* actually occur after Jerry Buss purchased the team and drafted Magic Johnson), HBO would clearly rely heavily on its disclaimer warning viewers that "some of the events and characters have been fictionalized, modified or composited for dramatic purposes." While case law holds that a disclaimer like the one HBO presents does not provide absolute immunity to the defendant in a defamation case, such a disclaimer is at least a factor that a jury may evaluate when determining whether the series actually reflected assertions of fact.

Overall, it is not entirely clear whether Jerry West would prevail in his threatened action because establishing defamation as a public figure, which necessitates that he prove "malice", is difficult for a plaintiff to do. However, if he could prove that HBO's depiction of him is untrue, that HBO either intentionally or recklessly aired the series showing him in such an unflattering light and if a jury believed the series depicted true events rather than a fictionalized version of them, then HBO could have some exposure.

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

State Supreme Courts Begin To Weigh In On Covid-19 Business Interruption Claims (continued from page 3)

Finally, in *Wakonda Club v. Selective Insurance Company of America* (Iowa Supreme Court, No. 21-0374, April 21, 2022), the court held against business owners. Writing for a 7-0 majority, the Iowa supreme court held that the government proclamations issued in Iowa were triggered by attempts to stop the spread of COVID-19. The business shut-downs were not due to any physical property damage or even the threat of imminent danger of physical harm to the buildings.

The three state supreme court opinions carry no precedential value in California. That being said, these opinions coupled with many California lower court opinions all potentially carry some amount of persuasive authority. While the California Supreme Court has not yet weighed in on the issue, the recent string of rulings from other state supreme courts are cause for concern to those business owners who may be seeking coverage under their commercial property insurance policies.

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

The BKCG Bulletin is Published By:
Burkhalter Kessler Clement & George LLP

2020 Main Street
Suite 600
Irvine, CA 92614
Attn: Alton G. Burkhalter
949.975.7500
949.975.7501 fax

340 North Westlake Blvd.
Suite 110
Westlake Village, CA 91362
Attn: William C. George
805.373.1500
805.373.1503 fax

Please review our firm at
www.bkcglaw.com

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Be sure to visit us on LinkedIn

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