PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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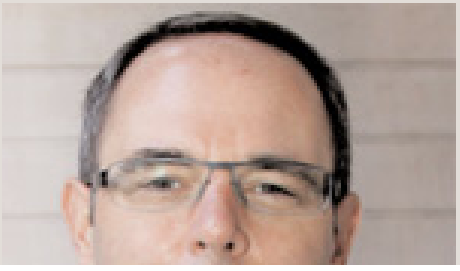


Willful Misclassification

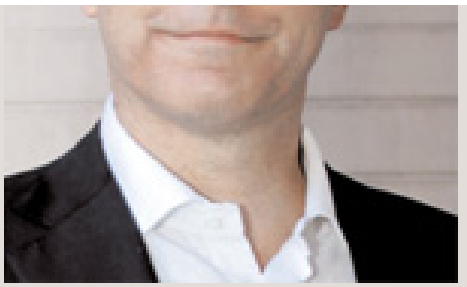
It is not uncommon for staffing companies serving as the employer of record to be sued along with the client company where that worker provided services. The typical claims made in these types of suits relate to joint employment liability for wrongful termination, discrimination and retaliation claims. For example, a worker may claim that he or she was subjected to discrimination on the basis of

his/her ethnicity because the client company treated him/her in a materially less-beneficial way than Caucasian workers.

A relatively recent addition to these types of standard claims concerns the “willful misclassification” penalties found in California Labor Code Sections 226.8 and 2753, enacted in 2012. Some attorneys are claiming that the employer of record/temporary staffing model, in and of itself, somehow violates these misclassification statutes because the staffing company and the client company are engaging in an effective conspiracy to deprive workers of compensation and benefits that would otherwise be owing to them had the client company hired them directly as their employer. In other words, even though there is no actual misclassification in the sense of a worker being improperly classified and paid as a 1099 as opposed to a W-2, the argument is that the employer of record construct is simply an artifice and a scheme that has the effect of depriving workers of compensation and benefits which are otherwise required in a direct employment relationship.

This argument seems to be a bit of a stretch because the statutes do not mention the possible applicability to situations where there is an actual employer-employee relationship, *i.e.* where a worker is not and has not been classified as an independent contractor. And except in instances of ambiguity, material terms are not be to added or read into statutes when interpreting statutes under controlling law. Nonetheless, we will have to see how the issue plays out in the courts before providing a definitive assessment.

For more information please contact Denis Kenny at dsk@sfcounsel.com.



Bill Scherer

Now that the New Year has begun and we are flying headlong into 2013 and its promises and challenges, it’s important to remember to stop and do the small things for ourselves that improve our lives. All too often we sacrifice personally to meet our goals and aspirations for our businesses. Nonetheless, it is ultimately how well we live our lives while meeting our goals that dictate whether we feel good about them at all. Below is a list

- Written by Denis Kenny

The Mediation Alternative

When most people think of litigation, an iconic moment from literature or film usually comes to mind: Atticus Finch defending Tom Robinson and exposing the lies of the Ewells in *To Kill a Mockingbird*; Jack Nicholson shouting at Tom Cruise about how he "can't handle the truth" in *A Few Good Men*; or Joe Pesci's questioning of Marisa Tomei about the nuances of auto repair as an ingenious means to prove the innocence of a relative in *My Cousin Vinny*. If not these exact scenes, the "classic" depictions of lawsuits usually involve dramatic resolutions to conflicts inside of oaken-paneled courtrooms in front of enraptured juries, public galleries, and gray-haired and stone-faced judges.

In reality, however, the course of litigation today in California is far different from such narrative depictions. Historically, trials have been on the decline since the 1960s, with only a small percentage of cases ever seeing the inside of a courtroom. In California in particular, this trend has been especially exacerbated due to large budget cuts to the judicial system, which have forced deep cutbacks to court staff as well as the closure of some courtrooms. Further, most cases that do go to trial only do so after one to two years of pretrial discovery, during which parties often each spend tens if not

of healthy habits I obtained from a recent newsletter I received that I believe are worth passing on. They are easy to embrace, and when practiced daily, help us grow in the right direction and improve the quality of our lives. They are, in no particular order, presented below for you:

1. Keep Moving.

To improve physical health, you don't have to join a gym or start training for marathons. Just move every day. Instead of staring at a television or computer screen for a couple of hours, get up and go for a twenty minute walk. Use the stairs

hundreds of thousands of dollars. In short, while the idealized delivery of justice makes for good storytelling, it is often presented through a prism that excludes real-life barriers to courtroom drama, including the incredible financial and emotional toll that can be placed on parties as well as limited state resources that make such forums less and less available.

Nevertheless, despite far fewer cases being resolved by trial, there has been no slowdown in the amount of lawsuits filed. As a result, alternative dispute resolution ("ADR") forums have become increasingly popular as a means to reach resolutions to legal disputes. One such forum is mediation.

Mediation is a process whereby opposing parties in a lawsuit voluntarily agree to engage a neutral third party (the "neutral") to assist them in attempting to reach a resolution. The neutral is most often an experienced attorney or retired judge who is able to bring a perspective to the matter that may be informed by hundreds – if not thousands – of previous cases. The neutral generally attempts to get both sides to realize the weaknesses their cases, understand the inherent risks in pursuing the matter through protracted litigation, and see the value in finding a near-term resolution of the matter. If successful, the mediation will result in a formal settlement of the matter on terms agreed to by the parties.

Mediation has many benefits as an ADR process. First, it allows the parties great flexibility and consequently may drastically reduce the overall burden of litigation. For example, when agreeing to mediate, parties may place formal discovery proceedings (such as the taking of depositions and the sending and answering of written requests for

instead of taking the elevator. Walk to places you normally drive to. In nice weather, meet with someone while taking them on a walk through the park.

2. Stay Positive.

Negative inputs sap our emotional energy, putting us in the mindset that can make it harder to succeed. Spot the negative influences in your life and eliminate them, or if they can't be avoided, at least don't indulge them. Brief list: 24-hour bad news channels; impossible deadlines; traffic; toxic people. If that radio talk show host or television

information) on hold until the mediation process has concluded. The parties may also seek out a neutral who specializes in the area of law in which the dispute arose. Second, unlike other ADR processes – such as arbitration – mediation is entirely voluntarily. Consequently, while the neutral is relied on for his or her experience in assessing the value of the dispute and potential risks, either party is thereafter free to walk away from any proposed deal if they get cold feet. Third, mediation allows the parties to craft a resolution of their choosing. This contrasts with formal resolution through trial, at the conclusion of which a judge or jury may be extremely limited in the remedies available to be given to the prevailing party. Fourth, mediation allows the matter to be evaluated by a party without a horse in the race, so to speak. Consequently, the neutral plays the important role in moving the parties from positions in which they may have become entrenched and toward a compromise and an end to the matter.

The biggest perceived drawback to mediation is that there is no "winner" or "loser" in the traditional sense. Instead, the parties, with the help of the neutral, will hopefully reach a compromise settlement. This form of resolution short circuits the traditional vindication that most associate with the end of a lawsuit. However, as anyone who has ever filed a lawsuit or been sued will attest, the financial and emotional toll of litigation can be tremendous. Perhaps unsurprisingly then, surveys of litigants who participate in mediation consistently report a high level of satisfaction with the process.

In sum, mediation presents a viable and often cost-effective means to resolve lawsuits – although one that most litigants remain unaware of until embroiled in a lawsuit. Scherer Smith & Kenny LLP has

interviewer sets you edge, why listen to them?

3. Work Your Mind.

Mental exercise is good for you, too. Make it a point to learn something new every day. It can be as small as someone's name or as big as a piece of history you have always been curious about. Learn a new word from a list of most frequently misused or misspelled words. Figure out how to be proficient with every last function on your smartphone. Just learn one thing a day.

utilized mediation successfully to obtain favorable results for many of its clients in matters ranging from complex commercial disputes to employment-related claims involving single employees and most everything in between. For more information, please contact Denis Kenny at dsk@sfcounsel.com or Ryan Stahl at rws@sfcounsel.com.

- Written by Ryan Stahl

Fraud in Contracts: Case Alert

Suppose you are struggling making mortgage payments under your current loan agreement. After several conversations with your bank, you agree to enter into a loan modification based on an oral promise from your lender that they will not take any action against you for at least a year regardless of whether you pay on time. In reliance on that promise, you sign on the dotted line, paying little attention to the details of the written agreement. Two months later the bank files a notice of default and tries to foreclose on your home under the modification agreement. As it turns out, no forbearance language made it into the written agreement that you signed. Naturally, you hire a lawyer and sue the bank for fraudulently inducing you to enter into the agreement based on that false oral promise.

As the law stood in California prior to January 14, 2013 , you would have been precluded from introducing evidence of that oral promise to support your fraud claim. Based on a decision made by the California Supreme Court in an old case decided in 1935, you were

4. Take Time Out.

Even during your busiest day, do not forget to take a few minutes out and enjoy some quiet time. Don't open emails; let your phone go to voicemail. Turn off your smart phone, tablet, and computer. For fifteen minutes, don't work at all. Just listen to your favorite music, read something for fun, stare out the window and daydream or do whatever it is that relaxes you. The idea is to quiet your mind and refresh your disposition before headings back into the fray.

5. Reach Out to

barred from introducing evidence of fraud if your evidence was nothing more than a promise directly at odds with the terms in the writing. This was called the Pendergrass rule (from the famous case, Bank of America etc. Association. v. Pendergrass (1935) 4 Cal.2d 258)), which greatly altered the rule on admission of evidence for claims of fraud in the inducement of contracts in California .

On January 14, 2013, in a case called Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association (2013) (S190581), the current sitting justices of the California Supreme Court decided they were fed up with the Pendergrass rule, and overturned the decision.

The Pendergrass Rule

Normally, under California law, where a material term of a written agreement is in dispute, courts will not let parties introduce evidence of an oral statement or promise that directly contradicts the terms of the agreement. In other words, if you sign an agreement whose language says you can assign the agreement freely to third parties without providing notice to the other contracting party, but you and the other contracting party had previously orally agreed that notice would be required, the court will not allow you to admit evidence of the prior oral agreement. This rule is meant to preserve the integrity of the final written agreement and prevent an onslaught of he said, she said that ultimately confuses the whole arrangement. The idea is if you want it in there, you better put it in there, or it's not part of the deal.

5. Reach Out to Someone.

Each day, try to connect to one person you have not engaged in awhile. This could be a college friend, someone you swapped business cards with on an airplane or a tradeshow, or any acquaintance who has been on your mind lately. Pick up the phone, shoot off a quick email. Let them know you are thinking about them. Even better, share something that might be of value to them. We really can't do everything on our own; we do need each other. Reach out to one person daily and you may be astonished with the

One (of several) important exceptions to this rule is where you are claiming that the entire document itself is a fraud or that you were tricked into entering into the contract in the first place based on fraud. In those cases, it is important to hear evidence why the entire contract is invalid, as opposed to mere conflicting ideas over material terms.

In *Pendergrass*, the California Supreme Court at the time took issue with the fraud exception in the statute. They felt the exception made it too easy for parties trying to get out of a contract to falsify oral testimony regarding contradictory promises made prior to or at the time of the execution of the written agreement. The Court explained that the party seeking to enforce the written agreement would inevitably always be found guilty of fraud simply because the other party made something up about having been told something different.

As a result, the Court decided on a limitation to the fraud exception: evidence of fraud would only be admitted so long as the evidence established an independent fact or representation, fraud in the procurement of the instrument, or some breach of confidence concerning its use, ***and not just a promise directly at odds with the terms in the writing***.

Issues with Pendergrass

The holding in *Pendergrass* has caused much consternation and confusion among courts throughout the years. First, it is not supported by California law, which we explained above provides

results.

Making these intentions into habits expands our horizons, piques our curiosity, and reengages us with friends and acquaintances. They make us better people, and provide a better basis from which to succeed in our business and personal lives.

- Written by Bill Scherer

absolute authority to introduce evidence of fraud. Second, it has been difficult for courts to apply over the last 78 years in that it conflicts with many other legal doctrines on the subject, including Restatements, most treatises, and the laws of a majority of other states. Finally, the *Pendergrass* rule departed from established California law at the time it was decided, without an acknowledgement or justification for the abrogation.

Riverisland

The Riverisland facts were much like those we discussed above. *Borrowers on a mortgage* fell behind on their loan payments to their credit association. In resolution of the issue, the credit association agreed to restructure the borrowers' debt by way of a new written agreement, which provided three months of forbearance and added eight parcels of real property as additional collateral. According to the borrowers, they did not read the agreement, but simply signed and initialed next at the spots that were tabbed for them.

Ultimately the borrowers did not make the required payments under the agreement, and the credit association recorded a notice of default. Later, after repaying the loan to avoid foreclosure, the borrowers brought suit for fraud and negligent misrepresentation against the credit association. In support of their claims, the borrowers alleged that the vice president of the credit association had made an oral promise to them prior to execution of the new agreement, to extend the loan for two years in exchange for only two parcels of real property as additional collateral. Of course, this promise directly contradicted the terms of the written agreement, which again the borrowers claim they did not read prior to signing.

Based on *Pendergrass*, the trial court ruled in favor of the credit association on the grounds that evidence of the oral promise was inadmissible because it did nothing more than contradict the terms of the written agreement.

The case made it all the way up to the California Supreme Court and rather than continue the flawed legacy of *Pendergrass*, the Supreme Court decided it had had enough. *For all the reasons noted above (contradictory law, confusion, departure from communal reasoning at the time), the California Supreme Court in Riverisland* concluded that Pendergrass was ill-considered, and should be overruled.

Impact of Riverisland Case

In terms of the practical impact of the *Riverisland* decision, it relaxes the use of the fraud exception, thereby potentially making it easier for parties to a written contract to claim it was induced by fraud. As a result of the decision, parties may be more likely to allege prior or contemporaneous oral representations of the other party in an attempt to challenge the validity of a written agreement under a fraud theory. Along those same lines, it may also make it more difficult for parties attempting to enforce a written contract where allegations of fraud exist since courts are now able to consider evidence of such alleged oral statements that contradict the express terms of a written agreement where a fraud claim is asserted. Of course, the decision does not relieve the burden on the plaintiff to prove the elements of promissory fraud; there still remains a big difference between alleging fraud and successfully proving it.

Now, more than ever, it is critical to maintain evidence of promises

made before entering into a written agreement. And, if those promises are not incorporated into the final writing, we strongly advise clients to make sure any prior promises are ironed out, retracted, or resolved to the satisfaction of all parties before signing.

If you would like more information about this case, or wish to discuss any topics in this article further, please feel free to contact Heather Sapp at hgs@sfcounsel.com or Brandon Smith at bds@sfcounsel.com.

- Written by Heather Sapp

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Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

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