

THE BKCG BULLETIN

SPRING 2019 EDITION



"Just One More Thing . . ." BKCG Wins \$80 Million in Hollywood Accounting Trial. . . So Far

BKCG's trial team of Alton Burkhalter, Dan Kessler and Keith Butler have now completed two phases of a three-phase trial for the creators of the television series Columbo. BKCG's clients are William Link and Christine Levinson Wilson, the daughter of the late Richard Levinson. Link and Levinson created, wrote and produced a number of award-winning TV shows for Universal Studios, including Murder She Wrote, Mannix, and Columbo.

Alton Burkhalter extended his jury trial win streak with Phase 1, where the jury returned unanimous 12-0 verdicts in less than 90 minutes on all questions put to them. This was significant because it established a baseline of substantial damages and dispelled Universal's affirmative defense based on statute of limitations.

Dan Kessler led the team to victory on Phase 2, in which a number of other high stakes issues were tried in a bench trial before the Honorable Judge Richard Burdge. At the conclusion of Phase 2, the trial court awarded Plaintiffs additional damages, including prejudgment interest, which establishes a baseline of \$80 million in damages heading into Phase 3.



This is a classic "Hollywood Accounting" case. Nearly 50 years ago, Universal agreed to pay Link and Levinson a percentage of profits received from Columbo. Despite the fact that Columbo was extremely popular and critically acclaimed (winning Emmy awards as well as other accolades), Universal insisted over the years that the show was never profitable. Under the terms of the 1971 contract, Universal was only required to provide an accounting statement to Link and Levinson if

Universal's accounting showed a profit. Unbeknownst to Link and Levinson, Universal was taking improper deductions, thereby keeping the show in the red. In the face of consistent denials of profits, in 2013 Mr. Link demanded an accounting. For 3 years, Universal did not respond at all. Then, out of the clear blue, Universal sent its very first accounting to Mr. Link in late 2016—along with a check for \$2.3 million. Based on this first accounting statement, Link and Levinson felt more was owed, retained counsel and promptly sued to enforce their rights.

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Ninth Circuit Delivers Justice, And A Serving Of Cold Pizza, In Latest ADA Ruling

The Americans with Disabilities Act (the "ADA") established a national mandate for the elimination of discrimination against individuals with disabilities. Title III of the ADA entitles all individuals to the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."

In a ruling that could only be surprising to those who have not been following recent trends in the law, the Ninth Circuit of the U.S. Court of Appeal decided that the ADA also applies to the internet and cyberspace! In 2016, a blind man named Guillermo Robles filed a federal lawsuit against Domino's Pizza alleging that he was twice unable to order a customized pizza using Domino's website and mobile app because neither worked with his screen-reading software, which vocalizes visual information on websites. Robles also claimed that he was unable to take advantage of discounts that Domino's offered only through its website and app. Robles sought monetary damages and a permanent injunction requiring Domino's to implement Web Content Accessibility Guidelines, which are private industry standards that have been adopted by many federal agencies.

The District Court agreed with Robles that the ADA applied to Domino's website and mobile app but nonetheless dismissed his case, finding that Domino's due process rights would have been violated since the Department of Justice had not yet issued standards for online accessibility. Robles appealed to the Ninth Circuit.

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Constructing a Solid Defense: BKCG Gets Full Defense Award in \$2 Million Claim By Contractor Against Long Time BKCG Client

Never walk off the job.

That was the message that resonated through the tens of thousands of documents, months of depositions, and a full week of arbitration. Disputes may arise during a complex commercial real estate project, but the general contractor walking off the job is the cardinal sin.

General contractor, KDC Construction, learned that lesson the hard way when it sued BKCG long-time client Red Mountain for \$2 million after leaving the shopping center it agreed to build unfinished. In the end, not only was KDC's entire claim denied by the arbitrator, Red Mountain was awarded its full cost to complete the project and deemed the prevailing party for purposes of seeking fees and costs of the litigation. Red Mountain Retail Group, a Santa Ana based company specializes in revitalizing neglected and challenging properties into attractive, productive parts of the community.



Red Mountain took this mission to Oxnard California where an old, dilapidated former K-Mart store had become an eyesore and magnet for vagrants and crime. After conducting its typical due diligence, Red Mountain purchased the property with the plan to remodel the existing structure into several spaces with major tenants as well as smaller shops. Red Mountain had buy-in from the city, and lined up national tenants such as Smart & Final and LA Fitness. In order for the plan to work, Red Mountain needed a reputable general contractor. After a thorough bidding process, Red Mountain chose KDC Construction, a nationally recognized contractor with plenty of experience and resources. After robust negotiations, Red Mountain and KDC agreed to a fixed price contract of \$7 million for the remodel. Red Mountain made it clear that the amount was to be an "all in" price. KDC agreed. The agreed project schedule was aggressive but achievable. Soon after the project began, however, delays from the City permitting process created some challenges. Red Mountain's project manager dutifully maneuvered the project through obstacle after obstacle.

Ultimately, despite the various hurdles, the parties were able to get the first tenant, Smart & Final, open before Thanksgiving as promised, and it seemed as if the rough waters were behind them. However, as the rainy season approached, and the project was behind schedule, disputes arose. KDC submitted over 100 change order requests to Red Mountain, ballooning the contract price to well over \$8 million. While Red Mountain did agree to the vast majority of the requests (and the agreed contract price went up by almost \$1 million), Red Mountain did not agree with all of them. Instead of using the robust resolution procedures in the extensive contract, however, KDC walked off the job when Red Mountain refused to capitulate. Left in the lurch, Red Mountain was forced to find other contractors to finish the shopping center, and did so. The cost to complete the project, however, was nearly \$2 million.

After leaving the site, KDC retained counsel and demanded over \$1.3 million in contract amounts KDC claimed for work done before it left. With BKCG in its corner, Red Mountain rightfully refused—knowing that it would have to spend more than that just to finish KDC's work. KDC sued Red Mountain in Ventura County Superior Court, but the case was quickly sent to arbitration per the terms of the contract.

KDC aggressively litigated the case. Ultimately, KDC asked for nearly \$2 million (plus its attorney's fees) after it layered on another \$500,000 in claimed penalties under California's Prompt Payment Act. Red Mountain once again looked to their trial counsel, Dan Kessler and BKCG's trial team of Ros Lockwood and Jon Stiliz. KDC employed a strategy to obfuscate its clear breach by attempting to focus the case on their numerous disputes that arose during the project. The case swelled to over 25,000 documents, with numerous subpoenas ranging from city officials to subcontractors to architects. BKCG navigated the extensive discovery and marshalled the evidence needed to prove the real case: KDC walked off the job, and Red Mountain had to finish the work.



The case proceeded to arbitration before seasoned retired judge, Stuart Waldrip with Judicate West. Each side had multiple witnesses as well as their experts. Consistent with the massive discovery, there were more than 800 documents marked as exhibits. The parties submitted the case to the arbitrator in early February, and had to wait patiently for an award.



In March, the interim award was issued. The arbitrator found that KDC did, in fact, breach the agreement when it left the project, denied KDC any penalties, awarded Red Mountain the additional amounts spent to complete the project and deemed Red Mountain the prevailing party. Red Mountain has filed its motion for fees, which is pending.

Reflecting on the award, Dan Kessler stated, "In my closing argument, I implored Judge Waldrip to go back to the contract and look at what is a breach—'the contractor must finish the work.' It was very gratifying to see the award come in on those lines, and to see the Red Mountain folks get the justice they deserve."

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

2019 Revision of California Civil Code Section 1542 Requires Updates to Releases and Separation Agreements

When formally settling a legal claim with another party in California, the typical and preferred course of action is to obtain a release of all known and unknown claims that the other settling party may have relating to the subject matter of the release. This prevents the other settling party from coming back with another claim if he or she later discovers a basis for a potential claim arising from the same set of facts, of which the other party was unaware at the time of the settlement.

As many of you reading this article will already know, in order to obtain a full release of both known and unknown claims under California law, the release must cite the language of California Civil Code Section 1542, and contain a clean and unambiguous waiver of the protections of the statute, since the statute is intended to prevent the person releasing claims from inadvertently waiving unknown claims merely by signing a general release.

The purpose of this article is to alert our readers to the fact that California Civil Code Section 1542 was amended, effective January 1, 2019 to read as follows:



"A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

Accordingly, if you or your company are using template forms of settlement agreements, general releases, or employee separation or severance agreements, the purpose of which is to obtain a release of all known and unknown claims from the other settling party, it is imperative that you immediately update those agreements to include the statutory language quoted above.

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

Ninth Circuit Delivers Justice, And A Serving Of Cold Pizza, In Latest ADA Ruling

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In affirming the District Court's conclusion that the ADA applies to a website, the Ninth Circuit noted that a place of public accommodation, like Domino's, must provide appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities. And, those auxiliary aids and services include electronic and information technology, including apps and websites. The Ninth Circuit stated that the inaccessibility of Domino's website and app impeded access to the goods and services of its physical franchises, which are the places of actual public accommodation.

The Ninth Circuit disagreed with the District Court, however, and held that Domino's due process rights were not violated because Domino's has known, since the ADA was enacted, that it must provide full and equal access to all individuals. It also rejected Domino's argument for specific instruction from the DOJ for website and app accessibility, finding that the Constitution only requires that Domino's receive fair notice of its legal duties, but not necessarily a precise blueprint for achieving compliance.



The Ninth Circuit's holding will have broad implications as mobile technology progresses and infiltrates commerce. Mobile apps helping shoppers navigate the aisles of a grocery store, and apps allowing customers to skip the line and order ahead, are all subject to the ADA's mandate and must ensure that the convenience and services they promise can be enjoyed by all customers. If your business - no matter how big or small - is expanding its reach and developing a website or app, you must integrate the software that provides access to your services to disabled individuals.

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

Don't Press Your Luck With Press Releases Regarding Pending Company Lawsuits

Because Southern California companies have enough to worry about what with employment lawsuits, traffic, and the ever-present possibility of a light sprinkle, it is crucial to avoid any mistakes that could expose your company to liability in the dissemination of a press release.

As in life, the general rule in drafting a press release is to stick with hard, true facts. For example, while you may be eager to publicize the details of a pending lawsuit against your opposing party, sticking to the fact of the lawsuit alone is enough to give the readers the information they need to seek out the information for themselves and make their own conclusions. Publicizing the underlying details of a particular lawsuit and condemning the actions of the other side, on the other hand, unnecessarily place your company at risk for defamation liability, as well as other business-related torts such as tortious business interference and trade libel.

Importantly, while the litigation privilege under Civil Code section 47(b) does provide broad protection against defamation liability for any statements made "in the initiation or course of" any legal proceeding, there is no blanket protection afforded statements merely regarding a legal proceeding. In fact, California courts have held clear that sending a press release regarding a pending company lawsuit to industry professionals with no connection to the lawsuit, is not an act in furtherance of or "in the initiation or course of" a legal proceeding.



Thus, the purpose of a press release regarding a pending company lawsuit should not be to market your company's goods or services, or to attack the other party. Rather, the purpose of such a press release should be to report verifiable facts regarding the existence of the lawsuit itself, and to "clear the air" in your industry regarding a pending lawsuit. This nuanced distinction is important to consider before you attempt to litigate your case in the press because at the end of the day, there are no statutory or constitutional protections for false, commercial speech directed to the public.

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



"On Call" Employees Must Be Paid For Calling In To See If They Are Required To Work

In February 2019, the California Court of Appeals held that an employer must compensate employees a minimum of two hours of pay if they are required to call in to work prior to their shift to see if they are scheduled to work that day.

In *Ward v. Tilly's Inc.*, the employee was required to call in before the start of her scheduled shift to find out if she had to work that day. These on-call shifts came in various forms, including an "on-call" shift after an employee's regular shift, before an employee's regular shift, or an on-call shift on days when they were not regularly scheduled to work. If an employee was told to come in, she was paid for the shift she worked, but if not, then she was not paid. This practice is common for businesses, especially retail businesses, where schedules often fluctuate and employees may not be needed for an entire shift.

A class action lawsuit was filed against Tilly's, a clothing store based in Irvine, California, claiming that Tilly's was required to compensate employees for the time they spent calling in to check if they would be working an on-call shift that day. Tilly's did not compensate employees for this time, but only paid them for shifts they actually showed up to work.

The employee argued that pursuant to Wage Order No. 7, which requires retail employers to pay retail employees "half the usual or scheduled day's work" with a minimum of two hours pay each time they report to work, applied and required Tilly's to pay employees at least two hours pay for calling in to see if they had to work that day. Tilly's argued that since the employee was not reporting to work, but merely calling in to see if they needed to report to work, the employee did not need to be compensated for that time.

The Court of Appeals sided with the employee and allowed the class action case to go forward. The Court held that it was not necessary for an employee to be physically present in the workplace for the Wage Order to be triggered, and since employees had to plan their days around a potential shift, they were required to be compensated for that time – for a minimum of 2 hours at their regular pay. The policy behind the Wage Order, which encouraged more definitive scheduling and shifts and was enacted at a time when workers would show up to work not knowing if they had a guaranteed shift, applied in this situation because the employees were required to be available to work their on-call shift if they were scheduled.



The *Ward v. Tilly's* case continues, but all employers should take note of the Court's ruling. Failure to compensate on-call employees for this time can lead to disastrous penalties for an employer. All retail employers should take note of this new California case and make sure that on-call employees are compensated at least two hours any time they must call in to find out if they have a scheduled shift.

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



General Contractors: New Labor Code Provisions You Must Know

California Assembly Bill 1701 ("AB 1701") was signed into law on October 14, 2017, and significantly expanded potential liability of general contractors for unpaid subcontractor wage claims on construction projects.

California Labor Code Section 218.7, created by AB 1701, went into effect on September 19, 2018, and applies to private construction contracts entered into on or after January 1, 2018. Labor Code Section 218.7 subjects "direct contractors" to potential liability for claims for unpaid wages made on behalf of employees of subcontractors or sub-tier contractors who perform work required under the contract between the "direct contractor" and the owner. Section 218.7 refers to the definition of "direct contractor" used under the mechanic's lien statutes, which includes either a "contractor with a direct contractual relationship with the owner" or a "prime contractor." Section 218.7 therefore generally applies to all general contractors on construction projects.

Section 218.7 affords no private right of action to individual employees. Claims may only be brought by the Labor Commissioner, unions claiming unpaid fringe benefits, or a joint labor management cooperation committee (comprised of labor unions and management) organized under federal law. A prevailing union or joint labor-management cooperation committee may recover attorneys' fees and costs, but no reciprocal right to recover fees and costs is provided to prevailing direct contractors.

Section 218.7(a)(2) limits potential liability to claims for unpaid wages and benefits and expressly excludes liability for penalties or liquidated damages. General contractors therefore are not subject to claims for statutory penalties associated with unpaid wage claims, such as waiting time penalties, under Section 218.7.

The time to bring an action for unpaid wages or benefits under Section 218.7 is substantially shorter than the statute of limitations period for direct employee wage claims. An action under Section 218.7 must be brought within one year of the recordation of a notice of completion or a notice of cessation of work or within one year of actual completion of work covered by the direct contract, whichever is earliest.



Section 218.7(a)(3) does not prohibit a direct contractor or subcontractor from establishing by contract or enforcing any lawful remedies against a subcontractor it hires to protect against liability for unpaid wage or fringe benefit claims. General contractors should therefore ensure that all subcontracts include specific indemnity language to protect against claims for unpaid wages or benefits brought on behalf of their subcontractors' employees. Provisions warranting strict compliance with all wage-and-hour regulations should also be included in subcontract agreements, specifically within progress payment and final payment provisions.



Section 218.7(f) gives direct contractors the right to inspect subcontractors' payroll records maintained pursuant to Labor Code Section 1174 to ensure compliance with wage regulations. Additionally, general contractors may withhold payments that are due to the subcontractor if the subcontractor fails to timely provide payroll records or project information records needed to confirm payment of wages and benefits due to its employees. Provisions referencing a general contractor's right to inspect payroll records and withhold payments pursuant to Labor Code section 218.7 should be incorporated into all subcontract agreements.

If you are a general contractor whose subcontracts were drafted prior to this new law, please contact our office to discuss your options to insulate your organization from further liability.

Please contact Jonathan Stiliz at jstilz@bkcgclaw.com or (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

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Universal denied that they made any improper deductions to the accounting. Universal also tried to claim that Link and Levinson were too late in suing—even though Universal had never sent an accounting statement before 2016. The jury disagreed. And so did the judge.

Phase 3 will commence shortly, and will be tried before a panel of three CPAs. A victory on just a few of the remaining issues set to be tried during Phase 3 could bump total damages to over \$100 million.

This trial marked the first time in nearly 20 years that Alton and Dan tried a case together, the last one also being a jury trial that resulted in an \$11 million jury verdict.

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

California Law Significantly Expands Employer's Obligation to Provide Employees with Sexual Harassment Training

For more than a decade prior to 2019, California law only obligated relatively large employers with fifty or more employees to provide sexual harassment training to just supervisory level employees. Beginning this year, California law dramatically expanded these training requirements.

Now, employers with only five or more employees must provide sexual harassment training, and they must provide it to all employees, not just supervisors (although non-supervisory employees require only one hour of training, whereas supervisor level employees must receive two hours). This training must now include education regarding harassment based on gender identity, gender expression and sexual harassment. As before, the law still requires employers to provide this sexual harassment training every two years. Employers have until January 1, 2020 to comply with these new requirements.

Although the statute that obligates employers to conduct this training, section 12950.1 of the Government Code, does not per se penalize employers for non-compliance with these new expanded training requirements, it does afford a government agency the ability to obtain an order to compel compliance. Perhaps more importantly, an employer that fails to comply with these new training requirements may be vulnerable to an employee's claim under the Fair Employment and Housing Act (FEHA) for failure to prevent harassment, which claim carries with it some legitimate teeth in that it entitles a prevailing plaintiff the right to recover his or her attorney's fees, in addition to compensatory damages. If you have questions or concerns about your company's compliance with this new harassment training requirement, please call BKCG for assistance.



Please contact Josh Waldman at jwaldman@bkcgllaw.com or (949) 975-7500 if you have any questions about any issue discussed in 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

Please review our firm at
www.bkcgllaw.com

340 North Westlake Blvd.
Suite 110

Westlake Village, CA 91362

Attn: William C. George

805.373.1500

805.373.1503 fax



Visit our web site at www.bkcgllaw.com



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