CAIIA Status Report

MARCH 2007

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Duty of Care - Employer - Internet Communications

Michelangelo Defino, et al. v. Agilent Technologies, Inc., Court of Appeal - Sixth District - December 14, 2006

Employers commonly make the Internet available for their employees to use for business purposes and to communicate by way of e-mail. This case concerns the liability of an employer for messages sent by an employee that were threatening.

Michaelangelo Delfino and Mary E. Day filed suit against Cameron Moore and his former employer, Agilent Technologies, Inc. for negligent infliction of emotional distress and negligent supervision or retention. They claimed Moore sent a series of anonymous threats over the Internet and used Agilent's computer system to send these threats. The plaintiffs further alleged that Agilent failed to take proper steps to prevent the employee's actions. The messages sent were either e-mail messages sent directly or messages posted on Yahoo message boards.

Agilent filed a motion for summary judgment. It was based upon the Communications Decency Act of 1996 ("CDA"), which provides that a provider of interactive computer services is immune from liability under certain circumstances. The trial court granted the motion. Delphino and Day appealed.

The Court of Appeal affirmed. The declarations filed in support of the motion established that, after it was determined that Moore was the sender of the messages, Moore was reprimanded and promised to send no more messages. Thereafter, when additional details were presented to Agilent, Agilent terminated Moore's employment.

The Communications Decency Act, 47 U.S.C. 230(c)(1), provides immunity for any interactive computer service for information provided by another person. The statute states that no cause of action may be brought that is inconsistent with this section. The purpose of this section is to encourage self-regulation of the dissemination of offensive

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■ PRESIDENT'S MESSAGE

As I stated in my first newsletter, writing these monthly status reports was going to be my ultimate challenge as President of the CAIIA. I just returned from a conference which I go to yearly and as I attended the various sessions I am glad to say I walked away with a few ideas. One session in particular that grabbed my attention had to do with Leadership. With all of the challenges we face in our business including the economy, competition and growth, the biggest challenge I learned was myself. Although I am a motivated and productive person and strive to provide the best service to my clients, all qualities necessary to be a good leader, I find myself at times being more of a boss than a leader. In short, although I am a leader to myself I sometimes unintentionally find that I require compliance from others. And that in order to become an effective leader I need to change my way of thinking in order to motivate others. An effective leader inspires and instills passion and direction in others. He or she empowers through direction and is committed to excellence. We need to appreciate what others can offer and to recognize their value by listening, asking, challenging their abilities, building a platform where individuals fill each others needs and changing our actions through awareness of who does what best in what type of environment. Most importantly we need to give credit where credit it due. The Marine Corp teaches that it is best to punish in private and praise in public. When we appreciate others for their contributions, and they are recognized for it, they feel valued and are more likely to be self motivated and to repeat the behavior which in turn equates to a higher level of performance.

SHARON GLENN
President - CAIIA 2006-2007

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materials over the Internet and also to avoid chilling free speech on the Internet which would be occasioned by tort liability. This is especially true for companies which do not create potentially harmful messages, but are simply intermediaries for their delivery. In order to secure immunity, the person sued must be a provider of an interactive computer service, the cause of action must treat the provider as a publisher or speaker of information, and the information at issue must be provided by another person.

In this case, Agilent was a provider of interactive computer service. Agilent was sued as the publisher or speaker of the information. The content, however, was provided by another person. Therefore, the CDA applied to Agilent, and it was immune from liability.

The causes of action for intentional infliction of emotional distress and negligence of emotional distress were therefore barred. In addition, the Court held they were properly barred because there was no showing that Agilent participated in the communications or ratified them. Furthermore, there was no liability under respondeat superior because the sending of the threatening e-mails and postings through the Internet were outside the scope of employment. The messages were sent for a personal reason and were not related to employment.

The Court further found no legal duty owed by Agilent to the plaintiffs. There was no evidence that Agilent breached any duty of care with respect to its conduct as an employer of Moore. Finally, there was no evidence that Agilent was aware that Moore was using their system to send these threats. Therefore, there was neither a claim that could be based on negligent supervision or retention nor upon negligent infliction of emotional distress.

The Court held that Agilent's motion for summary judgment should be affirmed.

COMMENT

This case is helpful to employers in its analysis of the immunity under the CDA as well as its analysis of common law tort liability for acts of employees using the company's Internet system. It allows the employer to avoid liability where it has neither participated in nor ratified the activities that occurred over the Internet.

Evidence - Admissibility of Settlement Agreement Reached Through Mediation

Fair v. Bakhtiari, California Supreme Court - December 14, 2006

Pursuant to California Evidence Code section 1119(b), documents prepared for purposes of mediation are generally inadmissible in civil proceedings. However, a signed settlement agreement reached through mediation is exempt from this general rule if the wording reflects that the agreement is binding or enforceable. (Cal. Evidence Code section 1123(b)). This case examines the type of language necessary to make a settlement agreement admissible and binding under section 1123.

Plaintiff R. Thomas Fair sued Karl Bakthiari and others alleging that Defendants had wrongfully excluded him from real estate deals, denied him compensation, and committed financial misconduct. The case eventually proceeded to mediation. At the end of the second day of mediation, Plaintiff's counsel drafted a handwritten memorandum recording settlement terms. The memorandum was signed by the parties and the mediator, and included the provision: "Any and all disputes subject to JAMS arbitration rules."

Subsequently, the parties filed case management statements informing the court that the case had settled. The parties also exchanged a formalized settlement and release agreement. Before the release was signed, a dispute arose as to the scope of the settlement. The parties attended the case management conference and advised the court that there was a settlement, but that details needed to be worked out. A continuance of the matter was granted. The parties were unable to finalize the settlement.

Defendants then requested that the case be put back on the trial calendar. Plaintiff counsel moved to compel arbitration, contending the parties were bound by the memorandum signed at the mediation. Defendants opposed the motion and objected to admission of the memorandum, pursuant to Evidence Code section 1119(b). Plaintiff claimed the memorandum was an admissible settlement agreement pursuant to Evidence Code section 1123(b). The trial court excluded the memorandum and denied the motion to compel arbitration. The Court of Appeal reversed, deciding that the arbitration provision could only mean that the parties intended the settlement reached at mediation to be binding. The California Supreme Court reversed the Court of Appeal.

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In its ruling, the Supreme Court reiterated that mediation confidentiality provisions were enacted to encourage mediation by permitting parties to frankly exchange views without fear of disclosure in later proceedings. Section 1123 is an exception to the general rule of confidentiality. Section 1123 states that the agreement must provide that it is enforceable "or words to that effect." The Court of Appeal felt that the arbitration provision indicated an intent to be bound. The Supreme Court disagreed. The court held that while parties may choose their own wording in an agreement, a settlement agreement must include a statement that it is "enforceable" or "binding," or a declaration in other terms with the same meaning. Arbitration clauses or terms contemplating remedies for breach are not sufficient. The judgment of the Court of Appeal was therefore reversed.

COMMENT

This case makes clear that an agreement signed at mediation must contain language that the settlement is binding or enforceable. Without such language, the agreement will not be deemed binding and will not be admissible under California Evidence Code section 1123(b).

Bad Faith – Underinsured Motorist's Claim

Laura Rappaport-Scott v. Interinsurance Exchange of the Automobile Club, Court of Appeal, Second District - January 11, 2007

A claim of bad faith in an uninsured motorist case is a threat constantly in the background of any arbitration. This case examines the factual context in which such claims can be made.

Laura Rappaport-Scott was insured by Interinsurance Exchange of the Automobile Club and carried uninsured and underinsured motorist coverage of $100,000. While driving in January of 1997, she was rear-ended by another vehicle that had been struck by a vehicle driven by an underinsured motorist. The underinsured motorist settled for $25,000, his limit of liability. Ms. Rappaport-Scott then submitted an underinsured motorist claim to Interinsurance.

She demanded arbitration. She claimed that the value of her case was $346,732.34, including $26,732.34 in medical expenses, $20,000 in future medical expenses, $150,000 in lost income and $150,000 in general damages. At the arbitration she requested $75,000, based on a claim worth more than her $100,000 limit, but reduced by the settlement of $25,000. She demanded that sum from Interinsurance prior to arbitration. Interinsurance offered $7,000 on the claim.

At the arbitration, Ms. Rappaport-Scott was found by the arbitrator to have suffered damages of $15,000 for medical expenses, $3,000 for loss of earnings, $45,000 for pain and suffering, for a total of $63,000. The arbitrator reduced the award by $25,000 and further reduced it for the payment of medical bills of $5,000 for a net award of $33,000.

Ms. Rappaport-Scott then sued Interinsurance for bad faith for failing to settle the claims in a reasonable time. The trial court sustained a demurrer to the complaint without leave to amend. Upon entry of judgment of dismissal, Ms. Rappaport-Scott appealed.

The Court of Appeal affirmed. It noted that the standard for evaluation of bad faith in a first-party underinsured motorist case is different from that involving third-party liability coverage. In the first-party context, the duty of the insurer is not to unreasonably withhold benefits due under the policy. That occurs when there is unreasonable delay or failure to pay benefits due under the policy. There is no unreasonable withholding of benefits if there is a genuine dispute between the insurer and the insured as to the amount of payments due.

The court stated the test of bad faith in a first-party context is not the failure to accept a reasonable settlement demand within policy limits. That rule only applies in the third-party context. The test in a first-party case is the unreasonable delay in the payment of benefits. In this case a genuine dispute doctrine existed as to the amount payable on the claim. Despite the fact $7,000 was offered by Interinsurance and $33,000 was awarded by the arbitrator, the vast difference between the amount demanded by Ms. Rappaport-Scott and her actual award demonstrated as a matter of law that a genuine dispute existed as to the amount payable on the claim. It was reasonable, as a mat-

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2007 Combined Claims Conference * Teaming Up For Education

Conference Registration and Session Sign-Up

March 13 - 14, 2007 * Pacific Palms Conference Center * Industry Hills, California

Questions, please call: 888.811.6933 or email: info@combinedclaims.com

Please fill out this registration form completely. One registration form per person. Photocopies accepted

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Company: _____

Address: _____

City, State, Zip: _____

Email: _____

Phone: _____ Fax: _____

Tuesday, March 13, 2007

9:00 – 10:15AM

- ❑ General Session — Fraud Comes in Many Ways

11:00 AM – Noon

- ❑ Track I – Liability — Anatomy of a Claim
- ❑ Track 2 – Property — Catastrophe- Psychological Trauma
- ❑ Track 3 – WC — How Long Before Malingering?

Noon – 1:30 PM

- ❑ Lunch/Speaker — John Cappelletti

1:30 - 2:30 PM

- ❑ Track I – Liability — Mastering Mediations
- ❑ Track 2 – Property — Negotiating Business Interruption
- ❑ Track 3 – WC — Subrosa – For Negotiating

3:13 - 4:15 PM

- ❑ Track I – Liability — Construction Defect/Multiple Party Suits
- ❑ Track 2 – Property — When Small Property Claims Run Amuck
- ❑ Track 3 – WC — WC Apportionment Rules

Wednesday, March 14, 2007

9:00 – 10:15AM

- ❑ General Session — Street Level Ethics

11:00 AM – Noon

- ❑ Track I – Liability — CGL's Top 10 Coverage Issues List
- ❑ Track 2 – Property — Property Law Updates
- ❑ Track 3 – WC — Burns in the Work Place

Noon – 1:30 PM

- ❑ Lunch — Recognition of new designees

2:00 - 3:00 PM

- ❑ Track I – Liability — Settling Liability Claims
- ❑ Track 2 – Property — Mitigating Claims After Water Damage
- ❑ Track 3 – WC — Workers' Compensation Subrogation

3:15 – 4:30 PM

- ❑ General Session — Animal Liberation and Environmental Extremism – Trends in Domestic Terrorism

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Bakersfield Businesswoman Charged with Insurance Fraud, Workers' Comp Fraud, Money Laundering, Employer Tax Evasion and Conspiracy

Among alleged fraud were claims filed against disability credit insurance after buying sports cars, boats and a motor home; husband and mother face lesser charges

BAKERSFIELD - Insurance Commissioner Steve Poizner today announced the arrest of a Bakersfield businesswoman and two accomplices on a list of charges stemming from a wide variety of alleged fraud.

Shawn Dodd, 40, is charged with four felony counts of insurance fraud, one felony count of workers' compensation insurance premium fraud, two felony counts of employer tax evasion, one felony count of money laundering, and two felony counts of conspiracy to obtain property under false pretenses. Both her husband, James "Sonny" Dodd, 48, and her mother, Barbara Bayird, 65, face one felony count each of conspiracy to obtain property under false pretenses. All three surrendered at the Kern County Superior Court January 26, 2007 on felony arrest warrants, were immediately arraigned and were released on their own recognizance.

"Ms. Dodd seems to have quite an appetite for insurance fraud," said Insurance Commissioner Steve Poizner. "But I have made fighting insurance fraud among my top priorities, so I'll make this crystal clear to all the would-be Shawn Dodds out there- you will not commit insurance fraud in California and get away with it."

California Department of Insurance's (CDI) Fraud Division investigators received numerous Suspected Fraudulent Claims reports from various insurance carriers regarding the billing practices of Shawn Dodd's businesses: Provident Medical Management, Executive Medical Management, National Chiropractic, Neurosport Chiropractic, Pacific United Medical Group, Old River Medical Center Inc., and Cal-Sport Physical Therapy.

In October 2003, the CUNA Mutual Group Insurance Company contacted the CDI Fraud Division's Fresno Regional Office regarding six suspicious disability insurance claims filed by Shawn Dodd. The CDI's investigation revealed that Shawn Dodd obtained loans from the Kern Central Credit Union which she used to purchase five vehicles. These vehicles included a 1999 Dodge Viper, a 2000 Mercury Cougar, a 1988 Pace Arrow Motor Home, a 24' Kachina Legend boat, and a 2001 Sunsation boat. Dodd also obtained a Visa credit card account from Kern Central Credit Union. At the time she obtained these loans, she purchased a credit disability insurance policy for each of these loans from the CUNA Mutual Insurance Group. Dodd also took out a loan from GMAC Credit Corporation for the purchase of a 2001 Chevrolet Silverado truck, and purchased credit disability insurance for this loan from the Universal Underwriters Insurance Company. On the applications for each of these loans, Dodd listed her occupation as the President/ Executive Officer of Provident Medical Management/ Executive Medical Management which are the parent companies of each of the above listed medical/chiropractic corporations.

On January 4, 2002, Shawn Dodd filed claims against each of the credit disability insurance policies which she had purchased alleging that she had suffered back injuries which prevented her from working. In these claims, Dodd listed her occupation as being "Receptionist, Billing/Filing Clerk, Bookkeeper". Her disability status for the claims was verified by medical reports allegedly signed by a physician Richard Infante, M.D., formerly employed by Dodd's Pacific Medical Group. Subsequent investigation revealed that Dr. Infante left Dodd's employment prior to Dodd's disability claims and he stated that he had not provided medical treatment since 1999.

During the execution of search warrants upon Shawn Dodd's business and home, a signature stamp for Dr. Infante's signature was recovered and evidence indicates the stamp was used by Dodd to prepare the medical reports required to make the credit disability insurance claims. CUNA Mutual and Universal Underwriters Insurance Companies paid in excess of $38,000 for these claims. During the execution of the search warrant upon the offices of VIP Medical Plaza/Executive Medical Management in February of 2004, Dodd's employees made statements which identified fraudulent billing practices by Dodd's companies. Subsequent investigation revealed that during 2003, one of Dodd's companies, National/Neurosport Chiropractic billed medical, automobile, and workers' compensation insurance carriers for 8,054 chiropractic adjustments. During this time period, Dodd through National/Neurosport Chiropractic employed only one chiropractor, Dr. Courtland Keith. When interviewed, Dr. Keith stated that he had actually performed less than ten percent of these 8,054 five region chiropractic adjustments. This fraudulent upgrading of chiropractic services rendered resulted in the insurance carriers being fraudulently billed more than $210,000 during calendar year

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Bakersfield Businesswoman Charged

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2003 alone.

Shortly after the search warrants upon Shawn Dodd's residence and office, a former employee of Provident Medical Management contacted the Kern County District Attorney's Office and reported that Dodd had denied her workers' compensation insurance benefits after she was injured while working. The former employee stated that while working for Provident Medical Management as a masseuse, she suffered an occupational injury. The employee completed the requisite forms for a workers' compensation insurance claim and provided this paperwork to Shawn Dodd. For six months Dodd intentionally failed to forward the completed workers' compensation insurance claim to her insurer, State Compensation Insurance Fund (SCIF). The former employee subsequently retained an attorney and filed her claim directly with SCIF. Dodd's intentional denial of benefits resulted in losses of $14,381 to SCIF, and $6,756 to Dodd's former employee. Subsequent investigation also revealed that Dodd had understated the amount of her payroll and misclassified the function of her employees when reporting to her workers' compensation insurance carrier, SCIF. The purpose of these misrepresentations was to minimize the workers' compensation insurance premium deposits and monthly premium costs paid by Provident Medical Management. These misrepresentations resulted in a loss of $8,100 to SCIF.

Based on information discovered during an investigation by the Employment Development Department (EDD) and the employment tax audit, it was determined that Dodd had charge and responsibility of the medical management company, known as Provident Medical Management Group and Provident Medical Management Group, Inc. from January 1, 2001 through June 30, 2003 and filed false Quarterly Returns for each quarter contained in the audited period, and did so with the intent to evade the provisions of the California Unemployment Insurance Code, (CUIC).

In November of 2002, Shawn Dodd instructed her Office Manager at Provident Medical Management to create fraudulent W-2 and Earnings Statements or "check stubs" showing that James "Sonny" Dodd was employed by Provident Medical Management and was being paid approximately $96,000 per year. According to the Office Manager, Dodd stated that these statements were being created to allow James Dodd to qualify for a loan to purchase a motor home. On March 7, 2003, James Dodd used these documents to qualify for a loan of $104,000 loan to purchase a 2003 Seabreeze Motor home from Venture-Out RV. In 2004, Dodd submitted to a voluntary repossession of the motor home by Kern Schools Federal Credit Union. The vehicle was subsequently sold by the Credit Union for substantially less than the loan's balance resulting in a loss of $46,000 to the Credit Union.

On August 22, 2003, Barbara Bayird applied for a $45,000 loan from the Kern Federal Schools Credit Union. The purpose of this loan was the purchase of a 1999 Chevrolet Corvette. At the time of this application, Bayird was retired from the Kern School Systems and her income was insufficient to qualify for the $45,000 loan. Shawn Dodd's Provident Medical Management Corporation subsequently issued Bayird an earnings statement which alleged that Bayird was being paid $2,500 per month by the company. Based solely upon this alleged secondary income, the Kern Schools Federal Credit Union issued the loan to Bayird which she used to purchase the Corvette. Investigators subsequently determined that the earnings statement was fraudulently produced at Shawn Dodd's direction solely for the purpose of allowing her mother, Barbara Bayird to qualify for the vehicle loan.

The Kern County District Attorney's Office is prosecuting the case. If convicted, Shawn Dodd faces a potential maximum sentence of up to eleven years and eight months in state prison and a $100,000 fine. Both James "Sonny" Dodd and Barbara Bayird, if convicted, face a maximum of three years in the state prison.

Assisting in the investigation were the California Employment Development Department's (EDD) Investigations Division, the National Insurance Crime Bureau, State Compensation Insurance Fund (SCIF) Fraud Interdiction Program, and the Special Investigations Units of GEICO, State Farm, CUNA Mutual, and Blue Cross Insurance Companies.

CAIIA *Calendar*

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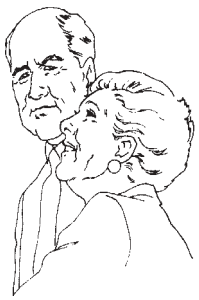
ter of law, to proceed to arbitration to resolve this genuine dispute. Ms. Rappaport-Scott therefore had failed to allege a cause of action for breach of the implied covenant based upon unreasonable delay in the payment of policy benefits. The trial court properly sustained the demurrer without leave to amend.

The judgment was affirmed.

COMMENT

This case shows that where there are reasonable disputes between the parties as to the value of the case in an underinsured motorist claim, there is no bad faith in proceeding to arbitration. The arbitration procedure is designed to resolve this good faith dispute.

An 80-year-old woman was arrested for shoplifting. When she went before the judge in Cincinnati he asked her, "What did you steal?" she replied, "A can of peaches."



The judge then asked her why she had stolen the can of peaches and she replied that she was hungry. The judge then asked her how many peaches were in the can. She replied 6.

The judge then said, "I will give you 6 days in jail."

Before the judge could actually pronounce the punishment, the woman's husband spoke up and asked the judge if he could say something. The judge said, "What is it?"

The husband said, "She also stole a can of peas."