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Status Report

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November 2019

California Court Determines Burden of Proof for Future Damages Discounts and Inflation

Credit to : Tyson and Mendes, La Jolla, CA

In *Lewis v. Ukran* (2019 B290128) Cal.App.5th, the California Appellate Court has finally taken a definitive position regarding the burden of proof for discounts and inflation for future damages awards and the burden rests on the party asking for the economic adjustment.

Background

The *Lewis v. Ukran* case stems from an automobile versus motorcycle accident in which Aleksander Ukran ("Ukran") collided into Thyme Lewis ("Lewis") while Lewis was driving his motorcycle. At the time of the accident, Lewis was an actor with a well-established career. He claimed the injuries he suffered prevented him from taking stunt jobs he had before the accident and claimed he would continue to lose out on jobs in the future. The trial court judge awarded Lewis $1.7 million in damages including $1.2 million for future loss of earnings for 12 years of working ability at $100,000 per year.

On appeal, Ukran argued that the trial court should have reduced the award for future lost earnings and future medical expenses to present cash value. Present cash value is the current value of a future sum of money given a specified rate of return. The problem was Ukran failed to offer any evidence or testimony regarding present cash value at trial. Nonetheless, Ukran argued the trial court should have, *sua sponte*, made the present cash value adjustment without any evidence or request by either party. The Appellate Court disagreed with Ukran and upheld the trial court's ruling.

The Court's Holding

The Court of Appeals observed that California law provided no definite guidance on which party bore the burden of proof for inflation and discount rates in contested cases. The Appellate Court therefore relied on a Ninth Circuit Court opinion which held that in the absence of evidence of discount or inflation rates, the court must award a lump sum of money for future damages..

Most importantly, the Appellate Court ruled that the moving party has the burden of proving the appropriate method of calculating for present value or inflation and the appropriate rate for doing so. For example, on one hand a defendant looking to discount the award has the burden of proving the present cash value. On the other hand, a plaintiff looking to increase the award to account for inflation similarly bears the burden of proving the appropriate method and rate for calculating inflation.

The Takeaway

The Appellate Court's holding underscores the importance of retaining all necessary expert witnesses for trial. In this instance, Ukran failed to retain an economist to testify in support of the request to adjust the award of future damages to present cash value. An economist could have testified to the appropriate methods and rates of return for the trial court to evaluate. Do not make this mistake. If future damages are alleged in your case, it is imperative to consider the benefit an economist would bring by providing the evidence necessary for the trier of fact to discount future damages.

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Inside this issue…..

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President's Message

Greetings to All,

Once again it seems like déjà vu writing this message to you in late October while the Kincaide Fire in Sonoma County burns out of control (not to mention all of the other fires that have been breaking out all over the state). I do not need to go back and look at my past President's letters to recall I had written/discussed something similar about California wildfires this time last year and the year before that I'm sure prior Presidents had comments about the wild-fires.

John Ratto

CAIIA President

When I wore a younger man's clothes, I recall the disasters used to be earthquakes and floods. Without going into a political discussion about whether or not these fire events are related to global warming (sorry kids…I tend to side on the opinion of "science doesn't care what you believe"), it is still quite a bit of madness. I used to get the "rush" when we had a major loss event to handle, now I just get sad and wish I could do something before these disasters breakout. (Hey look! Isn't that Ratto up on the hill with a weed-wacker?").

This is the part where I give some words of wisdom about taking care of yourself while handling a catastrophe. But I don't have to do that, because I know each of you will pace yourselves handling these major caseloads (yeah right!). No, seriously, as someone who works out and trains every day (okay I begrudgingly take one day off), it is important to pace yourself. Get plenty of rest, make sure that you have some downtime before that rest/sleep, and try to eat right. It is not easy but it is just as important as any claim that you are handling.

By the way, for any of you liability adjusters who keep saying, "Why is he always talking about property losses and disasters, and this and that?" Well, I am the president for another year and if any GL adjusters want to step in and be nomi nated for office, please raise your hand. Seriously, my email is (john@reliantclaims.com) and I would love to hear from any of you interested in becoming part of our organization or taking that extra step and becoming a board member or stepping into an executive position with our organization.

Finally, I want to report that we had a wonderful time at the annual fall meeting held in Sacramento this year. The Kimpton Sawyer Hotel in Sacramento was a great venue for our classes and meeting and we had a lot of fun and laughs at the Delta King riverfront restaurant where we honored past presidents, Pete Vaughn and Sterrett Harper, and where we swore in new board members and officers. It was the highlight of my evening when my lovely daughter Wilhelmina read me the oath of office to help swear me in for another year as President. Thank you, sweetie! You are perfectly awesome!

Until next month's letter…

John Ratto, President

NEWS OF AND FOR OUR MEMBERS

Pres. Ratto presenting Lifetime Achievement Award plaque to Sterrett Harper

Pres. Ratto presenting Honarary Member Award plaque to Pete Vaughn

John Ratto being sworn in by his daughter, Wilhelmina as CAIIA President for 2019-2020

CAIIA Guests visiting Stanford Mansion

Happy Thanksgiving to you and your family!

California's AB5 – A Bump in the Road or a Brick Wall For the Gig-Economy?

Credit to Tyson & Mendes, La Jolla, CA

"Change is the law of life. And those who look only to the past or present are certain to miss the future." – John F. Kennedy

Introduction

On January 1, 2020, AB5 will be the law of the land in California. The law is codified as California Labor Code, Section 2750.3. The new law provides significant protections to workers by classifying many who were previously deemed independent contractors as employees, and by placing the burden to prove that a worker is not an employee on the employer. The law has the potential to create major changes in the labor market, not the least of which is the disruption of the business model for many app-based, on demand service providers in what has become known as the "gig economy." This article provides a guide to the origin of AB5, its application, potential challenges and the law's future.

AB5's Genesis in the *Dynamex* Decision

The California Supreme Court issued its seminal labor law decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 ("*Dynamex*"). In the 82-page *Dynamex* decision, the Supreme Court evaluated existing standards for determining whether workers are deemed employees or independent contractors. It ultimately replaced those standard allowing for a much larger group of workers under the employee category. Significantly, the Court's new standards created a presumption that workers are employees and shifted the burden of proving otherwise to the employer or contracting entity. The Court also adopted the "ABC Test" (discussed below) to evaluate whether a particular worker is an employee or independent contractor.

The California Legislature enacted Assembly Bill 5 ("AB5") that codifies the Supreme Court's standards and tests as outlined in *Dynamex*. However, AB5 creates multiple exceptions for individuals in trades and professions that would otherwise be classified as employees. Employers generally prefer those who perform labor for compensation to be classified as independent contractors, because employees are entitled to benefits, including the minimum wage, paid sick and maternity leave, unemployment insurance, worker's compensation insurance and contributions to the Social Security system, among others. Studies suggest that classifying a worker as an employee can add as much as 30% to the employer's cost compared to the same worker being an independent contractor.

AB5 clearly favors workers, by classifying many of them as employees. Assemblywoman Lorena Gonzalez of San Diego, the bill's sponsor, stated that:

As one of the strongest economies in the world, California is now setting the global standard for worker protections for other states and countries to follow.

California Governor Gavin Newsome signed AB5 into law on September 18, 2019. A signing message released by the Governor stated that AB5 will:

. . . help reduce worker misclassification — workers being wrongly classified as 'independent contractors' rather than employees, which erodes basic worker protections like the minimum wage, paid sick days and health insurance benefits.

The *Dynamex* and AB5 Standards

The *Dynamex* decision and AB5 apply the "ABC Test" to classify a worker as an employee or independent contractor. The three ABC Test questions are:

1. Does the worker perform tasks under control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact?
2. Is the work integral to the company's business?

Is the worker engaged to perform a job which does not customarily have an independently established trade, occupation, or business of the same nature as the work performed?

To establish a worker is an independent contractor and not an employee, the employer must establish that <u>each</u> of these questions can be answered in the negative. A presumption exists that every worker is an employee, therefore, the burden of proving otherwise is on the employer.

The California Labor Commission, Employment Development Department, and Franchise Tax Board all have authority over worker misclassification and are expected to be involved in efforts to reclassify workers, albeit mainly in individual cases. More significant challenges to employer classifications of workers are expected to come from the California Attorney General's Office, City Attorney Offices, and District Attorney Offices. Private attorneys are also expected to pursue misclassification claims on behalf of workers. Some companies, especially those who cannot afford to become involved in multiple protracted lawsuits, are already evaluating the pros and cons associated with the reclassification of workers in an effort to reduce costs linked to litigation.

Another result of AB5 involves union organizing for workers who were formerly labeled independent contractors. Labor unions are rumored to be planning a concerted effort to unionize certain ride-share drivers once they become employees and then pursue related legislation in 2020.

Exempted Professions – And Significant Ones That Aren't

AB5 carves out an extensive group of professions and trades from its requirements. The exceptions were provided for groups which typically negotiate compensation rates, communicate directly with customers, and earn at least twice the minimum wage. To determine whether a specific job or profession is exempted, the statute itself should be reviewed, because the list of exempted professions may change over time. At this time, the list of exempted professions includes, but is not limited to: Doctors, psychologists, dentists, veterinarians, real estate agents, accountants, engineers, commercial fishermen, travel agents, graphic designers, aestheticians and even hair stylists and barbers. Photographers, photojournalists, freelance writers, editors and newspaper cartoonists are exempted from AB5, but only if they provide 35 or fewer submissions per year.

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A companion bill, AB170, provides a one-year exemption from the AB5 standards for newspaper delivery and distribution workers and was the result of a fierce lobbying effort by newspapers, many of which operate on limited budgets in the digital age. The bill exempting paper deliverers passed the legislature and is expected, as of this writing, to be signed by the Governor.

One group that is not exempted from AB5 are gig-economy workers, including those working for ride-share companies, on-demand delivery providers, and similar businesses.

Gig-Economy Responses

It is reported that companies such as Postmates, and DoorDash have been privately negotiating with labor unions, seeking agreements from the unions to preclude drivers and other workers from being classified as employees, in exchange for providing the drivers and workers with additional benefits. In addition, several companies operating in the gig-economy have collectively contributed $90 million toward the creation and promotion of a California ballot measure that would permanently classify their drivers as independent contractors, notwithstanding the ABC Test and other provisions of AB5.

In addition to their negotiations with unions and the proposed ballot initiative, the large gig-economy companies continue to lobby Sacramento politicians, including the Governor. They are reported to be seeking amendment of the AB5 statute which would protect the status of their workers as independent contractors in exchange for agreed wage and benefit increases similar to the arrangements being discussed with unions.

Takeaway

Several immediate changes are likely when AB5 becomes effective on January 1, 2020. As businesses are compelled to reclassify groups of workers as employees and pay them legally-required benefits employers costs would then increase and would ultimately be passed on to consumers for goods and services. Some industries, like health care, may experience a shortage of workers due to the loss of flexibility in employment that will result from the reclassification to independent contractors.

In addition, businesses which refuse to reclassify employees are likely to experience a significant number of legal challenges, both from public and private sources. Such challenges will result in relatively prompt capitulation by small businesses, which cannot afford to fund protracted litigation. For larger entities, including the gig-economy giants, litigation over the classification of workers is likely to occupy a small army of lawyers and many arbitrators and judges for several years.

On the national front, other states may follow California's lead and enact similar statutes. One such law is reported to be under consideration in New York. Democratic presidential candidate Bernie Sanders has introduced a proposed Federal law called the Workplace Democracy Plan. This law proposes a federal approach to worker classification similar to that in AB5. In addition, other presidential candidates, including Elizabeth Warren, Kamala Harris, Pete Buttigieg and Julián Castro have expressed support for AB5. Provisions in AB5 may find their way into the Democratic platform for 2020.

At the likely cost of higher prices for the public, AB5 promises to provide higher wages and enhanced benefits for many workers currently classified as independent contractors. As the law goes into effect, legal challenges will ensure the courts become involved in interpreting and applying AB5. Moreover, amendments to the law are likely, whether resulting from judicial decisions, effective lobbying, or practical experiences in enforcement.

We will continue to monitor AB5 and provide updates as the law changes.

DOI Announcement

Rancho Murrieta roofer arrested for workers' comp fraud

SACRAMENTO, Calif. — Herbert Allen Kelly III, 65, of Rancho Murrieta, owner of Kelly Roofing Company, was arrested Friday on six felony counts of workers' compensation fraud after allegedly underreporting his business' payroll and number of employees resulting in a loss to his insurer of $50,000.

"When business owners operate in the underground economy, they are cheating the system and create an unfair advantage that puts legitimate businesses at risk," said Insurance Commissioner Ricardo Lara. "We all pay the price for insurance fraud through increased costs for services and higher premiums."

On January 12, 2015, while employed with Kelly Roofing Company, a worker slipped and fell from a roof at a jobsite, falling approximately 25 feet. As a result of the employee's injuries, a workers' compensation claim was opened with Kelly's insurer, State Compensation Insurance Fund (SCIF), and to date SCIF has paid approximately $730,175 in medical and disability payments. Following the incident, Cal/OSHA conducted an inspection of the jobsite with Kelly who advised he had three employees.

SCIF conducted audits of Kelly Roofing Company on a yearly basis to verify premium and payroll. Kelly reported approximately $31,685 in payroll for the December 2012 to December 2013 policy period, yet reported $0 in payroll and no employees for the remainder of the policy period, 2014 through 2018.

During the SCIF audit for policy period 2015, when the accident occurred, Kelly reported he had no employees. However, SCIF noted Kelly Roofing Company had a workers' compensation claim in January 2015. Kelly alleged he only paid the injured worker $500 for a single day of work and did not have any payroll records for him.

Department of Insurance detectives served search warrants on both Kelly and Kelly Roofing Company's bank accounts and conducted an audit of bank records. Detectives discovered approximately $89,781 in total audited payroll with up to 15 possible employees. The department confirmed Kelly Roofing Company had employees during the period when Kelly claimed he had no employees and no payroll. The audited payroll was ultimately forwarded to SCIF who determined Kelly Roofing Company owed approximately $50,000 in unpaid past premiums.

This case is being prosecuted by the Sacramento County District Attorney's Office.

DOI Announcement

Bay Area man sentenced to two years in prison for $250,000 insurance fraud scheme

SAN FRANCISCO, Calif. — A joint investigation by the Department of Insurance, Employment Development Department and U.S. Department of State, Diplomatic Security Service (DSS) that exposed a complex unemployment insurance fraud scheme has now led to prison time on federal charges for the man who committed the crimes. Kenneth X. Huang, 41, was sentenced last week to two years in federal prison, three years supervised release, and ordered to pay $259,594 in restitution.

The restitution order included $128,753 to Great American Insurance Company doing business as IncomeAssure and $130,841 to the California Employment Development Department. Huang was ordered to self-surrender by November 8, 2019, to begin his federal prison term.

The investigation revealed that Huang used a false passport, Social Security card and fabricated proof of employment documents in order to obtain multiple insurance policies, each under a different name then bided his time before submitting fraudulent claims in order to meet the eligibility requirements of the policies and to escape detection. In total, he received $128,753 from his fraudulent insurance policies.

"Partnering with insurance companies, state departments and the Diplomatic Security Service, allowed us to stop a complex fraud scheme in its tracks," said Insurance Commissioner Ricardo Lara. "Without our detectives' actions in unraveling this fraud, the costs could have been much higher."

"The Diplomatic Security Service is pleased with the success of this case. This shows the positive outcome when federal and state agencies work together to investigate and prosecute all allegations of criminal activity related to passport and visa fraud," said Matthew Perlman, Special Agent in Charge of DSS's San Francisco Field Office. "We're committed to deterring, detecting, and investigating passport and visa fraud and bringing those who defraud U.S. businesses with fraudulent U.S. travel documents to justice."

A consumer can purchase supplemental unemployment insurance to replace a portion of the income lost due to unemployment. These policies typically require the policyholder to be employed by a company for at least six months before purchasing the policy, and the individual must maintain their employment during the first six months that they own the policy before they can collect any benefits.

According to Department of Insurance detectives, Huang lied about material information in order to secure multiple different IncomeAssure policies, under multiple different identities. Examples of Huang's deception include providing false names, altering notarized documents, misrepresenting the times of employment, and submitting completely forged documents from companies where he never worked.

Huang fled to Georgia after being indicted on federal charges in January. DSS special agents tracked and apprehended him there.

This case was investigated by the California Department of Insurance Enforcement Branch, with assistance from the Employment Development Department and the U.S. Department of State's Diplomatic Security Service. Huang's probation will be supervised by the United States Probation Office. The United States Attorney's Office prosecuted the case.

No Duty to Defend Claims of Retailer's Own Negligent Mislabeling Under Supplier's Indemnity Agreement or Vendor's Endorsement

Credit to Haight, Brown & Bonesteel, La Jolla, CA

In *Target Corporation v. Golden State Ins. Co. Limited* (No. B279995, filed 10/10/19), a California appeals court held that there was no duty to defend or indemnify a retail pharmacy against allegations that it had mislabeled a prescription drug under either a contractual indemnity clause with the drug's bulk supplier or a vendor's additional insured endorsement on the supplier's liability policy.

A customer purchased the drug from a Target store pharmacy and had a severe adverse reaction. The pharmacy had obtained the drug in bulk and packaged it in pill bottles for resale. The customer sued both the pharmacy and the supplier, alleging that the bottle was mislabeled in that it instructed her to finish all of the drug unless otherwise ordered by her physician and did not contain an FDA-approved warning that use of the drug should be discontinued at the first sign of a rash or any adverse reaction. She developed a rare condition that caused her skin to peel all over her body, requiring seven weeks in a hospital burn unit.

The pharmacy tendered its defense and indemnity to the supplier and the supplier's insurer under a Pharmaceutical Supply Agreement and the vendor's additional insured endorsement of the supplier's policy. Although initially agreeing to defend, the supplier and its insurer withdrew when the case was narrowed to pure failure to warn allegations, and the supplier was dismissed. The plaintiff made clear that she was not alleging that the drug was defective, but that it had been mislabeled and there was a failure to warn. The pharmacy then sued the supplier and its insurer for breach of contract and bad faith. But the court in that action granted summary judgment to the defendant supplier and its insurer, and the appeals court affirmed.

The Pharmaceutical Supply Agreement contained an indemnification clause requiring the supplier to "indemnify, hold harmless, and defend [retailer]... against any and all actions [or] claims . . . relating to or arising out of . . . Products purchased by [retailer] from [supplier],. . . provided however, that the foregoing indemnity shall not apply to any claims ... arising out of or due to the negligence or willful misconduct or omission of [retailer]. . . ." The Agreement said that "[supplier] shall obtain and maintain ... commercial general liability insurance . . . , including products liability/completed operations. . . [and] coverage for contractual indemnification obligations." The policy will "provide that [retailer] is included as an additional insured."

The supplier's additional insured endorsement provided that coverage applied "only with respect to 'bodily injury' or 'property damage' arising out of 'your products' [supplier's products] ... which are distributed or sold in the regular course of the vendor's business [retailer's business]." There was an exclusion stating that additional insured coverage did not apply to "[r]epackaging" of products or "[p]roducts which, after distribution or sale by you [supplier] have been labeled or relabeled."

The *Target* court quoted the additional insured endorsement's coverage for bodily injury "arising out of 'your products'" and said "It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." (Citing *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 328.) However, the *Target* court said that "[t]here is no 'minimal causal connection or incidental relationship' between the product distributed by supplier and customer's injury. [] Customer claimed that her injury arose not from a defective product, but from retailer's failure to warn of the risks and possible side effects of the product. Supplier did not distribute or have any role in preparing the information about the product that retailer provided." Moreover, the *Target* court noted that the pharmacy admitted it had repackaged and labeled the drug, which came within the vendor's endorsement exclusion.

The *Target* court went on to hold that the same result followed under the supply agreement. First, the court rejected a failure to procure insurance argument, on the ground that the supply agreement did not require the supplier to procure coverage insuring the pharmacy against its own liability for mislabeling.

As to the indemnity clause, the *Target* court said that it was actually broader than the additional insured endorsement, because it obligated the supplier to defend and indemnify claims "relating to or arising out of" its products. The court cited an arbitration agreement decision for the proposition that the contractual phrase "arising out of" is "generally considered to be more limited in scope than would be ... a clause … arising out of or relating to." (Quoting *Rice v. Downs* (2016) 248 Cal.App.4th 175, 186.) But the *Target* court agreed that there was nonetheless no obligation under the indemnity clause because the customer lawsuit was based solely on the pharmacy's own negligence in mislabeling the pill bottle.

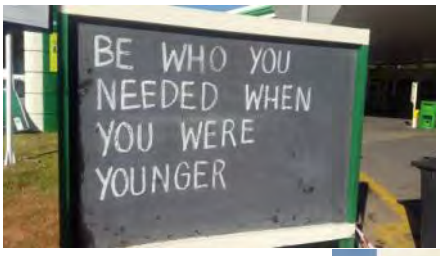
Finally, the *Target* court rejected the pharmacy's argument that mere allegations that it was negligent were insufficient to deny a defense, and that negligence would have to be established in fact. Here, the *Target* court took a detour from California law, because the supplier agreement had a Minnesota choice of law provision. And the court noted that there was no controlling Minnesota law on duty to defend under indemnity agreements. So the court instead relied on Minnesota insurance decisions stating that "in determining whether an insurer has a duty to defend, Minnesota courts consider the nature of the claim against the insured and whether that claim is covered by the policy, not whether the claim is meritorious. If the claim is within the policy's coverage, the duty to defend is triggered. It is not triggered if the claim falls outside the policy's coverage…. The practical effect of retailer's theory is that the distributor would have to defend the vendor until a final judgment was entered in the negligence action. This would render meaningless the exception to the Agreement's duty to defend."

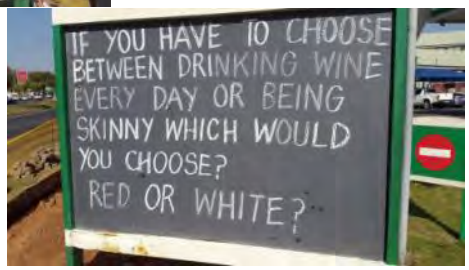
On the Lighter Side:

This is a very cool story. Can you imagine wanting to make sure you drove by a certain gas station every day? Just to see what the message was on the chalk board? It's true -- a gas station has become quite a landmark in Gauteng, South Africa, with its daily #PetrolPumpWisdom, which are uplifting quotes written on a chalkboard. Some people say they deliberately travel this route just to read the quote which brightens their day.

The lady behind this wonderful initiative at Hutton Hyde Park is Alison Billett
She told SA People: "We inherited the board from the previous owner, Dick Hutton, when we bought the filling station from him almost 20 years ago.
"We continued the tradition and it has become a landmark – more so now that it's on social media!

"Not a day goes by when I don't get a call or a visit from someone to tell me how much they appreciate the message –
it seems that every day there's something that just speaks to what is going on in someone's life and that inspires or motivates them.
"Having people come and tell me their stories and how the quote helped them in some small way is what motivates me to keep writing! "We use a variety of quotations – some are topical, some are funny, some are inspirational, some even reflect what is going on in my life that day! "Different things appeal to different people…





"The boards were spotted by a motivational speaker from the UK, Geoff Ramm, when he was driving by one day and he was so taken by them he included a piece about them in his book!
"The boards have appeared many times in newspapers and magazines and been spoken about on radio stations all over the world 9GAG has re-tweeted them a few times too!" Bob 95 FM in the USA recently posted Alison's "Rest in Peace" quote which has now been shared over a quarter of a million times around the world!

"Don't let Yesterday take up too much of Today" Will Rogers