

THE U.C. IS IMMUNE FROM STATUTE REQUIRING AN EMPLOYER TO PAY AN EMPLOYEE’S ATTORNEY FEES AND COSTS IN A LAWSUIT FOR NONPAYMENT OF WAGES OR BENEFITS

The typical employer faces the prospect of mandatory attorney fees and costs being awarded against it if an employee or former-employee prevails at trial on a claim for unpaid wages, fringe benefits or pension fund contributions. (*Cal. Labor Code* § 218.5.) In fact, substantial attorney fees can be awarded against the employer even if the employee is only able to prove he was underpaid by a nominal amount, possibly as low as one dollar. Generally, this statute encourages employers to fully compensate their employees because all workers in the state – even those with limited resources – should be able to compel an employer’s Labor Code compliance without limitations imposed by their individual financial situations. But are there any exceptions to this rule? And if there are exceptions, you may be asking, “Could my business qualify?” In one of the earliest decisions of 2011, the Fourth District of the California Court of Appeal found that there is an exception to the fee-shifting statute in wage, benefit and pension fund claims brought by employees and former-employees. The exception, however, is very limited.

In *Goldbaum v. The Regents of the University of California*, a tenured, long-time ophthalmology professor at the University of California, San Diego, brought an action against The Regents claiming breach of contract based on The Regents’ alleged failure to contribute sufficiently to his pension. Prior to the trial, a favorable settlement was reached for Goldbaum. Because the parties had not settled the issue of his legal fees, however, Goldbaum moved the trial court for an award of attorney fees and costs post-settlement. The trial court denied Goldbaum’s motion. In reviewing the trial court’s decision, the Fourth Appellate District held that The Regents stands in a unique constitutional position under the California law.

The California Constitution establishes The Regents as a public trust with full powers of organization and government. Because of this, The Regents has general rule-making and policy-making powers with virtual autonomy in self-government and general immunity from legislative regulation. However, the Court of Appeal recognized that the state legislature does have the authority (1) to enact “police power” (*i.e.*, health, safety and public welfare) regulations applicable to everyone else in the state (*e.g.*, workers compensation laws) and (2) to enact laws regulating the university in matters of statewide concern if the laws do not involve the internal affairs of the university.

The statute requiring employers to pay an employee’s attorney fees and costs after prevailing in a legal action is a law enacted by the state legislature. Analyzing whether the fee-shifting statute could be applied against The Regents, the Court noted that the law was not applied uniformly throughout the state and was not a matter of statewide concern because cities, counties and other local public agencies are exempt from the

Continued on page 2

IN THIS ISSUE

APPELLATE COURT REAFFIRMS EMPLOYERS CRUCIAL TOOL: ESTABLISHING A NON-EXEMPT EMPLOYEE’S FIXED SALARY THAT INCLUDES OVERTIME	2
IN CASES OF EXPRESS INDEMNITY, SOMETIMES AN ASSIGNOR’S RIGHTS CAN BE USED TO REMEDY DAMAGES INCURRED BY AN ASSIGNEE	3
APPEALING RESULTS AT W & Z	4
SEMINARS	4



Continued from page 1

statute. Largely because the fee-shifting statute is not applicable to everyone else in California, the Court of Appeal found that the “police power” exception to The Regents’ immunity did not apply. Moreover, the Court of Appeal held that The Regents’ compensation of its employees was a matter of its internal affairs. Therefore, the other primary exception to immunity should not apply. Finally, the Court of Appeal noted that the attorney fees requested by Goldbaum were based on The Regents’ pension plan contributions for its employee. The Court noted that several prior court decisions have held that many statewide wage laws cannot be applied against The Regents since those wage laws would affect The Regents’ internal affairs or are only of local, non-statewide concern. The Court of Appeal stated that it would be incongruous to permit an employee to collect attorney fees and costs for wage and benefit litigation when the underlying wage and benefit laws did not apply to The Regents. Chiefly for these reasons, the Court of Appeal affirmed the trial court’s ruling and found that The Regents is not subject to the mandatory fee shifting provisions applicable to most other employers in wage, benefit and pension suits.

Because an opposing party’s attorney fees can be substantial and because an employee has such a low threshold to meet for an entitlement to attorney fees, employers sometimes feel motivated to settle wage claims before trial even when they believe the claims are of doubtful merit. The Regents is not subject to the same attorney fee provisions that most other employers are subject to, and therefore, it is relieved of some of the settlement pressures that most other employers may feel. As a result, plaintiffs’ attorneys may be less inclined to prosecute claims for unpaid wages against The Regents. Unfortunately, the reasoning behind the *Goldbaum* opinion does not apply broadly to provide immunity to other businesses and individuals. *Wesierski & Zurek* stands ready to provide a vigorous defense to any employment or labor claims brought against our clients, through settlement and trial.

- *Christian C.H. Counts*

Visit our Website:
www.wzllp.com

APPELLATE COURT REAFFIRMS AN EMPLOYER’S CRUCIAL TOOL: ESTABLISHING A NON-EXEMPT EMPLOYEE’S FIXED SALARY THAT INCLUDES OVERTIME PAYMENTS

Recently, in *Carlos Arechiga v. Dolores Press, Inc.*, the California Second District Court of Appeal affirmed the trial court’s ruling that employers may still utilize explicit mutual wage agreements in order to establish non-exempt employees’ weekly combined base and overtime payments before any work is actually performed. This case reaffirms an employers ability to predetermine labor costs and thereby maintain better control and stability in today’s challenging economic times.

In *Arechiga*, the employee agreed to work as a janitor for eleven hours per day, six days per week, for a total of 66 hours per week. Arechiga was a non-exempt employee and thus entitled to overtime payments, but his employer also agreed that he would be entitled to 26 hours of overtime pay each week. After establishing this, the employer agreed to pay Arechiga a total of \$880 per week, including overtime pay. Three years later, the employee was terminated and brought suit against the employer for unfair business practices.

The employee claimed that his \$880 salary did not include any of his overtime pay, but merely compensated him for 40 hours of work at \$22 per hour. To support this, he pointed to a Labor Code statute and claimed that it prohibited calculating base pay and overtime benefits in such a manner. Based upon this, the employee claimed that his employer owed him 26 hours of weekly overtime pay for the last three years – totaling over \$130,000. The employer responded by asserting that the explicit mutual wage agreement doctrine applied.

The court agreed, holding that the Labor Code did not prohibit explicit mutual wage agreements, and that the parties had in fact entered into such an agreement. The doctrine allows an employer and employee to “lawfully agree to a guaranteed fixed salary so long as the employer pays the employee for all overtime at least one and one-half times the employee’s basic rate.” To fall under the protections of the doctrine, an employer has to show that the agreement specified (1) the days to be worked each week, (2) the number of hours to be worked each day, (3) that the employee would be paid a guaranteed, specified salary, (4) that the employee was told his basic hourly rate

Continued on page 4

IN CASES OF EXPRESS INDEMNITY, SOMETIMES AN ASSIGNOR'S RIGHTS CAN BE USED TO REMEDY DAMAGES INCURRED BY AN ASSIGNEE

It is a well-known and long-standing rule that an assignee “steps into the shoes” of the assignor when enforcing assigned rights. But what happens when the assignee incurs damages in a transaction that prevents the assignor from being injured? Because the assignor would not have any damages resulting from the transaction, it stands to reason that stepping into the assignor’s “shoes” would not get the assignee anywhere. Nevertheless, it might not always be true that an assignee completely assumes the assignor’s claims. A recent California Court of Appeal decision found that in at least one situation, an assignee can stand in an assignor’s “shoes” in order to remedy the assignor’s damages.

In *Searles Valley Minerals Operations Inc. v. Ralph M. Parson [sic] Service Co.* (Jan. 21, 2011), an employee was killed while working in Searles’ processing plant and his heirs brought a wrongful death action against the plant’s prior owner and Parsons – a contractor that designed and constructed the plant many years before and installed equipment involved in the employee’s death. In the prior owner’s construction agreement with Parsons, Parsons agreed to defend and indemnify the prior owner against personal injury and death claims arising from Parsons’ work. Several years later, the prior owner sold the plant to Searles. Under the terms of the plant’s purchase agreement, Searles agreed to indemnify the prior owner in exchange for an assignment of the prior owner’s rights under the plant’s construction contract. (The original indemnity agreement between Parsons and the prior plant owner permitted the prior owner to assign the agreement.)

The prior owner tendered the defense of the wrongful death action to Searles and to Parsons. Parsons refused the tender but Searles accepted it. Being the current plant owner and assignee of the prior owner’s rights, Searles subsequently filed a complaint against Parsons alleging breach of contract based on an express indemnity agreement between Parsons and the prior plant owner. The trial court sustained Parsons’ demurrer to Searles’ complaint

holding that the prior owner had not suffered any damages from Parsons’ breach of the indemnity agreement because the prior owner had not actually paid any defense costs itself.

On review, the Fourth District reversed the trial court, holding that the plant’s prior owner was entitled to indemnification and a defense from Parsons under the construction agreement’s indemnity provision. The Court of Appeal held that the plant’s prior owner did not itself incur any attorney fees or losses in the wrongful death case, and therefore the prior owner was not entitled to recover defense costs from Parsons. On the other hand, Searles did incur defense costs. The defense costs that Searles incurred were not all Searles’ own defense costs merely because Searles had paid them. Rather, some of the costs incurred by Searles could be characterized as the prior owner’s defense costs. Literal payment of the fees was not required before express indemnity would be enforced. As assignee of the prior owner’s rights against Parsons under the indemnity agreement, Searles could “stand in the shoes” of the prior owner to make a claim for the prior owner’s defense costs. Accordingly, the trial court’s order sustaining Parsons’ demurrer was vacated and the express indemnity action was allowed to proceed.

The *Searles* case indicates that courts can recharacterize an assignee’s damages as the assignor’s damages if doing so will promote fairness and justice. It is possible that this principle could be applied in situations other than express indemnity agreements. As the *Searles* case illustrates, when dealing with an assignee or successor to another party’s rights, it may be necessary to look beyond the liability scenarios traditionally between the original parties to a transaction, agreement or occurrence. One should also consider the impact on the assignee or successor. If you have questions about liability in any situation where there has been an assignment of rights, the attorneys at Wesierski & Zurek can provide guidance and advice.

- Christian C.H. Counts

APPEALING RESULTS AT W & Z

Paul J. Lipman recently prevailed on appeal, protecting Ronald Zurek's defense verdict in *Graven v. Goodell*. At trial, plaintiff bicyclist argued that defendant made a right turn and cut him off as he approached her from behind, without checking her mirrors. The defendant admitted not checking her mirrors, but said plaintiff must have been "curb sneaking" unsafely. Mr. Zurek argued that there is no duty to check one's mirrors when turning right if there is no indication that there is any hazard present (the driver testified she did not pass a bicyclist; the bicyclist testified that she did). At issue on appeal was the defendant's entitlement to the "right to assume the good conduct of others" instruction. Plaintiff argued that this can only be used if the defendant herself used due care, and that she had not checked her mirrors. On appeal, defendant argued, as Mr. Zurek had done at trial, that it is not necessarily negligence to make a right turn without checking one's mirrors, if there is no indication of a nearby hazard.

In affirming the defense verdict, the Court of Appeal quoted Mr. Zurek's colorful closing argument at length. As Mr. Zurek told the jury, "I dare say that of the thousands of right turns that are being made during the time I'm making this closing argument, that if we had a video camera on every driver in Southern California, you probably wouldn't see one who turns around and looks over at the curb and behind them. Why would you? There is no reason to, okay? Unless his bicycle was right here – unless she drove right by him, and she knew he was right here – well, yeah, then that's obviously a different situation. But he wasn't. He was back here and he was coming real fast, and he was going downhill ..." The jury agreed, and the Court of Appeal agreed that this was the jury's decision to make.

The Court of Appeal also agreed with Mr. Lipman's appellate argument that a survey of case law indicates that the "right to assume the good conduct of others" instruction is appropriate anytime there is a conflict in the evidence as to whether the defendant used due care. The instruction is not appropriate if it is clear that the defendant did not use due care.

- Paul J. Lipman

Paul J. Lipman heads Wesierski & Zurek's appellate department. Wesierski & Zurek LLP handles virtually all of its appeals in-house. Mr. Lipman has been involved in excess of 25 appeals, and has argued 10 before the Court of Appeal.

SEMINARS

We have interesting and informative seminars available on a wide variety of legal topics. We can also customize a seminar to fit your needs. Topics include Pre-Trial Discovery, Jury Selection, Restaurant/Hotel Liability, Premises Liability, School Bus Liability, Supermarket Liability, Sexual Harassment, Employee Handbook Creation & Liability ... and any other employment topic you may want covered. Our seminars emphasize both a pro-active risk prevention perspective, and the means to effectively litigate and defeat claims once they are filed.

If you would like to schedule a seminar, please contact Paul J. Lipman at (213) 627-2300 for further information.

Continued from page 2

upon which the salary was based, (5) that the employee was told that his salary covered both regular and overtime hours, and (6) that the agreement was reached before the work was done.

In making its determination in this case, the Court explained that the first three elements of the agreement existed based upon the fact that an oral agreement between the parties specified the plaintiff's days and hours of work, and set forth a guaranteed weekly salary of \$880. The remaining elements of the mutual wage agreement were established through witnesses at trial proving that the plaintiff was shown a piece of paper indicating that his salary was based upon an hourly rate of \$11.14, that he was told that his salary covered both regular and overtime hours, and that the agreement was reached before the work was performed.

Arechiga has provided an important tool for employers and those involved in employer-related litigation. Due to the court's decision, explicit mutual wage agreements will continue to be a viable option for employers seeking to control labor overtime expenses of non-exempt employees. By entering into such agreements with employees, employers can more precisely and effectively control labor costs, and at the same time provide employees with accurate and predetermined wage information. Due care, however, must be exercised to ensure full compliance with the explicit mutual wage agreement doctrine in order to avoid unintended overtime expenses.

- Andrew Brown

Editor

Paul J. Lipman