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Welcome to Insights,

a quarterly newsletter from Patton Martin & Sullivan designed to keep you up-to-date on legal issues that may impact your business.

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In this issue:

Employers Face Ongoing Challenges in Unsettled Legal Environment

By Kevin Martin

It is not easy being an employer in California these days. Whether you are hiring employees or letting them go, the waters are treacherous.

Take for instance the matter of Silguero v. Creteguard Inc., a July 2010 case out of California's Second District Court of Appeal.

In 2003, Rosemary Silguero began work with Floor Seal Technology Inc. (FST), as an in-house sales representative. In August 2007, FST threatened Silguero with termination unless she signed a confidentiality agreement. She signed the agreement, which prohibited her "from all sales activities for 18 months following either departure or termination." FST terminated Silguero's employment in October 2007.

Silguero soon found employment with Creteguard Inc., another California firm in the flooring industry. FST then contacted Creteguard and requested its cooperation in enforcing its confidentiality agreement with Silguero, including those provisions prohibiting her from all sales activities for 18 months following her departure from FST. Although not clear from the reported decision, there may have been a bit more arm-twisting from FST (i.e. the threat of litigation) to get Creteguard on board, but in any case Creteguard's chief executive officer informed Silguero that, although the company did not believe non-compete clauses Cont page 2

Damage Presentation Key in Recovering Lost Profits

By Randy Sullivan

Two recent cases involving failed land development transactions produced two extremely different outcomes. And, on closer examination, it's clear the results turned on the plaintiff's ability to demonstrate lost profits .

One case involved damages for a hotel/condominium project that was never built; the other for the failed redevelopment of a single lot. Plaintiffs won large judgments at trial. But the differences were exposed when the Court of Appeals analyzed whether the lost profits awarded were speculative.

In many ways, the differences in the awards were a product of factual distinctions, but also damage presentation.

The case of Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes arose out of Cont page 2

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were legally enforceable in California, Creteguard wished to respect colleagues in the same industry, and therefore were terminating her position.

Silguero sued Creteguard alleging, among other things, that the noncompetition agreement between her and FST, subsequently "enforced" by Creteguard, was void under California Civil Code Section 16600 favoring open competition and free mobility. Further, she claimed Creteguard's actions constituted an illegal restraint of trade in violation of both the Civil Code and the public policy of the State of California embodied in those laws.

Creteguard demurred to the complaint, arguing that there was no clearly-delineated public policy prohibiting a subsequent employer from honoring a putatively valid non-compete/confidentiality agreement entered into by an employee and a former employer, and that any restraint of trade in this instance was committed by FST. Creteguard concluded that its conduct was "in an abundance of caution" and designed not to invite a lawsuit by FST "for a then-unsettled issue of whether such an agreement was enforceable."

The trial court sustained Creteguard's position and Silguero appealed.

In reversing the lower court's ruling, the Court of Appeal for the Second District emphasized prior case law, concluding that "the interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change." In considering Creteguard's "understanding" with FST honoring its non-competition agreement, the Court of Appeal concluded that such an agreement was tantamount to a "no-hire" agreement which would be illegal because it "unfairly limits the mobility of an employee" and that FST should not be allowed to accomplish indirectly that which it cannot accomplish directly.

Doing business in an unsettled legal environment is difficult at best. Every decision carries risk.If your company is facing complex employment law issues, or any other business law concerns, the experts at Patton Martin & Sullivan LLP are ready to help. Contact us today at 925-600-1800.

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Damage Presentation Key in Recovering Lost Profits

the town's breach of an agreement requiring the devel oper to improve the town's airport and build a hotel or condominium project. The developer had submitted a revised development plan to the town for informal review, but not for formal approval. And ultimately the town decided not to move forward with the hotel/condominium project. A jury awarded the developer $30 million. The town appealed, claiming, among other things, that the award was based on speculative profits.

The town argued the developer's expert made too many assumptions including: "(1) all necessary permits would be obtained, (2) environmental review would be completed, (3) estimated construction costs provided by the developer were accurate, (4) the project would be built within the estimates, (5) the developer would successfully obtain financing, (6) the developer would successfully associate with a major brand, and (7) the mix of project units could be sold within the time

frame and at projected prices."

Despite these reasonable points, the decision was upheld, in large part because the expert witness for the developer was prepared to address these points. The expert relied on actual bids and standard construction costs; sales estimates were based on a comparable development; and he had the experience in valuing these types of projects. More importantly, his analysis included a discount not only to the present value but also for the risks associated with the project where construction had not yet started. Finally, although the project was years away from producing a buyer, the expert testified that the discounted price was a price someone would pay. The court upheld the award.

The second case, Greenwich S.F., LLC v Wong, produced a far different result.

In theory, demonstrating lost profits should have been easier in Greenwich. The case involved the profits that were not realized when a seller reneged on a deal to sell property on which the buyer planned on building a new residence. In a rising market, the buyer could have recovered damages for just the breach. Damages to a buyer for a seller's breach of a real estate purchase agreement are the difference in value of the property at the time of the contract and the date of the breach. Here, the property had not increased in value, in part, because the residence on the lot was in a dilapidated condition.

The jury returned a verdict that included $600,000 in lost profits, but, the appellate court ruled those lost profits were speculative and not recoverable.

While the plaintiff had developed another property in the past that produced $1.6 million in profits, the plaintiff made many admissions at trial regarding the unknown nature of the profits that would be produced by this transaction. For example, he testified that "he had no expectations about the certainty of any profit."

Given the fact he was not an appraiser, strong expert testimony might have been able to save the damage award.

But, unlike the expert for Mammoth Lakes Land Acquisition LLC, this expert had neither an opinion on whether the buyer could secure financing for a construction loan, nor on the costs to construct the proposed residence. The court overturned the trial court's award of lost profits.

These cases are also noteworthy, because neither agreement contained a liquidated damage clause setting forth the damages designated to compensate a party in the event of the other's breach of the agreement.

Finding the right expert and making sure all angles are covered takes experience, clarity of thought and hard work. If you find yourself facing complex real estate challenges, the experts at Patton Martin & Sullivan are ready to help.

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Employee or Independent Contractor – the Consequences of Misclassification

By Ralph Kokka

A recent appellate court ruling should give pause to companies doing business in California as to whether they have appropriately classified a service provider as an independent contractor.

Global logistics firm EGL Inc. had classified its truck drivers as independent contractors. The truck drivers had brought a class action -- Narayan v. EGL Inc. -- alleging that they were in fact employees rather than independent contractors.

The company had required the truckers to sign agreements, governed by Texas law, in which they acknowledged that they were independent contractors. Under Texas law, such acknowledgements of independent contractor status are enforceable.

A lower court issued a summary judgment in favor of EGL but the Ninth Circuit Court of Appeal disagreed. The Ninth Circuit ruled that the agreement's Texas choice of law provision did not govern the issue of whether the drivers were independent contractors because the issue was one of state law, not contract interpretation.

The Ninth Circuit noted that California's multi-faceted test for determining whether a service provider is an independent contractor would apply. The court further noted that because the test could not be applied mechanically, but must be considered as a whole, and differing inferences could be drawn in applying the test, a determination of independent contractor status could not be made as a matter of law.

In particular, the Ninth Circuit found the fact that the drivers had acknowledged in their agreements that they were independent contractors to be not dispositive of the issue. Instead, the court focused on a variety of other factors such as the amount of control the company exercised over its drivers and whether the drivers performed an essential part of the company's business.

The lesson to be learned from the case of Narayan v. EGL Inc. is that substance matters. Simply calling a service provider an independent contractor or having that person contractually acknowledge such status does not make that person an independent contractor. Moreover, invoking the law of a jurisdiction with favorable laws, such as Texas, will be ignored by the court, if the service provider was in fact performing services in California. Instead, companies should focus on whether the service provider in the role envisioned by the company actually qualifies as an independent contractor under California's multi-faceted test.

In certain cases, the company may be able to structure the relationship to insure that the service provider is an independent contractor.

If you would like to learn more about the proper classification of your service providers, please contact Ralph Kokka at Patton Martin & Sullivan at 925-600-1800.

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The Tricky Terrain of Property Rights in Takings Cases

By John H. Patton

While the 5th Amendment of the U.S. Constitution -- and parallel California provisions -- guarantees payment of just compensation when the government takes private property rights, that guarantee must be vigilantly protected by the property owner or it can be lost. Two California cases awaiting review by the U.S. Supreme Court explore the tricky terrain that the court sought to address when it decided Palazzolo v. Rhode Island in 2001. Even in the most straightforward application, the laws governing when and if a claim for compensation can or must be brought is significantly more complicated than the usual injury or tort case.

Often, governmental action affecting the landowner's rights has no real impact on the owner at the time of the measures, especially when they are in the form of regulations, studies, drafts, and preliminary orders. Sometimes the action is part of a long-term process that eventually culminates in restrictive action. All of this can lead to real confusion: If there was in fact a compensable taking, when did a taking occur? Will the action impact the use or value of the property? If so, what is the true extent of that impact?

The complexity multiplies when the property is transferred at any stage of the process. Even more troubling is the notion that the landowner or future landowner may be required to initiate legal action to recover compensation when practical determination of the loss and its extent are still unknown or unproveable. In deciding Palazzolo v. Rhode Island, the Supreme Court rejected the established precedent that a purchaser of property who had notice of an earlier-enacted restriction is barred from making a claim for compensation. The Court reasoned that such a rule would work a "critical alteration to the nature of property," stripping the newly regulated landowner of the ability to market or sell the interest owned prior to the restriction.

Still, some lower state and federal courts have in many cases continued to pay heed to the so-called Notice Rule, setting the stage for Guggenheim v. City of Goleta and CRV Enterprises v. United States, which seek to obtain clarity and uniformity of law.

In Guggenheim, the City of Goleta passed a new mobile home park rent control ordinance, after plaintiff Guggenheim purchased a trailer park knowing a prior rent control ordinance was in effect. When the landowner sought compensation for the negative impact caused to the property by the new ordinance, the Federal Courts followed the Notice Rule and rejected that claim. Guggenheim has requested review by the Supreme Court, urging that the old ordinance was irrelevant to his claims.

In the CRV case, the U.S. Environmental Protection Agency issued a written decision announcing the likelihood that it would one day implement various clean-up actions in a navigable body of water (a slough), but took no action for years, while pondering what actions it ultimately would take.

After that written decision was issued, but before any action taken, the landowner (CRV) purchased property adjoining the slough to develop a marina, for which the slough was essential. Years later, the EPA blocked maritime access to the slough by stringing a log boom across its mouth, rendering the property useless as it no longer had adequate maritime access.

When the owner sued, the EPA argued the owner had no rights to do so, because CRV

had knowledge of EPA's intent before it purchased the property, and did not own the property when EPA issued its written decision. Again, following the logic of the Notice Rule, the Federal Courts rejected CRV's claim for compensation, and CRV has requested review by the Supreme Court.

Both CRV and Guggenheim are awaiting decision as to whether review will be granted.

These cases point out the complexity involved when government actions change over time for any of a variety of factors. It can be a real challenge to determine which act or combination of acts created the impact, and when any such act did so. And those challenges are only made more difficult when property rights are being transferred among private owners as that process evolves.

Property owners facing governmental restrictions on the use of their properties need to address these issues promptly, and analytically, regardless of when those restrictions take effect. Professional input at an early stage can make all the difference in the world to protecting those rights.

Patton Martin & Sullivan is a firm of experienced professionals and trial attorneys, dedicated to producing results and protecting our clients' rights in complex situations.

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