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Issue No. 7 Spring 2014

Welcome to Insights,

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

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In this Issue:

PAGE 1
Employer's liability does have limits
Beware of ignoring an indemnity clause

PAGE 4
Hope of home appreciation isn't fraud, court finds

PAGE 5
Case Alerts — News Alerts

Employer's liability does have limits

By Caitlin Connell

Employers know they must take steps to prevent and manage harassment and discrimination in the workplace. But a recent case helps set some boundaries on that liability.

Montague v. AMN Healthcare, Inc. addressed the unique situation of a health care employee poisoning another coworker. Given the fact the dispute arose at work, and the poison was a supply of the workplace, a lawsuit was filed and went on appeal.

After a few disagreements at work, an employee took the opportunity to pour carbolic acid into a water bottle that the plaintiff left at work. The plaintiff then drank from her water bottle. She survived but understandably suffered an unpleasant reaction.

The plaintiff sued AMN, the staffing company that employed and provided the coworker to Kaiser, on theories of vicarious liability and negligence. The staffing company argued these theories failed because the coworker was a "special" employee of Kaiser at the time of the incident, absolving the staffing company of liability during the period the coworker worked at Kaiser.

On appeal, the Court did not reach the merits of the staffing company's argument, but instead focused on (Cont. on Page 2)

Beware of ignoring an indemnity clause

By John H. Patton

There is a tendency in the business world and in life in general, to ask for more than you really want. The theory is that doing so ensures you will get what you want, and perhaps more. But sometimes in the law, asking for more than what you want means you will not even get what you need. It is best to be clear as to what you want.

This is often the case with indemnity clauses that are inserted into contracts, frequently as non-negotiated boilerplate provisions that neither party considers very carefully. In general, an indemnity agreement, or clause, is intended to offer protection for one party from claims brought by third parties, by requiring the other party to the indemnity to provide protection from the legal consequences and/or to pay for the defense of the claim. These clauses are commonly included in all manner of business contracts — (Cont. on Page 2)

(**Connell,** Cont. from Page 1)
the issue of vicarious liability. The issue of vicarious liability of an employer turns on whether the co-worker acted outside the course and scope of her employment in poisoning the plaintiff. Courts decide that question based on whether the conduct was required or incidental to an employee's duties and whether the conduct was reasonably foreseeable due to the employer's business.

The plaintiff did not present any evidence of the coworker's job duties at Kaiser, such as whether her duties involved the use of carbolic acid. It also was not clear whether the coworker committed the poisoning during work hours. Finally, the plaintiff did not present evidence that the work-related disagreements, rather than the coworker's personal animosity toward the plaintiff unrelated to work, motivated the poisoning. This final issue is critical, because an injury inflicted out of an employee's personal malice, not prompted by the employment, will absolve the employer of the claim.

The Court found the poisoning highly unusual and startling. Because the act was not foreseeable, the claim failed.

The last issue decided by the court concerned the plaintiff's remaining claim for negligent training. This is an important finding because employees often claim that proper training would have prevented an incident of workplace discrimination or harm. This claim was dismissed as speculative, because the plaintiff presented only an inference that the staffing agency's failure to train the coworker how to avoid workplace violence may have caused the plaintiff's injury.

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(**Patton,** Cont. from Page 1)
purchase agreements, leases, construction and service contracts, and a host of other situations. Typically, Party A requires Party B to indemnify Party A from claims that may be brought by reason of the contract. For example, in a commercial lease, the landlord usually asks the tenant to indemnify the landlord from claims that may be brought by others by reason of the conduct of the business, or from claims brought by visitors to the premises.

There is nothing wrong with seeking this protection and it is a prudent consideration for any business arrangement. But the devil is in the details and there are scores of reported California appellate decisions dealing with these issues.

The courts commonly construe indemnity clauses against the drafting party, which typically is the party seeking protection. If the clause provides indemnity for a particular sort of conduct or risk, it may well be limited to that particular conduct or risk. But if the clause provides indemnity for very broad and unspecific conduct, it may not provide real protection in the event of a claim. For example, a clause that does not specify the sort of negligence will be covered may not protect the party who sought the indemnity, unless the negligence is shown to be "active" or "affirmative," as opposed to simply failing to do something required by ordinary care.

Here is another simplified example of the pitfalls in drafting these provisions. In Heppler v. J.M. Peters Co. (1999), 73 Cal.App.4th 1265, a general contractor inserted an indemnity provision in its subcontracts with a roofer, concrete supplier, and landscaper. The provision called for the subcontractors to indemnify the general contractor "to the fullest extent permitted by law" for "all claims, demands or liability for death or injury to persons or damage to property arising out of or in connection with Subcontractor's performance of the work. . ."
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(**Patton,** Cont. from Page 2)

When claims were brought against the general contractor for construction defects based upon the work of the subcontractors, the court held that the indemnity provision would only cover that work if it was proven that the subcontractors acted negligently or with fault, causing the defects. In other words, the court held that because the indemnity provision did not address non-negligent work by the subcontractors, the indemnity protection would not extend to such work, and would only provide indemnity for negligent work. The party seeking the indemnity was unable to prove that fault, and thus had to bear the loss on its own, in this case, a considerable amount.

The analysis is frequently arcane and often depends on the draftsmanship of the indemnity provision. In business situations where this protection may be important, it is risky to rely upon pre-printed forms or for the parties to draft the language of the indemnity without the assistance or review of counsel. In the Heppler case, it made a difference of hundreds of thousands of dollars to the losing party.

The moral is to know what you want and ask for it plainly. But given the complexity of the issues, that may not be enough without the participation of counsel in drafting the indemnity provision.

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Newsletter continues next page

Hope of home appreciation isn't fraud, court finds

By Randy Sullivan

The American Dream of home ownership, with its implicit promise of value appreciation, turned into a nightmare for many when the housing bubble burst in 2007.

That set off a wave of litigation as borrowers claimed representations by mortgage brokers and lenders amounted to fraud. The plaintiffs pointed to loan terms and statements that borrowers would be able to refinance home loans because home values would continue to appreciate.

Many of the loans that have been litigated arose in 2005 and 2006, and at this time now are largely barred by statutes of limitation based on the date escrow closed. As a result, borrowers now plead delayed discovery allegations to circumvent the statute of limitations. That is, they claim they are excused for not discovering an allegation sooner. It is a tall order to extend the statute of limitations for claims focused on loan terms because the loans closed years ago.

The current trend has been to focus on another allegation commonly found in borrower complaints. This claim is based on the related allegation that they recently learned the appraisal was incorrect and the borrowers were told home values would appreciate.

The recent case of Cancino v. Bank of America addresses the allegation that borrowers were told that their home would increase in value, so that they would be able to sell or refinance. Plaintiffs claimed that they did the refinance because it would allow for the monthly payments to be reduced and with the expectation they could also take advantage of any appreciation, so that they could sell or refinance the home at a future date at an appreciated value before having to pay the principal or higher monthly payments.

This is a common allegation found in almost any complaint by any borrower against the lender or mortgage broker. The court in Cancino upheld prior related rulings on issues concerning representations of future value by finding they are not actionable for fraud. The court also found that the plaintiffs' claim they did not discover that the appraisal was allegedly false and allegedly inflated due to artificial market conditions created by lenders in 2010, was not reasonable. Any such claim should have been discovered far sooner, the court found, and thus the claim was time barred.

This area is sure to be one that will continue to be litigated in the mortgage broker and lender context both as to the appraisals and borrowers claims of delayed discovery. Moreover, holdings such as that in Cancino will be applicable in a number of other circumstances where there are claims against person (brokers, or agents) based on their representations of future value for transactions of businesses or real estate.

Finally, these rulings are important because they allow lenders a route to avoid discovery and reduce the costs of defense.

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CASE ALERTS

- ***The McCaffrey Group, Inc. v. Superior Court –*** The court held that pre-litigation dispute resolution procedures that were part of a home purchase contract were enforceable even though the rights and duties were different than those set forth in the Right to Repair Act.

- ***Richman v. Hartley –*** The court found that even if real property has commercial uses, if it also has a residential use with one to four dwelling units, then delivery of a Transfer Disclosure Statement is required by the seller.

NEWS ALERTS

- CFPB implements ability to repay and qualified mortgage standards.
  READ STORY>

- CFPB is revising the Home Mortgage
  Disclosure Act by requiring mortgage lenders to disclose far more information to regulators.
  READ STORY>

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