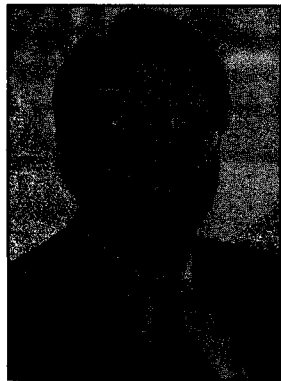


Proposition 103: The Supreme Court Takes the Initiative

It came as little surprise that Proposition 103, the far-reaching insurance initiative, was passed by the voters of California on November 8, 1988. The pollsters were right: the people of California were fed up with the insurance industry and wanted change and change is what they have ordered. As consumers, the initiative affects the personal insurance situation of each of us. However, as business trial lawyers, Proposition 103 has far-reaching effects.

Obviously, any analysis must for now assume that the California Supreme Court upholds Proposition 103's constitutionality. The Court has accepted for hearing the challenges of numerous insurers. Virtually all of Proposition 103's provisions are now in full force and effect. The Supreme Court, however, has stayed some provisions of the proposition, most notably the mandated 20% rate rollback. The constitutionality of the act is expected to be decided in early spring.



Edward E. Corey

The Supreme Court's subsequent reversal of its 1869 decision regarding the status of insurance as interstate commerce was quickly met with congressional intervention with the passage of the McCarran-Ferguson Act in 1945.

The McCarran-Ferguson Act provides that insurers shall be exempt from federal antitrust laws and subject to the regulations of the individual states. California's insurance regulations expressly allow numerous activities which, under normal antitrust rules, would generally be prohibited. Such activities include the insurers ability to act in concert to set rates, to exchange experience information for the purpose of setting rates and the allowance of rating organizations. To the extent that some of these permitted activities would, in the absence of McCarran-Ferguson, violate federal antitrust laws, they likely run afoul of California's antitrust laws found in the Cartwright Act. However, the application of California's Cartwright Act as to the insurance industry has been the subject of some confusion. Generally portions of the Cartwright Act as applied to the insurance industry have been held expressly superseded and contravened by

Continued on Page 4

Foley Has Arrived. Finally.

After extensive brief writing in the spring of 1986, two oral arguments before the Bird and Lucas courts in June 1986 and April 1987, interminable awaiting the decision, hearing rumor upon rumor about what "really" was going on with the case in San Francisco and resigning ourselves to the possibility that there might *never* be a decision, it came. As counsel in perhaps the most important labor case in California history, it was a gratifying way to end 1988.

But, the reality of 1989 is immediately upon us. Although *Foley* dispositively resolved a number of very important questions, it hardly eliminated — as we hoped that it would — all of the questionable legal "wrongful discharge" theories invented by the lower courts during this decade. Whereas the volume of future wrongful discharge cases undoubtedly will be greatly diminished by the Supreme Court's rejection of the "implied covenant" theory, there remain numerous unresolved and newly suggested issues. Hopefully, more definitive guidance will be provided by the Supreme Court in the near future before countless more cases are forced to trial.



Steven G. Drapkin

What Foley Decided

Most of the media attention on *Foley* focused on the Court's dramatic 4-3 ruling invalidating tort remedies for breach of the implied covenant of good faith and fair dealing in the employment setting. There were, however, a number of other important rulings in *Foley*.

Significantly, although the Court states that there remains a contractual "implied covenant" in all employment agreements, the justices apparently are of the unanimous view that this "implied covenant" does not create an independent exception to the "at-will" presumption of Labor Code Section 2922.¹

The majority reasoned in footnote 39 of its opinion that "[b]ecause the implied covenant protects only the parties' right to receive the benefit of their agreement, and, in an at-will relationship there is no agreement to terminate only for good cause, the implied covenant standing alone cannot be read to impose such a duty." In his dissent, Justice Broussard approvingly cited footnote 39 and, in addition, stated that all breach of contract "wrongful discharge" claims must rest on the employer's "breach of some contractual provision apart from the covenant. . . ." Justice Kaufman echoed similar sentiment that there "clearly" can be no breach of the implied covenant "unless

Continued on Page 2

it has first been proved that . . . the employer has given the employee a reasonable expectation of continued employment. . . ."

Thus, under *Foley*, the only possible remaining effect of the "implied covenant" in employment cases possibly is to protect the arbitrary cutoff of employment benefits. The classic example is the employment termination designed to prevent the vesting of a contractual right, such as terminating a salesman immediately prior to the time commissions would accrue to him. The cause of action is contractual and the damages simply are the contractual sums which otherwise would have been paid but for the improper termination. Damages for the termination itself, however, should not be allowed.

Another important aspect of *Foley* in connection with the "implied covenant" concept is the tacit holding limiting the scope of the *Seaman's* tort.² The majority decision makes clear that the *Seaman's* cause of action was "expressly circumscribed" to cases involving the bad faith denial of the existence of a contract and does *not* involve disputes relating to the terms of a contract. In almost all employment cases, there is no dispute about the existence of an employment contract — the issue relates to whether there is a provision affording job security and, if so, whether it was breached. Under *Foley*, therefore, the *Seaman's* claim seems to have been removed from the employee-plaintiff's arsenal.

The "public policy" aspect of *Foley* also was very significant. Although it did not resolve the open question whether a "public policy" claim may be based on a non-statutory policy, the 6-1 majority held that, even where a statutory policy is asserted, the critical inquiry is whether it "effects a duty which inures to the benefit of the public at large rather than to a particular employer or employee." Applying this rule in the context of *Foley* was easy inasmuch as the plaintiff based his position on an alleged statutory duty of employee loyalty designed to protect employers. We had argued that invoking a policy of this sort as a predicate for imposing tort liability on the employer was similar to the proverbial "burning of the village to save the village."

The Court's refusal in *Foley* to broadly expand the scope of *Tameny* likely will be felt in quite dissimilar contexts. Whereas prior court rulings arguably suggested that employees automatically could invoke *Tameny* as a basis for private enforcement of most employee protective legislation (except those provisions with comprehensive enforcement mechanisms), *Foley* suggests otherwise.

For example, Labor Code Section 432.2 prohibits an employer from discharging an employee for refusing to submit to a polygraph exam; it provides misdemeanor penalties, but is silent as to a right of civil enforcement. We would argue that under *Foley*, this is a classic example of a statute which "simply regulate[s] conduct between private individuals." The proper focus should be whether the Legislature *implicitly* intended to confer a private civil cause of action on behalf of individual employees. See, e.g., *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287 (no implied right of action for statutory violation).

A disappointing aspect of the *Foley* decision was the Court's treatment of the "implied" contract issue. In connection with both the statute of frauds and implied contract formation questions, the Court mischaracterized our arguments and failed to deal with its own arguably contrary case authority. Be that as it may, we are most concerned that the Court's endorsement of the vague set of *Pugh* criteria may result in many cases having

to be tried where, in reality, there was no "implied" job security agreement.

On the other hand, the implied contract discussion in *Foley* is noteworthy from the employer standpoint because it does make very clear that in analyzing questions of implied agreement, courts may only enforce the "actual understanding" of the parties. The decision also seemingly downplays the significance of employment longevity. Rather than providing an independent basis for finding an implied agreement, longevity seems relevant only to the question whether the employee was employed for "sufficient time for conduct to occur on which a trier of fact could find the existence of an implied contract."

What Foley Did Not Decide

The most disquieting aspect of *Foley* was the Court's last footnote which left open the question whether the decision was to have any effect on other pending cases.

The retroactivity issue hopefully will be resolved quickly in *Newman v. Emerson Electric Co.*, Case No. LA 32284, a pending wrongful discharge case, which the Court has just selected as its vehicle for determining this issue.* The Court undoubtedly intends to decide *Emerson* quickly inasmuch as all briefing will be completed by February 6, 1989.

Whenever the issue is ultimately resolved, however, it seems likely that *Foley* will be accorded full retroactive effect.

Under California law, as stated in a decision authored by Justice Broussard, even in those relatively rare instances where the Supreme Court overrules one of its own decisions, the "general rule" is that "overruling decisions are to be retroactively applied." *Peterson v. Superior Court*, (1982) 31 Cal.3d 147, 151-52.

Although the Court has "recognized exceptions to that rule when considerations of fairness and public policy preclude full retroactivity," there must be a "compelling reason" for disregarding the general rule.

The position for retroactivity is even stronger where, as here, the decision in question did *not* overrule prior Supreme Court precedent.

Under those circumstances, as Justice Mosk succinctly explained in *People v. Guerra* (1984) 37 Cal.3d 385, 399-401, there must be a threshold inquiry (i) whether "the decision establish[es] a new rule of law" and, if so, (ii) whether "there [was] a prior rule to the contrary." Neither part of this test is met by *Foley*.

The "seminal" implied covenant case, *Cleary v. American Airlines* (1980) 111 Cal. App.3d 443, was vigorously attacked from the start by the employer community and, significantly, even was implicitly criticized by Justice Grodin in *Pugh*. The most (and perhaps only) comprehensive treatment of the issue was not rendered until late 1986, after *Foley* already had been briefed and argued for the first time before the Supreme Court. See *Koehrer v. Superior Court* (1986) 181 Cal. App.3d 1155. The lack of any preexisting rule is further underscored by the divergent rulings of the lower courts. And, whatever the existing body of Court of Appeal precedent, it defies imagination for any employee to claim that he "relied" upon *Cleary* in getting fired.

Indeed, the *Foley* majority expressly recognized that there is no basis for a claim that employees had come to rely upon the existence of tort suits for breach of the implied covenant in connection with employment disputes.

Commenting upon Justice Broussard's contrary contention, the Court declared that "[e]ngaging in interpretation of the law for the first time hardly amounts to a 'radical restructuring' of the law. . . ." [fn.28.] Furthermore, the majority firmly contended that "our statements in *Seaman's* [decided in 1984] were far

from a definitive signal of approval for a tort remedy for breach of the covenant in employment cases. If anything, the reference highlighted the fact this question remained to be decided by this court." [fn. 27.]

Another important issue left open by *Foley* is whether there can be an implied job security agreement in the face of a prior written "at will" contractual provision. The majority seemingly recognized that at least one Court of Appeal decision held there cannot,³ and did *not* disapprove it. On the other hand, under the majority's analysis, a written contract arguably is as subject to implied modification as it is to oral modification. See, e.g., *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 317-18 (discussing circumstances when this can occur). The difference, of course, is that it should be very hard to argue that an employer implicitly has agreed to modify a written at will provision. This should be especially true where the employer periodically reaffirms the at will nature of its employment relationship.

In the breach of contract arena, the majority also declined to rule on the proper measure of damages where a breach has been proven.

Are discharged employees entitled to expected compensation through the time they otherwise would have died or retired (and do not forget that mandatory retirement policies have been abolished by age discrimination statutes)? Or, in the absence of express agreement, will implied agreements generally be interpreted as being only for a "reasonable" period of time? Whereas some cases have discussed the standard for termination (e.g., "good cause" or "good faith"), few have analyzed separate questions pertaining to the length of the allegedly agreed-upon term of employment.

A related damages question was raised by Justice Broussard in his separate opinion where he suggested that, at least in some instances, emotional distress damages *may* be an appropriate remedy for a breach of contract. In all due deference, we believe that it is far-fetched to treat an employment contract similarly to how Justice Broussard treats agreements to safely keep a family heirloom or to properly bury or cremate loved ones. But, resigning ourselves to the probable, this issue probably will have to be litigated time and again before a definitive appellate ruling is rendered.

Finally, *Foley* failed to resolve the strong split among the lower courts as to whether courts can formulate "public policy" in *Tameny* cases or, conversely, whether the "public policy" must be statutory or constitutional in origin. Because of the way the Court defined "public policy," this issue may not be as significant as it once was.

Other Open Issues

As we enter the post-*Foley* era of "wrongful discharge" cases, there are many other important issues, other than those mentioned above, which need to be answered as soon as possible.

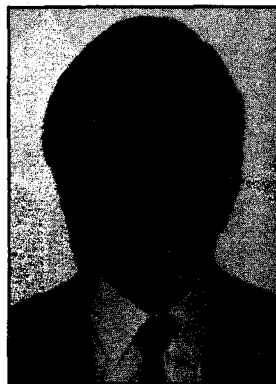
Among the issues not presented in *Foley* are important questions relating to the impact of the exclusivity provisions of the workers' compensation statute on employee emotional distress damage claims. Although now diminished somewhat by the elimination of the implied covenant tort claim, this issue will remain present in connection with a number of remaining tort claims, including intentional and negligent infliction of emotional distress, *Tameny* causes of action and discrimination under the Fair Employment and Housing Act ("FEHA"). A case dealing with a number of pertinent issues — *Shoemaker v. Meyers*, (1987) 192 Cal.App.3d 788, review granted (8/26/87) — has been

Continued on Page 7

Letter From the President

Writing a column addressed to the best business trial lawyers in California, the members of the Association of Business Trial Lawyers, provides an irresistible opportunity to solicit your views on the direction of the Association and to discuss two other issues of present concern: "Rent-A-Judges" and the impact of Appellate Court overload.

The Los Angeles Association of Business Trial Lawyers is a unique organization. No other local or regional bar association exists exclusively to serve the needs of business trial lawyers. In many respects the Association is analogous to the Section of Litigation of the American Bar Association, with more than 50,000 members, mostly business trial lawyers from around the United States.



Peter I. Ostroff

Since the ABTL was founded approximately 15 years ago, we have addressed ourselves to presenting the highest quality educational programs and providing an opportunity for business litigators to meet and communicate with members of the local judiciary respecting issues of mutual concern. These functions have been performed exceedingly well and with unprecedented success.

The issue that now confronts us is whether the Association should perform other functions. There are a number of possibilities.

We could form committees that address specific substantive areas of business litigation and develop specialized programs and publications. For example, the ABTL could establish committees devoted to antitrust, intellectual property, environmental and/or creditors' rights litigation. Similarly, we could form committees that facilitate litigation practice, such as computer utilization. The Association could take the initiative in solving problems within the civil litigation system, such as trial court delay and modernization/computerization of court administration. We could take a more affirmative role in proposing legislation.

Members of the Board of Governors of the Association are considering these issues now and welcome your input. Please communicate your thoughts to me or any other member of the Board. We would also welcome your active participation in any present or future Association activities.

The Rent-A-Judge Phenomenon

One of the problems that the Association could tackle is court congestion, and one solution may lie in the so-called "Rent-A-Judge" phenomenon: "private judging" by a substantial number of retired judges, principally from the Los Angeles and Orange County Superior Courts.

I heard recently that the term, "Rent-A-Judge", was coined by former California Supreme Court Chief Justice Rose Bird and was intended to be pejorative. Notwithstanding its origin, the term is now widely understood and used without negative connotation. In any event, there is no question that utilization of "private judges" is spreading and is becoming more sophisticated.

Continued on Page 8

Proposition 103

Continued from Page 1

specific provisions of the California Insurance Code. *Chicago Title Insurance Company v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 70 Cal.Rptr. 849, 44 P.2d 481.

Furthermore, the McBride-Grunsky Act, which allows carriers to act in concert in setting rates, specifically provides that actions allowed by the Act shall not be the basis of prosecution or civil proceedings under any other law of the State that does not specifically refer to insurance. This particular passage effectively provides immunity from the provisions of the Cartwright Act.

To the extent that any confusion existed as to the application of state antitrust laws to California's insurance industry, Proposition 103 makes it clear that California insurers will henceforth be subject to the State's antitrust provisions and unfair business practices laws. Proposition 103 amends the California Insurance Code by adding Section 1861.03, which provides that the business of insurance in the State of California shall be subject to all laws applicable to any other business including, but not limited to, the Unruh Civil Rights Act and the antitrust and unfair business practices laws. Furthermore, of the 39 California Insurance Code sections Proposition 103 repeals, 15 of those sections protected activities involving concerted rating efforts described above.

Successful implementation of the provisions of Proposition 103 will likely subject insurance companies throughout the State to increased antitrust challenges. This is especially true when it is considered that, prior to the passage of Proposition 103, California law permitted many acts now made illegal. This portion of Proposition 103 is now in force, the Supreme Court having dissolved its previously issued stay.

California insurers have had opportunities over the years to share information and act in unison in the making of rates and performing other functions essential to the underwriting process and issuance of insurance. Proposition 103 orders the repeal of those California Insurance Code provisions allowing such activity by the insurers.

Activities and conduct previously allowed by the California Insurance Code are clearly not authorized with the passage of Proposition 103. This previously lawful conduct can now be the subject of legal challenge.

Business trial lawyers who practice in the antitrust area are likely to be called upon with greater frequency for advice and defense of public and private rate-making cases and market withdrawal cases like that commenced by Attorney General Van de Kamp earlier this year involving the alleged conspiracy of insurers to refuse to write certain types of coverages.

In the Next Issue: **The Trial Delay Reduction Act**

How is the Trial Delay Reduction Act doing in Los Angeles County's Central District?

The next issue of *ABTL Report* will feature an interview with several judges involved in the program. They will comment on how the program has impacted civil litigation practice in Los Angeles County and how lawyers can use the program to their advantage.

Another provision of Proposition 103 which has similar antitrust ramifications repeals the California Insurance Code provision which to date has generally prevented banks from becoming licensed insurance agents in this State. The entrance of banks into the insurance agency and brokerage arena likewise brings with it numerous questions regarding further antitrust concerns.

The Banking Industry: New Participants

Proposition 103 orders the repeal of California Insurance Code § 1643 which, for the past ten years, has generally prohibited any bank, bank holding company, subsidiary or affiliate from being licensed as an insurance agent or insurance broker. (Banks, even under current law, may be issued an agent's license for selected lines and under special circumstances.) California banks have not hesitated to express their desire to become insurance agents. Both Security Pacific National Bank and First Interstate Bank have already expressed their interest to enter the market and are beginning appropriate preparations to do so. Banks that have spoken out on the issue feel that the sale of insurance helps keep the banks competitive with other financial institutions such as brokerage firms and savings and loan associations.

While many banks appear to be quick to jump on the agent bandwagon, other institutions are apparently choosing not to take advantage of Proposition 103. This may be due to earlier failed efforts of some banks to enter the insurance business indirectly in the early 1980s by permitting insurance companies to market their products in bank branches.

Banks have desired to enter the insurance agency business for many years. The California Bankers Association has indicated that the insurance agency issue has been its No. 1 legislative priority for more than ten years. Producers of insurance in California and their potent trade associations have been the major opposition to banks entering the insurance agency business.

Opposition to banks entering the insurance agency business was highly organized and very effective in the Legislature. When the applicable Insurance Code provision, Section 1643, was set to expire in 1979, the California Legislature enacted a permanent ban against banks entering the insurance business. The support of the bill was overwhelming, having 99 co-authors. Then Governor Jerry Brown promptly vetoed the measure. The Assembly and Senate then voted to override Governor Brown's veto, making the ban on banks entering the insurance business permanent. At that time, Governor Brown's vetoes had only been overridden twice. The California voters have now accomplished what the banks were previously unable to do.

Significant reasons exist for entering into the insurance agency business, according to the banks. Bankers point to the ability to earn commission income as well as provide "full-service" financial services to their customers, enabling solidification of bank-customer relationships. Banks additionally believe they may be able to obtain lower rates for various insurance products through the representation of potentially thousands of customers. This may, in fact, result in lower insurance prices for bank customers.

The provision of Proposition 103 permitting banks to sell insurance in this state allows California banks to join institutions in twenty-five other states already allowed to sell insurance.

Opponents of this provision have already expressed their intent to challenge the ability of banks to sell insurance in California. The effects of this provision on smaller insurance agencies in the state are obvious. Access to the consumer market as well as the substantial marketing capabilities of banks may drive smaller agencies out of business. In this light, opponents state that implementation of this provision of Proposition 103 could open the door for coercive business practices on behalf of banks,

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such as the insistence that customers buy the bank's insurance in order to obtain loans. Such illegal "tie-in" sales, however, are expressly prohibited by California Insurance Code Section 770.

Bank involvement in the insurance agency business also suggests further problems in the antitrust area. If banks are successful, as they anticipate, market shares should grow dramatically in favor of these financial institutions. As these shares grow, restraint of trade concerns obviously grow as well.

Business litigators representing banks will obviously be faced with other new problems and concerns. Banks will likely enter into insurance agency agreements encompassing a myriad of issues and concerns which arise from the insurer-agent relationship.

Additionally, banks choosing to enter the insurance agency business will necessarily have to be licensed by the State of California. Proposition 103 does not remove the administrative responsibility for policing agent banks from the Department of Insurance. Such licensing will subject banks to the scrutiny of yet another regulatory agency, the California Department of Insurance.

The banks' participation in the insurance agency business will also subject them to provisions of the Unfair Practices Act of the California Insurance Code, Section 790, *et seq.* Specifically, as agents or brokers, banks could be exposed to the provisions of Insurance Code § 790.03, setting forth prohibited acts of those engaged in the business of insurance.

Banks, unlike many agents, will certainly be the subject of bad faith actions which may arise from the selling of insurance. As "deep pockets," it can be fully expected that banks will be considered target defendants along with the insurance company issuing the policy. Although the California Supreme Court in *Moradi-Shalal v. Fireman's Fund Insurance Companies* has recently limited the effects of Insurance Code § 790.03 as it applies to third party claimants under insurance policies, exposure to litigation from their first party insureds may still exist as does common law bad faith exposure.

Availability of Business Insurance

As to lawyers representing insurance companies, one of the largest purchasers of legal services, initiatives such as Proposition 103, which impact on the insurance industry, certainly equally impact on the legal community.

Insurers in this state are now in a difficult position. Insurers have called the mandate of Proposition 103 "impossible" and at one point, 47 different insurance companies had announced they would be leaving the California insurance market. Many of the carriers making such announcements were primarily involved in the auto insurance industry, but the ripple effect of Proposition 103 will be felt in all areas of the property and casualty industry.

It has been speculated that smaller property and casualty insurers may leave the state if Proposition 103 is indeed fully implemented. The effect of a mass exodus from the California insurance market, should it occur, would result in substantially decreased availability of certain lines of insurance.

Some lines, such as Directors & Officers and professional liability insurance, which already are difficult to find and expensive to purchase, may be more affected than other lines. Decreased availability of coverage may eventually lead to gaps in the insurance protection available to individuals, professionals and corporations alike. Decreased defense and indemnification possibilities may lead to substantial changes in the way business litigation is handled.

Proposition 103 will not signal the death knell for insurance

Continued on Next Page

Proposition 103

Continued from Page 5

availability in this state. Carriers are necessarily committed to the California market because of its huge population and commercial base and, as such, would have no viable alternative other than withdrawal from California or dissolution.

As a result of rate regulation, however, those carriers writing solely in this State may be forced to change policy forms in an effort to reduce exposure on individual insurance contracts. These policy form changes could take the form of additional exclusions, renewed consideration of claims made as opposed to occurrence policy forms and greater implementation of the decreasing limits concept. (The decreasing limits provision in an insurance policy allows the reduction of the aggregate limits available for indemnification by the amounts spent in defense of a claim.)

The effects of decreased availability of coverage or changes in policy forms have obvious serious and dramatic effects on business litigation. Many cases involve insurance protection for both the defense and eventual settlement.

Insurance carriers financially bound to the California market will have to implement countermeasures to offset what the industry describes as substantial rate rollbacks in the property and casualty markets. It remains unclear as to the actual effect of Proposition 103 on commercial lines. Analysts have suggested that premium rates for many commercial lines are currently below the levels that would be required under Proposition 103. However, the far reaching effects which would come about in the personal lines auto insurance markets may substantially impact the other lines of the property and casualty industry. Carriers that feel compelled to stay in the California auto insurance market may have to make sweeping changes in property and casualty lines offered in order to provide some offset to diminished income as a result of the rate rollbacks.

Insurance Agency Rebating

For over fifty years, California law prevented any insurer, agent or broker from paying either directly or indirectly as an inducement for the sale of insurance any rebate of the whole or part of the insurance premium. (California Insurance Code § 750) Proposition 103 orders the repeal of this section.

The effect of the repeal of § 750 is somewhat unclear. The ability to rebate portions of a premium will, in all likelihood, favor the larger insurance producers in the state. Banks choosing to become insurance agents will be one of the prime beneficiaries of this repeal.

The anti-rebating provisions in California served to allow smaller independent agencies to maintain their business share in this state. As in other areas, where discounting or rebating was previously not allowed (such as the liquor business), it is likely that "super" agencies will develop. The ability to offer discounts or premium rebates is affected by the volume of business any particular producer writes. The smaller independent agencies will not be able to compete against the larger agencies whose volume will allow some degree of rebating.

Just as with the notion of banks entering the insurance

business, this provision will likely incite substantial opposition from the independent agents and brokers lobby. Increased litigation is anticipated, especially in light of the repeal of the antitrust exemption formerly available to insurers in this state. Charges of antitrust violations and unfair competition are the probable result of the enactment of this particular provision of Proposition 103.

Insurance Company Directors

Proposition 103 puts many insurers in a difficult situation. Most, if not all, of the California insurers have stated that the mandatory rate rollback prompted by Proposition 103 is virtually impossible to bear. What steps can then be expected from the board of directors of companies faced with the effects of Proposition 103?

Many of the insurance companies involved in this state are, of course, publicly traded companies whose boards of directors owe fiduciary obligations to the company's stockholders. Should company executives and directors merely take the mandated twenty percent rate rollback allowing the depletion of accumulated capital and surplus? The choices are difficult and unfortunately few.

Some insurance company executives have suggested a withdrawal from the California insurance market, at least for a period of one year. After one year, carriers can submit their proposed rates to the California Insurance Commissioner with the documentation the carriers believe will support the rates set. However, Proposition 103 provides that severe sanctions may be ordered against insurers violating the provisions of Proposition 103.

There are numerous other issues raised by Proposition 103. Virtually every business trial lawyer will somehow be affected by Proposition 103. Proposition 103 mandates changes in the tax structure affecting insurance companies — it requires the election of an insurance commissioner and the organization of a non-profit corporation to protect the rights of insurance consumers. Furthermore, the provisions establish the need for an enormous number of rate hearings before the insurance commissioner as well as miscellaneous proceedings involving insurers seeking exemptions from the rate rollback provisions because of the substantial threat of insolvency.

The United States' insurance industry economic base and power is awesome, controlling approximately \$1.4 trillion in assets, including \$650 billion in bonds and \$210 billion in mortgage loans for commercial real estate. It is clear that the insurance industry will take whatever steps it feels necessary to protect its substantial interests in the California insurance market by vigorous litigation and future legislative efforts.

We must now wait until the California Supreme Court decides, whether or not the "voter revolt" exemplified in Proposition 103 will become the law of this State. If the recent ruling of the Court, permitting implementation of Proposition 103, (with the notable exception of the rate rollback) is any indication, it looks as if the far reaching ramifications of this proposition are here to stay.

—Edward E. Corey

Foley Has Arrived

Continued from Page 3

pending before the Supreme Court for a long time, although it has yet to be argued.

Emotional Distress Issues

A related question which the courts finally will have to resolve relates to the applicability of the intentional infliction of emotional distress in the employment context. It would appear that *Foley's* broad conclusions that the employment relationship cannot be analogized to the insurance relationship and, instead, should be treated like all other contractual relationships, as well as its policy objections to standardless imposition of tort remedies in the employment setting, will result in decreased judicial reliance upon the intentional infliction tort.

Another important preemption issue — that involving the viability of common law causes of action for employment discrimination — is pending before the Second District Court of Appeal in *Rojo v. Kliger* (1988) 205 Cal.App.3d 646, rehearing granted (11/22/88). Existing precedent strongly diverges from *Rojo's* initial conclusion that the FEHA remedy is merely cumulative to common law remedies. *Rojo* also potentially raises the question whether Article I, Section 8 of the California Constitution provides a remedy for employment discrimination distinct from that of the FEHA.

Enforcing Arbitration

Finally, although the issue has not yet been actively litigated, there will be increasing attempts by employers to impose or enforce existing provisions for informal resolution of employment disputes. Whereas arbitration agreements conforming to the statutory model of a quasi-judicial hearing likely will be enforced, there remain many questions as to the necessary requirements.

In addition, many employers utilize extremely informal procedures without use of attorneys, formal testimony and/or outside decision-makers. Courts seem to have an inherent distrust of these processes. But, if as *Foley* teaches, it is not unreasonable or unconscionable to provide for an at will employment relationship, it would hardly seem inappropriate to require any dispute under a claimed employment agreement to be resolved under the employer's policies — whatever they are.

—Steven G. Drapkin

¹Some prior Court of Appeal decisions treated the "implied covenant" as a distinct exception to Labor Code Section 2922. See, e.g., *Koehrer v. Superior Court*, (1986) 181 Cal. App.3d 1155.

Jeaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal.3d 752.

³Fn. 23, citing *Shapiro v. Wells Fargo Realty Advisors*, (1984) 152 Cal.App.3d 467.

*We have submitted an amicus brief in *Emerson* on behalf of the Merchants and Manufacturers Association.

Dinner Program To Highlight 'Eighth Floor' Judges

"The Eighth Floor 1989: Law and Motion and Writs and Receivers" is the topic for the next ABTL dinner program on February 15, 1989 at the Los Angeles Biltmore Hotel.

The program will highlight each of the Law and Motion and Writs and Receivers Judges sitting in the Central District of the Los Angeles County Superior Court for calendar 1989.

Appearing as panelists:

- Law Department's Supervising Judge Miriam A. Vogel (Department 88)
- Law and Motion Judge David Yaffee (Department 82)
- Law and Motion Judge John Zebrowski (Department 84)
- Writs and Receivers Judge Kurt Lewin (Department 85)
- Writs and Receivers Judge Dzintra Janavas (Department 86)

Traditionally this has been one of ABTL's most popular programs. Reserve your calendar for February 15. Cocktails begin at 6:00 P.M. and dinner at 7:00 P.M. The charge is \$35 for members, \$45 for non-members.

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REPORT

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Our private judges are becoming directly involved in dispute resolution through both classic adjudication by formal trial and also other, more innovative, means. Private judges can be used to conduct formal jury trials in a courtroom setting and can often become involved far earlier than judges in the litigation process to serve as mediators in settlement conferences and/or to provide objective evaluations of the factual, legal and emotional merit of a dispute.

The issue is whether there is something "wrong" with this.

Interestingly, the Rent-A-Judge phenomenon has increasingly come under attack as a system of "Cadillac justice," or "Rolls Royce justice," or "justice for the rich," with critics arguing that there is something inherently unfair about a system which permits wealthy litigants to hire the highest caliber judges and achieve a prompt, relatively inexpensive trial conducted by a top quality jurist. At the same time, the argument goes, less fortunate litigants must patiently wait their turn for a number of years for a public "free" courtroom and judge who has not yet succumbed to the blandishments of the private sector to adjudicate their disputes. Another criticism is that as the wealthy "abandon" the system, there will be pressure to improve the system. Critics compare this phenomenon to the abandonment of public schools by the well-to-do in many urban areas.

Still another concern is that the "private" resolution of important issues contributes nothing to the development of the law that may otherwise occur if appellate courts had the opportunity to address the cases that are removed from the system. (More about this below.)

I must admit that I do not place much stock in these so-called shortcomings. My present purpose is to raise a limited question: To what extent, if any, should we as advocates consider these questions when we consider whether to utilize private judges to assist in solving our clients' litigation problems.

This one is easy — none.

I understand the contrary arguments, but I consider them outweighed by other considerations. It is in the interest of our civil litigation system that all litigants be encouraged to resolve their disputes in any lawful, prompt fashion. The adjudication of certain disputes by private judges outside of the public system is no more harmful or "unfair" than a private settlement arranged between parties whose lawyers were skillful enough to find a basis for compromise at an early opportunity.

Our responsibility is to use all of our skills, including creativity and imagination, within the bounds of the law and canons of ethics to achieve the best possible results for our clients in as expeditious and economical fashion as possible. The private judge/alternative dispute resolution option is a perfectly responsible and legitimate one that should be considered fairly on its merits, unfettered by these dubious reservations.

Appellate Congestion

Our appellate courts, as well as our trial courts, are seriously overloaded. Unfortunately, little attention has been given to the fact that the appellate courts do not have time because of the crush of work to resolve important civil litigation issues.

There are more appellate courts today and they are busier than ever before. Thus, while it cannot be said that our courts are productive, it is fair to observe that they do not seem to have the time to resolve significant open issues facing business litigators. As lawyers, we understand the importance of rules, whether emanating from the legislature or the courts, that have

sufficient clarity to enable us to predict with some degree of accuracy how a given court will resolve a dispute. The more clear the rules, the more likely disputes can be avoided or resolved. The converse is equally true. To the extent that our courts do not perform their function of resolving disputes in areas left open by the legislature (and significant "open" areas will always exist), disputes which cannot be resolved by the parties will proliferate.

Two significant examples of issues long left unresolved by California appellate courts are in the areas of breach of the implied covenant of good faith and fair dealing and wrongful discharge. Our courts have had numerous opportunities to clarify, in a comprehensible fashion, circumstances in which conduct generally regarded as a breach of contract may give rise to tort remedies. Unfortunately, little guidance is provided by the overly broad treatment of "bad faith" breach/denial of existence of a contract in *Seaman's Direct Buying Service, Inc. v. Standard Oil of California*. The *Seaman's* decision has served to create, not resolve disputes.

In the wrongful discharge area, it took three years for the California Supreme Court to decide *Foley v. Interactive Data Corp.* These cases presented important issues bearing on the scope of wrongful discharge, the circumstances in which an employee may prove a tort claim against his or her employer based on an alleged oral promise of continuous employment notwithstanding the statute of frauds, and the availability of a tort claim for breach of the implied covenant of good faith and fair dealing in an employment contract.

The Supreme Court has now ruled on these issues and answered many open questions. However, the lengthy delay was not helpful. The absence of clear judicial direction fosters an unhealthy atmosphere of uncertainty. From this uncertainty more disputes and consequently more litigation arise.

In view of the enormous talent that exists among our appellate judges, this comment is not fairly directed at the judges, but, rather, is an observation of an impact of the overburdened system that now exists. One challenge is to assist in devising ways to reduce or eliminate this problem.

Settlement Officer Program

The Association has been actively involved in the Superior Court's program of using experienced trial lawyers to serve as voluntary settlement officers. The voluntary settlement officers provided by the Association serve on Wednesdays, once or twice a year, and conduct settlement conferences in business cases. If you have at least ten years experience, have tried at least five cases and would be willing to serve as a voluntary settlement officer, please contact me at 553-8100.

— Peter I. Ostroff

Contributors to this Issue:

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