

Employment Law: A N E V E R E N D I N G S A G A



By *Olivia Goodkin*

A. At Will Employment

The general rule in California is that employment is "at will," meaning that employees may be terminated for any reason with or without prior notice. One exception to the general rule is that the termination may not breach a contract of employment between the parties. A wrongful termination case is easy to decide

when there is a written contract outlining the specific grounds that could lead to an employee's termination. The case is much harder when the employee argues that his or her longevity at the company, combined with other factors, supports a finding of an "implied" contract between the parties, allowing termination "for cause" only.

On October 5, 2000, the California Supreme Court issued an opinion in *Guz v. Bechtel*, a case involving the termination of a longtime employee of Bechtel. The court discussed when an employee can successfully sue an employer for wrongful termination based on an "implied" contract. The court reiterated the rule that a contract can be implied from a combination of factors, such as longevity, promotions, raises, actions or communications by the employer, assurances, etc., and that each case must turn on its own facts. The court made clear, however, that longevity alone is not enough to form an implied contract. Furthermore, a statement in the employee handbook providing that the employment is at will, combined with the general presumption of at will employment, is enough to shift the burden of proof to the employee to show that the employment is not at will.

What evidence is needed by an employee to establish an implied contract that he or she may be terminated only for cause? The court found that the employer's written personnel policies and procedures, upon which employees rely, can form a contract between the parties. While the policy manual may state that employment is not guaranteed, an employer may be bound to follow its procedures

and policies regarding discipline and termination, if the dismissal was based on lack of performance.

Based on the *Guz* case, we suggest that you review both your written and unwritten policies regarding discipline and termination. If you have questions about which discipline procedures or other policies should or should not be included in your handbook, your attorney should be consulted.

B. Arbitration Agreements

Many of you may have heard about the California Supreme Court decision regarding the legality of agreements requiring employees to arbitrate discrimination claims against employers. The case is *Armendariz v. Foundation Health Psychcare Services, Inc.* and it provides guidelines as to when arbitration agreements will be held valid.

There are five key points which must be included in arbitration agreements. First, all arbitration agreements must provide that a neutral arbitrator will hear the dispute. Second, the agreements may not limit the employees' remedies. For instance, if the employee would have been entitled to punitive damages if the claim had been filed in court, then the employee must be entitled to present that claim for damages in the arbitration. Third, the parties must be allowed at least minimal pre-hearing discovery, such as seeking production of documents from the opposing side. Fourth, the arbitrator is required to issue a written arbitration decision that reveals the essential findings and conclusions on which the award is based. Finally, the employee must not be required to pay any of the arbitration costs in excess of what it would have cost to file the case in court.

We suggest that employers review their arbitration agreements to see if they comply with the ruling in *Armendariz*.

Olivia Goodkin recently spoke before the California Society of CPA's Pasadena Discussion Group on the essential provisions of an employee handbook. She can be reached at (310) 286-1700 or at OG@RUTTERHOBBS.COM

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PREMARITAL AGREEMENTS

By: Marshall Rutter

Our founding partner, Marshall Rutter, who practices both family law and environmental law, was recently interviewed by Laura Diaz for broadcast on KABC-TV Eyewitness News. The topic was premarital agreements (“PMAs”) (frequently referred to as “prenuptial agreements” or “prenups” for short). Here is a summary of his comments.

PMAs have been featured prominently in the news in the aftermath of two recent California Supreme Court decisions. One, Marriage of Bonds, was especially notable as it involved Barry Bonds, the San Francisco Giants left fielder whom Los Angeles baseball fans love to hate. His PMA with a Swedish immigrant, who spoke English as a second language and was not represented by a lawyer, was upheld by the trial court when they divorced. The Supreme Court ruled that these circumstances and the prospective wife’s lack of a lawyer when entering into the PMA did not automatically mean it was unenforceable. The PMA was allowed to stand.

The other newsworthy case was Marriage of Pendleton and Foreman. For the first time, the California Supreme Court ruled that intelligent, well-educated persons who have substantial wealth and earning ability and are represented by competent lawyers can effectively include in their PMA a knowing waiver of spousal support (“alimony”). In a number of prior California cases, such a waiver was found to be contrary to public policy as promotive of divorce and, therefore, unenforceable.

These important cases have focused attention on PMAs as financial planning devices for prospective spouses. In the past, they have been used most often in second marriages of very wealthy people in September-June relationships. Today, with people marrying later in life after already accumulating wealth, PMAs are also popular among first-time married persons.

So what is a PMA and what can it accomplish? Under the California Premarital Agreement Act, Family Code Sections 1600 et seq., a PMA is a contract between prospective spouses which must be in writing and signed by both parties. There is no requirement for consideration (quid pro quo) other than the mutual promises of the parties. It becomes effective when they marry. PMAs can effectuate adjustments or transmutation of all sorts of property rights. They can change separate property to community property or, most often, preserve currently owned separate property or property to be acquired in the future as separate property. Rights in businesses, securities, options, life insurance policies, and real or personal property can be disposed of or acquired.

What PMAs must not be is involuntary (“We’re not walking down that aisle unless you sign this PMA!”) or unconscionable (“Everything is mine and nothing is yours”) although the Bonds case seems to move in that direction. Finally, each party needs to make a full and accurate financial disclosure to the other or knowingly waive it. PMAs cannot affect the duty of a parent to pay child support.

To assure the enforceability of a PMA, one should insist that both parties be represented by competent, experienced family lawyers who actively participate in negotiating the terms of the PMA. A PMA should be discussed and negotiated well in advance of the marriage to assure that it is voluntary. A PMA is dreaded by some who think that it suggests a marriage may not last, but a PMA can be viewed as an estate planning device too. When parties with a PMA die, the provisions of the PMA may help establish the separate or community character of property, whether the parties mutually agreed to maintain life insurance for the other, and the like. In view of an increasingly complicated and affluent society, not to mention the continuing high rates of divorce, PMAs can play an important role in organizing people’s financial affairs.

If you would like to discuss a premarital agreement with Marshall Rutter in a free initial consultation, he can be reached at (310) 286-1700 or MAR@RUTTERHOBBS.COM.

**B R I E F
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Margaret Echevarria is a litigation attorney who specializes in business, employment, and real estate matters. Margaret received her law degree from UCLA, but prior to doing so, she wrote advertising copy, studied classical piano, taught English to foreign speakers in Switzerland and France, and worked as an IBM systems programmer. For two years, Margaret also served as an elected trustee of the El Segundo Unified School District. Margaret is married and has two children.

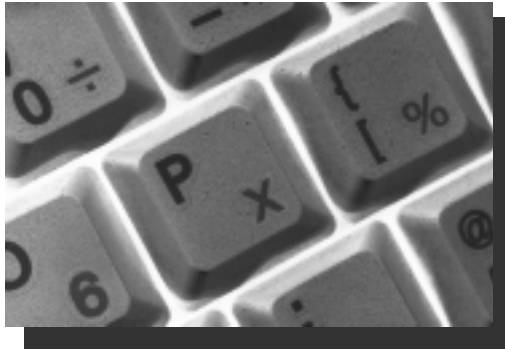


Susan C. Yu, who is fluent in Korean, Russian and Japanese, is our most recent addition to RH&D. Susan practices in the firm’s litigation department with an emphasis on commercial business litigation. She received her Juris Doctor, *cum laude*, from Syracuse University College of Law, where she was a Dana Hinman Scholar and Editor of the *Syracuse Journal of International Law and Commerce*. Susan is married and has a son.

NOTES FROM CYBERSPACE

UCITA: New Code For A New Mode *By: Sam Poss*

Hundreds of lawyers throughout the country were involved in a nine-year process, culminating in the adoption of a controversial, uniform set of laws applying to the computer industry. The uniform act is called the Uniform Computer Information Transactions Act (UCITA) and was adopted by the National Conference of Commissioners on Uniform



State Laws. UCITA applies to transactions central to the modern digital information economy such as electronic contracting, creating,

licensing, and selling computer software and computer games, and contracts for access to multimedia products and online data bases. Whether the UCITA will become enforceable law in California or other states will be left to the decision of each state legislature. When this article went to press, only Virginia and Maryland had adopted UCITA, both with modifications.

However, concerns expressed by consumer organizations, the Federal Trade Commission, state attorneys general, and even leading corporations could erode support for UCITA or perhaps result in sending it back to the drawing board.

Prior attempts to apply existing law from the sale of goods to computer information transactions have been unsuccessful due to the fundamental difference between a computer program stored in a disk (information) and the disk itself (a good). The resulting law has often been confusing and inconsistent. Computer information transactions often involve multiple states with conflicting legal approaches. UCITA seeks to promote clarity, uniformity and predictability through rational application of principles of law relevant to computer information transactions while facilitating existing commerce in this area.

The length and complexity of UCITA make a comprehensive discussion of the Act impossible here. Instead, a few novel provisions are considered.

Electronic Contracting. Electronic signatures will be as effective as written signatures. More generally, "authentication," which includes electronic symbols and processes used with intent to execute, can have legal effect.

"Robot-to-Robot" Contracting. Going a step further, "Electronic Agents" such as software programs can enter into

enforceable contracts without immediate human contact, for example, a buyer and seller using search programs on the Internet to create a binding contract.

Information Warranty. A new implied warranty would apply to inaccuracies caused by a lack of reasonable care regarding information prepared for a specific party. Strict liability (which may apply in the sale of goods) was rejected to avoid a chilling effect on free speech.

Internet Transactions. Under UCITA, an Internet transaction for electronic transfer of information is generally governed by the law of the state where the licensor is located, solving a problem considered in the last edition of this column.

Remote Disabling Devices. Remote disabling devices are a powerful software licensor remedy. UCITA restricts use of these devices by requiring 15 days' notice, expedited judicial review for a licensee to enjoin this remedy and a bar against the licensee's waiver of consequential damages (such as lost profits) caused by wrongful remote disabling.

Even if adopted in most jurisdictions, it could take years to determine if state-by-state modifications of the Act jeopardize the underlying

goal of uniformity. The process likely will be an arduous one, subject to considerable controversy.

Whatever the result, applicable law can be

expected to evolve to meet ongoing changes in the modern information based economy.



Sam Poss recently served as a panelist at the iBreakfast pitch competition by technology and e-commerce start-ups which was held at eTV World's expo in Santa Monica, California. Sam is a business lawyer whose practice includes Internet, computer and high technology transactions. He may be reached at (310) 286-1700 or at SP@RUTTERHOBBS.COM.



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