LOS ANGELES
Daily Journal
www.dailyjournal.com

EMPLOYMENT: The 2nd District Court of Appeal beats the state Supreme Court to the punch in a recent employment decision on meal and rest breaks. By Frances Rogers of Liebert Cassidy Whitmore, **PAGE 6**

ENVIRONMENT: A 9th Circuit decision draws attention to whether CERCLA provides contribution protection for private party settlements. By Belynda Reck and Diana Biason of Hunton & Williams, **PAGE 7**

EMPLOYMENT: What should the plaintiffs' bar do in the law and motion arena to regain ground in the fight for employee rights? By Thomas L. Dorogi of Caskey & Holzman, **PAGE 8**

VOL. 123 NO. 214 THURSDAY, NOVEMBER 4, 2010 © 2010 Daily Journal Corporation. All Rights Reserved

AG Candidates Locked in Tight Race

Democrat Kamala Harris Clings to Thin Margin Over Republican Steve Cooley

By Emily Green
Daily Journal Staff Writer

SACRAMENTO — One day after Republican Steve Cooley prematurely declared victory in the race for state attorney general, his Democratic opponent Kamala Harris held onto a razor-thin lead.

With 100 percent of precincts reporting, Harris had 3,292,836 votes to Cooley's 3,277,998 as of Wednesday afternoon. Neither Harris nor Cooley has conceded the race, and both campaigns say they don't expect to know any results for a while.

Charles Moran, a spokesman for the Cooley campaign, called the next three weeks a "kind of a wait-and-see game."

California's 58 counties have 28 days after the election to count vote-by-mail ballots, provisional ballots and other ballots that are damaged or cannot be read by a machine.

"We may even be looking at some ballot integrity issues," said Moran, suggesting that the Cooley campaign may ask for a recount should the final vote tally still have Harris ahead. A statement from the Cooley campaign said the race could extend until counties report their results to the Secretary of State's office on Dec. 3. Any voter can request a recount between Dec. 1 and Dec. 5.

Brian Brokaw, a spokesperson for the Harris campaign, expressed cautious optimism about the results. "You've got to remember that 100 percent of precincts voting is not 100 percent of ballots," said Brokaw, adding, "We would rather be where we are than not."

There are typically a few hundred thousand uncounted ballots following Election Day, according to the Secretary

See Page 16 — POSSIBILITY

Associated Press
Republican attorney general candidate Steve Cooley

Arent Fox 'War Room' Readies for Election Challenges

By Brandon Ortiz
Daily Journal Staff Writer

LOS ANGELES — Three attorneys sat in Arent Fox's election "war room" in the firm's Los Angeles office Tuesday, watching election returns on one flat screen TV and teleconferencing with partner Mark F. "Thor" Hearne II on a second.

The attorneys were part of an 11-lawyer team split between Washington, D.C., Colorado and West Virginia, organized to respond to post-election legal issues.

"Our role is to be a problem solver so that people can still vote," said Hearne, a veteran election attorney who represented the Bush-Cheney campaign in 2004. Tuesday, the Washington-based partner monitored a computer glitch in Missouri's voter database that caused voting delays.

The team was on standby for its clients, the Republican Governor's Association and the National Republican Senatorial Committee, for any recounts and other post-election legal matters.

By Wednesday, Hearne had flown from Washington to Colorado to meet Los Angeles partner Steven Bledsoe and an associate to advise Ken Buck's senatorial campaign on a potential recount. Buck, a Republican, was trailing incumbent Democrat Michael Bennet by a razor-thin margin.

"The situation is obviously very fluid as they continue to count votes," said Robert C. O'Brien, partner-in-charge of Arent Fox in Los Angeles. "We're monitoring developments to see whether a recount will be triggered or not."

This is the busiest time of year for election attorneys, who advise candidates on campaign finance, recounts, ballot challenges, vote fraud allegations and other issues.

Arent Fox, based in Washington and with a growing Los Angeles office, and Chicago-based McDermott Will & Emery, represent Republicans in Senate and gubernatorial races this year.

Seattle-based Perkins Coie represents most Senate and House Democrats, but none of its California-based attorneys is involved in races this year.

O'Brien said it's difficult to predict what other election matters the firm may work on. He was anticipating recounts in a handful of close races, including one for a West Virginia congressional seat.

"Recounts are rare, but when they happen, those tend to be the biggest areas involving law firms," said O'Brien, who served as the U.S. alternative representative to the United Nations under President George W. Bush.

brandon_ortiz@dailyjournal.com

Townsend, Kilpatrick Will Merge After All

By Jill Redhage and Craig Anderson
Daily Journal Staff Writers

SAN FRANCISCO — After client conflicts stymied merger talks between the two firms this summer, San Francisco-based intellectual property law firm Townsend and Townsend and Crew announced Wednesday it is joining forces with Atlanta-based Kilpatrick Stockton.

The combined firm will be known as Kilpatrick Townsend & Stockton and will house approximately 650 lawyers. The merger becomes effective Jan. 1. William Dorris, co-managing partner of Kilpatrick with Diane Prucino, will serve as chairman of the combined firm. Prucino and Townsend's chairwoman, Maureen Sheehy, will be its co-managing partners.

In an interview Wednesday, Sheehy said Townsend decided to forgo its independence because the opportunity to merge with 500-attorney Kilpatrick was "too significant and great an opportunity to pass by."

She said the combined firm will be an intellectual property "powerhouse," with Townsend contributing a particularly strong patent prosecution practice and Kilpatrick adding a well-regarded trademark and copyright practice. Kilpatrick is also well-known for its construction practice and adds a corporate transactional practice to the mix. Both firms have established antitrust practices.

For most law firm mergers to proceed, the partner compensation systems at the two firms must align. Profits per partner were $812,000 at Townsend last year, thanks to several large lawsuits settling, making for a 15 percent jump from the year prior. Kilpatrick partners, meanwhile, earned an average of $615,000 last year. Dorris said partner compensation decisions at both firms are made subjectively according to bottom-up recommendations from the partners in each practice team, instead of through a formula-based system that creates an "eat-what-you-kill" ethos.

The firms share clients such as Apple Inc., and they expect to continue to represent existing clients including Levi Strauss & Co., Visa Inc., AT&T Inc. and PepsiCo Inc. Last year, Townsend pulled in $161 million in revenue while Kilpatrick drew $246 million.

The firms' lack of geographic overlap, with the exception of their offices in Washington, D.C., is also a plus. Besides its San Francisco headquarters, the 175-lawyer Townsend has offices in Palo Alto, San Diego, Walnut Creek, Seattle, Denver and Tokyo.

Kilpatrick has offices in Augusta, Ga., New York and three locations in North Carolina, as well as in Dubai and Stockholm. It has a new office in Oakland.

Dorris and Sheehy said Kilpatrick Townsend plans to expand to Los Angeles and to build a larger presence in Asia. They said they don't anticipate any lawyer layoffs because redundan-

See Page 5 — TOWNSEND

GUEST COLUMN

The elimination of hundreds of General Motors dealerships closes another chapter on justice unserved, writes **Jonathan Michaels** of Michaels Law Group.

At the stroke of midnight on Oct. 31, 2010, the landscape of the automotive industry in the United States forever changed. With the final tick of the second hand, dealer agreements for some 500 General Motors dealers expired, ending generations of businesses across the country. This, it was held, was the way the "New GM" would move forward.

While the fate of these dealerships may now be certain, the way that we arrived here is unsettling. The trouble began in 2008, when leaders from GM, Chrysler and Ford responded to the deep economic downturn by traveling to Congress in private jets, asking for bailout relief. As they arrived in ostentatious fashion, the corporate executives claimed that their companies would not remain viable without immediate taxpayer dollars. With the possibility of a collapsed automotive industry being too much to risk, the Treasury agreed to provide $80.7 billion in grants and loans to Chrysler and GM. However, before the funds were committed, President Barack Obama created the "Presidential Task Force on the Auto Industry" and the "Treasury Auto Team," two agencies sanctioned to review Chrysler and GM's restructuring plans. This is where the problems began.

In February 2009, both Chrysler and GM submitted restructuring plans that included a gradual reduction of their dealer network that, they claimed, would allow them to become "more competitive" with foreign competition. This move was generally consistent with the automaker's plans of consolidating franchises in smaller markets and discontinuing the Plymouth and Oldsmobile brands that had been in place since the 1970s. However, the Treasury Auto Team — lead by two non-industry executives (investment banker Ron Bloom and private equity group founder Steven Ratner) — rejected the two plans, giving the automakers 60 days to submit a "more aggressive plan" for dealership terminations, stating that it would be "a waste of tax payers' money" to not take this opportunity to significantly reduce their dealership networks. The Treasury Auto Team was looking to emulate the "Toyota Model," which suggested that smaller dealership networks would reduce competition among dealers and increase sales volume for the remaining

See Page 6 — KILLING

DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: Court improperly denies motion for extension to file opposition to summary judgment motion where request was reasonable and would not prejudice parties. *Ahanchian v. Xenon Pictures Inc.*, U.S.C.A. 9th, DAR p. 16833

CRIMINAL LAW

Criminal Law and Procedure: Co-conspirator, who was partly victimized, is not entitled to restitution where he willingly participated in, and profited from, criminal enterprise. *U.S. v. Lazarenko*, U.S.C.A. 9th, DAR p. 16830

Criminal Law and Procedure: Governor may not condition petitioner's parole on admission of guilt, absent any additional indication of current dangerousness. *In re McDonald*, C.A. 2nd/7, DAR p. 16815

Criminal Law and Procedure: Trial court errs by excluding hearsay evidence of defendant's inconsistent statements on ground that defendant was required to testify. *People v. Baldwin*, C.A. 2nd/4, DAR p. 16822

Summaries and full texts appear in insert

MORE NEWS

Westward Expansion
A Detroit magistrate judge for years, Marc L. Goldman, left, headed west for the same bench seat in Orange County. **PAGE 2**

Justices Debate Prop. 64's Reach
The state Supreme Court appeared likely to fend off the latest challenge to consumer class actions brought in the wake of a 2004 ballot initiative aimed at curbing frivolous lawsuits. **PAGE 3**

Religious-School Tax Credit Gets Hearing
A group of Arizona taxpayers seemed to come up short Wednesday of crossing both of the hurdles it must clear to persuade the U.S. Supreme Court to strike down a state program that indirectly funds religious schools. **PAGE 3**

Transgender Candidate Poised for Victory
Alameda County Superior Court candidate Victoria Kolakowski would be the first openly transgender judge in the nation. **PAGE 4**

In Heated Battle, Ulmer Emerges as Victor
Propelled by a rally cry that helped band together his fellow judges and other members in the legal community, Judge Richard Ulmer held onto his seat Tuesday, besting opponent Michael Nava. **PAGE 4**

Stand-off Ends in MGM Bankruptcy
Metro-Goldwyn-Mayer has finally sought refuge in Chapter 11 bankruptcy after more than a year of financial woes, but the studio's massive restructuring will continue to provide business for dozens of lawyers. **PAGE 5**

Employers Do Not Have to Babysit Their Employees, for Now.

By Frances Rogers

Must California employers who provide meal and rest breaks to employees ensure that the employees actually, physically take duty-free meal or rest breaks? A California Court of Appeal recently held that employers are not required to ensure that their employees actually take their meal or rest breaks. This is a provocative ruling since the same legal question is currently pending before the state Supreme Court.

In *Hernandez v. Chiptole Mexican Grill*, a former employee of the popular fast food chain filed suit against his former employer and sought class certification for all hourly employees currently and previously employed by Chipotle in its California stores. The employee sought to certify a class of non-managerial California employees who were allegedly denied their legally required rest and meal breaks.

Frances Rogers is an attorney with the labor and employment law firm of Liebert Cassidy Whitmore. She is with the firm's Los Angeles office. She can be reached at frogers@lcwlegal.com.

Under California law, employers may not require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission (i.e. for those non-exempt employees covered by a wage order). Labor Code Section 512 provides that an employer "may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes..." An employer also "may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes..."

Wage Order 5-2001 applies to restaurant workers and requires employers to provide employees with a meal period of not less than 30 minutes for a work period of more than five hours. It further states that employers are to authorize and permit employees to take a 10-minute rest break for every four works worked.

Lawsuits for violating California's wage and hour laws, such as for missed meal and rest breaks, are often brought as class actions whereby the employee who brings the lawsuit seeks recovery on behalf of all employees similarly situated because an employer may have a common practice or policy that affected all employees in the same manner. These types of lawsuits, if successful, also mean lucrative attorney fee awards for the attorneys who represent these employees. Thus, class certification is an important hurdle for both the plaintiff and the employer.

An employee may bring a class action if the question at issue in the lawsuit is one of a common or general interest to numerous persons. Several factors are analyzed in reaching this conclusion, one of which is that common questions of law or fact must predominate over individual questions.

In this case, a general manager or "restaurateur" would manage each one of Chipotle's 130 restaurants in California. All other employees were non-exempt hourly employees entitled to overtime compensation and meal and rest periods under Labor Code Section 512 and Wage Order 5-2001. Chipotle had a company-wide policy that managers must provide employees with meal and rest breaks and that employees must take one uninterrupted 30-minute meal break after five hours of work. Chipotle directed employees to record their breaks and also paid employees for the time they took for breaks, including meal periods. Thus, there was no financial incentive for employees to record all breaks accurately.

Accordingly, Chiptole contended that class certification should be denied because there was no question that Chipotle provided, authorized, and permitted meal and rest breaks. The employees, however, contended that class certification should be granted, in part, because the issue was not whether Chipotle provided, authorized and permitted meal and rest breaks, but rather, whether the employees physically and actually took those meal and rest breaks. In other words, did Chipotle ensure that the meal and rest breaks were taken? The issue therefore turned on the legal question of whether employers may merely provide meal and rest periods or whether employers must physically and actually ensure that employees take those breaks.

The trial court acknowledged that this legal issue is currently pending before the state Supreme Court in the cases of *Brinker Restaurant v. Superior Court* and *Brinkley v. Public Storage*. A decision from the Supreme Court should be obtained in the coming months. However, the trial court ruled based on its prediction that the Supreme Court will decide that California employers are only required to provide employees with the ability to take breaks, not to ensure that breaks are taken. Thus, even if an employee's time record indicated a break was missed, that in and of itself did not establish that Chipotle failed to provide, authorize or permit the employee to take a meal or rest break. For this reason, individual issues predominated and class action treatment of the lawsuit was not appropriate. The employee appealed.

The Court of Appeal affirmed the trial court's decision to deny class certification. In doing so, the court held that the trial court's analysis of whether an employer must provide, permit, and authorize meal and rest breaks versus ensuring that those breaks are taken was correct. The court stated that it is an employer's obligation to ensure that its employees are free from its control for 30 minutes, not to ensure that the employees do any particular thing during that time. The court further commented that the employee's position in this case was not practical because it would create absurd incentives that would encourage employees to violate company meal break policy in order to sue the employer and receive extra compensation under California wage and hours laws.

This case may be a preview of things to come from the state Supreme Court when it finally issues its decision in *Brinker Restaurant v. Superior Court* and *Brinkley v. Public Storage*. However, this case must be relied upon cautiously since we do not know how the state Supreme Court will rule. It may ultimately rule in a different manner and would therefore make the *Hernandez v. Chipotle Mexican Grill* decision bad law. In the meantime, employers are encouraged to take whatever measures reasonable and necessary to provide, and perhaps ensure, that employees are fully relieved of duty during their mandatory rest and meal periods.

The Killing Fields

Continued from page 1

dealers, which in turn, would allow dealerships to invest more in their facilities, and improve brand equity.

Chrysler and GM responded to the request by submitting aggressive plans, which set out to swiftly shutter scores of dealers. In June 2009, the same month that Chrysler and GM filed for bankruptcy protection, Chrysler notified 789 dealerships that they would be terminated in 22 days, and GM notified 1,454 dealers that they would no longer be able to order new vehicles and that they must wind down all operations by Oct. 31, 2010. The Bankruptcy Court then ratified these termination procedures — a critical fact, given that state franchise laws generally *forbid* auto manufacturers from terminating dealers without good cause. With that, America was set to have its new dealership network.

However, while the Treasury Auto Team pushed for a drastic, and immediate, reformatting of the Chrysler and GM dealer networks, public sentiment did not follow. With the average dealership employing 50 people, and generating $15 million in annual sales, the termination of these businesses would result in the unemployment of 115,000 individuals, and the loss of $35 billion in annual sales to local economies — many of which rely on these dollars to generate precious tax revenue. Hence, in late 2009 President Obama signed into law the Consolidation Appropriations Act of 2010, which enabled the terminated dealers to have their dealer agreements reinstated through an arbitration process. For Chrysler dealers, who had already been terminated six months earlier, the decision to arbitrate was challenging, as many of them had already ceased operations. For GM dealers, who were still operating until October 2010, however, the law breathed new life into their fateful situation. Of the 1,454 terminated dealers, 1,169 pursued arbitration.

Associated Press

An employee walks across the empty showroom at Keeton Motor Co. in Fordyce, Ark., May 15, 2009. Dealership owner Ken Keeton said he received notice from General Motors that the manufacturer would end its franchise with the dealer by October 2010.

The arbitration procedures have now concluded and it has been determined that 500 GM dealers will lose their livelihoods. But with the businesses that will be lost and the lives that will be forever changed, an important, if not critical, question lingers: Is this justice served? Have we, as a society, appropriately thinned the ranks of the dealer networks, and set up the domestic manufacturers to better compete; or have lives been permanently altered without proper consideration?

Following the billions of dollars that were given to Chrysler and GM, many members of Congress had been asking the same question, prompting a full audit of the situation by the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP). In its 41-page report, SIGTARP made public several startling findings. First, while the auto executives told Congress that the elimination of its dealers would result in substantial costs savings to the manufacturers, neither Chrysler nor GM gave *any* consideration to these cost savings when making their termination decisions. Moreover, the amounts purportedly saved by the manufacturers varied greatly between Chrysler and GM — Chrysler estimated cost savings of $45,500 per dealer, while GM estimated savings of $1.1 million per dealer — calling into serious doubt the credibility of the claims.

But, more troubling were SIGTARP's findings relating to the reasoning behind GM's decision to close its 1,454 dealers. GM officials stated that the termination decisions were based on an objective criterion: dealers who either failed to have a dealer performance score of at least 70 (which measures customer satisfaction, etc.) or sold fewer than 50 cars in 2008 were selected for termination. However, the SIGTARP audit found that GM did not uniformly apply the criteria to the entire network; that GM terminated dealers who did not qualify for termination, while retaining others who did; and that GM retained little to no documentation on its decision making process, making outside review nearly impossible. So troubling were the findings, that SIGTARP has opened an investigation into possible illegal activity surrounding the terminations, which could result in prosecution by the Department of Justice.

Upon learning of SIGTARP's findings, members of Congress urged President Obama to issue an administrative mandate, halting the Oct. 31, 2010 termination date for the GM dealers until a full investigation could be completed. As Steven LaTourette (R-Ohio) and John Boehner (R-Ohio) wrote in an official letter to the Oval Office just days before the looming date, "there is too much at stake to proceed in an atmosphere where dealers were denied so much crucial information in a process rife with secrecy."

The calls by lawmakers to save the dealers from termination went unanswered, leaving their dealer agreements to expire on Oct. 31, and closing another chapter on justice unserved. So, the automakers will continue on their way, SIGTARP will move forward with its investigation, and the entrepreneurs who served the automakers, in many cases for generations, will join the expanding ranks of the unemployed.

Jonathan Michaels is the founding member of Michaels Law Group, which specializes in representing clients in the automotive industry. He can be reached at jmichaels@michaelslawgroup.com or (949) 581-6900.

Daily Journal

Charles T. Munger, Chairman of the Board
J.P. Guerin, Vice Chairman of the Board
Gerald L. Salzman, Publisher / Editor-in-Chief
Robert E. Work, Publisher (1950-1986)

David Houston, Editor

Alexia Garamfalvi, San Francisco Editor
Sharon Liang, Legal Editor

Liz Enochs, Associate Editor, *San Francisco*
Pia Sarkar, Associate Editor, *San Francisco*
Evan George, Associate Editor, *Los Angeles*
Michael Gottlieb, Associate Editor, *Los Angeles*
Hannah Mitchell, Associate Editor, *Los Angeles*

Richard Barkinskiy, Aris Davoudian *Designers*

Los Angeles Staff Writers
Pat Alston, Gabe Friedman, Emma Gallegos, Catherine Ho, Ciaran McEvoy, Susan McRae, Brandon Ortiz, Jean-Luc Renault, Anna Scott

San Francisco Staff Writers
Rebecca Beyer, Laura Ernde, Lisa Kestenbaum, Sara Randazzo, Jill Redhage, John Roemer, Fiona Smith, Amy Yarbrough

Bureau Staff Writers
Emily Green, *Sacramento*, Craig Anderson, *San Jose*, Jason W. Armstrong, *Riverside*, Don J. DeBenedictis, *Santa Ana*, Pat Broderick, Mandy Jackson, *San Diego*, Robert Iafolla, *Washington D.C.*

Robert Levins, S. Todd Rogers, *Photographers*

Eb Richardson *Editorial Assistant*

Rulings Service
Seena Nikravan, *Rulings Editor*
Meryl Chambers, *Verdicts and Settlements Editor*
Karen Natividad, Genevieve Knolle *Legal Writers*

Advertising
Audrey L. Miller, *Corporate Display Advertising Director*
Monica Smith, *Los Angeles Account Manager*
Joel Hale, Michelle Kenyon, *San Francisco Account Managers*
Kari Santos, *Display Advertising Coordinator*
Audrey Wood, *San Francisco Administrative Coordinator*

Art Department
Kathy Cullen, *Art Director*

The Daily Journal is a member of the Newspaper Association of America, California Newspaper Publishers Association, National Newspaper Association and Associated Press