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CIVIL LITIGATION REPORTER

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Volume 24 / Number 4 / June 2002

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FEATURING

Civil Case Management: New Statewide Rules and Case Management Statement

On July 1, 2002, comprehensive new and amended civil case management rules become effective in all state trial courts, continuing the efforts begun when the Trial Court Delay Reduction Act of 1986 shifted the primary responsibility for managing and advancing civil cases from the parties and their attorneys to the judiciary. The new rules and the new Case Management Statement form (Judicial Council Form CM-110) should significantly improve the civil case management process.

See p 141.

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Act applies to *all* general civil cases except those expressly exempted. See Govt C §68605.5.

- ***Repeal of arbitration status conference rule:*** Similarly, Cal Rules of Ct 211 on the arbitration status conference has been repealed and incorporated into Rule 212 because, in practice, courts do not hold separate arbitration status conferences, but deal with the assignment of cases to judicial arbitration as part of the case management process.

The trial-setting rules are obsolete and have been repealed.

- ***Repeal of current Rule 215 (every case must proceed to trial on date set or within next four court days):*** Courts should be actively managing cases and Rule 215 is repealed because it unduly restricts the flexibility of trial judges to set cases for trial.
- ***Trial setting rules repealed:*** Current Rules 216–221 on trial setting are obsolete because they apply only to cases "not subject to the Trial Court Delay Reduction Act"; their main features have been included in the new and amended case management rules.
- ***"Must" not "shall":*** All the case management rules are modified to reflect the contemporary style and usage in the California Rules of Court, including the use of "must" rather than "shall."

Conclusion

The new rules and Case Management Statement form should significantly improve the civil case management process. The task of improving this process is an ongoing challenge, however, and in the fall of 2003, the new case management processes will be reviewed, giving practitioners the opportunity to provide comments and suggestions for further improvements.

Maldonado and the Defense of PMK Depositions

ROBERT C. WRIGHT

What are the duties of a corporation served with a "PMK" (person most knowledgeable) deposition notice under CCP §2025(d)(6)? Until the recent decision of *Maldonado v Superior Court* (2002) 94 CA4th 1390, 15 CR2d 137, reported at 24 CEB Civ LR 21 (Feb. 2002), only the words of the statute and decisions under its federal analog, Fed R Civ P 30(b)(6), provided guidance. *Maldonado* fills the void with a number of guidelines for future cases.

In *Maldonado,* plaintiffs alleged that their employment was terminated based on defendant corporation's policy of "footprinting," *i.e.,* segregating Los Angeles into racial sales territories. Plaintiffs noticed defendant's PMK deposition on subjects relating to the reasons for their termination and sought production of documents in several relevant categories, including personnel files and job descriptions.

Defendant—now in bankruptcy—responded by producing its current human resources manager to testify on the employment issues and two other employees to discuss the "footprint" issues. However, the HR manager had little knowledge about plaintiffs' terminations or company employment documents and the other two witnesses had only a general understanding of the "footprint" issues and produced no documents.

Dissatisfied with defendant's response to the PMK notices, plaintiffs sought an order to compel and evidentiary sanctions and attorney fees.

Although it found that defendants should have produced the requested documents at deposition, the trial court ruled the "footprint" issue was irrelevant and refused to order further production of witnesses or documents.

The Second District Court of Appeal reversed, directing the trial court to (1) enter a new order that defendant search diligently and produce at deposition all available requested documents and that the deponents identified as most knowledgeable answer questions to the full extent of information known or reasonably available to

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them, and (2) consider a request for monetary sanctions against defendant.

Several important guidelines emerge from *Maldonado:*

- ***"Most qualified" means "most knowledgeable":*** The requirement in CCP§2025(d)(6) that a corporation designate its "most qualified" officer, manager, managing agent, employee, or agent to testify on the matters described in a deposition notice means that a corporation must designate the "most knowledgeable" person.
- ***Corporation must give PMK knowledge:*** The corporation must ensure that the PMK is sufficiently knowledgeable through access to information and documents reasonably available to the corporation.
- ***Loss of personnel is no excuse:*** A corporation is not required to produce former employees for deposition, even when they are the most knowledgeable people. However, loss of personnel does not excuse a corporation from the requirement that it produce a knowledgeable person.
- ***Document request triggers internal inquiry:*** Because no single person is expected to be familiar with the contents of all the corporation's files, when a request for documents is made to a PMK, "the witness or someone in authority is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." 94 CA4th at 1396.
- ***PMK must be able to testify:*** The PMK must be able to testify about readily available information. For example, a human resources manager must be able to identify a company personnel file and should be familiar enough with its contents to answer specific questions by referring to the information in the file.
- ***Multiple PMKs may be necessary:*** Because no single person may be best qualified to testify about all identified subjects, corporations must be prepared to use multiple PMK witnesses.

In sum, the responding corporation and its counsel must do their best to find and prepare appropriate corporate witnesses. As *Maldonado* shows, the lack of remaining knowledgeable employees can complicate this task. The task may also be onerous due to the number of matters described and the volume of documents and information sources that must be identified and reviewed to make the PMK knowledgeable. It may also be difficult to find current employees who are willing to undertake the necessary preparation and who will be effective at trial. *Maldonado* reminds practitioners of these inherent difficulties with PMK depositions and at the same time serves as a warning against a "cavalier attitude" when responding to this unique discovery device.

CALIFORNIA DEVELOPMENTS

ARBITRATION AND MEDIATION

Contractual

Credit card company's arbitration provision prohibiting class actions is unconscionable.

Szetela v Discovery Bank (2002) 97 CA4th 1094, 118 CR2d 862

Discover Bank required its credit card customers to agree to an arbitration clause that included a "no class action" provision. The Fourth District Court of Appeal found the provision to be unconscionable and unenforceable.

Discover sought to provide itself with "a get out of jail free" card . . . while compromising consumer rights.

To be held unconscionable, the provision needs to be both procedurally and substantively unconscionable. *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 99 CR2d 745. The "no class action" provision is procedurally unconscionable because the cardholders were told to "take it or leave it," without any opportunity for meaningful negotiation. Substantive unconscionability is evident from the "manifest one-sidedness" of the provision; although written as a mutual prohibition on class actions, it is unlikely to ever affect Discover, because credit card companies rarely bring class actions against their customers. Knowing that most customers will not bring claims for small overcharges, Discover sought to provide itself with "a get out of jail free" card and thereby violated public policy by giving itself a huge break while compromising consumer rights.