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Good News, Bad News and a New Delay in Meal Breaks Case

Employers have been waiting nearly 3½ years to find out whether the California Supreme Court wants them to force meal breaks on employees or only make the breaks available. Now, they'll have to wait a little longer.

The court finally heard oral arguments in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* on Nov. 8, 2011, which meant the court's decision was due by mid-February. But on Dec. 14, the court extended its deadline in order to consider additional briefs on a couple of issues that took lawyers by surprise during the arguments.

Now, the long-awaited ruling might not come out until April 12, 2012.

On the main issue, it seems likely the court will hold that employers only have to "provide" workers a half-hour meal period per typical day. Five of the court's seven justices seemed opposed to the idea of holding that employers must enforce the breaks.

Employee attorneys want the court to require meal periods so that employers can't pressure or cajole workers into skipping them. Over the last decade, workers and their attorneys have filed thousands of class actions and other lawsuits demanding back pay and other penalties because of missed meals and breaks.

Justice Joyce Kennard asked whether a nurse should be made to stop life-saving efforts to eat. Justice Carol A. Corrigan was flabbergasted that an overeager employee might be fired for skipping lunch, and the court's newest member, Justice Gordon Liu, said forced meal periods are coercive rather than employee-friendly.

The big surprise came when the court turned to the issue known as the "rolling five." State labor regulations, called wage orders, declare that "no employer shall employ any person for a work period of more than five hours without a meal break." Liu in particular insisted that meant that an employee is due a 30-minute break every five hours.

Another clause in the wage order says an employee who works less than six hours in a shift can agree to give up the meal break. Liu said that clause would make no sense if the break didn't come due at hour five.

He gave as an example someone who comes to work at 9 a.m., takes lunch at noon and then works from 12:30 to 6 p.m. Under the wage order, that person is due another meal break, Liu said.

The attorney representing employer Brinker Restaurant Group, which operates the Chili's Grill and Bar and Macaroni Grill chains, responded that the Labor Code imposes a meal break for work beyond five hours "per day" and a second break at 10 hours. Liu countered that the statute is a "baseline" and that wage order simply provides more protection.

But the reason the Supreme Court asked for new briefs and extended its deadline is to explore whether the court's eventual ruling should apply only to new cases or should apply retroactively to cover employer-employee relations in the past.

When Justice Marvin Baxter asked that question, Brinker's attorney was stumped. Chief Justice Tani Cantil-Sakauye said that the court's decisions clarifying existing law generally do apply retroactively.

Employers fear that if the "rolling five" rule is applied retroactively, it could expose them to many new lawsuits over old conduct.

In its order Dec. 14, the court said it wanted briefs "addressing the grounds for prospectively applying portions of this court's eventual decision on the merits."

Plaintiff May Collect for Medical Care Provider Wrote Off

Only a few months after the California Supreme Court limited how much injured tort plaintiffs may collect from defendants for past medical bills, a lower appellate court carved out an exception to the new rule, albeit a small one.

In August, the Supreme Court held that a plaintiff can recover only what his doctors and hospitals actually accepted as full payment from the plaintiff's health insurers — irrespective of how much more the medical providers may have billed. The venerable "collateral-source rule" cannot be used to give the plaintiff a windfall beyond the economic loss he actually incurred, the high court held in Howell v. Hamilton Meats and Provisions, Inc. The decision was described in the last issue of The Rodolff Law Firm Newsletter.

But what about situations that don't involve health insurance companies and their tough contracts with medical providers? What about medical services given as charity or those for which the doctor or hospital simply wrote off the fees? In those cases, an appellate court held in December, the rule of *Howell* doesn't apply, but the collateral-source rule does.

"Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule," the appellate court declared in Sanchez v. Strickland.

The case involved a man badly injured in a traffic accident. He died from the injuries after spending four months in hospitals. A jury found his medical expenses had amounted to $1.3 million, which the trial court judge reduced to $242,660, equal to the amount actually paid by his insurer, Medicare. (All sides agreed that *Howell* applied to payments from Medicare as well as private insurers.)

On appeal, one question concerned how to treat charges from a rehabilitation hospital that Medicare had not reimbursed. The hospital billed Medicare just under $113,998 and received $66,704 "with a $40,264 contract allowance," according to the opinion.

That left $7,020, which the rehabilitation hospital then billed to Medi-Cal. But, because the hospital in fact had no contract with Medi-Cal, the state health program for the poor did not pay. Therefore, the hospital simply wrote off the amount.

As a result, the $7,020 amounted to a "gratuitous payment" in services, the appellate court said. It quoted three earlier appellate decisions — including *Howell* — suggesting that plaintiffs should be able to recover for gratuitous services or payments.

The Supreme Court in *Howell* said allowing plaintiffs to recover for services given gratuitously wasn't at odds with its new rule limiting recovery to economic losses. Allowing that exception to the new rule would be "an incentive to charitable aid," the high court said. That incentive has "no application to commercially negotiated price agreements like those between medical providers and health insurers," the *Howell* court noted.

Mothers Beware: Small Sidewalk Cracks Are Legally Trivial

A crack or separation in sidewalk of less than an inch isn't very tall. In fact, a California appellate court has ruled, it's trivial.

Therefore, a 63-year-old woman who tripped over just such a defect and had six surgeries for her injuries nonetheless cannot keep the $1.3 million a jury found she deserved.

"[T]he walkway defect here was trivial as a matter of law," the appellate court held in *Cadam v. Somerset Gardens Townhouse HOA*.

And, the court added in an updated version of its opinion, a trivial defect "is no less trivial when it exists on a walkway in a privately owned townhome development."

The plaintiff, Barbara Cadam, had leased a townhouse in the Santa Maria community in 2006. In October that year, when she dashed home on her lunch break one sunny day, she stopped to talk to a gardener. As she was walking back toward her door, she tripped on the sidewalk separation.

Her injuries were extensive, including permanent disability in one hand. She sued the builder, the homeowners association and the maintenance company hired by the association.

The two sides agreed that the sidewalk separation was only "three-fourths to seven-eighths inch in depth," the court noted. But at trial, the plaintiff presented evidence of other sidewalk defects scattered around the development, including several on her street plus another that the association president himself had tripped on.

The trial judge let the jury decided the case but then threw out the verdict and entered judgment for the defense. "No reasonable person could find this was not a trivial defect looking at the photographs, … the height, [and] the surrounding circumstances," the judge held.

On appeal, the injured woman argued that the height of the defect was a factual question for the jury and that all the circumstances surrounding the accident must be considered.

But the Court of Appeal affirmed the trial judge. “It is well settled that a property owner is not liable for damages caused by a minor, trivial, or insignificant defect in his property,” the court noted.

Further, those “who maintain walkways — whether public or private — are not required to maintain them in absolutely perfect condition,” it said. They do not have to repair minor or trivial defects. And it cited several other appellate decisions that held cracks less than an inch deep to be trivial.

Apparently, the appellate court initially viewed the legal question so trivial that it ordered its decision not to be published. A month later, it changed its mind when it added two sentences pointing out that defects on private property in townhouse developments can be just as trivial as defects on other sidewalks.

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The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.