



# HURRELL CANTRALL

## NEWSLETTER

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### Attorneys

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- Joseph P. Johnson
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- Jennifer A. Grady
- Erica Bianco
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### MASTHEAD

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## NEWS & EVENTS

### We are Moving!

For the past few months, we have been designing our beautiful new office space on the 9th floor of the Verizon building at Macy's Plaza on the corner of 7th Street and Flower Street. We will still be located in downtown Los Angeles, just two blocks from our current location. Please make a note of our new address, beginning **May 21, 2011:** 700 S. Flower Street, Suite 900, Los Angeles, CA 90017. Our phone numbers will remain the same.

### Ribbon-Cutting Ceremony

We would like to invite you to view our new office at our meet-and-greet Open House and Ribbon Cutting Ceremony, held in conjunction with the Chamber of Commerce, on **June 29, 2011 at 6:30 p.m.** This event will be a great opportunity to meet our attorneys and members of the community in an informal setting. Wine and appetizers will

be provided. If you would like to join the mailing list for this free event, please email [jshaw@hurrellcantrall.com](mailto:jshaw@hurrellcantrall.com).

### Hurrell Cantrall's "Let's Talk Law" Seminar

On February 23, 2011, Hurrell Cantrall held its first "Let's Talk Law" seminar, which addressed the ways that proper documentation policies can prevent litigation in the employment and premises liability contexts. Our presenters, Tom Hurrell, Lisa Martinelli, Jill Wood, Blair Schlecter, and Jennifer Grady, provided suggestions on document retention policies and fielded questions from our guests.

Our **next seminar** will take place on **August 3, 2011 at 6:30 p.m. at 700 S. Flower Street, Suite 900.** This presentation, "The Effects of the Economy," will explore current trends in litigation. Our presenters will provide practical suggestions that business owners, managers, employers, and H.R. managers can use to pre-

pare for and prevent litigation in this unstable economic climate. This free event will include refreshments. Please RSVP to [jshaw@hurrellcantrall.com](mailto:jshaw@hurrellcantrall.com).

For more information, please visit our website at: [www.hurrellcantrall.com/news-events](http://www.hurrellcantrall.com/news-events).

### Hurrell Cantrall in the Community

Hurrell Cantrall is a proud member of the Los Angeles Chamber of Commerce.

On March 25, 2011, we attended the Association of Corporate Counsel's 16th Annual Gala Dinner, where President George W. Bush was the keynote speaker.

We will be representing Hurrell Cantrall at the upcoming Diversity for Success Seminar in Chicago on June 16 and 17, 2011.

*To join the mailing list for our newsletter, please email [jgrady@hurrellcantrall.com](mailto:jgrady@hurrellcantrall.com).*

## NEW ASSOCIATES

### Hurrell Cantrall Welcomes Two New Associates

**Brittany Vannoy** graduated from Pepperdine University School of Law and specializes in toxic torts and government entity defense. During law school, Ms. Vannoy served as a certified law clerk for the Los Angeles District Attorney's

Office, where she conducted preliminary hearings and argued motions on behalf of the Hardcore Gangs Division. As the Lead Articles Editor for the *Journal of the National Association of Administrative Law Judiciary*, Ms. Vannoy was published in the Journal's Spring 2009 edition.

**Sanaz Rashidi** specializes in toxic torts, employment litigation, and governmental liability. Before graduating from Loyola Law School, Ms. Rashidi received the First Honors Award in the areas of legal research, writing and real property. She is admitted to practice in California and before the U.S. District Court for the Central District of California.

### Cal. Court of Appeal Stresses the Importance of Meal and Rest Periods by Permitting Up to Two Premium Payments Per Employee Per Day for Failure to Provide Meal and Rest Periods

By Sanaz Rashidi, Esq.



Sanaz Rashidi, Esq.

"It is important to properly classify employees as 'exempt' or 'non-exempt' when determining whether an employee is eligible to receive overtime pay, because the proper classification as 'exempt,' when applicable, could help minimize an employer's exposure to overtime pay litigation."

On February 16, 2011 the California Court of Appeal issued a long-anticipated opinion in the class action lawsuit, *United Parcel Service v. Superior Court (Allen)* (2011) 192 Cal.App.4th 1043, regarding employers' responsibilities for enforcing meal and rest periods. The specific issue before the Court was the interpretation of California *Labor Code* § 226.7, which requires employers to pay an employee one additional hour of pay at the employee's regular rate of compensation for each work day in which a meal or rest period is not provided. In *Allen*, the plaintiffs brought forth an action seeking compensation from United Parcel Service (UPS), alleging failure to provide meal *and* rest periods pursuant to § 226.7. UPS argued that only *one* premium payment is allowable per workday, regardless of the number or type of break periods that were not provided. Plaintiffs disagreed, arguing that the *Labor Code* allows up to *two* premium payments per workday; one for failure to provide meal periods, and another for failure to provide rest periods.

Analyzing these two arguments, the California Court of Appeal looked to the specific wording of the statute, the legislative and administrative history of the statute, the Industrial Welfare Commission wage orders, the public policy behind the statute and wage orders, and the principle of construing § 266.7 broadly in favor of protecting employees. The Court held that the legislative intent of California's *Labor Code* would be undermined if the Court ruled that only one premium payment was allowable per workday, because employers would be encouraged to require an employee who has missed a ten minute rest period to also miss his/her meal period. The Court thus ruled that § 226.7 permits up to *two* premium payments per work day, to be paid to an employee who is not provided a meal or rest period.

#### "Exempt" Employees v. "Non-Exempt" Employees- which ones carry more potential penalties?

Because this new ruling strictly applies only to "non-exempt" employees, it is imperative that the employer determine whether an employee falls under "exempt" or "non-exempt" status. An "exempt" employee is generally not subject to any of the laws pertaining to overtime, meal, or break periods. Conversely, a "non-exempt" employee is subject to all wage laws, including, but not limited to, overtime pay, meal breaks, and rest periods.

In California, the *Labor Code* provides greater protection for employees than its federal counterpart, thus trumping the *Fair Standards Labor Act*. As such, employers must comply with California law. Under California law, the three main categories of "exempt" status are professional, administrative, and executive employees. A "professional," "administrative," or "executive" employee is an individual who is "engaged in work which is primarily intellectual, managerial, or creative," and who "customarily and regularly exercises discretion and independent judgment in performing these duties," and earns "a monthly salary equivalent to no less than twice

the state minimum wage for full time employees." (California *Labor Code* § 515(a)).

It is important to properly classify employees as "exempt" or "non-exempt" when determining whether an employee is eligible to receive overtime pay, because the proper classification as "exempt," when applicable, could help minimize an employer's exposure to overtime pay litigation, as all employees are entitled to receive overtime pay unless they are properly classified as "exempt" employees under the California *Labor Code*.

However, employers should be cautious when classifying employees and ensuring that the proper tasks are given to each employee. For example, an employer is in violation of the California *Labor Code* if the employer classifies a "non-exempt" employee as "exempt" in order to avoid overtime pay. As these classifications each have specific provisions which can be difficult to understand, we recommend consulting with counsel to ensure that all employees are properly classified. It is advisable to make this determination and memorialize it in writing, if possible, at the time an employee is hired.

#### What does this decision mean for California employers?

Based on this ruling, we recommend that employers update their policies and procedures to ensure that all non-exempt employees are classified properly and take their required meal and rest periods. Employees are now able to recover up to two additional hours of pay in a single work day for meal period and rest period violations. The degree to which this new ruling affects different businesses and industries will differ depending on the number of non-exempt employees the organization employs.

Additionally, the costs associated with violating California's meal and rest period rules should also be considered. For example, if an employer loses a class action involving a large number of "non-exempt" employees making claims over a two to three-year time period, it could easily cost the employer millions of dollars in compensation that it must pay to its current and/or former employees.

Unless and until the California Supreme Court or the United States Supreme Court accept review of a pending case on this issue and reach a different decision, we suggest implementing policies and procedures which properly track and record all employees' hours and break times. These records can be very helpful in the unfortunate event that litigation arises due to allegations of meal and rest period violations, insufficient overtime pay, and/or "exempt" v. "non-exempt" status misclassification. We also recommend providing all employees with documentation indicating their classification as an "exempt" or "non-exempt" employee and the reasons for this classification. Reviewing these classification procedures and policies with legal counsel can drastically reduce the risk of future litigation. ■



## GOVERNMENTAL LIABILITY

### Are You Sure You Want to Send That?: California Supreme Court Permits Searches of Cell Phone Text Messages

By Brittany Vannoy, Esq.

Traditionally, law enforcement has been permitted to conduct warrantless searches of items "immediately associated" with an arrestee's person "incident to a lawful arrest." Under this standard, the United States Supreme Court ("USSC") has permitted searches of the contents of such items as a cigarette pack found in an arrestee's pocket, or the chips of paint found on an arrestee's clothing, but has forbidden the search of a footlocker (a small trunk traditionally kept at the foot of a bed). (*U.S. v. Robinson* (1973) 414 U.S. 218; *U.S. v. Edwards* (1974) 415 U.S. 800; and *U.S. v. Chadwick* (1977) 433 U.S. 1, 15.) In January 2011, the California Supreme Court added "virtual content" to this list by permitting the search of text messages on mobile devices in *People v. Diaz* (2011) 51 Cal.4th 84.

In *Diaz*, Defendant Gregory Diaz was arrested after participating in a narcotics sale with a police informant. Diaz was carrying his cell phone in his clothing at the time of his arrest, and police seized and searched the cell phone. After reviewing the phone's text messages folder, officers confronted Diaz with a text message purportedly regarding the narcotics sale. Diaz promptly confessed. Both the confession and the text message were used against Diaz in trial, and Diaz was ultimately convicted. On appeal, the California Supreme Court analyzed the validity of the cell phone search, indicating the key question was "whether [Diaz]'s cell phone was personal property immediately associated with his person." The Court ruled that because Diaz carried the phone on his person, it was

"immediately associated" with Diaz. The police were therefore permitted to search the contents of the cell phone without a warrant, pursuant to the "search incident to arrest" exception to the Fourth Amendment.

In the past, the USSC has held that a search incident to arrest is "justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained." (*Edwards, supra*, 415 U.S. at 802-803 (citations omitted)). A search incident to arrest may be made regardless of whether there is probable cause to believe the arrestee possesses a weapon or will destroy evidence. (See *Chadwick, supra*, 433

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Brittany Vannoy, Esq.

"Cell phone users should therefore keep in mind that any information in their text messages folder is fair game during a search incident to arrest."

## PRODUCTS LIABILITY

### Tarmann and Its Progeny—Setting the Heightened Pleading Requirements Standard for Fraud Actions Against Corporations

By Rittu Kumar, Esq.

The scenario: Plaintiff uses or is exposed to chemical products manufactured by corporate defendants. Plaintiff sues the corporate defendants for fraudulent concealment, among other causes of action. The Court rules that plaintiff failed to adequately allege fraud against the corporate defendants. The Court dismisses the fraudulent concealment cause of action.

This fictitious scenario is one that a corporate defendant hopes for in any lawsuit and is one that is not out of reach based on *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153 and its progeny. *Tarmann* requires a plaintiff to plead a cause of action for fraudulent concealment against a corporate defendant with greater specificity as compared to a non-corporate defendant.

In general, the elements of a cause of action for fraudulent concealment are: (1) the defendant must have concealed or suppressed a material fact; (2) the defendant must have been under a duty to disclose the fact to the plaintiff; (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff must have been unaware of the fact and would

not have acted as he did if he had known of the concealed or suppressed fact; and (5) the concealment or suppression of the fact caused the plaintiff to sustain damage. (*Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 850.)

However, when a plaintiff alleges this same cause of action against a corporate defendant, the plaintiff must also allege: (1) the names of the persons who made the allegedly fraudulent representations; (2) their authority to speak; (3) to whom they spoke; (4) what they said or wrote; and (5) when it was said or written. (*Tarmann, supra*, at 157.) In other words, the *Tarmann* case specifically instructs that a plaintiff must provide specific information related to the identity of the employee of the corporate defendant who made these representations, what authority the employee had to make such representations on behalf of the corporation, when the representations were made, where they were made, and what the exact statements were.

In *Tarmann*, as part of her fraudulent concealment claim, the plaintiff alleged that "unknown" adjusters and/or claims supervisors or managers employed by defendant State Farm

Mutual Automobile Insurance represented to her that that she was authorized to repair her vehicle following an auto accident, that their obligation to indemnify plaintiff for the repair was reasonably clear, and they would pay plaintiff for the repairs upon completion of the same which, according to plaintiff, the defendant failed to do. (*Tarmann, supra*, at 156.) The court noted that plaintiff failed to meet the heightened pleading requirements against a corporate defendant such as State Farm Mutual Automobile Insurance because she did not know the names of the "unknown" persons who made the representations. As such, the *Tarmann* court held that the trial court properly sustained State Farm Mutual Automobile Insurance's demurrer as to plaintiff's fraud claim without leave to amend, thereby ridding the complaint of this cause of action.

When faced with a scenario where fraud is alleged against a corporate defendant in an inadequate manner, there is a strong basis to bring it to the court's attention based on *Tarmann*. If a plaintiff fails to allege the heightened pleading requirements, the corporate defendant can request the court to dismiss the fraudulent concealment cause of action from the case. ■



Rittu Kumar, Esq.

"Tarmann requires a plaintiff to plead a cause of action for fraudulent concealment against a corporate defendant with greater specificity as compared to a non-corporate defendant."



**Standing Left to Right:** Joseph Johnson, Jennifer Grady, Jill Wood, Sanaz Rashidi, Mariam Kaloustian, Thomas Hurrell, Lisa Martinelli, Jamie Webb-Akasaka, Brittany Vannoy, Blair Schlecter  
**Front Row Left to Right:** Charles Phan, Erica Bianco, Rittu Kumar, Maria Markova, Adrianna Paige, Anthony Perez

## GOVERNMENTAL LIABILITY

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U.S. at 15.)

In December 2009, Ohio's Supreme Court addressed a set of facts similar to those in *Diaz*, holding a cell phone search unconstitutional due to the arrestee's heightened expectation of privacy in the cell phone's contents. (*State v. Smith* (2009) 124 Ohio St. 3d 163.) While the *Diaz* majority expressly refused to apply this logic, dissenting Justice Kathryn Werdegar believed privacy should be considered. The main thrust of her dissent, however, centered upon the lack of exigency seen in cell phone search cases. Justice Werdegar argued that once police are in exclusive control of the phone, the arrestee is unable to destroy any stored evidence.

Conversely, the *Diaz* majority cited USSC precedent to point out that no exigency is required when the item searched is "immediately associated with the person," as opposed to merely being within the arrestee's "immediate control." While some claim this distinction is unfounded, *Diaz* points out that if

"the wisdom of the [USSC]'s decisions 'must be newly evaluated' in light of modern technology, then that reevaluation must be undertaken by the [USSC] itself." Although the USSC denied a writ of certiorari in *State v. Ohio*, now that both state and federal courts have issued decisions on either side of the line, the question may be ripe for USSC review.

In the meantime, the extent of permissible warrantless cell phone searches remains uncertain. The *Diaz* decision specifically approved the search of an arrestee's text messages folder where evidence of a drug deal could be found. However, the broader concept suggested is the permissibility of warrantless searches of the contents of any item found on an arrestee's person. This could include the search of small laptops and iPads when those items are carried "on the person," and are thus "immediately associated" with the arrestee. Police could then access and use as evidence an arrestee's emails, phone logs, photograph and video galleries,

passwords, reading materials, and music files stored on electronic devices. While some believe this potential privacy invasion is clearly unconstitutional, the *Diaz* decision held the privacy argument irrelevant.

Nevertheless, there is a chance that the USSC will decide to carve out an exception to the exception, and decide that modern technology requires a re-writing of the rules. While the ultimate outcome is unclear, the state of the law in California is evident: when an arrestee is in immediate possession of a cell phone at the time of his arrest, the police may search the cell phone's text messages for evidence of a crime, and use what is found against the arrestee in a court of law. Cell phone users should therefore keep in mind that any information in their text messages folder is fair game during a search incident to arrest. ■

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If you have any questions regarding legal matters, please contact Thomas C. Hurrell at [thurrell@hurrellcantrall.com](mailto:thurrell@hurrellcantrall.com).

If you have comments/ suggestions for our next issue, or would like to join the newsletter mailing list, please contact Jennifer A. Grady at [jgrady@hurrellcantrall.com](mailto:jgrady@hurrellcantrall.com).

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**HC**