PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Denis S. Kenny Named a Super Lawyer!

Scherer Smith & Kenny LLP congratulates Denis Kenny for being

In This Issue

selected as a 2014 Super Lawyer. Super Lawyers is a rating service that names only the top five percent of lawyers in a state. The rigorous selection process includes peer recognition, professional achievement, and independent research. It has been clear to us and to our clients for many years that Denis Kenny is an outstanding attorney, and we are delighted that he has been recognized for his dedication, hard work, intelligence, and efficiency. You can find more information in the following magazines in August 2014: Northern California *Super Lawyers Magazine* and *San Francisco* Magazine, among other publications.

998 Offers: Immobilizing the Tail Before It Wags the Dog

In December 2013, the Ninth Circuit Court of Appeal, in the case of *Muniz v. United Parcel Service, Inc.*, upheld a damages award of just under $28,000 in an employment discrimination case brought under California's Fair Employment and Housing Act ("FEHA"). Notably, FEHA provides for an award of attorney's fees to the prevailing-party plaintiff, who in this instance was a former UPS employee named Kim Muniz. While her employment was not terminated, Ms. Muniz claimed gender and age discrimination had led to a demotion.

While the above damages award may appear somewhat run-of-the-mill related to a lawsuit of this nature, the associated prevailing-party fee award was extraordinary in comparison. After extensive briefing and argument, Ms. Muniz's attorneys were awarded "reasonable"

Partner Notes

Denis Kenny

April showers bring May flowers. Let's hope that saying proves true given this horribly dry year we've been having in California. Although, I must admit, I have found myself often repeating the phrase, "We may as well embrace the drought" while enjoying the many gorgeous

attorney□s fees in the amount of $692,162. Moreover, this amount had been significantly reduced from an original request of nearly $1.9 million.

The above scenario is all too commonplace in litigation when attorney□s fees are potentially recoverable either via statute (such as FEHA) or a separate contractual provision (such as a prevailing-party fee provision within a negotiated agreement). When these circumstances are present, the prospect of a potentially large fee award may become the proverbial □tail wagging the dog□ and a (if not the) major driver in litigation.

Thankfully, California law provides a potential shield against such awards in the form of Code of Civil Procedure section 998 (□Section 998□), which was enacted to encourage settlement by penalizing a party who refuses to settle. A Section 998 offer operates by allowing one party to serve a written settlement offer on the other in a specific form pursuant to Section 998□s requirements. Once served, the offeree has thirty days to accept the offer, after which point the offer is deemed rejected. If the offer is rejected and the case goes to trial, then whatever formal judgment is ultimately awarded to the offeree must □beat□ (or be more than) the Section 998 offer □ otherwise, the offeree faces very harsh consequences.

Namely, if the offeree□s judgment or award □ inclusive of any recoverable preoffer costs and fees - does not exceed the Section 998 offer amount, the offeree (1) may not collect any of its postoffer fees and costs and (2) must additionally pay the postoffer costs of the offeror. Put simply, a Section 998 offer can have the effect of reversing the financial outcome of litigation.

many gorgeous, sunny, clear, blue bird days we have been having these past several months of winter.

Meanwhile, my youngest brother, Brendan, an attorney with a young family living in the suburbs of Minneapolis, Minnesota, has faced one of the worst winters in the past fifty years. This marks my brother's first full winter living in Minnesota after spending all of his life in the Mediterranean climate of Northern California.

Hearing my brother's stories about day-to-day life of a Minnesotan facing a harsh winter makes me realize how much

If applied to Ms. Muniz's case, one can see how the effective use of a Section 998 offer can provide significant financial protection in litigation. For example, suppose a Section 998 offer had been made at the outset of Ms. Muniz's case, shortly after the filing of her complaint. At this point, counsel for her employer could have estimated the costs and fees incurred by Ms. Muniz's attorneys in drafting and filing a complaint as well as her potential damages at trial based on an internal investigation and the nature of her claims. While of course not being able to derive an exact amount, they could have arrived at an estimate and then made a Section 998 offer meant to represent the total value of these amounts – say $50,000.

From this point on, Ms. Muniz's counsel would have to constantly evaluate their chances of success and potential damages, keeping in mind the amount of fees and costs that could be added to such damages to beat the Section 998 offer amount would have been frozen in time as of the date of the offer.

Further, Ms. Muniz and her attorneys would have to give real consideration to costs being incurred by her employer in defending the action (such as paying for deposition transcripts – which can run $1,000 to $1,500 per day – and expert depositions – for which experts may be compensated at rates of several hundred dollars per hour). Ms. Muniz would have to pay her employer these amounts in the event her judgment or award, inclusive of preoffer fees and costs, did not exceed the $50,000 offer amount.

To complete this example, if Ms. Muniz's award were only $28,000 and a court were to find her reasonable preoffer fees and costs to be only $15,000, she would not be able to recover any additional fees or

we California residents truly take for granted. The daily routine for most of us consists of awakening from our slumber, getting dressed, having a coffee and a bite to eat, and walking out the door to head to our car, bus, ferry, light rail, subway, or other mode of transport, to begin the workday, with, at most, an overcoat and an umbrella. (Do you still remember that contraption?)

Or, for those of us with children, our daily routine may include helping them get ready for school, fed and out the door, with appropriate attire for

costs. Further, she would be ordered to pay the postoffer costs of her employer, which in a fully litigated case such as this would very likely exceed $43,000. The end result would be a "victory" for Ms. Muniz in name only.

Section 998 offers, while not appropriate for every case, are a critical tool to be considered in litigation. Their use provides both protection against potentially astronomical fee awards as well as additional incentive for settlement. If you have questions regarding their use or any other litigation-related matters, we at Scherer Smith & Kenny LLP are happy to discuss them further with you. Please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or Negin Yazdani at nny@sfcounsel.com for more information.

- *Written by Ryan Stahl*

Can You Keep A Secret? Confidentiality Clauses in Settlement Agreements Mean Business

So you're on the verge of settling or have just settled a case. Included in your settlement agreement are all the standard clauses, such as payment, dispute resolution, choice of law, and of course, the confidentiality (or non-disclosure) clause. A confidentiality clause in a settlement agreement is a material term, a virtual necessity, and can

the weather (and, of course, the schools' dress code, which can be challenging to say the least, especially with girls!)

Now compare that California morning routine to my brother's in the harsh Minnesota winter. First, you need to build-in an additional 30-60 minutes to the front and back end of your workday to account for time needed for snow shoveling the driveway, starting and running the car (which needs to be parked in the 24/7 heated garage to avoid freezing the engine block), making sure the gas tank is always at least half full (since gas will freeze if the

look something like this:

> The Parties agree to maintain in confidence the existence, the contents and the terms of, and the consideration for, the Settlement Agreement. Should one of the Parties breach this provision by disclosing Settlement Agreement information, the non-breaching party shall be entitled to liquidated damages in the amount of Ten-Thousand Dollars ($10,000.00) per each occurrence of such breach.

But just how confidential does an agreement have to be kept in order to avoid breaching the agreement? Normally, the boundaries of the confidentiality clause are set forth in the agreement and may specify third parties to which the terms and conditions of the agreement may be disclosed. These third parties may include bankers, auditors, spouses, attorneys, and professional advisors, among others that are related in some way to the case. And when in doubt, it is a safe practice to keep the agreement a secret.

In the recent case of *Gulliver Schools, Inc., et al. v. Snay*, the court found that a Plaintiff's disclosure of the mere existence of a settlement agreement to his daughter constituted a breach of the confidentiality clause, such that the Defendant no longer had to pay the Plaintiff $80,000 of a settlement payment agreed to in the Settlement Agreement.

In Gulliver, Plaintiff Patrick Snay, who was an employee of Gulliver Schools, sued the school for age discrimination and retaliation. Gulliver Schools ultimately agreed to pay Mr. Snay a total of $140,000 (paid in three (3) varying installments) to settle the case. Central to this

volume is too low), and, of course, dressing appropriately for the weather conditions (which means, wearing lots of layers, a top coat, hat and sensible shoes which are difficult things to find and match with business attire).

The starkly contrasting dichotomy between the daily routines of these two distinct regions of the United States, undoubtedly contributes to the stereotypes for our respective cultures.

The Minnesotan (and Midwesterners, in general) is typically considered hard-working, unpretentious and

agreement was a written settlement agreement (the "Agreement") containing a detailed confidentiality clause, which stated that Snay's violation of the clause would result in his loss of $80,000 of the total settlement. Specifically, the clause stated the following:

> [Snay] shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this Agreement. A breach will result in disgorgement of [Snay's] portion of the settlement Payments.

Upon signing the Agreement, Snay told his college-aged daughter that the case had settled and that he was happy with the result. Snay's daughter, in turn, posted the following status on her Facebook profile, which was seen by a number of past and current Gulliver students: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

Gulliver caught wind of this posting and refused to pay Snay an $80,000 portion of the settlement agreement because Snay had breached the confidentiality clause. The court found that the parties could have negotiated the terms of the confidentiality clause to allow Snay to disclose the settlement to his daughter. Since those were not the negotiated terms, the court followed the plain language of the terms and agreed that Gulliver no longer owed Snay the $80,000 payment.

This was an expensive lesson in following the terms of a settlement agreement, which we suspect lead to the cancellation of at least one European summer vacation. To avoid similar slip ups, employers

down to earth. The Protestant work ethic controls. And exercise takes a distant back seat to imbibing in hearty foods and ample libations. The winter goiter (which may last all year) is a common result. The simple things in life--a bright, sunny day, a braut and a beer enjoyed in a lounge chair in the back yard or on the porch of a summer lake house--paint the picture for a perfect day in the Midwest.

The Californian, on the other hand, is often labeled as OCD, entitled, spoiled, self-centered, or some variation of those adjectives. Our perfect day may include a day at the

should be mindful of their own discussions and disclosures to others surrounding settlement agreements, as even the most innocent disclosures can violate confidentiality clauses.

If you have questions regarding the drafting of a confidentiality clause, negotiating an appropriate confidentiality clause, interpreting a confidentiality clause currently in place, or about settlements and settlement agreements, in general, we at Scherer Smith & Kenny LLP are happy to assist you. Please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com, or Negin Yazdani at nny@sfcounsel.com for more information.

- *Written by Negin Yazdani*

Should You Have a Will or a Trust?

Estate planning is something that everyone knows they must do, but it is a path that many fear to tread. The subject is unknown terrain for many. It requires collecting, synthesizing and collating information and let's face it, making decisions surrounding your own mortality can be just a bit unsettling. Nonetheless, life often forces you to confront this process, in most cases due to the large joys of life: entering into partnership with the person you love, having a child, and taking steps to ensure that the family you choose in your life will be well-taken care of in the event of your death. Taking the first step into this strange landscape requires that you choose the process by which your assets will be

beach, elbow to elbow with throngs of other people, or perhaps the pursuit of any number of heart-pumping, endurance challenges such as riding a century, competing in a Tough Mudder, running a marathon, or going to the gym for a spin, Tae Bo or Insanity workout. Simply put, the stereotypical Californian wants not only to look good but to let others see how they look.

These are just stereotypes but they are grounded in some truth. We likely have all experienced these types of personality and cultural traits in people throughout the country and the world, for that matter. But

distributed.

Estate planning in California can be embellished through such things as establishing irrevocable trusts and life estates and purchasing life insurance, but distributing assets to beneficiaries essentially boils down to the use of one of two vehicles: (a) a formal vehicle that probates your will, or (b) a more informal vehicle that relies on the terms of your revocable trust. For ease of discussion, the first shall be known as "formal probate," and the second as "trust administration."

If you ask your attorney to draft a will, the executor appointed through your will distributes your assets, and he must use the formal, statutory probate process, generally offered and overseen by the county court system in the county of your residence. On the other hand, if you ask your attorney to draft a revocable trust, the trustee appointed through your trust will have the authority to carry out distribution of your assets without the court's formal oversight.

Please note that the IRS does not distinguish between either method for purposes of estate taxes, meaning that all of the tax credits, as well as the tax code and regulations, applicable to formal probate is likewise available to trust administration. Further, even though you may formally title your assets in a revocable trust, the IRS will not consider the trust to be an independent entity until your death. This means you can continue to own, sell, purchase and encumber assets in a revocable trust just as you would if they are titled in your name alone.

Which is right for you? That decision varies based upon the client's needs. But here is a brief list of the material "pros" and "cons" of each method:

for that matter? But one thing is clear. As we head into the spring of 2014, we should all strive to recognize and cherish the simple things in life.

No matter where we live in the United States--Minnesota, California and everywhere in between--we are blessed with so much more than the vast majority of others in the world. The daily challenges we face, irrespective of whether our worries and struggles relate to finances, health, family, taxes, climate and the like, are mostly fleeting.

Remember, no matter what our differences are in terms of our

First, I generally use the following metaphor to differentiate formal probate from trust administration: imagine your estate is a cake consisting of your assets that are to be cut into pieces and served to your beneficiaries.

In the case of formal probate, you will leave all the cake's ingredients scattered on the counter, and your executor must mix the ingredients and bake the cake through formal probate before cutting it into pieces and handing it out to your beneficiaries. Formal probate is time consuming and lengthy in many cases taking a couple years. However, drafting your will also takes less effort on your part because you are merely instructing the executor to whom to distribute your assets.

In the case of trust administration, on the other hand, the cake is largely already baked when it is, euphemistically speaking, ready to be served, since you must formally transfer real property and non-retirement assets into your revocable trust in order to get the benefits a revocable trust offers. Therefore, since you bake the cake prior to your death through the establishment of your revocable trust and contribution of your assets, it is more time-consuming (and therefore more expensive) to establish your revocable trust, but generally less work for your trustee and more efficient when distribution comes. And for that reason and the fact that it is not overseen by a judge, trust administration generally takes less time than administration through formal probate.

Even though drafting a will is generally less expensive than a revocable trust, you should also know that formal probate is nearly always more expensive than trust administration. This is because of the filing fees,

day-to-day lives, we should uniformly appreciate the good things in our lives. Spring is a time of reflection, introspection and, hopefully, change for the better. That's at least the mantra I will continue to strive for and I hope the same for you. Thanks to all Scherer Smith & Kenny LLP clients, friends and family for letting us appreciate the veritable bounty in our lives as Californians and citizens of the United States.

court fees, bonding requirements, and statutory fees to which both the executor and his or her attorney are entitled to by law. This last point is nearly always the most important to the clients with whom I work.

However, if you are young, many believe that going through the more formal (and expensive) process of establishing a revocable trust is overkill when the chances that it will mature and be used is unlikely. They would rather save money today on the chance that their beneficiaries pay more later in trust administration.

Other factors to consider in choosing between a trust and estate are the following:

- Formal probate for estates in which the surviving spouse receives the entire estate does not involve the same rigor, time, effort, or expense that is generally described above. As such, in those circumstances there is little cost or administration difference;

- Because trust administration is not court-supervised, it is a more informal process that, in my opinion, is more prone to abuse. Therefore, if you choose trust administration it is important that you truly trust the persons you've entrusted to distributing your assets;

- Once established, a revocable trust requires slightly more tending, since an asset must be properly contributed to, and titled in, your trust if it is to be distributed under it. Put another way, assets not contributed to a revocable trust must be formally probated. This is not a problem if the non-trust assets are valued at less than $100,000, but could be problematic if there are assets of greater value, or there exists real property that is not held in trust.

As you can see, though there are generally some major factors that hew clients towards either a will or a trust, there are other more minor considerations that might ultimately be the determining factor in your decision. My hope in providing this brief analysis is that you will be much better able to have a knowledgeable conversation that permits you to choose the right vehicle for yourself when you hire counsel to draft your estate plan and estate planning documents.

Written by Bill Scherer. If you wish more information regarding wills and trusts and the best plans of establishing your estate plan please contact Bill at wms@sfcounsel.com.

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

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