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Specializing in general liability, employment, construction and product liability

Vol. I., Iss. 1

February 2004

Employment: Can Employees Forego Your Grievance Process?

By Matthew D. Marca and Katherine L. Fraser

Quick look: The California Court of Appeal decides that an employer's internal grievance process need not be exhausted when doing so would be fruitless.

As an employer, you may have found yourself wondering whether an employee must exhaust your internal grievance process before pursuing their administrative remedies under FEHA. Though the issue is still in flux, the California Court of Appeal recently weighed in on the matter in *Dixon v. Regents of the University of California*. The decision may make you re-think your own grievance procedure.

Dixon v. Regents of the University of California

In *Dixon*, plaintiff was employed in the UCLA School of Medicine Residency Training Program, a three-year program in which participants were re-appointed each year. After completing his first year of the program, UCLA notified Dixon that his appointment would not be renewed, due to allegedly poor job performance. Dixon, an African-American,

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Construction: A Question for the Jury: the Economic Loss Rule and Component-to-Component Damage

By Patrick E. Taylor, Jr., and Michael Kennedy, Jr.

Quick look: The jury, not the judge, will have the final say as to what constitutes the product at issue in cases where component-to-component damage is claimed.

Imagine it: in the course of building hundreds of new homes, you installed a product that later proved to be defective and, in fact, a safety hazard. As the product's manufacturer has filed for bankruptcy, you have taken it upon yourself to replace the product, at no small cost. Your subsequent lawsuit against the manufacturer for negligence and strict liability seems a likely success until it comes to light that the defect was the result of an after-market addition to the product, installed by the manufacturer but built by another party entirely. This after-market addition is the source of the damage to the product. Suddenly, the economic loss rule has come into play, and your prospects for a legal victory have dimmed considerably. What happened?

This question was of more than academic interest to KB Home, one of America's largest homebuilders,

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obtained a right to sue letter from the DFEH and then initiated the University's internal grievance process, claiming employment discrimination and harassment. The University's procedure consisted of three phases: informal review, formal review, and a hearing before a hearing officer or committee. Though the first two stages were completed fairly quickly, the third had not yet commenced when his counsel decided to pursue the claim in court – some three years after Dixon's termination.

The trial court found that Dixon, having started the internal grievance process, was required to finish it before bringing an action at law, and granted the University's motion for summary judgment. On appeal, Dixon argued, among other things, that continuing to participate in the grievance procedure was futile, and that he should be allowed to proceed to court with his discrimination and harassment claims.

The Court of Appeal noted that California courts are split on the issue of whether a plaintiff who has a claim under FEHA and an employer-mandated internal grievance procedure must exhaust both procedures before bringing a lawsuit. The majority of cases have held that such individuals must pursue both their internal and administrative remedies before moving on to a civil suit. On the other hand, at least two courts have held just the opposite: if both a FEHA and an administrative remedy are available, the plaintiff may elect to pursue the FEHA course of action and bypass the internal grievance route entirely. The California Supreme Court is currently reviewing the issue; Taylor & Gutierrez will keep you informed on the matter.

In this case, the court followed those decisions which would require a plaintiff to complete an internal grievance procedure before bringing a civil

suit, thus siding with the majority. Despite taking this position, however, the court ultimately found for Dixon, citing the futility doctrine. Under that theory, a plaintiff need not continue to participate in a procedure that is clearly fruitless. Nine years had passed between Dixon's notification that his employment would not be renewed and the decision from the Court of Appeal. As the court said, "What was and is required is exhaustion of the administrative and judicial remedies, not exhaustion of Dixon." The employee was thus allowed to bring his civil suit, despite having failed to complete the University's internal grievance process.

What does Dixon mean for you?

While the *Dixon* court indicated that it would uphold and enforce internal grievance procedures, it sent a clear message that unreasonably lengthy grievance procedures would not be tolerated.

With this in mind, how can you structure your grievance procedure to avoid some of the problems faced in *Dixon*? Nine years of ongoing internal review and litigation is a costly prospect, one all employers would rather avoid.

While most employers already have an internal review process in place, many would benefit from an assessment of the status quo. In drafting employers' grievance procedures, we routinely ask:

- § When was the last time your grievance process was reviewed with an eye toward efficiency?
- § Does your procedure allow for resolution of employee grievances without involving your attorney?

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when the U.S. Consumer Product Safety Commission issued a recall of 30,000 Consolidated brand furnaces in 2001. KB had installed approximately 2,200 Consolidated furnaces in new homes between 1983 and 1994, and Consolidated was in bankruptcy when the recall was issued. In light of Consolidated's circumstances, KB voluntarily replaced defective furnaces, spending over \$3 million in the process. It turned out that Consolidated had been installing emissions control devices in the furnaces sold to Californians in order to comply with emissions requirements. These components, stainless steel nitrous oxide rods, were now causing damage to the furnaces such that there was a substantial risk of fire.

The existence of an after-market addition to the product implicated what has been termed the "economic loss rule," a doctrine which bars recovery in tort for economic damages caused by a defective product unless those losses are accompanied by some form of personal injury or damage to property *other than* the defective product itself. (Note that contractual warranty law would apply to damage to the product itself.) Here, KB Home had alleged negligence and strict liability, both tort claims. The question thus became whether or not the furnace was itself a single manufactured product, or whether the rods should be considered separate products. The answer would dictate whether or not KB Home would be able to recover in tort for their costs for repairing and replacing the furnaces.

A series of legal maneuvers eventually brought the case to the attention of the California Court of Appeal, who required that the first determination to be made was what exactly the product at issue was. In the words of the court, "distinguishing between 'other property' and the defective product itself in a case involving component-to-component damage requires a determination whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to

expect its failure, invariably to damage other portions of the finished product." Each side offered a host of factors to be used in the process of identifying 'the product,' including how easily the device could be removed from the larger product and whether or not it performed an integral function in the operation of the larger product. The court accepted the validity of all suggested factors, but held that the determination of this all-important question should be left to the trier of fact. The jury, not the judge, would have the final say as to what constitutes the product at issue in cases where component-to-component damage is claimed.

The application of the economic loss rule to product defect cases is relatively new in California; it was only in 2002 that the California Supreme Court handed down *Jimenez v. Superior Court*, the decision which established the rule in this arena. In an effort to carve out some exception to the ban on tort recovery in these cases, KB Home attempted to persuade the Court of Appeal that a limited life-safety defect exclusion should be applied. The court declined to do so, pointing to the California Supreme Court's earlier rejection of just such a proposal when the matter was before it. As it now stands, there is no recovery in tort when the sole damage is to the product itself. Recovery is still available in such a situation under warranty theories, however.

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The Back Page

By Michael T. Kennedy, Jr.

Taylor & Gutierrez recently defended a concrete ready mix supplier in a construction defect case involving a parking structure adjacent to a shopping center in Fresno. The structure was comprised of a slab on grade and a poured in place post-tensioned suspended slab of approximately 144,000 square feet. Plaintiff alleged that the concrete components of the structure were undergoing a reaction known as Alkali-Silica Reactivity (“ASR”). ASR occurs where the alkali in the cement reacts with the aggregates in hardened concrete, creating a chemical reaction. A byproduct of this reaction is a gel, which expands through entrained air. If enough gel is produced, it can begin to break the concrete apart as it expands. ASR claims are becoming more popular in the world of construction defect claims.

Because our client had supplied not only the ready-mix concrete but the aggregate used for the concrete, we became the primary defendant, along with the general contractor. Throughout the case, plaintiff alleged that our client would be primarily responsible for the cost of rebuilding the structure, and for other damages such as loss of revenue in the parking center while the structure was off-line.

Discovery was intensive. More than 20 depositions were taken, in the San Francisco Bay area, Fresno, Merced, and Orange County. Each party propounded hundreds of items of discovery and took samples from the parking structure. Plaintiff retained numerous expert witnesses, including some of the most prominent concrete experts in California, as well as the foremost forensic structural engineer in this type of litigation. All of these experts insisted that the structure would need to be demolished and rebuilt in order to halt the ASR reaction and prevent the deteriorating structure from harming members of the public, who would park there while shopping in the adjacent mall. Plaintiff demanded \$8 million in mediation sessions, and was still demanding in the mid-seven figures at the beginning of trial.

We were able to determine that while there is an ASR reaction occurring in the concrete, it is very mild. Our investigation showed that detectable levels of ASR occur in most of the concrete in the world, but that there had never been any problem with concrete made from aggregates quarried from the Fresno area. As industry standards dictate that consideration of the service history of the aggregate is the primary consideration in the analysis of the severity of an ASR reaction, we were able to disprove plaintiff’s claims against our client. Despite plaintiff’s claims, we were able to prove that our client had complied with all industry standards, and that the concrete supplied was not defective and was performing as expected. The extensive cracking and damage to the structure was not caused by the concrete supplied, but rather by design and construction issues having nothing to do with materials.

The case wound up settling on the first day of trial for \$1.4 million, with our client paying less than 10% of the total settlement amount.

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§ Is your procedure structured in such a way that it yields information that will be useful if the grievance develops into a lawsuit down the road?

It may be that your grievance process implicates union involvement, in which case, you are not at liberty to redraft the procedure entirely. Even that might not entirely preclude change, however. A streamlined, expeditious grievance process will ultimately save time and money. Thoughtfully crafted policies may be used to accomplish much of the fact-finding and information gathering that your attorney would otherwise have to do in the event of a lawsuit.