



"Legal excellence knows no color or gender"

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Message from the Executive Director

Has it really been a year already? It seems like yesterday that NAMWOLF staff and leadership was considering the ways to highlight and celebrate our 10th Anniversary. Now, 2011 is quickly coming to a close. During this year, our goals were simple...continue to grow as an organization while keeping the focus on our vision: 'to be the leading organization in the legal profession dedicated to diversity through lasting partnerships between preeminent minority and women owned law firms and private/public entities.' This year, while celebrating our 10th Anniversary, NAMWOLF realized significant growth through creating an atmosphere of inclusion everywhere we went! Our Business Meeting in Miami and our Annual Meeting in Las Vegas had record attendance and received high praise from both in-house and law firm attendees. In 2011, we also introduced our first "Regional Meeting" in San Francisco with great success, resulting in plans to continue these events throughout the country next year.



Jason L. Brown

In retrospect, it has been another special year for NAMWOLF. Due to the collective efforts of our staff, leadership and supporters, we made an indelible imprint on the discussion of diversity within the legal profession. We have created or strengthened relationships with numerous diversity focused organizations such as California Minority Counsel Program, Texas Minority Counsel Program, the Minority Corporate Counsel Association and the National Association of Women Lawyers, just to name a few. Since our humble beginnings a decade ago when we boasted 7 Law Firms Members and 18 Corporate Partners – NAMWOLF will close 2011 with over 100 Law Firm Members and over 150 partners in our Corporate & Public Entity Partnership Program (CPEPP). In addition to our growth, we introduced for the first time, our **Platinum Partners**. This distinguished classification is reserved for those CPEPP partners who have met their goal of spending 5% of their outside legal budget on minority and women owned law firms. The inaugural members of this prestigious category of NAMWOLF supporters include Accenture, American Airlines, Federal Deposit Insurance Company (FDIC), KeyCorp and Shell Oil Company. As we celebrate the achievements of these companies, we actively support our other corporate and public entity partners so that they can reach this milestone in the very near future.

Each year we continue to strive to set the bar even higher for ourselves as an organization. It is impossible to meet our goals alone. We owe a debt of gratitude to all of our active and dedicated law firm members, corporate partners and leaders for their tireless support and commitment to NAMWOLF. As pleased as we are about our results in 2011, we are more determined than ever to have the most successful year in NAMWOLF's history in 2012. We can't wait to show you what's in store!

On behalf of your NAMWOLF Staff - I wish you all a wonderful holiday season and a prosperous new year.

NAMWOLF ANNOUNCES 2012 BUSINESS MEETING IN NEW ORLEANS



We look forward to seeing everyone in New Orleans for the 2012 Business Meeting, Feb. 26 - 28, at the Royal Sonesta. The detailed schedule of events will be available shortly. In the meantime you can start making your accommodation reservations at the Royal Sonesta. We have a great room rate (\$174/night) available Feb. 26 - 27, 2012. Please call the Royal Sonesta directly (504-586-0300) and reference the NAMWOLF Business Meeting. Here is a sneak peak to the planned schedule of events:

- Two cocktail receptions (Feb. 26 & 27)
- The State of the Organization Address by the Executive Director
- Inclusion Initiative Update
- Advisory Council Retreat
- Round table discussion with In-House and Law Firm Members
- Young Lawyers Session
- In-Person Committee and Initiative Meetings (Including the launch of a new initiative for law firm marketing professionals)
- Annual Meeting Planning
- Marketing Session for Law Firm Members
- Dine Around (New Orleans Style!)
- Networking Lunches

NEW YEAR'S THOUGHTS...

Be always at war with your vices, at peace with your neighbors, and let each new year find you a better man.
~Benjamin Franklin

What great thing would you attempt if you knew you could not fail?
~Dr. Robert H. Schuller

Never tell your resolution beforehand, or it's twice as onerous a duty.
~John Selden

One resolution I have made, and try always to keep, is this: To rise above the little things.
~John Burroughs

For last year's words belong to last year's language
And next year's words await another voice.
And to make an end is to make a beginning.
~T.S. Eliot, "Little Gidding"

NAMWOLF 2011 YEAR IN REVIEW

2011 was another groundbreaking year for NAMWOLF thanks to our terrific members, which resulted in the following:

- 2011 Business Meeting in Miami, FL and was the most successful Business Meeting in NAMWOLF's history with 130 attendees.
- NAMWOLF held its first Regional Meeting in San Francisco, CA
- 2011 Annual Meeting celebrating NAMWOLF's 10th Anniversary broke attendance records with nearly 380 attendees
- We recognized five companies as our first ever NAMWOLF Platinum Partners
- We welcomed 6 new Corporate Partners to the Corporate and Public Entities Partnering Program (CPEPP)
- We welcomed 23 new Law Firm Members in 2011
- The Inclusion Initiative grew to include 17 corporations with a goal of spending \$70 million with minority and women owned law firms in 2011



THANK YOU FOR ANOTHER TERRIFIC NAMWOLF YEAR!

Welcome New NAMWOLF Members & Congratulations to CPEPP Partners

New Law Firm Members:

- Angones, McClure & Garcia, P.A.—Miami, FL
- The Axelrod Firm, PC—Philadelphia, PA
- Baker Williams Matthiesen LLP—Houston, TX
- Infante Zumpano Salazar & Miloch LLC—Coral Gables, FL
- LKP Global Law, LLP—Los Angeles, CA
- Sanchez Daniels & Hoffman LLP—Chicago, IL
- Wilkins Finston Law Group LLP—Dallas, TX
- Andrews Lagasse Branch & Bell LP—San Diego and Glendale, CA

Congratulations to Corporate and Public Entities Partner Program (CPEPP) Partners:

- Walmart
- Dreamworks Animation



The NAMWOLF Newsletter is now completely formatted with hyperlinks so you can link to a person, firm or company by clicking on the name, photo, logo or event with the Control (Ctrl) button...

For ease of reading, other than the box to the right, we've removed the color/underlined link look!

NAMWOLF NEWSLETTER/ WEBSITE SUBMISSIONS

Please send **newsletter submissions** to the editor, Justi Rae Miller, at jmiller@berensmiller.com in Word, Arial, 10 font, single space. Please limit substantive articles to 550 words. Photo and logo submissions should accompany the article and need to be jpg equivalent at 300 DPI. Deadlines are as follows:

1st Quarter 2012: February 1, 2012

2nd Quarter 2012: May 11, 2012

NAMWOLF now features member law firm successes & announcements on its website at [Emerging Trends](#) and sends out these notices on [Twitter](#) and [Facebook](#).

Please send **announcements & successes** to jane_kalata@namwolf.org in Word, Arial, 10 font, single space and limited to approximately 350 words. Photo and logo submissions should accompany the announcement/awards and need to be jpg equivalent at 300 DPI. A link to the article at your firm's website is also suggested.



SPOTLIGHT on Wong Fleming, P.C

By Jorge Espinosa & William R. Trueba, Jr., Espinosa Trueba, PL, Miami, FL

Linda Wong, a native of Hackensack, New Jersey, began her professional legal career through the service of others. After completing law school, she worked for the New Jersey Attorney General's office and the New Jersey Office of Legislative Services. From there, she worked as an attorney with the New Jersey Department of the Public Advocate's Division Advocacy for the Developmentally Disabled. In this position, she defended the rights of some of the most needy and least heard members of our society. She also developed a deep appreciation for the value that different perspectives bring to the practice of law and to society in general.

In 1993, while considering how she wanted to further develop her career, Linda discussed the possibility of opening an office in private practice with Daniel Fleming. Dan, a successful litigator who came out of the large and mid-size firm experience, had previously contacted Linda to resolve a legal issue for one of his Asian-Pacific American clients. After conferring on his client's options, the two continued to speak and eventually decided to form their own law firm.

It should be no surprise that in founding Wong Fleming, diversity was an important consideration for Linda and Dan. Since its formation, the law firm has fostered diversity in its own workplace. Today, the firm that they started 18 years ago has over 50 attorneys comprising of 23 women and 25 minorities. The firm maintains offices in the District of Columbia, California, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Texas and Washington. With offices spanning across the U.S., Wong Fleming can serve its clients' legal needs in a wide range of specialties and geographic locations.

Linda's work is focused on employment and commercial litigation, including insurance defense, creditor's rights and real estate litigation. Dan specializes in bankruptcy and commercial litigation, representing financial institutions and Fortune 500 clients. The law firm's main practice areas include employment, labor, mergers, acquisitions, construction, insurance defense, distressed assets, product and premises liability, tax, transportation, intellectual property, creditor's rights, education law, immigration, commercial transactions, real estate and bankruptcy.



When was the firm founded?

The firm was founded by Linda Wong and Daniel Fleming in November 1993.

What were your goals for your new firm?

The firm's goals were initially to provide a full practice firm which integrated the founder's concepts of quality and diversity.

And how big is the firm – office location, partners and attorneys?

Wong-Fleming is the nation's largest woman-owned law firm. It presently maintains offices in California, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Texas and Washington. Its main office is in Princeton, New Jersey. The firm presently employs over 50 attorneys, 23 of which are women and 25 minorities.

What are the firm's significant areas of practice?

Areas of practice for the firm include employment, labor, mergers, acquisitions, construction, insurance defense, distressed assets, product and premises liability, tax, transportation, intellectual property, creditor's rights, education law, immigration, commercial transactions, real estate and bankruptcy.

Please name some corporate clients of the firm.

Some of the firm's blue chip clients include Shell Oil Company, Nationwide Mutual Insurance Company, JPMorgan Chase, Ford Motor Credit, Prudential, Accenture (formerly the business and technology consulting division of accounting firm Arthur Anderson), TIAA-CREF and Harley-Davidson Financial.

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(Wong Fleming, Continued from page 5)

Tell me about your recent victories, special recognitions, awards?

In addition to numerous Super Lawyer designations for many of the attorneys at the firm, Linda Wong is particularly proud of being named top minority lawyer by the New Jersey Bar. She also is very proud of the Trailblazer Award given to her by the National Asian-Pacific American Bar Association.

What are your firm's long term goals?

After the substantial growth of the firm and its broad diversification, the firm wants to continue to develop itself as a firm of choice for Fortune 500 clients.

How does your firm encourage diversity?

The firm has an affirmative policy to consider diversity as an important factor in all hiring decisions. Its employees are encouraged to share their cultural diversity. Diversity is important to the firm because it enriches the firm's internal culture. It also allows the firm a broader depth of cultural experience with which to serve its clients.

How did your firm come to know NAMWOLF? Why did you join?

After becoming minority certified, the firm received information about NAMWOLF. The description of that organization and its goals immediately struck a chord with the Firm's principals since they reflect the law firm's own internal commitment.

What has been your involvement with NAMWOLF? For how long?

The firm joined NAMWOLF in 2006. It has served in its bankruptcy and insurance initiative committees.

What are your thoughts on the annual meeting?

The annual meeting is one of the most important marketing meetings for the firm. It provides a great opportunity to meet and develop contacts with large corporations that are committed to the goal of diversity. Apart from the business aspect of the meeting, it is also a great way to spend quality time with a great group of people.

And what tangible benefits has your firm received from the organization?

The firm has developed wonderful friends and business contacts throughout the country with whom it exchanges referrals. It has also made solid, meaningful contacts with global corporations.

What do you see as the future of NAMWOLF?

The organization is bound to continue to grow. As more women and minority owned firms establish their reputation for quality services, the organization is likely to grow in numbers and importance. NAMWOLF does make a difference. It uniquely knows how to bring together a diverse community of people in a manner that beneficially fosters growth, understanding, and interaction among all NAMWOLF members.



The authors of the Spotlight article are Jorge Espinosa and William R. Trueba, Jr., both founding members of Espinosa | Trueba PL. Mr. Espinosa is Florida Bar Board Certified in Intellectual Property Law and has extensive experience in the domestic and international registration and enforcement of trademarks and copyrights including anti-counterfeiting and border protection. Mr. Trueba is a registered patent attorney and his practice centers on patent and trademark litigation.

Recent Corporate and Commercial Decisions From the Delaware Courts

By Lisa R. Stark and Scott L. Matthews, The Delaware Counsel Group LLP

Delaware Court of Chancery has issued a number of recent corporate and commercial decisions relevant to both law firm attorneys and in-house counsel. Three of these decisions are discussed below.

Chancery Court Dismisses Action Challenging Goldman Sachs Compensation Practices

In *In re Goldman Sachs Grp., Inc. S'holder Litig.*, C.A. No. 5215-VCG (Del. Ch. Oct. 12, 2011), the Court of Chancery held that plaintiffs had failed to plead sufficient particularized facts to establish that making a demand on the board of directors of Goldman Sachs Group, Inc. ("Goldman") to investigate Goldman compensation practices would be futile. Therefore, the Court dismissed plaintiffs' derivative claims with prejudice. Plaintiffs, stockholders of Goldman, alleged excessive compensation at Goldman and brought a derivative claim against Goldman directors for alleged breaches of fiduciary duties and corporate waste. Defendants moved to dismiss the claims for failure to make a pre-suit demand. The Court held that plaintiffs had failed to raise a reasonable doubt as to whether Goldman's directors were disinterested and independent, and whether the board was well informed and acted in good faith. In addition, the Court dismissed plaintiffs' claims that any compensation payments constituted corporate waste. Plaintiffs also

brought a *Caremark* claim alleging that Goldman failed to monitor risky business strategies, which the Court rejected because the plaintiffs failed to demonstrate Goldman's willful ignorance of "red flags," as required by the *Caremark* decision.

Chancery Court Gives Deference to Contractual Fiduciary Duty Provisions in Limited Partnership Context

In *Brinckerhoff v. Enbridge Energy Co., Inc.*, C.A. No. 5526-VCN (Del. Ch. Sep. 30, 2011), the Delaware Court of Chancery dismissed plaintiff's claims that defendants, the general partner (the "GP") of a master limited partnership (the "MLP") and the GP's board of directors, breached their

"The LPA provided that the GP could enter into transactions with affiliates that were 'fair and reasonable' and that affiliate transactions would be presumed to fair and reasonable where the GP relied on expert advice."

fiduciary duties in entering into a joint venture with an affiliate where the MLP's partnership agreement (the "LPA")

expressly (1) authorized the GP to enter into affiliate transactions, and (2) eliminated the GP's liability for damages from breach of fiduciary duties unless the actions were taken in bad faith. The LPA provided that the GP could enter into transactions with affiliates that were "fair and reasonable" and that affiliate transactions would be presumed to fair and reasonable where the GP relied on expert advice. The Court noted that the MLP, acting through the GP, engaged a special committee, which hired its own financial and legal advisors, before recommending the transaction to the GP, which entitled the GP to a presumption that the transaction was fair and reasonable.

The Court also found that plaintiff had failed to allege facts suggesting that the GP or the GP's board acted in bad faith. The Court went as far as to suggest, in *dicta*, that "[i]t may...be the case that if a limited partnership agreement expressly permits a corporate general partner to take certain action, that the board of that general partner cannot be found to have acted in bad faith for causing the general partner to take the expressly permitted action." However, the Court declined to address that particular issue in light of the plaintiff's failure to plead facts alleging that the GP's board acted in bad faith.

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Lisa R. Stark and Scott L. Matthews Practice with Delaware Counsel Group, LLP, which has been representing domestic and international clients in complex transactional and governance matters involving Delaware business entities since 2004.

THE
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(Delaware Updates, Continued from page 7)

Court Invalidates Class Vote Adopted in Breach of Board's Fiduciary Duties

In *Johnston v. Pedersen*, C.A. No. 6567-VCL (Del. Ch. Sept. 23, 2011), the Court of Chancery found that written consents representing a majority of the outstanding voting power of Zurex, Inc. ("Zurex") were effective to remove and replace Zurex's incumbent directors even though Zurex's Certificate of Incorporation also required a class vote of the holders of a class of Zurex's preferred stock where Zurex's directors had breached their fiduciary duty of loyalty in issuing the preferred stock. The preferred stock had been issued by Zurex to select friendly investors and management to thwart off a change in control of the board after Zurex, a financially troubled company, had a series of proxy contests that were further destabilizing the company.

While the Court stated that it believed that the defendant directors honestly believed that they were acting in the best interests of the company in issuing the preferred stock, the Court held that their actions nonetheless could not pass enhanced scrutiny. Drawing from *Mercier v. Inter-Tel (Del.) Inc.*, 929 A.2d 786 (Del. Ch. 2007) and *Blasius Industries Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), the Court determined that the defendants bore the burden of proving that their motivations were proper and not selfish, and that they did not preclude the stockholders from exercising their right to vote or coerce them into voting in any particular way. Further, because the vote involved the election of directors and matters of corporate control, the directors were required to support their actions with a compelling justification. The Court held that an intent to raise capital by the issuance of the preferred stock was not a compelling justification where the stock possessed a class vote on every issue subject to a stockholder vote.



NAMWOLF BOARD OF DIRECTORS

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Sanchez & Amador, LLP

Janice Brown

Brown Law Group

Linda Burwell

Nemeth Burwell, P.C.

Carlos Concepcion

Concepcion, Sexton & Martinez

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Hewlett-Packard

Kenneth I. Trujillo

Trujillo, Rodriguez & Richards, LLC

Robin Wofford

Wilson Turner Kosmo LLP



Form I-9 Violations Cost Employer \$173,250 in Penalties Even Though No Illegal Aliens Employed

By Sara Goldsmith Schwartz, Schwartz Hannum PC

The United States Department of Justice ("DOJ") recently imposed a \$173,250 fine on a contractor of drywall services for violations of the federal Form I-9 reporting requirements. This is a stark reminder that failure to implement and maintain a compliant Form I-9 program can be very costly to employers.

The employer in this proceeding was Ketchikan Drywall Services, Inc. ("KDSI"), a seasonal, project-oriented business employing crews of between three and forty workers on projects lasting from a few days to a month. KDSI hired workers for specific projects and laid them off when the projects ended. KDSI recalled workers for other projects if their work was satisfactory.

The United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE" or the "Government") demanded that KDSI produce the original Form I-9 for each employee who worked for KDSI during the preceding three years. The Government then sought \$286,624.25 in penalties for 271 alleged Form I-9 violations, as follows:

- \$45,581.25 for KDSI's alleged failure to prepare a Form I-9 for 43 employees;
- \$69,377.00 for KDSI's alleged failure to ensure that 65 employees properly completed Section 1 of the Form I-9 (in this section, the employee must attest to his or her status in the United States);
- \$115,192.00 for KDSI's alleged failure to properly complete Section 2 of the Form I-9 for 110 employees (in this section, the employer must attest that specific documents were examined to establish the individual's identity and eligibility for employment in the United States); and
- \$56,474.00 for KDSI's alleged failure to properly complete both Section 1 and Section 2 of the Form I-9 for 53 employees.

KDSI requested and obtained a hearing before the DOJ, admitting 130 of the alleged 271 violations and contesting the remainder. KDSI also challenged as unreasonable the penalty sought by the Government.

Upon review of the matter, the DOJ determined that KDSI committed 225 of the alleged 271 violations and

Sara is the Founder and Managing Partner of Schwartz Hannum PC, a management-side labor and employment law firm located in Andover, Massachusetts. Sara gratefully acknowledges the efforts of Arabela Thomas, who assisted with the preparation of this article.



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that an appropriate penalty was \$770 per violation, totalling \$173,250. Acknowledging that the permissible penalties in this case ranged from only \$24,750 (\$110 per violation) to \$247,500 (\$1,100 per violation), the DOJ concluded that KDSI's penalty belonged in the higher end of this range, *even though no workers were actually found to be unauthorized aliens, and KDSI had no history of previous violations.*

In explaining its decision to award such a large penalty, the DOJ stated that KDSI "[did] not demonstrate a good faith effort to ascertain what the law requires or conform its conduct to it" given that KDSI had delegated its Form I-9 functions "to employees who were not qualified to perform the task." The DOJ also emphasized that failure to properly complete Section 1 and Section 2 of the Form I-9 "is always a serious violation" and that failure to prepare a Form I-9 at all "is among the most serious of paperwork violations."

As this case illustrates, the Government is casting a wide net in its search of Form I-9 violations and levying heavy penalties against employers. Accordingly *all* employers should be sure to:

- Complete a Form I-9 for each new employee within three business days of hire;
- Oversee proper completion of both the employee at-

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(I-9 Violations, Continued from page 9)

testation and the employer attestation sections of the Form I-9;

- Keep, with the Form I-9, copies of any documents that the employee produces to establish identity and eligibility to work in the United States (employers are not required to copy the documents they examine, but, if they do, must keep them with the Form I-9);
- Retain the original signed Form I-9 for either three years after the date of hire or one year after the employee's employment is terminated, whichever is later;
- Satisfy the detailed federal regulations covering electronic preparation and storage of Form I-9, if applicable; and
- Maintain the ability to make these forms available to ICE for inspection on three days' notice, as failure to do so is an independent violation of federal law.

An excellent way to get started, or to maintain an existing compliant Form I-9 program, is to provide on- or off-site training to those supervisors, managers and human resources officials involved in the Form I-9 function.

Please feel free to contact us if you have any questions about Form I-9, would like to discuss Form I-9 training for your organization, or need assistance in responding to a Form I-9 audit.



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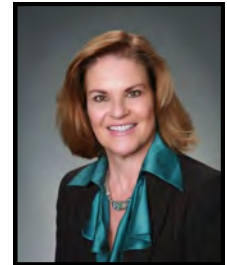
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NAMWOLF'S ANNUAL CONVENTION TREASURE HUNT

At the 2011 Annual Convention in Las Vegas, a knowledgeable member, Laura Gibson (shown on the right) from the firm of Ogden, Gibson, Broocks, Longoria & Hall, L.L.P., won a netbook for providing the most* correct answers to our treasure hunt questions.

Thanks to Pugh, Jones & Johnson, P.C. for the wonderful donation for this activity!

**If you were wondering, she had ALL the answers correct!*



- Q. What NAMWOLF member had her first job as a tour guide at the top of the Empire State Building in NY?

Francine Griesing, Griesing Law, LLC

- Q. What NAMWOLF in-house company sent the most in-house lawyers to a single NAMWOLF Annual Meeting?

Accenture - 12 lawyers

- Q. What southern NAMWOLF firm has a celebration called "Tiara time"? A recent "Tiara time" was in response to the Firm being hired to represent an oil company in the DEEPWATER HORIZON oil spill litigation.

Kuchler Polk Schell Weiner & Richeson

- Q. In what Ohio NAMWOLF firm's office can you expect to find bras, panties and lotions - get your mind out of the gutter - due its representation of national lingerie and beauty products retailers?

Perez & Morris LLC

- Q. Which advisory council member company has a general counsel who was previously chief counsel to a federal agency? Which agency?

GlaxoSmithKline – Food and Drug Administration (FDA)

- Q. This California firm is where the pets go, where tires roll, where automakers avoid wrecks, oil companies issue gas cards, a former Olympian peddles protein and baseball memorabilia is unusually abundant.

Wilson Turner Kosmo, LLP

- Q. What mother-daughter firm recently won a patent infringement case in the United States Supreme Court?

Pruetz Law Group LLP

- Q. Which Partner at a California NAMWOLF firm fought a bull in Mexico City?

Gary Lafayette, Lafayette & Kumagai LLP

- Q. What NAMWOLF firm has a partner who is the lead singer in a rock band?

Taber Estes Thorne & Carr PLLC

- Q. Which NAMWOLF member spends as much time practicing law as she does baking cookies?

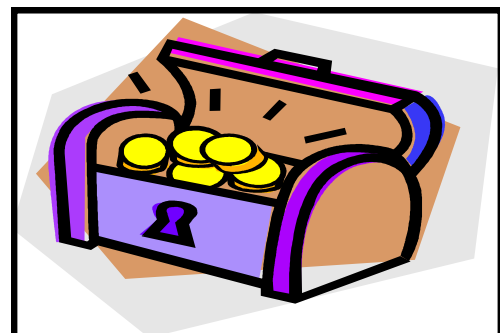
Cheryl Bush, Bush Seyferth & Paige PLLC

- Q. Which NAMWOLF member was a model and stock broker prior to her legal career?

Barbara Berens, Berens & Miller, PA

- Q. Which NAMWOLF member company's trucking fleet logs more than 800 million miles per year, with each individual driver logging more than 100,000 miles annually – the equivalent of four trips **around the world**?

Walmart



Courts Struggle to Analyze Employment Arbitration Agreements after *AT&T Mobility v. Concepcion*

By Michael Cole, Miller Law Group

In April 2011, the U.S. Supreme Court issued its landmark decision in *AT&T Mobility, LLC v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740 (2011), holding that the Federal Arbitration Act ("FAA") preempts California's rule that invalidates arbitration agreements in which the parties waive the right to class-wide proceedings. Although *AT&T* arose in the consumer context and dealt with the preemption of California state law, it has potentially far-reaching implications in the employment context. Indeed, *AT&T* has been looked on favorably by many employers as wholeheartedly approving class action waivers and signaling the death knell of expensive and time-consuming class actions. But as courts nationwide wrestle with applying *AT&T* in the employment context, with often confusing results, it behooves employers to proceed cautiously in revising their arbitration agreements.

In California, for example, courts are considering the impact of *AT&T* on the California Supreme Court's earlier decision in *Gentry v. Superior Court*. Courts in California are also dealing with whether *AT&T* extends to waivers of other types of representative actions. In *Gentry*, the California Supreme Court held that class action waivers in employment agreements could be unenforceable where a plaintiff establishes certain factors that, taken together, show that the waiver would undermine the vindication of a substantive statutory right. Recently, a California Court of Appeal -- in what appears to be the first published decision on this topic since *AT&T* -- handed down *Brown v. Ralph's Grocery Company*, 197 Cal.App.4th 489 (2011), addressing the enforceability of an employment arbitration agreement that contained both a class action waiver and a waiver of employees' rights to bring a representative action under the California Private Attorneys General Act ("PAGA"). The majority opinion overturned the trial court's decision that the class action waiver was unconscionable, but side-stepped whether *Gentry* remains good law following *AT&T*, holding only that the plaintiff had not met his burden to establish the *Gentry* factors.

In a more recent decision, however, a federal district court in California enforced a class action waiver in an arbitration agreement, ordering the plaintiff to arbitrate a variety of wage and hour claims on an individual basis. *Dauod v. Ameriprise Financial Services, Inc.*, Case No. 10-cv-00302 (C.D. Cal. Oct. 12, 2011). Relying on *AT&T*, the court concluded that the waiver was enforce-

able. Although the court did not cite to or address *Gentry*, the court rejected plaintiff's argument that *AT&T* should be read narrowly to apply only to consumer class actions. Other California federal courts have more explicitly held that *AT&T* overruled *Gentry*. See *Lewis v. UBS Fin. Services Inc.*, 2011 WL 4727795 (N.D. Cal. Sept. 30, 2011).

As to whether *AT&T* applies to other types of waivers, again the courts are divided. The majority in *Ralph's Grocery* held that *AT&T*'s reasoning did not apply because PAGA has a quasi-public purpose. Specifically, PAGA "deputizes" citizens to enforce the California Labor Code and to protect the public by bringing a representative action as a private attorney general to collect civil penalties. The court concluded that PAGA would be frustrated by enforcement of an arbitration agreement containing a representative action waiver. On this point, the majority held that *AT&T*'s reasoning did not apply because it did not address enforcement of an arbitration agreement that would significantly undermine a state statute.

"Indeed, AT&T has been looked on favorably by many employers as wholeheartedly approving class action waivers and signaling the death knell of expensive and time-consuming class actions."

Not all courts have agreed with *Ralph's Grocery* regarding PAGA representative action waivers. For example, applying *AT&T*, the United States District Court for the Central District of California in *Quevedo v. Macy's, Inc.*, 2011 WL 3135052 (C.D. Cal. June 16, 2011), denied a motion for reconsideration of an earlier decision enforcing a class action and PAGA representative action waiver, and compelling arbitration of individual wage and hour claims.

It also remains to be seen how *AT&T* will be applied under federal law. For example, the United States District Court for the Southern District of New York recently adopted the recommendation of a magistrate judge

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(AT&T Mobility, Continued from page 12)

refusing to compel arbitration of individual Title VII claims (including pattern and practice discrimination). *Chen Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 (S.D.N.Y. July 7, 2011).

The magistrate declined to extend the reasoning of *AT&T*, noting that *AT&T* dealt only with the preemption of state law and not the impact of the FAA on arbitration agreements that impeded the vindication of federal substantive rights.

The law in this area is certain to evolve, given the conflicting court decisions. As a result, employers should exercise caution and seek the advice of counsel when deciding to implement or enforce class and other representative action waivers.

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