ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at http://www.kttlaw.us/memos.html

RE: GEORGE THE BARTENDER AND THE *ANGELOTTI* PRELIMINARY INJUNCTION OR ARE *LIEN CLAIMANTS CELEBRATING A BIT PREMATURELY?*[1]

FROM THE LOBBY BAR AT THE HYATT:

As I approached the Lobby Bar, I knew it was going to be a rather raucous evening. You see loyal Lobby Bar patron it came out in news flash earlier in the day that a federal judge issued a preliminary injunction enjoining the State of California from collecting lien activation fees from any lien claimant or dismissing liens because the activation fee had not been paid on the grounds that this violated the equal protection clause as contained in the 14th Amendment to the United States Constitution.[2]

I found this ironic. As a defense attorney, I have always longed for equal protection of the laws but alas, I was not in a protected class like lien claimants.

Upon entering the Lobby Bar I was bombarded by a cacophony of light and sound. It was as if the Lobby Bar had been turned into a modern Las Vegas dance club! A DJ booth had been set up in the corner of the bar featuring strobe and LED color lights. Party balloons were floating up to the ceiling and streamers were coming down from the ceiling. In the darkness I could barely make out the phrases on the balloons - "Ye$, We Can" and "Equal Right$."

And the music, oh the music! I could hear the refrain of the tune: "We Won't Stop" by Miley Cyrus being sung by all the lien claimants in attendance, being led by none other than that duplicitous duo, Larry and Lenny Lien. As if this weren't enough I was really taken aback at the sight of approximately 12 lien claimant representatives twerking in the middle of the dance floor.[3]

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[1] For those new patrons to the Lobby Bar, George the Bartender's workers' compensation case involves an injury to his elbow, epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] Now, we know what you're thinking, loyal Lobby Bar patron, today is March 14, 2014, but for purposes of story flow "today" refers to November 5, 2013. We thank you in advance for your understanding.

[3] Though unaware of it at the time, after showing a video I took with my smartphone to one of the members of my crack writing team of *George the Bartender* I was assured that this was in fact the dance that the lien claimants at the Lobby Bar were doing. It had all the appearances of a low back/hip injury waiting to happen, especially for some of the more chronologically enhanced celebrants, but I digress.

Needless to say the celebration was in full swing and the only thing I could do to stave myself from losing my lunch was to close my eyes and think of the Lobby Bar's breathtakingly beautiful cocktail waitress, Kim, bringing a Beefeater's martini straight-up with two olives.

Now that I'm collected, allow me to fill you in a bit, loyal Lobby Bar patron. A federal judge hearing a case called *Angelotti Chiropractic, Inc., et al. v. Kamala D. Brown, et al.* SACV 13-1139-GW(JEMx) has issued a preliminary ruling (27 pages long) addressing the three Constitutional issues raised by a handful of lien claimants led by none other than interpreter vendors, photocopy service vendors and chiropractors. These issues were as follows:[4]

1. Taking of private property without just compensation
2. Due process
3. Equal protection

The trial judge ruled against the lien claimants on the first two arguments but seemingly found merit in the equal protection argument. The judge found some validity in the argument of the plaintiffs that they were not afforded equal protection of the law as certain potential lien claimants were excluded by California Labor Code §4903.05(c)(7). Those entities are:

1. Health care service plans licensed pursuant to California Health and Safety Code §1349
2. Group disability insurers under a policy issued in California pursuant to provisions of California Insurance Code §10270.5
3. Self-insured employer welfare benefit plans, as defined by the California Insurance Code §10121
4. Taft-Hartley health and welfare funds
5. Publicly funded programs providing medical benefits on a nonindustrial basis

It is quite clear to me that there was a legitimate reason for excluding the above providers and/or potential lien claimants as these groups didn't have a hand in creating the current lien crisis in our wacky world of workers' compensation in California. I am quite confident that the attorneys representing the State (or whom I refer to as the "good guys") will eventually prevail.

An injunction is somewhat like a petition for removal pursuant to California Labor Code §5310. Both requests are directed to the equitable arm of the court and/or Appeals Board and before relief is issued, the parties must establish that irreparable harm will befall them unless relief is granted. Although I personally have had a very difficult time in establishing the requirement of "irreparable harm."

[4] A copy of *Angelotti* can be obtained via email request

A preliminary injunction is just that, preliminary. If this case proceeds to trial the preliminary injunction can either become a final injunction or stay or be dissolved and allow the State of California to once again collect activation fees from lien claimants. However, before the case can go forward to trial the Ninth Circuit Court of Appeal must address the appeal of the State of California as to whether or not the preliminary injunction issued by the trial judge should be cancelled or stay in effect.

The thrust of the lien claimants' argument was directed at the date of December 31, 2013, or what I like to affectionately refer to as "LIEN CLAIM ARMAGEDDON." At the stroke of midnight on New Year's Eve 2013, all lien claims that had been filed since the beginning of time would be dismissed with prejudice as a matter of law unless the activation fee was paid.

Plaintiffs made the argument that this was a financial hardship as activation fees paid on every lien would amount to millions of dollars. Although I do not buy this argument, the federal court certainly did and it lead them to issue a preliminary injunction.

The actual effective date for the injunction is Tuesday, November 19, 2013, and this day certainly will be a cause for joy in the lien claimant community and will be a date they'll always celebrate.

At this point in my musings, Larry and Lenny Lien came over to give me a party hat and a drink advising that they were now back to "business as usual."

I told Larry and Lenny that they shouldn't count their chickens before they've hatched and that we are a long way from a permanent injunction. I also reminded the Lien brothers that lien claimants still have the burden of proof at trial and multiple liens have been defeated on this basis alone. I also advised that we still had in place the lien filing fee of $150.00.[5]

The single most pressing problem with the preliminary injunction is that the balancing act between the employer community and employees has been jeopardized.

Although no one really knows for certain the figures upon which SB 863 is based, it is my understanding that approximately $800,000.00 of this compromise bill went to raising permanent disability benefits.

[5] After the *Angelotti* case some lien claimants became emboldened and through attorneys in the State of California filed their own concurrent federal and state lawsuits challenging not only the activation fee but the lien filing fee itself. Although these plaintiffs have now dismissed their Federal actions, they are still proceeding in State Court claiming that the activation and filing fee are unconstitutional. They also argued the restrictions on assignments and the lien statute of limitation are also unconstitutional. These actions are still pending.

To compensate employers for this increased financial burden, SB 863 contained reform with respect to lien claimants and the Utilization Review (UR) system. Appeals of UR denials and/or modifications now go directly to the State through Independent Medical Review (IMR) as opposed to the Board.

The IMR system now seems to be working for the benefit of employers. Despite the costs of each individual appeal, most appeals to IMR are denied and are uphold the UR decision. I look forward to waving an IMR decision upholding a timely and valid UR determination in the face of lien claimants that still want to litigate their liens.

The Director of the Division of Industrial Relations (DIR), Christine Baker, for the first time in my forty plus years in practice brought together labor and management in an historic compromise which resulted in Senate Bill 863.

There are certain people that tend to energize an audience by their speech, actions and performance. Christine Baker is one of those persons.

There is no question that Christine Baker has energized all segments of the workers' compensation community by bringing together the two groups that should be involved in any workers' compensation reform, i.e. the people who receive the benefits and the people who pay the benefits; in other words, labor and management. She made this happen.

Now the victory of SB 863 is being threatened. This could result in another reform bill. Looking squarely at Lenny and Larry Lien, I indicated that you should think twice what you wish for as you may not really like a new reform bill that takes dead aim at lien claimants.

With Larry and Lenny Lien looking rather deflated I took my leave of the Lobby Bar for the night.

DISCLAIMER:

All characters at the Lobby Bar aside from George, Kim and I are fictional and the storyline is simply a product of my warped imagination.

Although I originally felt a disturbance in the force upon hearing the news of the injunction, I am confident that the reforms so carefully crafted in SB 863 will be returned to us, so stay tuned.

Though, I must admit that my preoccupation with this issue is waning as I am currently preparing to embark on my annual vacation to the beautiful sandy beaches of Kauai, a place where every cocktail waitress is breathtakingly beautiful.

Picture it, loyal Lobby Bar patron, me sipping on Mai Tais at the Grand Hyatt, with Georgia on my mind. Georgia, George's cousin, tends bar at the Grand Hyatt in Kauai. Hard days of denying benefits aren't too far away, so you know I'll be enjoying the reprieve while it lasts.

Make mine a double, Georgia.

Aloha.

-Joe Truce