YOUNG LAWYERS' CORNER

Libby Jurors Ask: What Is Reasonable Doubt?

Arguing from the instructions

BY HON. MARK A. DRUMMOND
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"We would like clarification of the term 'reasonable doubt,'" the jurors in the trial of I. Lewis "Scooter" Libby wrote. "Specifically, is it necessary for the government to present evidence that it is not humanly possible for someone not to recall an event in order to find guilt beyond a reasonable doubt?" Huh? The judge's response? "Reread the instruction."

Many trial lawyers have had the experience of delivering a compelling, some may even say spellbinding closing to a jury, only to have the judge start reading the instructions and sound as if she's speaking another language. We think to ourselves, Oh, I wish I'd gone over that instruction, or, I wish I had argued or emphasized this instruction. Let's face it, when the words have evaporated from the courtroom, all the jury is left with are the exhibits and the written instructions.

"It's almost case-specific," says Zaldwaynaka Scott, Chicago, Co-Chair of the Section of Litigation's Criminal Litigation Committee. "What constitutes reasonable doubt in one case might not create doubt in another case just based on facts and circumstances. I've tried a lot of cases and have heard every question under the sun. I have seen jurors ask for dictionaries, which are not given to them, but I have never seen them ask for a further definition of reasonable doubt."

"The jury's task is so dependent on the facts presented at trial that a more nuanced explanation of reasonable doubt—perhaps using hypothetical examples—may lead the jury to think the judge is suggesting a particular outcome in the case," says Thomas A. Gilson, Phoenix, Co-Chair of the Section's Criminal Litigation Committee. "There may be a better way to respond to the question asked by the Libby jurors than reading back the standard instruction, but I am not aware of it."

The rule is that only the judge can instruct the jury on the definition of reasonable doubt. Most jurisdictions, however, also allow counsel to argue what constitutes a reasonable doubt or doubts by use of stories or analogies.

Paul Mark Sandler, Baltimore, Chair of the Section's Litigation Institute for Trial Training, puts it this way: "Let's assume we have a box, and in that box are a cat and a mouse. We put the lid on the box; we walk away. When we come back the mouse is gone. Is there any reasonable doubt on what happened to that mouse? But what if when we come back, we open the box and, lo and behold, there's a big hole in the side of the box. Is there now reasonable doubt of what happened to that mouse? Sure there is. Well, let's turn to the holes in the prosecution's case. . . ."

Resources:

Judge John L. Kane, *Reasonable Doubt and Other Shibboleths*, Vol. 29, No. 1 LITIGATION (Fall 2002), available at www.abanet.org/litigation/journal/archive.html.

Information on the Litigation Institute for Trial Training, July 12-13, 2007, available at www.abanet.org/litigation/litt.

Insurance Coverage

Courts Consider Insurance Coverage of Wage and Hour Claims

Conflicting decisions raise questions for employers

BY GARTH T. YEARICK
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Employers today are facing an increasing onslaught of statutory wage and hour claims involving substantial collective damages. A California Court of Appeal has given a sliver of hope to employers that payments made to settle such claims can potentially be covered by insurance. *SWH Corp. v. Select Insurance Co.*

Ann Marie Painter, Dallas, Co-Chair of the Section of Litigation's Employment and Labor Relations Law Committee, has observed a substantial increase in wage and hour claims that has "continued to pick up speed for the last five to six years," she says. "It really has burgeoned and become a big part of the complex litigation docket for employment lawyers," Painter explains. These claims, usually in a collective action format, generally allege that a particular employer's pay practice, such as designating claimants as exempt employees to avoid paying overtime wages, violates state or federal law.

Painter says that these types of claims are attractive to claimants because they are "relatively easy to make," provide for fee shifting, and entail potential collective damages that are "incredibly huge." But the effects on employers can be "devastating." Painter notes that insurance coverage generally has not been an issue in such cases but that this California decision may cause both plaintiffs' and defense counsel to "dig a little further."

In *SWH Corp.*, a California appellate court, in an unpublished decision, reversed a summary judgment in favor of an insurer that involved an employer's payments to settle a class action based on alleged violations of California's wage and hour laws. The insurer had successfully argued to the trial court that its directors and officers liability policy excluded coverage of such payments as a matter of law. The appellate court disagreed. Although the policy expressly excluded Fair Labor Standards Act claims, the court determined that the policy language did not clearly and unambiguously exclude state law wage and hour claims.

The court also rejected the insurer's arguments that the settlement payments clearly constituted restitution that was partially uninsurable under state law, and reversed, due in part to triable issues of fact on that issue. The court held that "California's minimum wage and overtime laws are remedial, not punitive" and that the "line between damages and restitution is often fine or invisible."

Linda B. Foster, Atlanta, Co-Chair of the Section's Insurance Coverage Litigation Committee, says that she was "shocked" to read the California court's opinion. "Fifteen years ago there was almost nothing in the context of employment litigation that was covered by any insurance policy." Since that time, Foster states, there has been an "explosion of employment liability policies." Noting that the California case involved unusual language in a directors and officers policy instead of a traditional employment liability policy, she says that "prior to this case, if you had asked me whether a wage and hour violation case could be potentially covered by insurance, I would have said no way."

In contrast, Foster points out a subsequent decision by the Seventh Circuit also dealing with insurance coverage of wage and hour claims. In *Farmers v. St. Paul*, the court determined that a similar but differently drafted exclusion in a traditional employment practices liability policy did exclude state law-based wage and hour claims. The court not only held that the specific exclusion was enforceable but determined the purpose of the exclusion was to avoid a "moral hazard," where an insured could "refuse to pay overtime and then invoke coverage so that the cost of overtime would come to rest on the insurance company."

Although Foster believes the insurance industry will quickly clamp down on the ambiguity identified by the California court, she contends the biggest lesson from these decisions may be that employment law counsel, for both plaintiffs and the defense, should be familiar with all policies that may cover employment law violations. "The presumption has always been that this is not insurable, but as the California court demonstrated, there may be room for argument under certain types of policies."

Resources:

SWH Corp. v. Select Ins. Co., 2006 Cal. App. Unpub. LEXIS 8694 (Cal. App. Sept. 28, 2006) (unreported).

Farmers Auto. Ins. Assoc. v. St. Paul Mercury Ins. Co., 2007 U.S. App. LEXIS 8214 (7th Cir. Apr. 10, 2007).