**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. CC-07-1300 PaDMo |
| CHECKMATE STAFFING, INC., and jointly administered cases, | Bk. No. SA 03-19318-RK |
| Debtors. | Adv. No. SA 04-01791-RK |
| DIVERSIFIED PARATRANSIT, INC., | |
| Appellant, | |
| v. | **M E M O R A N D U M**[1] |
| CHECKMATE STAFFING, INC., | |
| Appellee. | |

Argued and Submitted on January 25, 2008
at Orange, California

Filed - February 11, 2008

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Robert Kwan, Bankruptcy Judge, Presiding

Before: PAPPAS, DUNN and MONTALI, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Chapter 11[2] Debtor Checkmate Staffing, Inc. ("Checkmate") prosecuted an adversary proceeding against Diversified Paratransit, Inc. ("DPI") to collect an account receivable. While DPI admitted that it owed most of the amounts sought, it asserted a right to recoupment as a defense. The bankruptcy court denied DPI's recoupment claim and awarded a money judgment to Checkmate. DPI appealed. We AFFIRM.

**FACTS**

Checkmate[3] and its six wholly owned subsidiaries, including StaffAide, Inc. ("StaffAide"), provide temporary staffing services to businesses. DPI, and its subsidiaries, Paul's Yellow Cab, Inc. and Inland Express, Inc., provide transportation services to the public using buses and taxis.

In April 2002, Checkmate and DPI entered into a contract in which Checkmate agreed to supply personnel and related services to DPI (the "Agreement"). To do so, Checkmate hired all of DPI's existing employees, and agreed to pay their salaries and benefits. Checkmate also committed to provide worker's compensation insurance coverage for the benefit of the employees provided to DPI and, in addition, employer's liability insurance covering the acts of those employees. DPI retained the right to control the

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[3] Unless clarity requires otherwise, we refer to the parties and their subsidiaries collectively as Checkmate or DPI.

employees provided by Checkmate, and in return for Checkmate's various promises, DPI agreed to make monthly payments to Checkmate.

In addition to the provisions requiring that Checkmate obtain insurance coverage, the Agreement also included an indemnity provision (the "Indemnity"):

> StaffAide shall comply with all applicable Federal, State, and local laws including, but not limited to, the provisions of the Equal Employment Opportunity Act, the Americans and [sic] Disabilities Act, and the Fair Labor Standards Act. StaffAide shall indemnify, defend and hold [DPI] harmless from and against any and all losses of whatever nature, type, or manner, that arise out of acts of StaffAide, and its employees, whether assigned to [DPI] at its premises or not, which acts arise out of either negligence, gross negligence, willful misconduct, or any cause related to the acts of StaffAide and/or its employees hereunder.
>
> This indemnity and defense obligation shall apply in all circumstances except in the event that any loss is the result to [sic] the direct acts, or omissions of [DPI], or its officers, directors or legal representatives. [DPI] shall give prompt notice to StaffAide of any claim for which it seeks indemnification and/or defense under this Agreement. StaffAide shall name [DPI] as an additional insured to its General Liability and Workers Compensation policies and to any and all other policies in effect at the time of this agreement or hereafter, which may provide indemnity or defense to [DPI].

At some unspecified time, DPI learned that from October 11, 2002, through December 19, 2003, Checkmate had failed to carry any worker's compensation insurance or employer's liability insurance as to the employees provided to DPI as required by the Agreement. In the meantime, on December 29, 2003, Checkmate filed for chapter 11 relief. The parties agree that DPI was aware of Checkmate's failure to provide the worker's compensation and employer's

liability coverage before the filing of Checkmate's bankruptcy petition.

Following the filing of the bankruptcy petition, Checkmate continued to provide services to DPI pursuant to the Agreement through April 2004. The proper insurance was obtained. As of May 10, 2004, DPI owed Checkmate approximately $487,500 for services and personnel provided under the Agreement postpetition. On that date, DPI entered into a service agreement with another provider and refused to pay the remaining amounts due to Checkmate under the Agreement.

In June 2004, Koosharem Corporation purchased substantially all of the assets of Checkmate, including the $487,500 account receivable owed by DPI, in a bankruptcy court-approved § 363(f) sale. On October 27, 2004, Koosharem sued DPI in Los Angeles County Superior Court to collect the $487,500 balance owed on its account. To settle a dispute that had arisen between Checkmate and Koosharem over the asset purchase transaction, Koosharem eventually reassigned its rights in the action against DPI to Checkmate.

Checkmate removed the collection action to the bankruptcy court on December 2, 2004.[4] On December 24, 2004, DPI answered the complaint, asserting as an affirmative defense that Checkmate had breached the Agreement by failing to provide the required insurance coverage and other injuries. DPI claimed a right to recoupment of the damages it incurred on account of Checkmate's breach.

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[4] Later, on September 5, 2006, the bankruptcy court entered an order substituting Checkmate as plaintiff in this action.

In a Joint Pretrial Order ("JPTO"),[5] DPI admitted it owed Checkmate $467,500 for Checkmate's post-petition services under the Agreement. It disputed the remaining $20,000 of the claimed invoices, and contended that its liability to Checkmate was subject to its claim of recoupment. The JPTO proposed, and the bankruptcy court agreed, to bifurcate the trial of the action to resolve three disputed issues:

> 1. Whether Checkmate's sale of assets free and clear of liens prevented DPI from asserting a claim for recoupment.
>
> 2. Whether DPI was entitled to offset its damages, if any, for alleged breaches of the Agreement by Checkmate against funds owed by DPI to Checkmate under the Agreement.
>
> 3. How damages from the alleged breach of the Agreement should be measured.

However, before trial, the parties through their briefs agreed that the sale of Checkmate's assets to Koosharem did not prevent DPI from asserting a recoupment defense, and that DPI's recoupment may be based on damages from an alleged breach of the Agreement. Trial Tr. 14:15-17 (December 19, 2005). In addition, Checkmate waived its claim for the $20,000 in disputed services. As a result, the bankruptcy court was required to resolve at trial only the amount of DPI's damages available as a claim for recoupment.

The bankruptcy court conducted the first day of trial on December 19, 2005. Regarding the measure of DPI's damages, both in its pretrial tentative ruling and in its comments on the record at the December 19 hearing, the bankruptcy court suggested that the preferred measure under California law was a legal remedy, i.e., the amount of damages proximately caused by the breach.

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[5] The JPTO was submitted by counsel for DPI and Checkmate and entered as an order of the bankruptcy court on October 13, 2005.

Trial Tr. 2:7-12. DPI instead argued that it could, under California law, assert an alternative, equitable measure: restitution of the amounts it had paid Checkmate to pay the premiums for the insurance coverage that was not provided. Trial Tr. 4:12-17.

The bankruptcy court rejected DPI's plea for an equitable remedy: "You don't get to equity if there's an adequate remedy at law. That's a bedrock principle." Trial Tr. 11:25 - 12:2. However, the court recognized that an equitable remedy might be available if the remedy at law proved to be inadequate: "At this point I'm not convinced that there isn't an adequate remedy at law. If I come to that conclusion, then you certain[ly] can argue restitution as an equitable remedy in this case." Trial Tr. 12:13-16. "[W]e'll proceed on the basis that there is an adequate remedy at law. If the Court determines there is not an adequate remedy at law, then alternatively restitution or some other equitable remedy can be asserted." Trial Tr. 15:16-19.

At this point, the parties requested that the bankruptcy court refer the matter to mediation. The court agreed, and continued the trial. Trial Tr. 13:16-23. Mediation was not successful.

On November 7, 2006, Checkmate filed a Motion in Limine, seeking to exclude 13 exhibits proposed by DPI to be offered in evidence at the continued trial. The bankruptcy court conducted a hearing on the Motion in Limine on November 7, 2006. By order entered November 8, 2006, the court struck nine exhibits because they lacked relevance, but indicated that seven of those exhibits, A-G, might subsequently be admitted if DPI established that the

restitution measure of damages was appropriate.

In February 2007, the presiding bankruptcy judge, Judge Ryan, retired, and the adversary proceeding was reassigned to Judge Kwan.

The second day of trial in the adversary proceeding occurred on March 7, 2007. The day before the trial, DPI submitted its trial brief and declarations in lieu of direct testimony. When the trial commenced the next day, the bankruptcy court struck significant portions of DPI's evidence as hearsay and improper expert testimony.

At the conclusion of the trial, the bankruptcy court took the issues under submission. On August 1, 2007, the court entered a memorandum decision rejecting DPI's claim for recoupment and detailing the reasons for its decision, together with separate findings of fact and conclusions of law. As a result of its decision, the bankruptcy court entered judgment in favor of Checkmate and against DPI for the $467,500 sought. DPI filed a timely appeal on August 10, 2007.

## JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) or (c)(1).[6] We have jurisdiction pursuant to 28 U.S.C. § 158.

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[6] Actions by a chapter 11 debtor to collect an account receivable from a third party may be non-core matters. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982). However, counsel for DPI at the hearing before the Panel conceded that no challenge to the bankruptcy court's jurisdiction has been raised and we presume that the bankruptcy court's jurisdiction to enter a final determination is not at issue. Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 410-11 (9th Cir. BAP 2005).

**ISSUES**

1. Whether the bankruptcy court abused its discretion in determining that the proper measure of damages to be awarded to DPI for any breach of the Agreement by Checkmate was the amount of damages proximately caused by the breach.
2. Whether the bankruptcy court erred in refusing to enforce the Indemnity against Checkmate for DPI's expenses incurred for intentional torts.
3. Whether the bankruptcy court abused its discretion in certain evidentiary rulings.

**STANDARDS OF REVIEW**

"The selection of which measure of damages to apply is within the sound discretion of the trier of fact." GHK Assocs. v. Mayer Group, 224 Cal. App.3d 856, 874 (Cal. Ct. App. 1990).

The bankruptcy court's interpretation of the provisions of a contract is a question of law reviewed de novo. Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1064 (9th Cir. 2002).

Evidentiary rulings are reviewed for abuse of discretion. Trichler v. County of Lake, 358 F.3d 1150, 1155 (9th Cir. 2004). "To reverse on the basis that an evidentiary ruling was erroneous, we must conclude not only that the bankruptcy court abused its discretion, but also that the error was prejudicial." See McEuin v. Crown Equip. Corp., 328 F.3d 1028, 1032 (9th Cir. 2003). An evidentiary ruling is prejudicial if it is more probable that not that the erroneous ruling tainted the judgment. Id.

**DISCUSSION**

I.

The bankruptcy court did not abuse its discretion in determining that the proper measure of DPI's damages for Checkmate's breach of the Agreement was the amount proximately caused by the breach, not restitution of the payments made by DPI.

DPI has attempted to frame the issue on appeal as whether "the bankruptcy judge abused his discretion by failing to acknowledge DPI's alternative form of damages." DPI's Br. at 13. But this is an inaccurate characterization of the bankruptcy court's decision. Both bankruptcy judges presiding over the adversary proceeding acknowledged that an equitable remedy may be available to DPI as an alternative to the usual damages remedy for breach of contract. However, both judges correctly decided that, under California law, restitution was properly imposed as a remedy for a breach of contract only if the court was convinced that the damages proximately caused by the breach were an inadequate remedy.

In this regard, Judge Ryan noted:

> So in the context of election, you can take a case and say election but I'll bet you'll find in every one of those cases that the court came to a conclusion that there was not an adequate remedy at law for purposes of them looking at equity as an alternative remedy. . . . At this point, I'm not convinced that there isn't an adequate remedy at law. If I come to that conclusion, then you certain[ly] can argue restitution as an alternative equitable remedy in this case.

Tr. Trial 12:12-16 (December 19, 2005). After trial, Judge Kwan confirmed this preliminary ruling in his Memorandum Decision ("Memorandum"):

> This court reaffirms its conclusion that it does not see any relationship between the insurance

> premiums paid by the defendant and any damages it may have incurred resulting from plaintiff's breach of the StaffAide agreement and concludes that the monies representing the insurance premiums are not the measure of damages for defendant's recoupment claim. The Court concludes that the appropriate measure of damages for a breach of contract is under Civil Code § 3300, which is the actual loss or harm caused by the breach. Claims for restitution and unjust enrichment are not appropriate claims here because defendant's claims arise out of a breach of contract which is governed by Civil Code § 3300 and quasi-contractual remedies, such as restitution and unjust enrichment, are not applicable. . . . Moreover, the Court further concludes after trial that defendant has failed to present evidence to show that the measure of damages for a breach of the StaffAide agreement under Civil Code § 3300 is not an adequate remedy.

In adopting this position, the bankruptcy court correctly applied the California statutory law, which provides:

> **Measure of damages for breach of contract.** For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

CAL. CIVIL CODE § 3300.

DPI in fact concedes in its brief that "when actual damages resulting from a breach of contract can be ascertained with the requisite degree of certainty, such damages, under California Civil Code § 3300, are the preferred method of the courts in fashioning an award for the party seeking recovery." However, DPI argues that rescission of the Agreement and restitution was also available as a remedy in this case for Checkmate's breach of contract. Implicit in DPI's argument is that the bankruptcy court should not have denied its election of the remedy of restitution.

There is some merit to DPI's argument that the aggrieved party in a contract breach under California law may elect an appropriate remedy under some circumstances. Oliver v. Campbell, 43 Cal.2d 298, 302 (1954). Among the remedies available are the damages proximately caused by the breach, rescission of the contract with restitution, specific performance, injunction, declaratory relief, ejectment or quiet title, and proceeding in tort. 1 Witkin, SUMMARY OF CALIFORNIA LAW CONTRACTS § 853, 940-41 (10th ed. 2005). Of these, only proximate damages and restitution are appropriate in this adversary proceeding.

But restitution is available under an election of remedies only when it follows a rescission of the contract. Oliver, 43 Cal.2d at 302. Here, there was no rescission, nor could there have been under the facts of this case and California law. A party seeking rescission is required to do so promptly upon discovering grounds justifying rescission. CAL. CIVIL CODE § 1691 (emphasis added). The California courts have interpreted the "promptness" requirement to be a short one, demanding action by the aggrieved party within a month of discovery of the breach unless an adequate explanation for delay is provided. Campbell v. Title Guar. & Trust Co., 121 Cal. App. 374, 377 (Cal. Ct. App. 1932) (holding that, barring exceptional circumstances, thirty days is time allowed to rescind a contract following discovery of grounds for rescission); Gedstad v. Ellichman, 124 Cal. App.2d 831, 834 (Cal. Ct. App. 1954) ("A delay of more than one month in serving notice of rescission requires explanation."). Here, DPI admits that it became aware of Checkmate's failure to procure insurance prior to December 29, 2003. In spite of this knowledge,

DPI continued to use Checkmate's services under the Agreement for four additional months. Indeed, DPI never notified Checkmate that it intended to rescind the Agreement; it simply allowed the contract to expire in April 2004, and replaced Checkmate with another service company.[7] And to the extent that DPI has intended to rescind the Agreement through this adversary proceeding, it has failed to provide an explanation for its tardiness, and is far too late now to act.[8]

Under these facts, the remedy of restitution was not available to DPI under an election of remedies because the Agreement was never rescinded. As a result, the bankruptcy court did not abuse its discretion in deciding that the appropriate measure of damages for a breach of the Agreement was the remedy at

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[7] The Agreement provided for a one-year term commencing on April 23, 2002, and allowed for a one-year extension unless terminated by either party. There was no provision for further extensions in the Agreement, and no indication in the record that the parties negotiated for any extension. Thus, the Agreement expired by its own terms on April 23, 2004.

According to the deposition of DPI's president, Mr. Hunt, the parties understood that the Agreement terminated in April 2004.

Q: Was there any change in the rates or the services that [Checkmate] provided after bankruptcy?

A [Hunt]: I believe that they considered our contract went through April, so they left us alone until April. And then they were giving us a new quote for beginning May 1st, and that's when we found this other company that was a more aggressive quote.

Hunt Deposition 50:12-18 (May 17, 2005).

[8] Indeed, the amounts owed by DPI to Checkmate are attributable to services provided during the last months of the contract. It is hardly equitable to allow DPI, which became aware of Checkmate's breach months earlier, to continue to accept services under the Agreement, only then to assert a right to recoupment as a defense to payment when the contract finally expired and it had secured another vendor.

law provided in CAL. CIVIL CODE § 3300, the actual loss or harm caused by that breach.

Although DPI never effectively rescinded the Agreement with Checkmate, in the exercise of its discretion, and as a court of equity, the bankruptcy court could have allowed restitution as an alternate remedy if DPI demonstrated that the damages it suffered from actual loss or harm caused by the breach were inadequate. Wilkison v. Wiederkeht, 101 Cal. App. 4th 822, 830-31 (Cal. Ct. App. 2002) (equitable remedy may be considered where legal remedy is inadequate). However, DPI failed to establish that the legal remedy was inadequate, and also failed to prove its case for restitution.

There are no exceptions elsewhere in the California codes to the California Civil Code provision establishing the measure of damages for breach of a contract by a private party to obtain insurance for another party.[9] The California cases examining this proposition have held that "the general rule [is] that [one] who fails to procure insurance as requested will be liable for [the] resulting damage." Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Assoc., Inc., 115 Cal. App. 4th 1143, 1145 (Cal. Ct.

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[9] Both the California Civil and Insurance Codes have provisions dealing with the failure of an insurer to provide coverage under a policy (contract) of insurance. However, the California courts have held that these special provisions apply only to insurance companies, and not to entities that contractually undertake to obtain insurance coverage from insurance companies for the benefit of other parties. Delta Mfg. Co. v. Jones, 69 Cal. App. 3d 428, 432 (Cal. Ct. App. 1977) ("The liability of one who breaches a contract to procure insurance is to pay damages, and is not that of an insurer."). Thus, DPI's citations to Albillo v. Intermodal Container Serv, Inc., 114 Cal. App. 4th 190(Cal. Ct. App. 2003), and Rattan v. United Serv. Auto. Ass'n, 84 Cal. App. 4th 715 (Cal. Ct. App. 2000), both of which deal with the special responsibilities of insurers, are inapposite in this context.

App. 2004) (quoting Saunders v. Coriss, 224 Cal. App.3d 905, 909 (Cal. Ct. App. 1990). California law also dictates that, in the event of a failure to procure insurance required by a contract, the measure of damages is the expenses incurred by the party for whom insurance was to be provided in defending or settling a claim that would have been covered by that insurance. Davidson v. Welch, 270 Cal. App.2d 220, 236-37 (Cal. Ct. App. 1969); Fred A. Chapin Lbr. Co. v. Lumber Bargains, Inc., 189 Cal. App.2d 613, 617 (Cal. Ct. App. 1961); Am. Trust Co. v. Truck Ins. Exchange, 147 Cal. App.2d 395, 397-98 (Cal. Ct. App. 1957).

DPI appears to have ignored the bankruptcy court's instruction that it show that the legal remedy was inadequate as a condition to invoking a right to restitution. Instead, DPI sought restitution based solely on its argument that to allow Checkmate to recover under the Agreement would amount to unjust enrichment.

Recovery for unjust enrichment (also known as quantum meruit) is founded on the notion that an entity should not be permitted unjustly to enrich itself at the expense of another, but should be required to make restitution for property or benefits received. 1 Witkin, SUMMARY OF CALIFORNIA LAW CONTRACTS § 1013, 1102-03 (10th ed. 2005). DPI relies upon three California cases to support its argument that Checkmate should not be allowed to retain funds paid to it by DPI for insurance coverage that Checkmate never obtained.

In Ghirardo v. Antonioli, 14 Cal.4th 39 (1996), the California Supreme Court examined the case of a seller of real property who mistakenly understated the payoff demand on a promissory note and who subsequently demanded payment of the remaining sum from the purchaser. The court held that principles

of unjust enrichment permitted the seller to recover the sums mistakenly omitted from the incorrect payoff statement. Id. at 50.

In Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726 (Cal. Ct. App. 2000), Lectrodryer's customer obtained a letter of credit from SeoulBank to pay off Lectrodryer. When Lectrodryer mailed a documentary presentation to the bank with a draft for payment, the bank declined to honor the letter of credit, and instead allowed the letter to expire and claimed that Lectrodryer had not timely complied with its terms. SeoulBank refused to return the $493,000 to the customer, and instead retained the funds. The California Court of Appeals held that the bank was unjustly enriched when it retained for itself funds that the customer used to purchase the letter of credit for the purpose of paying Lectrodryer, and affirmed the order of the trial court that the bank should surrender the funds in restitution to Lectrodryer.

As argued by Checkmate, these decisions do little more than state general principles regarding unjust enrichment, and the facts of these cases are inapposite to this matter. In both cases, it is significant that no contract existed between the affected parties. Under California law, an action in quasi contract does not lie "when an enforceable, binding agreement exists defining the rights of the parties." Paracor Fin. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996) (applying California law); Sutter Home Winery v. Vintage Selections, 971 F.2d 401, 408-09 (9th Cir. 1992)(denying on the pleadings defendant's quasi contract claims because the relationship between parties is governed by a contract); see also Hedging Concepts,

Inc. v. First Alliance Mortgage Co., 41 Cal. App. 4th 1410, 1419-20, 49 Cal. Rptr.2d 191 (1996). Here, the parties' rights are defined by the Agreement, a contract, so these decisions are of little help to DPI.

One case cited by DPI which did involve a contract among the parties is Alder v. Drudis, 30 Cal.2d 194 (1947). In Alder, a patent holder and an investor entered into a contract by which the investor agreed to provide funds for the exploitation of an invention. The investor gave the patent holder funds, and the holder gave the investor a copy of the invention. The investor then rescinded the contract, but would not return the invention unless his funds were returned. The trial court ordered restitution of the invention to the holder, and of the funds to the investor. This decision was ultimately upheld by the California Supreme Court.

But the Alder decision is distinguishable on several levels. First, as with the other cases cited, the facts do not align with those in the instant appeal. Second, the California Supreme Court explicitly limited its holding to a narrow group of contracts:

> [Restitution] was not allowed by the early English law, and there are still many exceptions and inconsistencies in the application of the rule. . . . But where the transfer is of goods or choses in action of unique character, or of exclusive privileges such as patents and copyrights, specific restitution will generally be granted.

Alder, 30 Cal. 2d at 202. The Agreement in this appeal clearly does not fall within the narrow circumstances described in Adler as justifying restitution.

Finally, imposition of restitution as the measure of recovery focuses on the consideration paid under the contract, and in many instances, placing restitution on equal footing with damages for breach of contract may offend the public policy underlying remedies for breach of contract.

The traditional role of contract remedies compensates "the promisee for the loss resulting from the breach, not compulsion of the promissor to perform his contract . . . ." Harris v. Atlantic Richfield Co., 14 Cal. App. 4th 70, 77 (Cal. Ct. App. 1993). This tradition dates back at least to the nineteenth century: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else." Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 462 (1897). This tradition remains alive today, as exemplified by the ruling of the Ninth Circuit in Castongay: "In some cases, it would be in a party's best interest to breach and pay the piper rather than incur the cost associated with avoiding a breach." Gen. Am. Life Ins. Co. v. Castongay, 984 F.2d 1518, 1523 n.7 (9th Cir. 1993).

The bankruptcy court's determination that the measure of damages for breach of the Agreement between Checkmate and DPI was the amount of damages proximately caused by the breach is supported by the California statute and its case law. The bankruptcy court's determination that DPI failed to establish that the remedy at law was inadequate was not an abuse of discretion.

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II.

The bankruptcy court did not err in refusing to enforce the Indemnity against Checkmate for DPI's expenses incurred for intentional torts.

DPI alleges that Checkmate had a contractual duty to indemnify or defend DPI for losses and expenses it incurred in connection with a discrimination lawsuit brought against it by the U.S. Equal Employment Opportunity Commission (the "EEOC"). The bankruptcy court rejected DPI's arguments. We agree with the bankruptcy court's decision for two reasons: there is strong public policy in California prohibiting indemnification for expenses resulting from the beneficiary's own intentional torts; and DPI did not adequately establish that its claims for indemnification for expenses incurred in defending the EEOC Actions arose during the term of the Agreement.

A. California public policy prohibits indemnification for expenses resulting from the intentional torts in this appeal.

On May 12, 2004, the EEOC commenced an action against DPI in the U.S. District Court for the Central District of California (the "EEOC Actions"), alleging that DPI and its affiliates had discriminated against certain employees by subjecting them to a racially and/or sexually hostile work environment. DPI alleges that it spent $325,665.66 to defend and settle intentional tort lawsuits.[10] DPI argues that Checkmate was obligated to indemnify, defend and insure DPI for these damages under the Agreement, and

[10] Both Checkmate's and DPI's briefs discuss only the EEOC Actions in the context of the Indemnity. According to the Amended Declaration of Brian Hunt, DPI incurred expenses of $192,000 to defend the EEOC Actions, and $115,000 to settle them, for a total of $307,000. We are unable to account in the record for the approximate $19,000 discrepancy between this amount and the total amount referred to above.

that it is entitled to recover its losses from Checkmate via recoupment. The bankruptcy court disagreed, and so do we.

Before turning to the Indemnity, we note that the bankruptcy court also correctly determined that

> The claims in the EEOC Action[s], being intentional tort claims, would not have been covered by worker's compensation or employer liability insurance under California law.

Conclusion of Law ¶ 2.8. Racial discrimination and sexual harassment are intentional torts under California law. Combs v. St. Farm Fire & Cas. Co., 49 Cal. Rptr.3d 917, 920 (Cal. Ct. App. 2006) ("There is no doubt that intentional [racial] discrimination . . . is willful conduct for which section 533 precludes indemnification."); Lackner v. North, 135 Cal. App. 4th 1188 (Cal. Ct. App. 2006) (racial discrimination is intentional tort); Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 14 Cal. App. 4th 1595, 1603-04 (Cal. Ct. App. 1993) ("Alleged sexual harassment and wrongful termination of employee were intentional acts for which [indemnity] was barred[.]"); Brown v. Smith, 55 Cal. App. 4th 767, 787 (Cal. Ct. App. 1997) (sex discrimination is intentional tort). And under California law, an insurer is not liable for claims arising from intentional torts. CAL. INS. CODE § 533 ("An insurer is not liable for a loss caused by the willful act of the insured[.]"). The bankruptcy court correctly concluded that DPI could not recover damages from Checkmate for its failure to procure insurance coverage for its intentional torts because such torts would not have been covered by the workers compensation or employer liability insurance policies required by the Agreement. See Michaelin v. St. Comp. Ins. Fund, 50 Cal. App. 4th 1093, 1106-

08 (Cal. Ct. App. 1998); Tamrac, Inc. v. Cal. Ins. Guar. Ass'n, 63 Cal. App. 4th 751, 757-760 (Cal. Ct. App. 1998).

While insurers are not required to indemnify for intentional torts, the California statutes also include a much broader public policy prohibition banning such provisions in any contract that purports to relieve or indemnify damages flowing from a willful injury to another person.

> **Certain contracts unlawful.** All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

CAL. CIVIL CODE § 1668 (2007). Section 1668 effectively expands the scope of § 533 to encompass any contracts for indemnification that may not directly involve an insurance company. Aetna Casualty & Sur. Co. v. Superior Ct., 19 Cal. App. 4th 320, 330 (Cal. Ct. App. 1994) ("The purpose of these statutory proscriptions is to discourage the commission of willful conduct by withholding [indemnity] coverage for the conduct").

Section 1668 shares with § 553 the prohibition on contracts to indemnify intentional torts. However, the California courts have recognized that § 1668 is written with broad strokes and have taken steps to restrict its application to intentional torts that are inherently malicious and involve issues of public interest. Davidson v. Welch, 270 Cal. App.2d 220, 234 (Cal. Ct. App. 1969) ("Willful, within the meaning of CC § 1668 . . . connotes an act done with malice or malevolence, as distinguished from an act motivated by good intentions but founded in negligence."); Madison v. Superior Ct., 203 Cal. App. 3d 589, 599 (Cal. Ct. App. 1988)

("CC § 1668 . . . does not apply to every contract, despite the statute's broad language. The statute applies only to contracts that involve the public interest.").

While the scope of § 1668 has been limited, the California courts have decided that racial discrimination and sexual harassment torts such as those alleged to have occurred in the instant appeal are sufficiently malicious and of public interest as to come within the reach of this statute. Commodore Home Systems, Inc. v. Superior Ct. of San Bernardino County, 124 Cal. App.3d 756, 783 (Cal. Ct. App. 1981) ("To strike down a person's opportunity to earn a living solely on the basis of race can never be less than malicious and oppressive. . . . In other words, any employment discrimination based on race is malicious, oppressive, egregious, and inexcusable."); Fisher v. San Pedro Peninsula Hospital, 214 Cal. App.3d 590, 617 (Cal. Ct. App. 1989) ("[B]y its very nature, sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society."). Likewise, sexual harassment and racial discrimination are matters of public interest. Armendariz v. Found. Health Psychcare Servs., 24 Cal. 4th 83, 100 (2000) ("No extensive discussion is needed to establish the fundamental public interest in a workplace free from the pernicious influence of sexism."). And we take it as axiomatic that racial discrimination is a matter of the highest public interest. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Both DPI and Checkmate agree that § 1668 prohibits indemnification for willful misconduct. DPI's Br. at 25; Checkmate's Br. at 17. However, they disagree about whether DPI

could benefit from the Indemnity. In addition to their briefs in the bankruptcy court and this appeal, the parties discussed their views on the public policy prohibition against indemnification of intentional torts with the bankruptcy court at trial. DPI argues that the Indemnity was not designed to indemnify DPI and its officers, agents and representatives for their own willful misconduct. Rather, according to DPI, the Indemnity represented a means of insuring that the Checkmate employees assigned to DPI would not subject DPI to liability for the intentional torts of Checkmate employees. Checkmate argues that § 1668 simply bans indemnification for those intentional torts within its scope.

In interpreting a statutory provision under California law, we look first to the statute's plain meaning. Doe v. City of Los Angeles, 42 Cal. 4th 531, 547 (2007) ("In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law [.]"). Where the plain meaning of the statute is clear, "courts will not interpret away clear language in favor of an ambiguity that does not exist." People v. Coronado, 12 Cal.4th 145, 147 (1995). There is no ambiguity in the statute. Section 1668 bans contracts that allow "anyone" to seek indemnity for intentional torts that are malicious or contravene the public interest. This broad reach is amplified by the parameter "directly or indirectly."

DPI seeks indemnification for the legal expenses it incurred in defending lawsuits brought against it by the government for engaging in racial and sexual discrimination against its employees. DPI is the only named defendant in the EEOC Actions. DPI could have argued that Checkmate was the employer of the

employees who sexually and racially harassed the victims identified in the EEOC Actions as a defense to the allegations that DPI was responsible for that harassment. Nevertheless, DPI's request for indemnification for recovery for its expenses from Checkmate based upon the Agreement is barred by CAL. CIV. CODE § 1668.

B. The bankruptcy court did not clearly err in determining that the actions comprising the basis for the EEOC Actions did not arise during the term of the Agreement.

In the alternative, even if DPI were not prohibited by statute from enforcing the Indemnity against Checkmate, the bankruptcy court did not clearly err in finding that DPI had not proven that its claims for indemnification had accrued during the term of the Agreement.

To recover under an agreement for indemnification, the indemnitee must establish, by competent evidence, the parties' contractual relationship; the indemnitee's performance of that portion of the contract giving rise to the indemnification claim; the facts showing a loss within the meaning of the parties' indemnification agreement; and the amount of damages sustained. Four Star Elec. v. F & H Constr., 7 Cal. App. 4th 1375, 1380 (Cal. Ct. App. 1992). In this case, the bankruptcy court decided that DPI failed to prove that its claimed damages accrued within the time that the Agreement, and therefore the Indemnity, was in effect.

The parties entered into the Agreement in April 2002. The complaint filed against DPI by the EEOC alleged that the unlawful employment practices existed at DPI from "at least 1995 and continuing to the present." In addition, Checkmate provided as

evidence a copy of DPI's attorney's billing records which tended to indicate that DPI considered the cause of action as having arisen in 2000. DPI provided no controverting evidence. Based upon this evidence, the bankruptcy court found and concluded that:

> FOF 1.21. The complaint in the EEOC Action[s], states that the wrongs alleged therein are based on a course of conduct that goes back to calendar year 1995. The [Agreement} was not entered into until April 4, 2002.
>
> FOF 1.22 There is no evidence before the court that the claims described in the EEOC Action[s], accrued after the [Agreement] was entered into.
>
> COL 2.7 [DPI] failed to prove with reasonable certainty that the claims in the EEOC Action[s], arose during the term of the [Agreement].

On this record, the bankruptcy court could properly find and conclude that DPI had not proven that the conduct constituting the alleged intentional torts occurred during the term of the Agreement. Since DPI could not establish its right to indemnification from the EEOC Actions, the bankruptcy court need not consider whether Checkmate was obligated to indemnify DPI for damages related to the EEOC Actions.

The bankruptcy court did not err in denying DPI's demand for indemnification of its expenses incurred defending and settling the EEOC Actions.

III.

The bankruptcy court did not abuse its discretion in its evidentiary rulings.

DPI raises several issues concerning evidentiary rulings made by the bankruptcy court.

DPI contends that the bankruptcy court improperly struck significant portions of the declaration of Julie Sims, an attorney

representing DPI in defending various workers compensation claims. The court allowed the witness's testimony concerning the amount of her fees DPI had paid to defend these actions, but ruled that her observations in her declaration regarding the settlement values, and the prospective risk and potential damages of each claim, amounted to expert testimony. Because DPI had not timely disclosed that Ms. Sims would testify as an expert at least 90 days before trial, the bankruptcy court refused to consider her expert opinions.

Testimony by experts qualified by "knowledge, skill, expertise, training, or education," is allowed "in the form of an opinion or otherwise" based on "scientific, technical, or other specialized knowledge" if that testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. In our circuit, the trial court has "wide latitude" to exclude expert testimony when there has not been a timely disclosure. Yeti by Molly, Ltd. v. Decker Outdoor Corp., 289 F.3d 1101 (9th Cir. 2001) (affirming a trial judge's decision to exclude an expert report submitted 28 days before trial as untimely.)

Here, DPI disclosed the potential expert testimony within 24 hours of the date of the trial. As the court ruled, this is a violation of FED. R. CIV. P. 26(a)(2), which requires the disclosure of expert witnesses 90 days before trial.

> [THE COURT:] [U]nder rule 26 . . . there is a time for making the disclosures of the expert and then submitting a report to the other side. . . . If there hasn't been any disclosure, then it would be improper I think to offer testimony in an expert witness capacity at this time.

Tr. Hr'g 11:6-17 (March 9, 2007). In the absence of timely disclosure of Ms. Sims' role, Checkmate was potentially unable to prepare for trial, and could have been prejudiced had the testimony been allowed. It therefore was not an abuse of discretion for the bankruptcy court to exclude her expert testimony for failure to timely disclose that it would be offered at trial.

DPI next objects that the bankruptcy court excluded all its evidence regarding the amounts DPI paid to Checkmate attributable to insurance coverage under the Agreement. The bankruptcy court excluded this evidence as not relevant because it had already determined that the measure of damages was actual damages proximately caused by the breach and not the insurance premiums paid by DPI.

The trial court has "broad discretion" in determining the relevance of evidence. United States v. Finley, 301 F.3d 1000, 1007 (9th Cir. 2002). Because the evidence in question related to restitution, and not the amount of damages suffered by DPI as a result of breach of the Agreement which the court had determined was the proper measure of damages, the bankruptcy court did not abuse its discretion in excluding this evidence.

DPI argues that the bankruptcy court erred in excluding its evidence regarding lost revenue. In particular, DPI's evidence allegedly showed it lost $92,920 in revenues from its subsidiaries which were denied access to Ontario and Los Angeles airports because DPI lacked required insurance coverage for its drivers.

The measure of damages for breach of contract under California law focuses on lost profits, not lost revenue. Gerwin

v. Se. Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209, 222-23 (Cal. Ct. App. 1971).[11] The bankruptcy court also noted that, according to the testimony of DPI's president, Mr. Hunt, DPI had no profit from its airport operations. For these reasons, the bankruptcy court's exclusion of airport revenue figures was not an abuse of discretion.

Finally, DPI challenges the bankruptcy court's ruling that placed the burden of proving efforts to mitigate on the party claiming damages. We have examined the record and do not find that the court made such a ruling. The court did make a finding of fact regarding mitigation:

> FOF 1.28 The Defendant did not introduce any evidence regarding what, if any, efforts were made to mitigate the damages they allege that Paul's Yellow Cab and Inland Express suffered due to the lack of insurance coverage in calendar year 2003.

However, this finding followed two others regarding incomplete income statements from those subsidiaries in the record before the bankruptcy court, and noting that the only information was lost revenue rather than the required lost profits. Thus, we believe that this finding was part of the court's effort to marshal its

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[11] In their briefs in both the bankruptcy court and in this appeal, and in oral argument before the Panel, DPI continues to assert that lost revenue equals lost profit, because there would have been no increases in fixed costs or overhead if DPI had access to the airports. Even assuming that this proposition is correct, and that a business can generate almost $100,000 in revenue with no attendant expenses, the bankruptcy court properly found that "[t]he income statements that [DPI] introduced into evidence in support of the damages claim by Inland Express and Paul's Yellow Cab were incomplete." Finding of Fact 1.26. DPI provided only the first of four pages of the income statements for those companies. DPI has never adequately explained the reason for the missing information, and the excerpts of record provided to the Panel also do not include the missing pages. For this reason alone, the bankruptcy court acted within its discretion in excluding the exhibits.

known facts about the finances of the DPI subsidiaries to support its conclusion that DPI had not proven damages from that source. Indeed, since the court ultimately ruled that DPI had not established a damages claim from its subsidiaries, there would have been no need for the court to rule on the burden of proving efforts to mitigate.

**CONCLUSION**

The decision and judgment of the bankruptcy court is AFFIRMED.