

NOT FOR PUBLICATION

FEB 11 2008

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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)	Bk. No.	SA 03-19318-RK
jointly administered cases,)		
)	Adv. No.	SA 04-01791-RK
Debtors.)		
_____)		
DIVERSIFIED PARATRANSIT, INC.,)		
)		
Appellant,)		
v.)	MEMORANDUM¹	
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.

1 Chapter 11² Debtor Checkmate Staffing, Inc. ("Checkmate")
2 prosecuted an adversary proceeding against Diversified
3 Paratransit, Inc. ("DPI") to collect an account receivable. While
4 DPI admitted that it owed most of the amounts sought, it asserted
5 a right to recoupment as a defense. The bankruptcy court denied
6 DPI's recoupment claim and awarded a money judgment to Checkmate.
7 DPI appealed. We AFFIRM.

8
9 **FACTS**

10 Checkmate³ and its six wholly owned subsidiaries, including
11 StaffAide, Inc. ("StaffAide"), provide temporary staffing services
12 to businesses. DPI, and its subsidiaries, Paul's Yellow Cab, Inc.
13 and Inland Express, Inc., provide transportation services to the
14 public using buses and taxis.

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

23 _____
24 ² Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
26 enacted and promulgated prior to the effective date (October 17,
27 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.

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

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

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

7 StaffAide shall comply with all applicable
8 Federal, State, and local laws including, but
9 not limited to, the provisions of the Equal
10 Employment Opportunity Act, the Americans and
11 [sic] Disabilities Act, and the Fair Labor
12 Standards Act. StaffAide shall indemnify,
13 defend and hold [DPI] harmless from and against
14 any and all losses of whatever nature, type, or
15 manner, that arise out of acts of StaffAide, and
16 its employees, whether assigned to [DPI] at its
17 premises or not, which acts arise out of either
18 negligence, gross negligence, willful
19 misconduct, or any cause related to the acts of
20 StaffAide and/or its employees hereunder.

21 This indemnity and defense obligation shall
22 apply in all circumstances except in the event
23 that any loss is the result to [sic] the direct
24 acts, or omissions of [DPI], or its officers,
25 directors or legal representatives. [DPI] shall
26 give prompt notice to StaffAide of any claim for
27 which it seeks indemnification and/or defense
28 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].

22 At some unspecified time, DPI learned that from October 11,
23 2002, through December 19, 2003, Checkmate had failed to carry any
24 worker's compensation insurance or employer's liability insurance
25 as to the employees provided to DPI as required by the Agreement.
26 In the meantime, on December 29, 2003, Checkmate filed for chapter
27 11 relief. The parties agree that DPI was aware of Checkmate's
28 failure to provide the worker's compensation and employer's

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

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

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

20 Checkmate removed the collection action to the bankruptcy
21 court on December 2, 2004.⁴ On December 24, 2004, DPI answered
22 the complaint, asserting as an affirmative defense that Checkmate
23 had breached the Agreement by failing to provide the required
24 insurance coverage and other injuries. DPI claimed a right to
25 recoupment of the damages it incurred on account of Checkmate's
26 breach.

27

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

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

8 1. Whether Checkmate's sale of assets free and
9 clear of liens prevented DPI from asserting a
claim for recoupment.

10 2. Whether DPI was entitled to offset its
11 damages, if any, for alleged breaches of the
12 Agreement by Checkmate against funds owed by DPI
to Checkmate under the Agreement.

13 3. How damages from the alleged breach of the
Agreement should be measured.

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

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

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

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

6 The bankruptcy court rejected DPI's plea for an equitable
7 remedy: "You don't get to equity if there's an adequate remedy at
8 law. That's a bedrock principle." Trial Tr. 11:25 - 12:2.
9 However, the court recognized that an equitable remedy might be
10 available if the remedy at law proved to be inadequate: "At this
11 point I'm not convinced that there isn't an adequate remedy at
12 law. If I come to that conclusion, then you certain[ly] can argue
13 restitution as an equitable remedy in this case." Trial Tr.
14 12:13-16. "[W]e'll proceed on the basis that there is an adequate
15 remedy at law. If the Court determines there is not an adequate
16 remedy at law, then alternatively restitution or some other
17 equitable remedy can be asserted." Trial Tr. 15:16-19.

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

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

1 restitution measure of damages was appropriate.

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

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

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

19

20

JURISDICTION

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 157(b)(1) or (c)(1).⁶ We have jurisdiction pursuant
23 to 28 U.S.C. § 158.

24

25 ⁶ Actions by a chapter 11 debtor to collect an account
26 receivable from a third party may be non-core matters. N.
27 Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84
28 (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).

1 **ISSUES**

- 2 1. Whether the bankruptcy court abused its discretion in
3 determining that the proper measure of damages to be awarded
4 to DPI for any breach of the Agreement by Checkmate was the
5 amount of damages proximately caused by the breach.
- 6 2. Whether the bankruptcy court erred in refusing to enforce the
7 Indemnity against Checkmate for DPI's expenses incurred for
8 intentional torts.
- 9 3. Whether the bankruptcy court abused its discretion in certain
10 evidentiary rulings.
- 11

12 **STANDARDS OF REVIEW**

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

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

19 Evidentiary rulings are reviewed for abuse of discretion.
20 Trichler v. County of Lake, 358 F.3d 1150, 1155 (9th Cir. 2004).

21 "To reverse on the basis that an evidentiary ruling was erroneous,
22 we must conclude not only that the bankruptcy court abused its
23 discretion, but also that the error was prejudicial." See McEuin
24 v. Crown Equip. Corp., 328 F.3d 1028, 1032 (9th Cir. 2003). An
25 evidentiary ruling is prejudicial if it is more probable that not
26 that the erroneous ruling tainted the judgment. Id.

27

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1 premiums paid by the defendant and any damages
2 it may have incurred resulting from plaintiff's
3 breach of the StaffAide agreement and concludes
4 that the monies representing the insurance
5 premiums are not the measure of damages for
6 defendant's recoupment claim. The Court
7 concludes that the appropriate measure of
8 damages for a breach of contract is under Civil
9 Code § 3300, which is the actual loss or harm
10 caused by the breach. Claims for restitution
11 and unjust enrichment are not appropriate claims
12 here because defendant's claims arise out of a
13 breach of contract which is governed by Civil
14 Code § 3300 and quasi-contractual remedies, such
15 as restitution and unjust enrichment, are not
16 applicable. . . . Moreover, the Court further
17 concludes after trial that defendant has failed
18 to present evidence to show that the measure of
19 damages for a breach of the StaffAide agreement
20 under Civil Code § 3300 is not an adequate
21 remedy.

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

24 **Measure of damages for breach of contract.** For
25 the breach of an obligation arising from
26 contract, the measure of damages, except where
27 otherwise expressly provided by this code, is
28 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.

1 There is some merit to DPI's argument that the aggrieved
2 party in a contract breach under California law may elect an
3 appropriate remedy under some circumstances. Oliver v. Campbell,
4 43 Cal.2d 298, 302 (1954). Among the remedies available are the
5 damages proximately caused by the breach, rescission of the
6 contract with restitution, specific performance, injunction,
7 declaratory relief, ejectment or quiet title, and proceeding in
8 tort. 1 Witkin, SUMMARY OF CALIFORNIA LAW CONTRACTS § 853, 940-41 (10th
9 ed. 2005). Of these, only proximate damages and restitution are
10 appropriate in this adversary proceeding.

11 But restitution is available under an election of remedies
12 only when it follows a rescission of the contract. Oliver, 43
13 Cal.2d at 302. Here, there was no rescission, nor could there
14 have been under the facts of this case and California law. A
15 party seeking rescission is required to do so promptly upon
16 discovering grounds justifying rescission. CAL. CIVIL CODE § 1691
17 (emphasis added). The California courts have interpreted the
18 "promptness" requirement to be a short one, demanding action by
19 the aggrieved party within a month of discovery of the breach
20 unless an adequate explanation for delay is provided. Campbell v.
21 Title Guar. & Trust Co., 121 Cal. App. 374, 377 (Cal. Ct. App.
22 1932) (holding that, barring exceptional circumstances, thirty
23 days is time allowed to rescind a contract following discovery of
24 grounds for rescission); Gedstad v. Ellichman, 124 Cal. App.2d
25 831, 834 (Cal. Ct. App. 1954) ("A delay of more than one month in
26 serving notice of rescission requires explanation."). Here, DPI
27 admits that it became aware of Checkmate's failure to procure
28 insurance prior to December 29, 2003. In spite of this knowledge,

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

9 Under these facts, the remedy of restitution was not
10 available to DPI under an election of remedies because the
11 Agreement was never rescinded. As a result, the bankruptcy court
12 did not abuse its discretion in deciding that the appropriate
13 measure of damages for a breach of the Agreement was the remedy at
14

15 ⁷ The Agreement provided for a one-year term commencing on
16 April 23, 2002, and allowed for a one-year extension unless
17 terminated by either party. There was no provision for further
18 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.

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

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

22 A [Hunt]: I believe that they considered our contract went through
23 April, so they left us alone until April. And then they
24 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.

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

26 ⁸ Indeed, the amounts owed by DPI to Checkmate are
27 attributable to services provided during the last months of the
contract. It is hardly equitable to allow DPI, which became aware
28 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.

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

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

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

21 _____
22 ⁹ Both the California Civil and Insurance Codes have
23 provisions dealing with the failure of an insurer to provide
24 coverage under a policy (contract) of insurance. However, the
25 California courts have held that these special provisions apply
26 only to insurance companies, and not to entities that
27 contractually undertake to obtain insurance coverage from
28 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.

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

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

16 Recovery for unjust enrichment (also known as quantum meruit)
17 is founded on the notion that an entity should not be permitted
18 unjustly to enrich itself at the expense of another, but should be
19 required to make restitution for property or benefits received. 1
20 Witkin, SUMMARY OF CALIFORNIA LAW CONTRACTS § 1013, 1102-03 (10th ed.
21 2005). DPI relies upon three California cases to support its
22 argument that Checkmate should not be allowed to retain funds paid
23 to it by DPI for insurance coverage that Checkmate never obtained.

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

1 of unjust enrichment permitted the seller to recover the sums
2 mistakenly omitted from the incorrect payoff statement. Id. at
3 50.

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

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

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

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

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

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

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

28

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

6 The traditional role of contract remedies compensates "the
7 promisee for the loss resulting from the breach, not compulsion of
8 the promisor to perform his contract" Harris v. Atlantic
9 Richfield Co., 14 Cal. App. 4th 70, 77 (Cal. Ct. App. 1993). This
10 tradition dates back at least to the nineteenth century: "The duty
11 to keep a contract at common law means a prediction that you must
12 pay damages if you do not keep it - and nothing else." Oliver
13 Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 462
14 (1897). This tradition remains alive today, as exemplified by the
15 ruling of the Ninth Circuit in Castongay: "In some cases, it would
16 be in a party's best interest to breach and pay the piper rather
17 than incur the cost associated with avoiding a breach." Gen. Am.
18 Life Ins. Co. v. Castongay, 984 F.2d 1518, 1523 n.7 (9th Cir.
19 1993).

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

26 //
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28 //

1 II.

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

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

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

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

26 ¹⁰ Both Checkmate's and DPI's briefs discuss only the EEOC
27 Actions in the context of the Indemnity. According to the Amended
28 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.

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

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

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

8 Conclusion of Law ¶ 2.8. Racial discrimination and sexual
9 harassment are intentional torts under California law. Combs v.
10 St. Farm Fire & Cas. Co., 49 Cal. Rptr.3d 917, 920 (Cal. Ct. App.
11 2006) ("There is no doubt that intentional [racial] discrimination
12 . . . is willful conduct for which section 533 precludes
13 indemnification."); Lackner v. North, 135 Cal. App. 4th 1188 (Cal.
14 Ct. App. 2006) (racial discrimination is intentional tort); Coit
15 Drapery Cleaners, Inc. v. Sequoia Ins. Co., 14 Cal. App. 4th 1595,
16 1603-04 (Cal. Ct. App. 1993) ("Alleged sexual harassment and
17 wrongful termination of employee were intentional acts for which
18 [indemnity] was barred[.]"); Brown v. Smith, 55 Cal. App. 4th 767,
19 787 (Cal. Ct. App. 1997) (sex discrimination is intentional tort).
20 And under California law, an insurer is not liable for claims
21 arising from intentional torts. CAL. INS. CODE § 533 ("An insurer
22 is not liable for a loss caused by the willful act of the
23 insured[.]"). The bankruptcy court correctly concluded that DPI
24 could not recover damages from Checkmate for its failure to
25 procure insurance coverage for its intentional torts because such
26 torts would not have been covered by the workers compensation or
27 employer liability insurance policies required by the Agreement.
28 See Michaelin v. St. Comp. Ins. Fund, 50 Cal. App. 4th 1093, 1106-

1 08 (Cal. Ct. App. 1998); Tamrac, Inc. v. Cal. Ins. Guar. Ass'n, 63
2 Cal. App. 4th 751, 757-760 (Cal. Ct. App. 1998).

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

8 **Certain contracts unlawful.** All contracts which
9 have for their object, directly or indirectly,
10 to exempt anyone from responsibility for his own
11 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.

12 CAL. CIVIL CODE § 1668 (2007). Section 1668 effectively expands the
13 scope of § 533 to encompass any contracts for indemnification that
14 may not directly involve an insurance company. Aetna Casualty &
15 Sur. Co. v. Superior Ct., 19 Cal. App. 4th 320, 330 (Cal. Ct. App.
16 1994) ("The purpose of these statutory proscriptions is to
17 discourage the commission of willful conduct by withholding
18 [indemnity] coverage for the conduct").

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

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

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

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

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

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

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

1 employees who sexually and racially harassed the victims
2 identified in the EEOC Actions as a defense to the allegations
3 that DPI was responsible for that harassment. Nevertheless, DPI's
4 request for indemnification for recovery for its expenses from
5 Checkmate based upon the Agreement is barred by CAL. CIV. CODE
6 § 1668.

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

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

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

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

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

5 FOF 1.21. The complaint in the EEOC Action[s], states that
6 the wrongs alleged therein are based on a course of
7 conduct that goes back to calendar year 1995. The
[Agreement] was not entered into until April 4,
2002.

8 FOF 1.22 There is no evidence before the court that the
9 claims described in the EEOC Action[s], accrued
after the [Agreement] was entered into.

10 COL 2.7 [DPI] failed to prove with reasonable certainty
11 that the claims in the EEOC Action[s], arose during
the term of the [Agreement].

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

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

22 III.

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

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

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

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

10 Testimony by experts qualified by "knowledge, skill,
11 expertise, training, or education," is allowed "in the form of an
12 opinion or otherwise" based on "scientific, technical, or other
13 specialized knowledge" if that testimony will "assist the trier of
14 fact to understand the evidence or to determine a fact in issue."
15 FED. R. EVID. 702. In our circuit, the trial court has "wide
16 latitude" to exclude expert testimony when there has not been a
17 timely disclosure. Yeti by Molly, Ltd. v. Decker Outdoor Corp.,
18 289 F.3d 1101 (9th Cir. 2001) (affirming a trial judge's decision
19 to exclude an expert report submitted 28 days before trial as
20 untimely.)

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

25 [THE COURT:] [U]nder rule 26 . . . there is a
26 time for making the disclosures of the expert
27 and then submitting a report to the other
28 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.

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

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

15 The trial court has "broad discretion" in determining the
16 relevance of evidence. United States v. Finley, 301 F.3d 1000,
17 1007 (9th Cir. 2002). Because the evidence in question related to
18 restitution, and not the amount of damages suffered by DPI as a
19 result of breach of the Agreement which the court had determined
20 was the proper measure of damages, the bankruptcy court did not
21 abuse its discretion in excluding this evidence.

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

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

1 v. Se. Cal. Ass'n of Seventh Day Adventists, 14 Cal. App. 3d 209,
2 222-23 (Cal. Ct. App. 1971).¹¹ The bankruptcy court also noted
3 that, according to the testimony of DPI's president, Mr. Hunt,
4 DPI had no profit from its airport operations. For these reasons,
5 the bankruptcy court's exclusion of airport revenue figures was
6 not an abuse of discretion.

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

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

15 However, this finding followed two others regarding incomplete
16 income statements from those subsidiaries in the record before the
17 bankruptcy court, and noting that the only information was lost
18 revenue rather than the required lost profits. Thus, we believe
19 that this finding was part of the court's effort to marshal its
20

21 ¹¹ In their briefs in both the bankruptcy court and in this
22 appeal, and in oral argument before the Panel, DPI continues to
23 assert that lost revenue equals lost profit, because there would
24 have been no increases in fixed costs or overhead if DPI had
25 access to the airports. Even assuming that this proposition is
26 correct, and that a business can generate almost \$100,000 in
27 revenue with no attendant expenses, the bankruptcy court properly
28 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.

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

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CONCLUSION

The decision and judgment of the bankruptcy court is
AFFIRMED.