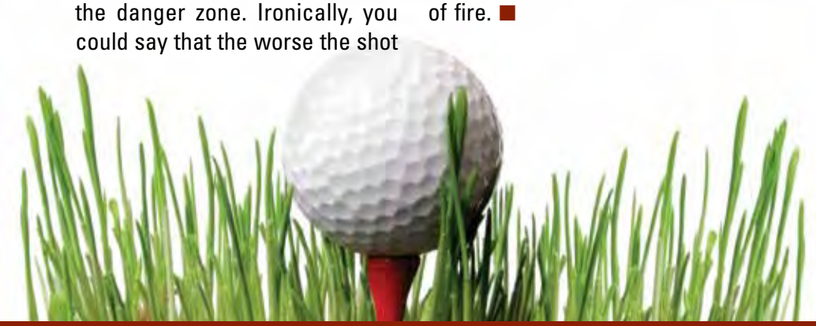
GOLFER CAN'T BE SUED FOR ERRANT SHOT

Azad and Anoop were friends and frequent golf partners. The friendship was no doubt strained when they became adversaries in litigation arising from an injury to Azad during a golf outing. A shot struck by Anoop hit Azad in the eye, causing a serious injury. There was a factual dispute as to whether, when he saw his wayward shot heading for Azad, Anoop yelled "fore" or some other warning, as golf etiquette would dictate. Anoop said he did call out something, while Azad and another witness said they heard no warning at all.

In the end, whether or not a verbal warning had occurred made little difference in the case, because the court ruled that Anoop had no legal duty to give such a warning under the circumstances. Anoop did not owe his fellow golfer a duty to give a warning about a shot, where Azad was out ahead of Anoop but at least 50 degrees away from the intended line of flight. Some courts have spoken of a duty to warn those within the "foreseeable danger zone" of a golf shot, but even they recognize that, at some point, the distance and angle are great enough to take the injured person out of the danger zone. Ironically, you could say that the worse the shot (and, thus, the more unexpected the path that the ball takes), the less likely it is that there could be a duty to warn.

An even more basic flaw in the lawsuit stemmed from the court's conclusion that, from the time he stepped onto the first tee, Azad had assumed the commonly appreciated risks of playing golf, one of which is that golfers hit lots of misdirected shots. The risks that participants in sporting or recreational activities are deemed to have consented to are those which are inherent in participation in the sport. Relieving a participant from liability furthers a policy of facilitating free and vigorous participation in sporting and recreational activities. While Azad's case was unsuccessful, this should not be taken to mean that a golf course is lawless terrain, where golfers can do whatever they please with impunity. Reckless or intentional conduct, or concealed or unreasonably increased risks, can still result in liability for injuries, but hitting a lousy shot and not yelling "fore" is not enough to make a duffer pay damages to another golfer unlucky enough to be in the line of fire. ■



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Legal Matters

Summer 2010

Firm Announcements

Kumen L. Taylor

The law firm of Hutchison & Steffen proudly announces Kumen L. Taylor as Partner. Kumen practices primarily in the areas of civil and commercial litigation and also litigates cases involving employment and real estate law. He has an extraordinary record as a successful litigator and has never lost a jury trial. He has successfully handled numerous bench and jury trials in the course of his career and is licensed to practice in Nevada, Utah, and Idaho.

Earlier in his career, Kumen served as associate corporate counsel for litigation for the nation's largest diesel fuel distributor. Kumen also is fluent in Spanish, having spent several years in Central America. Cases that Kumen has successfully tried include wrongful termination, premises liability, auto accident, insurance bad faith, trespass, property damage, business liability, homeowner's liability, and product liability cases.

A native of Tucson, Kumen grew up in Arizona and California. He earned a Bachelor of Arts degree in Spanish, magna cum laude, from Weber State University in Ogden, Utah, where he was also the top graduate in his class from the foreign language department of the College of Humanities. He received his Juris Doctor degree, cum laude, from the J. Reuben Clark Law School at Brigham Young University. He began his legal career in Idaho Falls, Idaho, practicing mostly in civil litigation. Kumen is active in his church and in the community. He coaches youth teams, serves as a Scoutmaster and Cubmaster for the Boy Scouts of America, and works with several youth organizations through his church and community.

Erin Lee Truman

The Firm also welcomes Erin Lee Truman as Of Counsel. Erin is a seasoned trial attorney and heads Hutchison & Steffen's Alternative Dispute Resolution Department, which includes both mediation and arbitration. Erin is a well-known litigator with significant trial experience and practices primarily in personal injury litigation and Alternative Dispute Resolution. Erin is licensed to practice law in Nevada and Arizona.

After law school, she joined Edwards, Hunt, Hale and Hansen, Ltd., where her practice emphasized insurance law and civil litigation. She then joined Allstate

Continued inside...see Truman

LITIGATION OVER NONCOMPETE AGREEMENTS

Agreements between employers and their employees prohibiting or restricting competition by a departing employee are nothing new, but their use is growing—and not just for the highest levels of management. This trend makes it all the more important to understand the limits that courts have placed on such agreements, with a view toward balancing employers' interests with policies favoring competition and unfettered opportunities for individuals to pursue their livelihoods. While courts have sometimes struck down noncompete agreements in their entirety, occasionally they effectively have rewritten parts of an agreement, a practice known as "blue penciling," so as to fix offending parts while retaining acceptable provisions.

In employment contracts, restrictive covenants, as they are sometimes called, are from the outset suspect as restraints of trade that are disfavored at law, and they must withstand close scrutiny as to their reasonableness. For the same reason, they generally are not to be construed to extend beyond their proper import, or farther than the contract language absolutely requires. In cases of ambiguous language, to borrow a term from baseball, the "tie" goes to the former employee.

The requirements for enforcing a noncompete agreement may vary some from state to state, but a typical set of conditions requires that the agreement (1) be necessary for the protection of the employer, that is, the employer must have a protectable interest justifying the restriction imposed on the activity of the former employee; (2) provide a reasonable time limit; (3) provide a reasonable territorial limit; (4) not be harsh or oppressive as to the former employee; and (5) not be contrary to public policy. In keeping with the law's predisposition against such agreements, generally the employer has the burden of proving the reasonableness of a noncompete clause.

In a recent case involving a company that distributed novelty items to convenience stores and similar businesses, a noncompete clause that prohibited a route salesperson from interfering with or attempting to entice away customers—who were customers of the employer during a one year period before the employee's termination, and whom the employee had serviced, dealt with, or obtained special knowledge about during his employment—was found by a court to be reasonably necessary and enforceable to protect the employer's business. The employer had a legitimate interest in prohibiting solicitation of its recent past customers and in winning back their business, and, as to such customers, the former employee would be in a far better position than an ordinary competitor, with a distinct advantage were it not for the noncompete restriction.

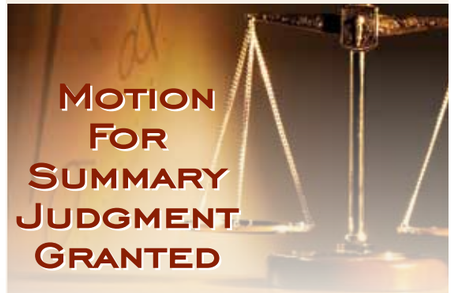
The case of the novelty items business resulted in a split decision for the employer. A separate clause in the agreement, referred to as the "business" clause, prohibited a former employee, for 24 months following his or her termination, from engaging "in any business which is substantially similar to" the employer's business. The court concluded that this provision went too far. It did not protect a legitimate business interest and was thus unenforceable. The engagement of a former employee in a similar, but noncompetitive, enterprise posed little, if any, additional danger to the employer.

When a tax return preparation firm sued a former employee for breach of a noncompete agreement, the court used a standard providing that an agreement of that kind will be enforced only if the business interests the employer seeks to protect and the effect the covenants have are reasonable as to (1) duration; (2) the capacity in which the former employee is prohibited from competing against his or her former employer; and (3) the geographic territory in which the former employee is restricted from working. The court held that the noncompetition clause in the tax preparer's employment contract was overbroad for failing to properly limit the territory to which it applied, making the entire covenant unenforceable. The clause purported to limit the former employee from working for any employer whose business included the preparation and electronic filing of income tax returns, if that employer was located, conducted business, or solicited business in the geographic district where the former employee had previously worked or within 10 miles of the district's borders, even if the former employee did not propose to work in or near that district. Such a clause cannot stand, because, as the court put it, it "overprotects" the employer at the expense of a former employee's right to earn a living. ■

Truman...continued from front page.

Insurance Company, the nation's largest publicly held personal lines insurer, as counsel. During her 14 years with Allstate, she represented hundreds of individuals and corporations insured by the company in all phases of civil litigation, including uninsured and underinsured motorist actions. She also served as lead counsel on a team that provided in-house training for litigators in 10 Western states. An experienced presenter, she has developed seminars and training sessions on litigation and insurance law.

Erin is a graduate of Brigham Young University, which she attended as a Trustee Scholar. She was awarded a Bachelor of Science degree in accounting with a minor in business management. In 1991, she earned her Juris Doctor degree from the J. Reuben Clark Law School and worked as a summer intern with the law firm of Beckley, Singleton, DeLanoy, Jemison & List, Chtd. Erin is active in her church and the community and has a strong commitment to fundraising and advocacy on behalf of children's charitable organizations. ■



Firm partners Mark A. Hutchison and Kumen L. Taylor and associate attorney Christian M. Orme won a contested motion for summary judgment after multiple hearings, during which the Court found that the Firm's client proved it delivered nothing to the opposing party, a gas station, on the date of the alleged accident. Since the Firm's client was not the owner of the gas station, it owed no duty to inspect the premises on days when it made no deliveries to the store. Further, the Firm's client will recover a significant amount of money pursuant to its offer of judgment. ■

PATRICIA LEE HONORED

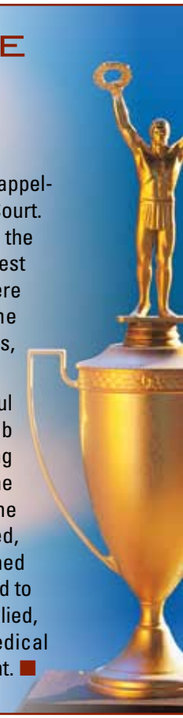
The Firm congratulates partner Patricia Lee, honored during the "Women to Watch 2010" event at The Palazzo. Each year, *In Business Las Vegas* seeks nominations of women expected to make a mark on the southern Nevada community in a variety of ways. Nominees ranged from CEOs, presidents, and business owners to attorneys, clothing designers, and commercial real estate executives.

More than 100 highly qualified women were nominated and reviewed, and Patricia was one of 17 honored with the award. ■

JACOB REYNOLDS NAMED CHAIRPERSON

The Firm congratulates Jacob A. Reynolds, who was recently named Chairperson for the Las Vegas Chapter of the J. Reuben Clark Law Society. The Law Society has more than 10,000 members (law students, law graduates, and attorneys) worldwide. Members work together to mentor and support each other, as well as be of service and an influence for good in their communities. ■

APPELLATE PRACTICE VICTORIES



Recently, Hutchison & Steffen partner Michael K. Wall was lead appellate counsel in two important matters before the Nevada Supreme Court. The first involved an appeal by Wal-Mart upon the verdict in favor of the Firm's client of approximately $375,000, plus attorney's fees and interest of about $200,000, which was the result of a slip and fall causing severe injury and subsequent mistreatment by the manager on duty. The Nevada Supreme Court ruled in favor of the Firm's client on all issues, and affirmed the judgment and the fees.

The next matter was an action for personal injuries and wrongful death arising from an automobile accident. The Firm's client, a cab company, filed third-party complaints against three doctors, accusing them of malpractice which caused the death of the injured party. The lower court dismissed on statute of limitation grounds, applying the med-mal statute of limitations. The Nevada Supreme Court reversed, stating that the statute of limitation for equitable indemnity is governed by chapter 11, not by the med-mal statute, and has not yet commenced to run. Also, the contribution statute of limitation should have been applied, which also has not yet commenced. This means on third-party medical malpractice cases, the statute of limitations is practically non-existent. ■