SERIAL SEXUAL HARASSMENT PREDATORS – IN THE "NEW CLIMATE" ARE ATTORNEYS WHO NEGOTIATE SETTLEMENTS FOR THEM EXPOSED TO LIABILITY?

Chinye Uwechue Follow
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Future attorneys may need to be more careful when they are involved in settling sexual harassment incidents for the third/fifth/tenth/twentieth time on behalf of the exact same serial predator.

When the predilection and the falsity of denials are known to the legal representatives negotiating the settlements, at what point do the non-disclosure provisions and waivers become void as a matter of public policy? When do provisions, inserted to induce settlement, become instances of bad faith (e.g., a predator's denial of ever having been involved in any prior sexual harassment[1] coupled with a promise (broken many times in the past) to go for counseling[2])?

A fundamental historical aspect of contract law[3] is the respect for the right of parties to enter into a bargain of their choice and the sanctity of the ensuing agreement. In California, however, there are instances when the "sanctity of a contract" is bypassed and ignored, e.g., when its purpose is contrary to existing law and/or against public policy.

Specific statutory provisions in this area include:

Civil Code s 1667: "That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals."

Civil Code s 1668: "All contracts which have for their object, directly or indirectly, to exempt any one 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."

Civil Code s 1670.5: "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable

to its commercial setting, purpose, and effect to aid the court in making the determination."

Civil Code s 1670.11 which states: "Notwithstanding any other law, a provision in a contract or settlement agreement entered into on or after January 1, 2019, that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment on the part of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party, when the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the Legislature, is void and unenforceable."

Concerning the application of *Civil Code s 1668*, the Court of Appeal in *Neubauer v Goldfarb* (2003) 133 Cal. Rptr. 2d 218[4] observed: "In *Cohen* . . . The court began by observing: "The law has traditionally viewed with disfavor attempts to secure insulation from one's own negligence or willful misconduct[.]" "Furthermore," the court noted, "it is the express statutory policy of this state that `[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from the 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.' (Civ.Code, § 1668.)" The court found "[t]his public policy applies with added force when the exculpatory provision purports to immunize persons charged with a fiduciary duty from the consequences of betraying their trusts."" (*Id.* at p. 224)

The *Neubauer* Court noted that "a waiver requires the **knowing and intelligent relinquishment of a right** . . . The agreement states Neubauer "has requested and received such information in connection with the execution of this agreement as he believes to be necessary in order to make an informed decision to enter into this agreement and to bind himself as set forth herein." . . . . Obviously **Neubauer had to rely on the Goldfarbs' good faith representation** they had provided him with all the information necessary "to make an informed decision to enter into this agreement" including the waiver clause. **If it turned out the Goldfarbs withheld material information a trier of fact could find Neubauer's purported waiver was not fully informed.**" (Emphasis added) (*Id.* at p. 225-226)

In Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642 the court ruled that: "The law has traditionally viewed with disfavor attempts to secure insulation from one's own negligence or willful misconduct, and such provisions are strictly construed against the person relying on them, particularly where such person is their author . . . Furthermore, it is the express statutory policy of this state that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from the 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." (Civ. Code, § 1668.) This public policy applies with added force when the exculpatory provision purports to immunize persons charged with a fiduciary duty from the consequences of betraying their trusts . . . Moreover, the California Supreme Court has evinced a clear policy of

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In *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal. 3d 465, the Supreme Court made the following comments: ". . . the Westlake affidavits quoted a provision of the Westlake bylaws which reads in relevant part: "Each member of, or applicant to the Medical and Dental Staff, waives any right of personal redress against the Medical and Dental Staff, the Judicial Review Committee, the Governing Board, or any member thereof, for disciplinary action taken under this article."" (*Id.* at p. 472); "With respect to the Westlake revocation, defendants contended that plaintiff's action was barred on three separate grounds. First, defendants claimed that the "waiver of redress" provision of the Westlake bylaws quoted above was effective to bar any recovery by plaintiff arising from the termination of staff privileges at the hospital. " (*Id.* at p. 473)

The *Westlake Community Hospital* court concluded that "more recent decisions of this court clearly demonstrate that an exculpatory clause of this nature transgresses public policy and cannot bar a plaintiff's access to the courts. Initially, insofar as the provision in question purports to bar a plaintiff's claim based on the *intentional* wrongdoing of the hospital or its staff, as is alleged in the instant case, Civil Code section 1668 leaves no doubt that the provision is invalid, for the section provides in relevant part: "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 ... are against the policy of the law.""

Citing *Tunkl* v. *Regents of University of California* (1963) 60 Cal. 2d 92, the *Westlake Community Hospital* court ruled: ". . . we do not doubt that the instant exculpatory clause cannot stand." (*Id.* at p. 479-480)

The reasoning enunciated in these cases could be expanded to include sexual harassment incidents that lead to settlement agreements that contain waivers and non-disclosure provisions that are designed to ensure that victims do not enforce their rights and do not disclose the details of their experience.

The question is whether the attorneys and law firms that draft such clauses time and time again for the same **serial** predators are thereby exposed to some liability when it becomes evident that the silencing of victims has created a future "pool" of new victims who (because of the silencing of earlier victims) are unaware of the dangers associated with dealing directly with a particular serial predator? In future, attorneys who represent serial predators may need to be very careful when negotiating settlement agreements that contain waivers and stringent non-disclosure clauses.

Article by Chinye Uwechue, Esq., August 5, 2021

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[2] It is not unusual for each earlier victim to believe that he/she is the "only one". This mindset allows each one to believe that the predator's behavior is unusual (a "one off") and therefore out of character and therefore capable of being rectified through counseling.

[3] The phrase is not historically exclusive to International Law.

[4] 108 Cal. App. 4th 47.

Published By

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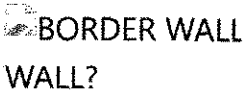

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[1] This denial having been made possible because of the latest victim's total ignorance of the existence of prior incidents since all the earlier victims signed settlement agreements that contained stringent non-disclosure clauses and waivers.

[2] It is not unusual for each earlier victim to believe that he/she is the "only one". This mindset allows each one to believe that the predator's behavior is unusual (a "one off") and therefore out of character and therefore capable of being rectified through counseling.

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