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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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Arbitration—Unconscionability—Restriction of Remedies

Ramos v. Superior Court, 28 Cal.App.5th 1042 (2018) hits close to home, as it invalidates an arbitration clause in a law firm's partnership agreement. Without resolving whether the plaintiff—a former income partner at the firm—was an "employee," the court applied *Armendariz v. Foundation Health Psychcare Services*, Inc., 24 Cal.4th 83 (2000) to find the arbitration provision was unconscionable because it precluded statutory remedies that would be available in court, required the partner to pay fees she would not have to pay in court, and contained a confidentiality provision. The clause was also procedurally unconscionable because the contract was one of adhesion. The court of appeal rejected the law firm's request to sever the unconscionable provisions and voided the entire arbitration agreement.

Attorneys—Disqualification—Conflicts of Interest

The court of appeal was not kind to a lawyer seeking to reverse a disqualification order: "In addition to multiple other reasons why the attorney here should be disqualified, when more than one client is seeking funds from the same source, the conflict is self-evident. There might not be enough money to satisfy each client's claim." *Bridgepoint Constr. Services, Inc. v. Newton*, 26 Cal.App.5th 966 (2018). Here, the lawyer was first disqualified from jointly representing two clients in a claim against a third party because they had conflicts between them. Undaunted, the attorney then filed a case against the same

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third party on behalf of another client seeking return of a part of the same funds the first two clients had sought from the third party. The lawyer argued that he did not have a conflict because none of his three clients was suing the other. The court would have none of it: "What [the lawyer] ignores is that [the three clients] are all seeking the same damages from the same $2 million pool. The conflict is obvious. Every dollar that [client 3] obtains from the pool is a dollar that not available to [clients 1 or 2]."

Attorneys—Malpractice—Accrual of Limitations Period

A legal malpractice action accrues, and the one-year limitations period commences, when the plaintiff is on inquiry notice of his claim. The decision in *Genisman v. Hopkins Carley*, 29 Cal.App.5th 45 (2018), reminds that inquiry notice is an objective, not a subjective standard. There, Genisman sued lawyers who represented him in a business transaction, alleging they changed the structure of the transaction from a buyout to a redemption without informing Genisman and that, as a result, Genisman was sued by a lender for failing to disclose the true nature of the transaction. It was undisputed that the lender had accused Genisman of failing to disclose and threatened a lawsuit more than one-year before the malpractice lawsuit was filed, but Genisman claimed he had no reason to believe the accusation until his former lawyers sent him the transaction documents, which occurred less than a year before he filed suit. Nonetheless, the trial court granted summary judgment in favor of the attorneys on statute of limitations grounds, and the court of appeal affirmed. The court held that inquiry notice requires only "a suspicion of wrongdoing," not confirmation thereof. Further, even if Genisman did not believe the lender's accusations, "subjective suspicion is not required." Rather, the standard is whether a reasonably prudent person would conduct further investigation into the matter, and the court had no trouble finding that standard met based on the lender's accusations and threat of a lawsuit.

Corporations—Dissolution—Stay of Proceedings—Buyout

Corporations Code Section 2000 provides that when a shareholder sues for involuntary dissolution, the holders of 50% or more of the voting power may avoid dissolution by purchasing the plaintiff's shares at "fair value." After the defendants invoke section 2000 by moving to stay the involuntary dissolution and appoint appraisers to value the shares, may the plaintiff dismiss the involuntary dissolution proceeding and moot the section 2000

proceeding? Delving into appealability and dismissal issues, the court of appeal held a plaintiff may not dismiss the involuntary dismissal action and moot the section 2000 proceedings. *Ontiveros v. Constable*, 27 Cal.App.5th 259 (2018). The court held that the section 2000 proceeding supplants the involuntary dismissal action and "once a court grants a motion under section 2000, a plaintiff no longer controls a cause of action for involuntary dissolution, and therefore, cannot dismiss it under Code of Civil Procedure section 581. At that point, the parties give up their rights to litigate that cause of action and will abide by the process set forth in section 2000."

Litigation—998 Offer—Pre-offer Costs.

Section 998 instructs that in determining whether a plaintiff obtained a more favorable judgment, courts "shall exclude" any post-offer costs awarded to the plaintiff. But how are pre-offer costs to be considered? In *Martinez v. Eatlite One, Inc.*, 27 Cal.App.5th 1181 (2018), the defendant made a 998 offer of $12,001 that was silent about the treatment of costs. Plaintiff rejected the offer, and the jury ultimately awarded damages in the amount of $11,490. The trial court then awarded plaintiff attorneys' fees and costs and denied the same to defendant, holding that plaintiff had obtained a more favorable judgment because she was entitled to pre-offer costs and attorney fees, which when added to the judgment exceeded the 998 offer. The court of appeal reversed. The court noted that a party who accepts a 998 offer is entitled to costs and fees unless they are excluded by the offer. Thus, "the value of defendant's 998 offer, which was silent on costs, necessarily included $12,001 plus plaintiff's pre-offer costs and fees defendant would have been liable for if plaintiff had accepted the offer." In determining whether plaintiff obtained a more favorable judgment, therefore, "the court should have compared the jury's award plus plaintiff's pre-offer costs and fees with the amount of the 998 offer plus plaintiff's pre-offer costs and fees." Under that analysis, plaintiff did not obtain a more favorable judgment.

Litigation—Appealability of Trial Court Order Vacating Arbitrator's Discovery Order Against Nonparty.

Generally, an arbitrator's interim rulings are not reviewable in the trial court or on appeal. The decision in *Uber Technologies, Inc. v. Google LLC*, 27 Cal.App.5th 953, 238 Cal.Rptr.3d 765 (2018), illustrates a notable exception. The underlying dispute involved Google's claim against two former employees who started the self-driving vehicle company Ottomotto (Otto), which was acquired by Uber.

Google initiated arbitration against the former employees and sought discovery from Uber related to pre-acquisition due diligence performed by Uber and Otto's outside counsel. Uber objected, but an arbitration panel determined the due diligence documents were not protected and ordered them produced. Uber then initiated a special proceeding asking the superior court to vacate the discovery order. The court granted Uber's petition and vacated the arbitration order. Google appealed, but Uber moved to dismiss the appeal arguing the trial court's discovery order was not appealable because it was not a final arbitration award. The court of appeal disagreed. The court first noted that a 2008 Supreme Court decision gave the superior court jurisdiction to review the arbitrator's discovery order against Uber, which was not a party to the arbitration agreement. The court of appeal then concluded that the trial court's order vacating the arbitrator's discovery order was appealable as a final judgment because that order "conclusively determined Uber's obligations to Google. There was nothing left for the superior court to determine as between Uber and Google, and the Order disposed of all issues between them in the special proceeding."

Litigation—Mandatory Relief from Default or Dismissal—Failure to Respond to Demurrer

Civ. Proc. Code section 473(b) provides for mandatory relief from default, default judgment, or "dismissal" where an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his mistake, inadvertence, surprise, or neglect that caused the default or dismissal. Courts of appeal have held that the section does not apply to "dismissals" that result from failure to serve a complaint in timely manner, failure to prosecute, failure to file an amended complaint following a demurrer, or failures that lead to summary judgment. It does, however, apply where plaintiffs fail to respond to a "dismissal motion." In *Pagnini v. Union Bank, N.A.*, 28 Cal.App.5th 298 (2018), the court of appeal held that a demurrer was a "dismissal motion" for purposes of section 473(b). Thus, the trial court was obligated to grant relief where plaintiff timely presented a sworn statement from his attorney attesting that the attorney had mistakenly failed to respond to the demurrer after miscalculating the time for filing an amended complaint.