February 2013

*Richard A. Derevan**
*Todd E. Lundell**
Snell & Wilmer L.L.P.

S T A T E

Attorneys—Disqualification—Corporate Derivative Action

Conflict issues can be tricky when a lawyer represents a shareholder in an action against another shareholder and also seeks to maintain a corporate derivative action against the corporation as well. In *Shen v. Miller*, 212 Cal.App.4th 48, 150 Cal.Rptr.3d 783 (2012), warring 50% shareholders had a number of actions involving themselves and the corporation. Briefly, Shen sued Miller for various claims of breach of fiduciary duty involving the corporation, and when Miller filed an action to dissolve the corporation, Shen filed a creditor's claim in that action. And then Shen filed two other actions, a derivative action seeking mostly declaratory relief and an action seeking 50% of the corporation's assets. The actions were deemed related and Miller sought to disqualify Shen's lawyer. The essence of Miller's disqualification motion was that Shen's lawyer was both suing the corporation (in the winding-up proceeding) and representing it (in the derivative action). The trial court denied the motion and the court of appeal affirmed. In a lengthy discussion the court of appeal held that even though the corporation would be the ultimate beneficiary of the derivative action, the filing of that action was not, by itself, sufficient to make the corporation a client of Shen's lawyer for disqualification purposes. The court also rejected Miller's argument that even if no attorney-client relationship existed, the lawyer should still be disqualified on the ground that he owed a duty of

* Certified Specialist, Appellate Law
The State Bar Board of Legal Specialization

confidentiality to the corporation. Important to the court of appeal's analysis with respect to both arguments was that Shen's attorney never had represented the corporation, even in happier days before the two shareholders began their disputes.

Contracts—Parol Evidence

In *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*, 151 Cal.Rptr.3d 93, 55 Cal.4th 1169 (2013), the California Supreme Court significantly transformed the rules governing the admission of parol evidence to prove fraud in connection with a contract. A well-established exception to the parol evidence rule allows a party to present extrinsic evidence to show that a contract was tainted by fraud. In a 1935 decision, however, the California Supreme Court limited this exception to cases where the proffered evidence "tend[ed] to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and *not a promise directly at variance with the promise of the writing*." In *Riverisland*, the Supreme Court overruled this 80-year-old precedent as "ill-considered." The Supreme Court held that the *Pendergrass* limitation was not supported by the statute codifying the parol evidence rule, "conflict[ed] with the doctrine of the Restatements, most treatises, and the majority of our sister-state jurisdictions," "may actually provide a shield for fraudulent conduct," and "departed from established California law at the time it was decided . . . ." The Supreme Court, therefore, eliminated the distinction between fraudulent promises that are consistent with the terms of a contract and those that are not. Applying its new rule, the Supreme Court held that the court of appeal had properly reversed a trial court order granting summary judgment against plaintiffs who had sued a credit association for fraud and negligent misrepresentation in connection with plaintiffs' loan documents and who had sought to rescind or reform those documents based on fraud.

Litigation—Anti-SLAPP Motion—Protected Activity

Can the submission of an insurance claim constitute prelitigation conduct protected by California's anti-SLAPP law? In *People ex rel. Fire Ins. Exchange v. Anapol*, 150 Cal.Rptr.3d 224, 211 Cal.App.4th 809 (2012), the

court of appeal answered yes. There, two insurance companies brought a qui tam action alleging that defendants, including two attorneys, purposefully submitted false and/or inflated insurance claims. The attorneys filed anti-SLAPP motions arguing that filing insurance claims on behalf of their clients was protected by the First Amendment right to petition. The trial court denied the motion on the ground that the submission of insurance claims does not constitute protected conduct. On appeal, the court held that "under the proper circumstances, submission of an insurance claim can constitute prelitigation conduct protected by the anti-SLAPP law." But the submission of an insurance claim will not always be protected activity, and courts must consider the circumstances of each case: "When the claim is submitted under circumstances demonstrating that the claim was not submitted for payment in the regular course of business, but was instead merely a necessary prerequisite to expected litigation or was submitted as the equivalent of a prelitigation demand letter, it may constitute protected petitioning activity." The court of appeal affirmed the trial court's denial of the anti-SLAPP motions, however, on the ground that the attorneys' "bald assertions that the claims were submitted with the subjective intent that litigation would follow" were insufficient to establish a prima facie case of protected activity.

Litigation—Evidence—Proper Objections

It's not new, but is worth repeating: General objections to the admission of evidence do not preserve issues for review on appeal. Instead, the objection must state the ground or grounds upon which it is based. In *In re E. A.*, 209 Cal.App.4th 787, 147 Cal.Rptr.3d 327 (2012), the court explained that requiring reasons allows the trial court to consider the basis for admission and the opportunity to make a correct ruling. The court went on to say that "The unfairness to the trial court and the opposing side if appellate counsel is permitted to invent the grounds for the objection is manifest. . . . We have long passed the days when formulaic incantations were part of the judicial process."

Litigation—Expert Testimony—Trial Court's Role as "Gatekeeper"

In *Sargon Enterprises, Inc. v. University of Southern California*, 149 Cal.Rptr.3d 614, 55 Cal.4th 747 (2012), the California Supreme Court confirmed trial courts' "duty to act as a 'gatekeeper' to exclude speculative expert testimony." Sargon Enterprises, a small dental implant company, sued USC for breaching a contract to conduct a clinical study of Sargon's new implant. At trial, Sargon sought to introduce expert testimony that it suffered damages ranging from $200 million to over $1 billion on the theory that but for the university's breach of contract, Sargon would have become a worldwide leader in the industry with a significant market share. After an extensive evidentiary hearing, the trial court excluded the testimony. In a split decision, the court of appeal reversed, and the Supreme Court granted review. In affirming the trial court's decision to exclude the testimony, the Supreme Court held that under Evidence Code sections 801 and 802, the trial court "acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." The trial court had properly excluded Sargon's expert testimony because the expert "provided no logical basis to infer that Sargon would have achieved" the significant market share on which his testimony was based. The Supreme Court, however, warned trial courts to "be cautious in excluding expert testimony," particularly when the plaintiff claims lost profits. "The lost profit inquiry is always speculative to some degree," and "[c]ourts must not eviscerate the possibility of recovering lost profits by too broadly defining what is too speculative."

Litigation—Lis Pendens—Litigation Privilege

In *La Jolla Group II v. Bruce*, 149 Cal.Rptr.3d 716, 211 Cal.App.4th 461 (2012), the court of appeal clarified the circumstances under which the filing of a lis pendens constitutes activity protected by the litigation privilege. After their home was foreclosed based on a fraudulent deed of trust, the homeowners filed a quiet title action and recorded lis pendens. The party who had purchased the home in good faith subsequently filed a complaint for slander of title against the former homeowners and their

attorney, who moved to strike the complaint under Code of Civil Procedure section 425.16. The trial court granted the motion, and the court of appeal affirmed. Because the slander of title plaintiffs conceded that the filing of lis pendens was protected activity under the first step of the anti-SLAPP analysis, the appeal turned on the question of whether plaintiffs "established a tenable claim for slander of title." The court of appeal held that plaintiffs had not established a claim because "the absolute privilege under Civil Code section 47(b) was applicable to the recording of the lis pendens in this case." The court strictly construed the two statutory conditions for the privilege to apply—that the lis pendens (1) identifies an action "previously filed" in a court of competent jurisdiction that (2) affects title or right to possession of real property. The court rejected the proposition that "the availability of the litigation privilege to a recorded lis pendens depends upon whether the claimant is able to make a certain evidentiary showing of merit to support the real property claim." The court held that section 47(b) "does not contain a lack of 'evidentiary merit' exception to the litigation privilege, and it would be improper for us to insert what the Legislature has plainly omitted."

Litigation—Summary Judgment—Separate Statement

Batarse v. Service Employees International Union Local 1000, 209 Cal.App.4th 147 Cal.Rptr.3d 340 (2012), points up the need to file a separate statement opposing summary judgment that complies with the rules. The court of appeal held that the trial court did not abuse its discretion in granting summary judgment because the party opposing summary judgment had not filed a separate statement of disputed and undisputed facts that complied with the rules. The court of appeal said that typically a court will consider a summary judgment motion without an adequate separate statement only when the case "involves a single, simple issue with minimal evidentiary support." Here, however, "the motion presented multiple issues" concerning plaintiff's ability to present a prima facie case and various defenses; accordingly, "the trial court was justified in declining to consider plaintiff's opposition without a separate statement that conformed to the requirements of" the code and the rules of court.

Torts—Assumption of Risk—Bumper Cars

In *Nalwa v. Cedar Fair, L.P.*, 150 Cal.Rptr.3d 551, 55 Cal.4th 1148 (2012), the Supreme Court held that "the primary assumption of risk doctrine, though most frequently applied to sports, applies as well to certain other recreational activities including bumper car rides." Plaintiff, who had fractured her wrist on a bumper car ride at an amusement park, sued the park owner for negligence. The trial court granted summary judgment to the defendants concluding that the assumption of risk doctrine precluded the negligence claims, but the court of appeal reversed, and the Supreme Court granted review. The Supreme Court held that the assumption of risk doctrine was not limited to sports, but applied to recreational activities "involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity." The doctrine applied to the bumper car ride because "[l]ow-speed collisions between the padded, independently operated cars are inherent in—are the whole point of—a bumper car ride." The court concluded that the doctrine applied "even though amusement parks are subject to state safety regulations and even though, as to some rides, park owners owe participants the heightened duty of care of a common carrier for reward."