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NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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S T A T E

Arbitration—Review of Arbitration Award

The court of appeal's decision in *Ahdout v. Hekmatjah*, 152 Cal.Rptr.3d 199, 213 Cal.App.4th 21 (2013), sheds light on two exceptions to the general prohibition against judicial review of arbitration awards: where the arbitrator exceeds its powers by (i) enforcing an illegal contract, or (ii) issuing an award that violates public policy. Ahdout claimed that a contractor was required to disgorge all compensation for its contracting services because the contractor was not licensed. Under Business and Professions Code section 7031, parties who hire an unlicensed contractor are entitled to reimbursement for that contractor's compensation. An arbitrator denied Ahdout's claims and the trial court confirmed the award without reviewing the evidence to determine whether section 7031 was violated. The court of appeal reversed. The court rejected Ahdout's claim that the arbitration award was subject to judicial review as enforcing an illegal contract because "the alleged illegality in the instant case does not infect the entire contract." The court held, however, that the trial court was required to review the award to determine whether it violated public policy. "We conclude that section 7031 constitutes an explicit legislative expression of public policy, that if not enforced by an arbitrator, constitutes grounds for judicial review." The court held that "the trial court should have conducted a de novo review of the evidence to determine whether disgorgement of compensation for [the general

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Arbitration—Review of
Arbitration Award—Required
Disclosures

contractor’s] construction work was required by section 7031.”

The court of appeal’s decision in *Gray v. Chiu*, 151 Cal.Rptr.3d 791, 212 Cal.App.4th 1355 (2013), illustrates another ground on which an arbitration award may be vacated—failure of an arbitrator to make a mandatory disclosure. *Gray* involved a medical malpractice claim. After the proceedings commenced, but before the arbitration hearing, lead counsel for the defendant doctor became an arbitrator providing arbitration services through ADR Services, the same dispute resolution provider that was handling the malpractice claim. The neutral arbitrator in that arbitration, however, never disclosed this new relationship with defendants’ counsel. After the arbitrators issued an award in favor of the defendants, the plaintiff petitioned to have the award vacated. The trial court denied that petition and confirmed the award, but the court of appeal reversed. The court of appeal rejected defendants’ argument that the arbitrator had no duty to disclose because defense counsel’s membership in ADR Services could not cause a person aware of the facts to entertain doubt regarding the arbitrator’s neutrality. The court explained that “[i]n addition to compelling the disclosure of all facts that could cause a person to entertain such a doubt, section 1281.9 enumerates specific instances where disclosure is always compelled.” Under Ethics Standard 8(b)(1)(A), one of those instances is where the a lawyer in the arbitration is a member of the organization providing the arbitration services. The court also rejected defendants’ argument that vacatur was not required because the plaintiff knew of defense counsel’s affiliation with ADR, holding that such an argument incorrectly “assumes that someone other than the neutral arbitrator” can make the required disclosure. Where an *arbitrator* fails to make such a disclosure, vacatur is required. “While that rule seems harsh, it is necessary to preserve the integrity of the arbitration process.”

Attorneys—Fee-Splitting—
Estoppel

Ordinarily, for a fee splitting agreement to be enforceable, client consent in writing is required by Rule 2-200 of the Rules of Professional Conduct, and, in the case of class actions, under Rule of Court 8.769, fee agreements must be disclosed to the court before fee approval may be obtained. In *Barnes, Crosby, Fitzgerald & Zeman LLP v. Ringler*, 212 Cal.App.4th 172, 151 Cal.Rptr.3d 134 (2012), the court held that a defendant-attorney was estopped to assert noncompliance with these rules as a defense to a complaint by a referring law firm for its share of fees where the allegations were that the defendant prevented the plaintiff-law firm from complying with the rules by switching class plaintiffs and threatening an interference lawsuit should the referring law firm contact the plaintiff class representatives. The court distinguished those cases that deny recovery to attorneys who willfully or negligently violate the fee sharing rules.

Courts—Retaining Jurisdiction
Over Judgment

In *Stump's Market, Inc. v. Plaza De Santa Fe Limited, LLC*, 151 Cal.Rptr.3d 459, 212 Cal.App.4th 882 (2013), the court of appeal reversed a trial court order retaining jurisdiction to enforce a judgment for specific performance. The case involved a lessor's attempt to terminate a long-standing lease with a grocery market. Both a jury and the trial court found in favor of the market, and the trial court granted specific performance of the lease, including lease options that could extend the lease for another 17 years. Concerned that the lessor would invent ways to frustrate the specific performance order, the trial court retained jurisdiction "to make further orders, including injunctions, if necessary in the future to effectuate and or enforce the court's judgment." The court of appeal found that the trial court abused its discretion in this regard. The court of appeal recognized that "a court may retain jurisdiction to assure compliance with its judgment," but held that "such an exercise of jurisdiction is exceptional and limited to special circumstances." The court searched, but found no "reported case in which a court retained jurisdiction for a similar length of time to essentially govern the parties operating under a contract negotiated at arm's length." The court further found that by retaining jurisdiction to

declare the parties' rights and responsibilities in the future, the trial court is improperly "sitting as a predispute referee in the event the parties disagree in the future."

Forum Non Conveniens—
Reconsideration by New Judge

Section 410.30 of the Code of Civil Procedure, dealing with forum non conveniens, authorizes a court to stay an action "upon motion of a party or *its own motion*" if certain criteria are met. In *Williamson v. Mazda Motor of America, Inc.*, 212 Cal.App.4th 449, 150 Cal.Rptr.3d 569 (2012), the court of appeal held that given the "its own motion" language in section 410.30, a trial court may grant a motion for reconsideration of the denial of a forum non conveniens motion, notwithstanding the absence of new facts or compliance with section 1008 of the Code of Civil Procedure. The court of appeal further held that the motion may be presented to a judge other than the judge who denied the first motion when the first judge is unavailable.

Litigation—Attorney-Client
Relationship

When an insurer retains counsel to defend its insured, a "tripartite" attorney-client relationship arises, confidential communications between either the insurer or the insured and counsel are protected by the attorney-client privilege, and the insurer and insured both hold the privilege. But, does the same tripartite relationship arise when a title insurer hires counsel to *prosecute* an action on behalf of an insured? In *Bank of America, N.A. v. Superior Court*, 151 Cal.Rptr.3d 526, 212 Cal.App.4th 1076 (2013), the court held "yes." There, Fidelity National Title Insurance Company retained a law firm to represent Bank of America to prosecute a lawsuit for equitable subrogation, injunctive relief, and fraud. The defendant served a subpoena requesting production of documents that included communications between counsel and Fidelity regarding the litigation. B of A moved to quash the subpoena on the ground that the communications were privileged. The trial court denied the motion on the ground that Fidelity had retained counsel to *prosecute*, not defend, the lawsuit. The court of appeal, however, granted B of A's petition for writ of mandate. The court noted that the parties' title insurance policy "gave Fidelity the right to initiate and prosecute

litigation, such as a quiet title against an adverse claim.” Moreover, “a title insurer’s duties to defend and to initiate a lawsuit are kindred duties addressing the same fundamental concern.” Thus, “[w]hether a title insurer is defending an action or prosecuting one . . . [t]here is no logical reason why a tripartite attorney-client relationship should exist in one case but not the other.” The court also held that “it does not matter whether there is a formal retainer agreement between Fidelity and [counsel]” because “a formal contract is not required to create an attorney-client relationship.”

Litigation—Offers to
Compromise—CCP § 998

Section 998 of the Code of Civil Procedure, dealing with offers to compromise, has been a fertile source of published court of appeal opinions. *Whatley-Miller v. Cooper*, 212 Cal.App.4th 1103, 151 Cal.Rptr.3d 517 (2013), is one more case in this long line. Here, shortly after filing their medical malpractice complaint, plaintiffs served a section 998 offer on defendant calling for payment of \$950,000 and stating “each side to bear its own costs.” The offer was accompanied by an acceptance directing the clerk to enter judgment in the amount of \$950,000 “pursuant to Plaintiffs’ Offer to Compromise which is attached hereto.” The acceptance also stated, however, that “Costs to be submitted pursuant to cost bill” Plaintiffs did better at trial than their offer and sought section 998 costs at the conclusion of trial. The court of appeal rejected the defendant’s three arguments against awarding section 998 costs. First, the defendant argued that the acceptance had to be in the offer itself. But as the court of appeal pointed out, section 998 says that the acceptance may be “on the document containing the offer or on a separate document of acceptance.” Second, the court rejected the defendant’s argument that the discrepancy between the offer and the acceptance document concerning costs was a fatal ambiguity, invalidating the offer. The court noted that the acceptance document did not require the defendant to pay costs, and further that the costs recital in the acceptance document “has no force and is simply surplusage.” Finally, the court rejected the defendant’s argument that the offer was made in bad faith because it was made so close to the complaint’s filing and he had inadequate time to investigate and consider the offer. The

court of appeal held that the trial court did not abuse its discretion in rejecting this argument because its order laid out the information the defendant had before the offer was made and expressly noted that the defendant never sought more time to consider the offer.

**Supreme
Court
Action**



The supreme court granted review in *Richey v. AutoNation* (November 2012-January 2013 issue) dealing with the scope of judicial review of employment arbitration agreements concerning an employee's unwaivable rights and the "honest belief" defense in CFRA cases.