



# NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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## S T A T E

### Appeal—Appealability—Order After Judgment

Section 904.1(a)(2) of the Code of Civil Procedure makes appealable “an order made after a judgment made appealable by paragraph (1).” But determining whether a postjudgment order is really appealable is not so simple as looking to see if an appealable judgment had been entered earlier. That is because the Supreme Court has held that “not every postjudgment order that follows a final appealable judgment is appealable.” Instead, the court has said that to be appealable, a postjudgment order must also (1) raise an issue different from those arising on appeal from the judgment and (2) “either affect the judgment or relate to it by enforcing it or staying execution.” And as the court in *Macaluso v. Superior Court*, 219 Cal.App.4th 1042, 162 Cal.Rptr.3d 318 (2013), stated, even the supreme court has warned against “a talismanic employment of this verbal formulation.” Navigating these lightly charted waters, the *Macaluso* court held that a postjudgment order directing a third party to testify at a deposition and to produce documents meets these standards and is appealable.

### Appeal—Finality of Trial Court Decision—Dismissal

Parties cannot manufacture appellate jurisdiction while keeping alive the possibility of future litigation. That is the lesson from *Kurwa v. Kislinger*, 57 Cal.4th 1097, 162 Cal.Rptr.3d 516 (2013). After an adverse ruling on pretrial motions resulted in the dismissal of some of plaintiff’s claims, the parties agreed to dismiss the

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remaining claims without prejudice and to waive the statute of limitations. The court of appeal held that the resulting judgment was appealable because “no causes of action remained to be tried in the court which entered judgment . . . .” The Supreme Court reversed, holding that because the parties agreed that some causes of action can be “resurrected upon completion of the appeal, they remain ‘legally alive’ in substance and effect.” A rule allowing an appeal would “permit[] parties to evade the one final judgment rule . . . .” Thus, “the parties’ agreement holding some causes of action in abeyance for possible future litigation after an appeal from the trial court’s judgment on others renders the judgment interlocutory and precludes an appeal under the one final judgment rule.”

**Arbitration—Specificity of Agreement—Enforceability**

In *HM DG, Inc. v. Amini*, 219 Cal.App.4th 1100, 162 Cal.Rptr.3d 412 (2013), the trial court refused to enforce an arbitration agreement on the theory that it was uncertain because it did not specify what agency or person would handle the matter or how the arbitrator would be selected. The court of appeal reversed. The court of appeal rejected the trial court’s premise that to be valid an arbitration agreement must identify a specific arbitrator or a single method for selecting an arbitrator to be valid. The court of appeal relied on CCP § 1281.6 which provides that the trial court “shall appoint the arbitrator” when the agreement does not provide a method for doing so or the parties cannot otherwise agree. The court of appeal held that “the presence of multiple alternative methods for selecting an arbitrator . . . does not render the clause invalid or unenforceable.

**Arbitration—Unconscionability**

In *Peng v. First Republic Bank*, 219 Cal.App.4th 1462, 162 Cal.Rptr.3d 545 (2013), the court of appeal reversed a trial court’s finding that an arbitration agreement was unconscionable. Two points are worth noting. First, the court of appeal held that the agreement’s requirement to follow AAA rules was not rendered unconscionable solely by the failure to attach those rules. Second, the court held that a provision allowing the employer to unilaterally modify the terms of the agreement did not render it unconscionable because the implied covenant of good faith and fair dealing “prevents an employer from modifying an arbitration agreement once a claim has

accrued or become known to it,” and “plaintiff does not assert that defendant has modified the Agreement in any way.”

**Arbitration—Vacatur of Award—  
Disclosures**

The decision in *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP*, 219 Cal.App.4th 1299, 162 Cal.Rptr.3d 597 (2013), illustrates the importance of arbitrators’ disclosures even concerning what might be considered dated information. There, the arbitrator listed as a reference in a 10-year old resume a lawyer who was a named partner in a law firm that was a defendant in the arbitration proceedings. After the arbitrator ruled in favor of the law firm, the resume surfaced and the plaintiff sought to have the award vacated. The trial court refused to vacate the award, but the court of appeal reversed. The court of appeal held that “[a]n objective observer reasonably could conclude that an arbitrator listing a prominent litigator as a reference on his resume would be reluctant to rule against the law firm in which that attorney is a partner as a defendant in a legal malpractice action.”

**Attorneys’ Fees—Reciprocity—  
Tort Claims—Allocation**

The question of entitlement to attorneys’ fees can be confusing when both contract and tort claims have been tried. Fortunately, a recent decision out of the Fourth District, Division Three, provides some clarity. *Brown Bark III, L.P. v. Haver*, 219 Cal.App.4th 809, 162 Cal.Rptr.3d 9 (2013). In that case, plaintiff sued a defendant company for breach of contract on a successor liability theory and the company and an individual for conversion and fraud. The loan agreement contained a unilateral fee clause permitting only the plaintiff to recover fees. The defendants prevailed on all causes of action and sought their attorneys’ fees on both the contract and the tort claims, relying on Civil Code § 1717. The opinion covers a variety of topics, including what is an action “on a contract,” the effect of suing for successor liability, and section 1717’s reciprocity provision. The court held that defendants were entitled to recover their fees incurred on the contract causes of action, but not the tort ones. The court explained that “[t]ort and other noncontract claims are not subject to section 1717 and its reciprocity principles.” But despite holding that the defendants could not directly recover for work on the tort

claims, the court pointed out that on remand the trial court was not required apportion fees between causes of action for work done that was common to both.

Corporations—Derivative  
Actions—Futility Requirement

In *Charter Township of Clinton Police and Fire Retirement System v. Martin*, 219 Cal.App.4th 924, 162 Cal.Rptr.3d 300 (2013) plaintiffs brought a derivative action against the company’s board of directors, certain executives, and a consulting firm that advised the company concerning its compensation system. As a prerequisite to a derivative action, a plaintiff is required to make demand on the corporation’s board or allege with particularity why such a demand would be “futile.” To excuse the demand requirement, a plaintiff must allege “particularized facts” creating a reasonable doubt either that (i) the directors were disinterested and independent; or (ii) the challenged transaction was the product of a valid exercise of business judgment. In this case, the court of appeal found the allegations too vague and conclusory—noting among other things, that mere threat of personal liability for approving questionable transactions is by itself insufficient—and upheld the trial court’s dismissal of the complaint.

Corporations—Elections—  
Challenges to Board Election—  
Fiduciary Duty—Indispensable  
Parties

The decision in *Morriscal v. Rogers*, 220 Cal.App.4th 438, 163 Cal.Rptr.3d 156 (2013), contains two important holdings for litigation involving challenges to the validity of an election of corporate directors. There, a shareholder sought to invalidate under Corporations Code section 709 an election claiming that the other shareholders violated their fiduciary duty by entering into a series of transactions with an outside management company and by voting to restructure the board of directors to give effective control to the management company. First, the court of appeal concluded that the trial court could properly consider breach of fiduciary duty and conflict of interest allegations in a 709 hearing. Second, the court held that because trial court’s finding that the shareholders breached their fiduciary duty would invalidate not only the election but also several agreements entered into at the same time, the other shareholders who had a direct interest in those agreements were indispensable parties and the case could not proceed without them being joined.

