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Newcases of BUSINESS LITIGATION INTEREST

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STATE

Arbitration—Enforceability—Who Decides—Delegation Clause

A delegation clause in an arbitration agreement is one that delegates to the arbitrator the authority to resolve disputes concerning the enforceability, applicability, formation, or interpretation of the arbitration agreement. But when are such clauses enforceable? *Tiri v. Lucky Chances, Inc.*, 226 Cal.App.4th 231, 171 Cal.Rptr.3d 621 (2014), considered this issue at length. It concluded that to be enforceable, a delegation clause must (i) be clear because "a delegation to an arbitrator is ineffective absent clear and unmistakable evidence that the parties intended such a delegation"; and (ii) not be revocable under state law on grounds such as duress, fraud, or unconscionability. Here, the court rejected plaintiff's argument that the clause was unconscionable. It found that even though the clause was contained in a contract of adhesion and was procedurally unconscionable because it was presented to an unsophisticated party on a take it or leave it basis, it was not substantively unconscionable—and thus enforceable—because it was not overly harsh and did not sanction one-sided results.

Arbitration—High-Low Agreement; Enforcement

In *Horath v. Hess,* 225 Cal.App.4th 456, 170 Cal.Rptr.3d 325 (2014), parties to an arbitration entered into a high-low agreement, with plaintiff agreeing to accept $44,000 if the award was less and $100,000 if the award was more. The arbitrator was not informed of the agreement and awarded $366,000. The plaintiff moved to have the

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award confirmed in the full amount and the defendant sought to have the judgment limited to $100,000. The trial court treated the defendant's motion as an untimely motion to correct the award, denied it, and entered judgment in the full amount of the award. The defendant then filed a motion for acknowledgment of full satisfaction of judgment since he had paid the $100,000 plus interest. The trial court denied that too. The court of appeal sensibly reversed, holding that the agreement to cap the award at $100,000 was enforceable. The court pointed out that the stipulation permitted the award—no matter what its amount—to be entered as a judgment, so the losing party did not have seek to vacate or correct it as a condition to enforcing the cap.

Litigation—Class Actions—Decertification—Timing and Grounds

In *Hall v. Rite Aid Corp.*, 226 Cal.App.4th 278, 171 Cal.Rptr.3d 504, the trial court certified a class action, but later decertified it. On plaintiffs' appeal, the court of appeal addressed the timing and basis for decertifying a class action, reversing the trial court. The court of appeal first held that since "an order granting class certification is 'subject to modification at any time,'" the plaintiffs' argument that the trial court could not revisit its ruling in the absence of new facts or law had to be rejected. But the court of appeal held that the trial court erroneously decertified the class based on its view that plaintiffs' legal theory lacked merit, not whether the theory or the case was susceptible of class treatment. The court read a recent California Supreme Court case to mean that "as long as plaintiff's posited theory of liability is *amenable* to resolution on a class-wide basis, the court should certify the action for class treatment *even if* the plaintiff's theory is ultimately incorrect at is substantive level . . . ."

Litigation—Judges—Peremptory Challenge

A judgment creditor may move to amend a judgment to add an alter ego as a judgment debtor. When that motion is filed, does the purported alter ego have the right to a 170.6 peremptory challenge even if the judgment debtor had already used a peremptory challenge? Since section 170.6 limits each "side" of litigation to a single peremptory challenge, the court in *Orion Comm., Inc. v. Superior Court*, 226 Cal.App.4th 152, 171 Cal.Rptr.3d 596 (2014), held that in order to exercise the peremptory challenge, the burden is on the purported alter ego to

establish that its interests are "substantially adverse" to the original judgment debtor. After conducting an "independent review" of the evidence, the court concluded that the alleged alter ego did not meet its burden, and issued a writ of mandate for the trial court to deny the 170.6 challenge.

Litigation—Judgment—Enforcement of Judgment—Postjudgment Attorneys' Fees

If a judgment includes attorneys' fees as an item of costs under CCP § 1033.5, then under CCP § 685.040, the judgment creditor is entitled to reasonable attorneys' fees incurred in enforcing the judgment. But there is a catch. Under CCP § 685.070(b) and § 685.080(a), the judgment creditor must seek the fees "[b]efore the judgment is fully satisfied but not later than two years after the costs have been incurred. . . ." In *Gray1 CPB, LLC v. SCC Acquisitions, Inc.,* 225 Cal.App.4th 401, 169 Cal.Rptr.3d 906 (2014), a judgment creditor pursued a long and tortuous postjudgment path to collect a large judgment. Then one day the judgment debtor's lawyer hand-delivered a certified check for the full amount outstanding including all interest. The judgment creditor's lawyers held the check for 12 days, depositing it only after they had filed a motion seeking $3.1 million in postjudgment fees. The trial court denied the motion as untimely and the court of appeal affirmed. The court of appeal held that the judgment was fully satisfied when the judgment creditor accepted the check, not when it later was deposited. The court explained that the judgment creditor could have refused the check and filed its motion for fees to avoid this result—but turning down a big check in payment of a judgment that the creditor has not been able to collect doesn't seem like much of a choice. Better for the judgment creditor to have been making periodic fee motions to avoid what occurred here.

Litigation—Res Judicata—Joint and Several Liability

The lesson of *DKN Holdings LLC v. Faerber*, 225 Cal.App.4th 1115, 170 Cal.Rptr.3d 745 (2014) is that if you have a breach of contract claim against parties who may be jointly and severally liable, name them all in one action. Here, plaintiff obtained a judgment against *C* for breach of a commercial lease. Plaintiff had named two colessees, but dismissed them without serving them. After entry of the statement of decision, plaintiff then sued the two colessees, *A* and *B*, "for the same money damages

that [plaintiff] was awarded against [*C*]." The court of appeal held that plaintiff was barred by res judicata from asserting claims against *A* and *B* based on the same obligation: "when, as here, a final judgment on the merits has been rendered in one action against a joint and several obligor, res judicata will bar the assertion of identical claims against other joint and several obligors, in a subsequent action, by parties bound by the judgment in the prior action."

Torts—Breach of Fiduciary Duty—Aiding and Abetting

In *American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal.App.4th 1451, 171 Cal.Rptr.3d 548 (2014), the court of appeal held that defendants may be held liable for aiding and abetting the breach of a fiduciary duty even if they do not owe the plaintiff a fiduciary duty. The court recognized that a nonfiduciary cannot be liable for conspiracy to breach a fiduciary duty, but held that California law "does not treat conspiracy to breach a fiduciary duty and aiding and abetting a breach of fiduciary duty similarly." The court drew a distinction between two "theories" of aiding and abetting claims. The first is similar to conspiracy, as it "requires only that the aider and abettor provide substantial assistance to the person breaching his or her fiduciary duty." To be liable under that theory, the aider and abettor must "owe a fiduciary duty to the victim . . . ." The second theory "arises when the aider and abettor commits an independent tort"—that is, "when the aider and abettor makes a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." The court of appeal held that the defendants could be liable on this second theory without having any fiduciary relationship to the plaintiffs. Moreover, the court appears to find the "independent tort" requirement to be a very low bar, being met merely by establishing "actual knowledge" of the fiduciary duties owed by others. The court held that the defendants were liable because plaintiff "pleaded and proved that defendants had actual knowledge of the fiduciary duties [the other actors] owed to [plaintiff], that defendants provided the three fiduciaries with substantial assistance in breaching their duties, and that defendants' conduct resulted in unjust enrichment."