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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—Class Arbitration— Who Decides

Calling the issue “not entirely settled,” the court of appeal has held that the question whether the parties agreed to class arbitration or not was for the arbitrator, not the trial court to decide. *Sandquist v. LEBO Automotive, Inc.*, 228 Cal.App.4th 65, 174 Cal.Rptr.3d 672 (2014).

Attorney and Client—Limitation of Actions

After a lawyer settled his client’s case, the client sought a refund of paid, but unearned attorneys’ fees being held by the lawyer. Because the client did not sue until more than one year after the lawyer-client relationship ended, the trial court held that the claim was barred by the statute of limitations found in section 340.6 of the Code of Civil Procedure. *Lee v. Hanley*, 227 Cal.App.4th 1295, 174 Cal.Rptr.3d 489 (2014). The court of appeal reversed. It held that a claim by a client against a lawyer is not subject to section 340.6 “to the extent the claim is construed as a wrongful act not arising in the performance of legal services, such as garden variety theft or conversion.” Here, the trial court decided the case on demurrer, and the court of appeal remanded for a trial so that the facts concerning the dispute over the funds could be determined, as a precursor to determining if section 340.6 applied.

Litigation—anti-SLAPP Commercial Speech Exception

The decision in *Demetriades v. Yelp, Inc.*, 228 Cal.App.4th 294, 175 Cal.Rptr.3d 131 (2014), illustrates the limits of the anti-SLAPP statute as applied to commercial speech. There, a restaurant owner sued Yelp, a popular website

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where users post reviews about local businesses, for false advertising and unfair competition. Plaintiff asserted that Yelp's claims regarding the efficacy of its filtering software—which Yelp uses to filter out unreliable reviews—were untrue. The trial court granted Yelp's special motion to strike, but the court of appeal reversed on the ground that Yelp's alleged conduct fell into the commercial speech exemption to the anti-SLAPP statute, which allows false advertising claims to proceed without having to undergo the scrutiny of the anti-SLAPP statute when those claims are based on statements of fact about a product or service that are directed to potential buyers. The court acknowledged that "Yelp's website is a public forum and contains matters of public concern in its reviews of restaurants and other businesses," but further held that "Yelp's statements about its review filter—as opposed to the content of the reviews themselves—are commercial speech about the quality of its product (the reliability of its review filter) intended to reach third parties to induce them to engage in a commercial transaction (patronizing Yelp's website, which patronage induces business on Yelp to purchase advertising.)"

Litigation—Class Actions—
Review

Hendershot v. Ready to Roll Transportation, 228 Cal.App.4th 1213, 175 Cal.Rptr.3d 917, teaches four things about class actions. First, a court of appeal reviews only the reasons given by the trial court in making the certification decision and "ignore[s] any other grounds that might support denial." Second, a trial court abuses its discretion in denying certification when it looks at the merits beyond what is necessary to affect decisions essential to class certification. Here, after being sued, the defendant settled with a number of putative class members and obtained releases from them. The trial court held that given the number of putative plaintiffs who settled, the class no longer met the numerosity requirement. The court of appeal held that the trial court necessarily looked at the merits of the release defense but that the defense did not "overlap" with the numerosity requirement and therefore it was improper to consider the defense. (The court said that the release defense might have affected the ability of named plaintiffs to represent settling members, but since the trial court ignored that issue so too would the court of appeal.)

Third, “numerosity” does not necessarily mean “many.” The court of appeal noted that the supreme court has affirmed a class with ten members, and it held that the trial court’s ruling here on numerosity (nine nonsettling members remained) was infected by its improper look at the merits of the release defense. Finally, the court of appeal held that release defense was an affirmative one, and because it had not been pleaded in the answer (or an amended answer) the defendant should not have been allowed to oppose certification on that basis.

Litigation—
Class Actions—Settlement—
Temporary Judge

After filing a class action, but before any answer was filed or certification decision made, the named plaintiff and the defendant settled the case in a mediation. The settlement contemplated that the retired judge who mediated the dispute would act as a temporary judge through approval of the settlement. The Presiding Judge of the superior court refused to play along, and plaintiff’s counsel sought a writ to compel appointment of a temporary judge. The court of appeal denied the writ. *Luckey v. Superior Court*, 228 Cal.App.4th 81, 174 Cal.Rptr.3d 906 (2014). It held that precertification, plaintiff had no authority on behalf of the putative class to stipulate to a temporary judge. The court of appeal also held that the superior court itself had the authority to oppose the writ petition because (i) it was the only entity who could do so, since defendant had filed a nonopposition; and (ii) the superior court’s procedures and financial obligations in handling class actions were at issue, and it could defend those procedures.

Litigation—General and Specific
Jurisdiction

The First District recently decided two cases applying the United States Supreme Court’s recent decision in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), which held that “only a limited set of affiliations with a forum will render a defendant amendable to all-purpose jurisdiction there.”

First, *Bristol-Myers Co. v. Superior Court*, 228 Cal.App.4th 605, 175 Cal.Rptr.3d 412 (2014) recognized *Bauman*’s narrowing of general jurisdiction principles, but applied a broad understanding of specific jurisdiction. Plaintiffs, including 575 non-California residents, sued Bristol-Myers asserting products liability claims based on alleged defects in the drug Plavix. The court of appeal held that Bristol-Myer was subject to California jurisdiction even as

to the non-California plaintiffs. Even though Bristol Myers had sold more than \$1 billion worth of Plavix in California, the court of appeal held that Bristol-Myers was not subject to general jurisdiction because California was not Bristol-Myers' place of incorporation or principal place of business, and no other exceptional circumstances existed. Nonetheless, the court held that Bristol-Myers was subject to specific jurisdiction: "we conclude that [Bristol-Myer] has engaged in substantial, continuous economic activity in California, including the sale of more than a billion dollars of Plavix to Californians. That activity is substantially connected to the [non-resident plaintiffs'] claims"

Second, in *Young v. Daimler AG*, 228 Cal.App.4th 855, 175 Cal.Rptr.3d 811 (2014), the court refused to limit *Bauman* solely to foreign plaintiffs involving conduct occurring outside of the United States. Plaintiffs in *Young* argued that Daimler should be subject to general jurisdiction because their case involved California plaintiffs, a product that was purchased in California, and a product manufactured by a United States subsidiary of Daimler. The court rejected this argument, holding that under *Bauman* "the domicile of the plaintiffs and the location of the incident sued upon are essentially non-factors in the general jurisdiction calculus."

Litigation—Time to Respond to Amended Complaints

Rule 3.1320(j) of the California Rules of Court provides that a defendant has 10 days to "answer or otherwise plead" to a complaint following, among other things, "the expiration of the time to amend if the demurrer was sustained with leave to amend" By contrast, Code of Civil Procedure section 471.5(a) provides 30 days for a defendant to answer an amended complaint. So, which time period applies where a plaintiff files an amended complaint after a demurrer is sustained with leave to amend? In *Carlton v. Dr. Pepper Snapple Group, Inc.*, 228 Cal.App.4th 1200, 175 Cal.Rptr.3d 909 (2014), the court held that the 30-day rule applied. "[T]o read the statute and rule in harmony, the rule must be read to apply when an amended complaint is *not* filed. Thus, the 10-day rule would apply when a plaintiff is granted leave to amend but elects *not to amend*, and the statute's 30-day period would apply when a plaintiff *does amend*."