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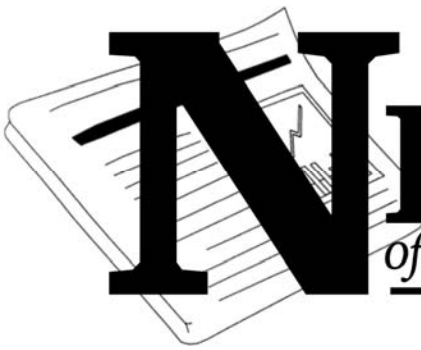

Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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STATE

Appeal—Appealability—Notice of Appeal—Postjudgment Fee Order

It's not new, but it bears repeating. When a trial court issues a postjudgment attorneys' fee award, the court of appeal lacks jurisdiction to consider the award unless (i) an appeal from the order is included in a timely-filed notice of appeal from the judgment; or, (ii) if the award has not been made when the appeal from the judgment is filed, the party files a new notice appeal from the postjudgment fee order. The only exception is if the judgment specifically grants entitlement to fees, leaving only the amount to be determined later. In that event, an appeal from the fee award is treated as being subsumed in the appeal from the judgment. *Golightly v. Molina*, 229 Cal.App.4th 1501, 178 Cal.Rptr.3d 168 (2014).

Appeal—Standards of Review—Abuse of Discretion

The abuse of discretion standard of review on appeal can be vexing because it "is not a unified standard." *Verizon California Inc. v. Board of Equalization*, 230 Cal.App.4th 666, 178 Cal.Rptr.3d 831 (2014). Indeed, that standard has been described in various different ways. The decision in *Verizon California* reiterates a three-step application that may be helpful in certain cases. There, the court held that under an abuse of discretion standard of review, "[i] the trial court's findings of fact are reviewed for substantial evidence, [ii] its conclusions of law are reviewed de novo, and [iii] its application of the law to the facts is reversible only if arbitrary and capricious."

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Arbitration—Disclosure—Waiver

In *Dornbirer v. Kaiser Foundation Health Plan, Inc.,* 166 Cal.App.4th 831, 83 Cal.Rptr.3d 116 (2008), the court of appeal held that certain omissions in an arbitrator's disclosure forms did not merit vacating the award where the arbitrator had made the general disclosures required but omitted details and the parties decided to proceed with the arbitration anyway. After *Dornbirer* was decided the Legislature amended CCP § 1285.85(c) to provide that "The ethics requirements and standards of this chapter are nonnegotiable and shall not be waived." In *United Health Care Centers of San Joaquin Valley, Inc. v. Superior Court* 229 Cal.App.4th 63, 177 Cal.Rptr.3d 214 (2014) the issue presented was similar to *Dornbirer*. The arbitrator omitted specifics of previous engagements by both counsel, but the arbitration proceeded anyway without further inquiry by either side. After losing, plaintiff sought to vacate the award, arguing that the amendment to section 1285.85(c) effectively overruled *Dornbirer* and therefore the award had be vacated based upon the arbitrator's failure to make complete disclosures. The court of appeal disagreed. It held that section 1285.85(c) intended only to prevent contractual waivers of disclosure rights, not forfeitures as such occurred here and in *Dornbirer*. The court said that if "a party is aware that a disclosure is incomplete or otherwise fails to meet the statutory disclosure requirements, [the party] cannot passively reserve the issue for consideration after the arbitration has concluded. Instead, the party must disqualify the arbitrator on that basis before the arbitration begins."

Arbitration—Powers of Arbitrator—Changing Final Award

While an arbitrator may generally issue successive *interim* awards leading up to a final award, CCP § 1284 narrowly circumscribes an arbitrator's power to change a *final* award. In *Cooper v. Lavely & Singer Professional Corp.*, 230 Cal.App.4th 1, 178 Cal.Rptr.3d 322 (2014), an arbitrator issued a final award that including denying fees to the prevailing party. The prevailing party sought to have the award corrected or reconsidered because the denial of fees was based at least in part on a typographical error in the prevailing party's submission that misled the arbitrator. The arbitrator allowed reconsideration based on a JAMS rule permitting an arbitrator to "grant any remedy or relief that is just and

equitable . . .” and granted fees in a “revised final award.” The trial court confirmed the award, but the court of appeal vacated it as beyond the arbitrator’s powers. The court of appeal held that section 1284 does not permit an arbitrator to substantively change a final award to include new awards of attorneys’ fees and that the JAMS rules did not modify section 1284.

Attorneys’ Fees—Cost Bill Unnecessary

In a case of first impression, the court of appeal has held that a prevailing party seeking attorneys’ fees under Civil Code section 1717 need not file a cost bill in addition to a timely-filed motion for fees. *Kaufman v. Diskeeper Corp*., 229 Cal.App.4th 1, 176 Cal.Rptr.3d 757 (2014).

Corporations—Derivative Actions—Discovery

To bring a derivative action, the plaintiff must either first make demand on the board of directors to sue or, alternatively, to allege with specificity why a demand would be futile. Applying Delaware law because the corporation was incorporated there, the court of appeal has held that a plaintiff is not entitled to discovery to obtain the specific facts necessary to show demand futility: “The proper purpose of discovery in a shareholder derivative action is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists.” *Jones v. Martinez*, 230 Cal.App.4th 1248, 179 Cal.Rptr.3d 35.

Dismissal—Setting Aside—Void —Attorney Authority

Sometimes you can bring too many lawsuits. Plaintiffs filed three nearly identical lawsuits, two in federal court and one in California state court. Deciding to pursue only one, they dismissed the state court action and one of the federal ones. Under Federal Rule 41, however, a second dismissal operates as an adjudication on the merits, so the defendant in the other pending federal suit was able to get the third suit dismissed based on res judicata. Plaintiffs then tried to set aside the dismissal of the state action on the theory that it was void because their lawyer had not advised them about the federal two-dismissal rule. The court of appeal disagreed. It recognized that in certain circumstances, an attorney’s unauthorized disposition of a client’s substantive rights is void. But here, plaintiffs had consented to the dismissal of the California action; the fact that they had not been advised of its consequences did not make the dismissal void. *Nixon Peabody LLP v. Superior Court*, 230 Cal.App.4th

818, 179 Cal.Rptr.3d 96 (2014).

Labor and Employment—Franchisor Liability

The Supreme Court's decision in *Patterson v. Domino's Pizza, LLC*, 60 Cal.4th 474, 177 Cal.Rptr.3d 539 (2014), is a significant decision clarifying the circumstances under which a franchisor can be vicariously liable for workplace injuries allegedly inflicted by an employee of the franchisee (e.g., sexual harassment). The court held that a franchisor's imposition of a "uniform marketing and operation plan cannot *automatically* saddle the franchisor with responsibility for employees of the franchisee who injure each other on the job." Rather, for vicarious liability to apply, the franchisor must have "retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees."

Litigation—Electronic Discovery

"There is little California case law regarding discovery of electronically stored information under [Code of Civil Procedure] section 1985.8," which makes the court of appeal's decision in *Vasquez v. California School of Culinary Arts, Inc.*, 230 Cal.App.4th 35, 178 Cal.Rptr.3d 10 (2014), particularly important. Under section 1985.8, a party may, at its own expense, subpoena "electronically stored information" and may "specify the form or forms in which each type of information is to be provided." In *Vazquez*, nonparty Sallie Mae moved to quash a subpoena seeking electronic information, arguing that it could not be compelled "to do anything other than to produce records as they already exist" and that it could not be compelled compile its data into a spreadsheet. The trial court disagreed, denied the motion to quash, and granted plaintiffs' request for attorney's fees. The court of appeal affirmed. Relying on federal cases, the court held that Sally Mae could be compelled to extract the requested information from its existing database and produce it in the form requested by plaintiffs even though that would require "complex computer programming" and cost $18,848. Not incidentally, that amount was significantly less than the cost to plaintiffs of obtaining paper documents containing that same information.