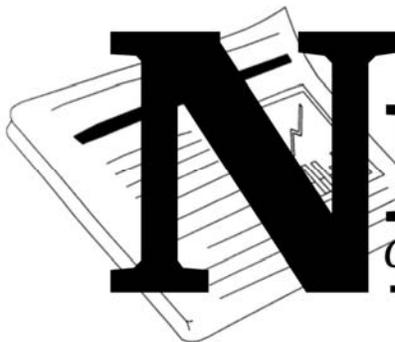


January 2015



NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

Richard A. Derevan*

Todd E. Lundell*

Snell & Wilmer L.L.P.

S T A T E

Appeal—Adequate Record— Consequences of Failure to Designate Adequate Record

If one does not designate the entire reporter's transcript of a trial to be the record on appeal, Rule 8.130(a)(2) requires the appellant to "state the points to be raised on appeal." In such a case, "the appeal is then limited to those points, unless, on motion, the reviewing court permits otherwise." Don't count on the reviewing court to permit otherwise. *Aspen Grove Condominium Ass'n v. CNL Income Northstar LLC*, 231 Cal.App.4th 53, 179 Cal.Rptr.3d 429 (2014). In this case, the appellant designated a partial transcript and listed seven issues to be raised on appeal. In its opening brief, it sought to raise an issue concerning the improper admission of evidence, an issue the court of appeal said was not "expressly or impliedly encompassed" within the specified issues. The court refused to consider the issue and rejected the appellant's argument that refusing to do so violated the policy of deciding cases on their merits: That policy, the court said "is not undermined by holding [appellant] to its own choice of issues to raise on appeal."

Appeal—Dismissal— Disentitlement Doctrine

The court of appeal's decision in *Gwartz v. Weilert*, 231 Cal.App.4th 750, 180 Cal.Rptr.3d 809 (2014) reminds us that if you want to appeal from a judgment, you must abide by the trial court's orders. Defendants appealed from a \$2.4 million judgment for fraud. After entering judgment, the trial court enjoined defendants from selling, transferring, or dissipating assets. When plaintiffs

* Certified Specialist, Appellate Law
The State Bar Board of Legal Specialization

discovered that defendants were violating the court's order, they moved to dismiss the appeal. The court of appeal granted the motion, holding that "[i]t would be unjust to allow defendants to seek the benefits of an appeal while willfully disobeying the trial court's valid orders and frustrating plaintiffs' legitimate efforts to enforce the judgment."

Appeal—Notice of Appeal—
Timeliness

Conservatorship of Townsend, 231 Cal.App.4th 691, 180 Cal.Rptr.3d 117 (2014), points up a procedural trap in using a temporary judge to decide a case and the need to file documents with the superior court clerk, not just the temporary judge or the service that employs him or her. The general rule is that specified valid posttrial motions extend the time to file a notice of appeal, so that typically the appellant has 30 days from service of the order or a notice of entry of order on the posttrial motion to file the notice of appeal. Cal. Rules of Court, rule 8.108. In this case, the losing party filed its motion to vacate the judgment only with the temporary judge—as had been the case with all filings since the judge's appointment. The temporary judge never ruled on the posttrial motion, so it was denied by operation of law. The losing party then appealed from the judgment. The court of appeal dismissed the appeal as untimely. It held that the posttrial motion was not a *valid* motion because it had not been filed with superior court (see Cal. Rules of Court 2.400(b)(1) and CCP § 663a) and therefore the appellant was not entitled to the extended period within which to file the notice of appeal. Since the normal time to appeal a judgment had expired when the notice of appeal was filed, the court dismissed the appeal.

Arbitration—Arbitrable
Controversy

In order to litigate a dispute in court, there must be an actual controversy that is sufficiently ripe and not merely a hypothetical dispute about events that may occur in the future. But does this ripeness requirement apply to contractual arbitrations? The court of appeal in *Bunker Hill Park Limited v. U.S. Bank National Association*, 231 Cal.App.4th 1315, 180 Cal.Rptr.3d 714 (2014), held that the ripeness requirement does not apply unless the parties' arbitration agreement contains such a requirement. Bunker Hill sought to compel U.S. Bank to arbitrate the parties' disagreement over whether certain

subleases would automatically terminate if the underlying lease between Bunker Hill and U.S. Bank were terminated. Although U.S. Bank had the right to terminate the lease, it had not done so and, therefore, opposed arbitration on the ground that Bunker Hill was seeking an improper advisory opinion. The trial court agreed, and denied the motion to compel, but the court of appeal reversed. The court of appeal noted that the parties' arbitration agreement required them to arbitrate "any and all disputes, controversies or claims arising under or relating to the ground lease." This "expansive arbitration provision does not on its face limit the universe of arbitrable disagreements to those that are 'ripe,'" and the court "decline[d] to read an unwritten justiciability requirement into the arbitration provision the parties bargained for and negotiated."

Damages—Punitive Damages

Is a defendant entitled to a new trial on punitive damages when a court significantly reduces the amount of compensatory damages awarded by a jury? In a split decision, the majority in *Izell v. Union Carbide Corp.*, 231 Cal.App.4th 962, 180 Cal.Rptr.3d 382 (2014) held that a new trial on punitive damages is not necessary if the proportionality between compensatory and punitive damages remains within a constitutionally acceptable ratio. There, a jury awarded plaintiffs \$30 million in compensatory damages (of which Union Carbide was responsible for 65 percent) plus \$18 million in punitive damages against Union Carbide. The trial court reduced the compensatory award to \$6 million, but let the punitive award stand. The court of appeal affirmed, explaining that "the ratio of the jury's punitive damage award to Union Carbide's share of compensatory damages (after the trial court's reduction) is 4.62 to 1." Because that ratio is not "presumptively invalid" under due process guidelines, Union Carbide was not entitled to a new trial. The dissent would have held that a new trial on punitive damages is required "when a substantial reduction in compensatory damages makes the proportionality of the jury's award 'suspect'"

Litigation—Motions—Sanctions

A court has the power under CCP 1987.2 to impose sanctions on a motion to quash a subpoena if the court finds "the motion was made . . . in bad faith." *Evilsizor v. Sweeney*, 230 Cal.App.4th 1304, 179 Cal.Rptr.3d 400

(2014) holds that a motion does not need to be ruled on and denied to be sanctionable. The court affirmed a trial court order imposing sanctions on a party who failed to withdraw his motion to quash after the subpoenaing party modified his subpoena in light of objections by the moving party and then incurred attorneys' fees in opposing the still-pending motion.

Litigation—Privileges

Palmer v. Superior Court, 231 Cal.App.4th 1214, 180 Cal.Rptr.3d 620 (2014), is a big deal for lawyers who consult with in-firm claims counsel about complaints against them by a current client. The question is whether, since the firm owes a fiduciary duty to the client, in-firm communications between a lawyer who worked on the matter and in-firm claims counsel about the client's complaint are protected by the attorney-client privilege in a later malpractice action by the client. Although some federal cases recognize a "fiduciary" or "current client" exception to the attorney-client privilege, the court held that the privilege applied and that it was "not at liberty to adopt" those exceptions because "in California it is well-settled that the attorney-client privilege is a legislative creation, which courts have no power to lit by recognizing implied exceptions." The court held the privilege applied "only when a genuine attorney-client relationship exists" and identified four factors to help decide when in-firm communications met that standard.

Tort—Conversion—Bona Fide Purchaser

May a bona fide purchaser be held liable for conversion, when she had no notice that the purchased goods had been converted by the seller? Somewhat surprisingly, the answer is yes. In *Regent Alliance Ltd. v. Rabizadeh*, 231 Cal.App.4th 1177, 180 Cal.Rptr.3d 610 (2014), the court of appeal emphasized that "[c]onversion is a strict liability tort" that does not depend on the "knowledge [or] intent of the defendant." The court recognized a fraud exception—a bona fide purchaser who purchases goods that were obtained by fraud is not liable for conversion—but the court held that "there is no general exception for bona fide purchasers." The dissent argued that the majority's "rigid and formalistic application of the law of conversion" "raises fairness concerns that prevent me from joining the majority's decision."