August 2015

Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

*Richard A. Derevan**
*Todd E. Lundell**
Snell & Wilmer L.L.P.

STATE

Appeal—Dismissal—Disentitlement Doctrine

The disentitlement doctrine authorizes a court of appeal, in its discretion, to dismiss a pending appeal where the appellant has disobeyed trial court orders. In *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.*, 238 Cal.App.4th 259, 189 Cal.Rptr.3d 583 (2015), the parties entered into a stipulated judgment by which defendant agreed to issue a specific number of shares to plaintiff to satisfy a debt. The stipulated judgment also required the defendant to issue additional shares if the share trading price dropped below a certain level. The price dropped, but defendant refused to issue the additional shares. Plaintiff then obtained an order requiring the defendant to issue the shares and restraining defendant from issuing shares to any third party until defendant had complied with the posttrial order. Rather than issuing shares to the plaintiff as required, defendant appealed and issued shares to third parties. Plaintiff moved to dismiss the appeal on the basis of the disentitlement doctrine. Because there was no dispute that the defendant was willfully violating the trial court's order against issuing shares to third parties, the court of appeal found no equitable reason to refuse to apply the disentitlement doctrine. It dismissed the appeal.

Arbitration—Waiver—Participation in Discovery

Two recent cases discuss when a party waives a right to arbitration by participating in discovery before moving to compel arbitration—and each comes to a different conclusion. *Oregel v. PacPizza, LLC*, 237 Cal.App.4th 342,

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

187 Cal.Rptr.3d 436 (2015); *Khalatian v. Prime Time Shuttle, Inc.*, 237 Cal.App.4th 651, 188 Cal.Rptr.3d 113 (2015). Both cases have a good discussion of the law, and both hold that mere participation in litigation and discovery without the opposing party suffering prejudice does not compel a finding of waiver. So, the party resisting arbitration should focus on the prejudice it incurred before the motion to compel is filed.

Attorneys—Law Firm Disqualification—Service as Settlement Officer

When a lawyer serves as a settlement officer, that lawyer is, of course, disqualified from later representing one of the parties in the same lawsuit. But what if the settlement-lawyer's law firm later substitutes in to represent one of the parties in the same litigation? Can the firm represent one of the parties? No. The entire firm is disqualified, regardless of screening procedures put in place to preserve any confidential information the settlement officer learned. *Castaneda v. Superior Court,* 237 Cal.App.4th 1434, 188 Cal.Rptr.3d 889 (2015).

Litigation—Forum Non Conveniens—Nominal Defendant

To obtain dismissal of an action based on forum non conveniens, a defendant in a multi-defendant action much show that an alternative forum exists in which the action could be brought against *all* defendants. In *David v. Medtronic, Inc.*, 237 Cal.App.4th 734, 188 Cal.Rptr.3d 103 (2015), a number of plaintiffs brought a product liability action against a medical device manufacturer and a doctor who, plaintiffs alleged, was a co-inventor of the device. In the trial court, defendants asserted the doctor was a nominal defendant and plaintiffs submitted no evidence or argument contesting that. Defendants moved to sever each plaintiff's case from the other plaintiffs and to dismiss based on forum non conveniens. Plaintiffs opposed on the theory that there was no alternative forum in which any case could be refiled because the defendant-doctor was a California resident. Following federal authority, the court of appeal held that the presence of a nominal defendant should not bar transferring a case under forum non conveniens, but the case against the nominal defendant case should be severed from that of the moving defendants and remain in California.

Litigation—Settlement Agreement—Release—Ambiguity

Epic Communications, Inc. v Richwave Technology, Inc., 237 Cal.App.4th 1342, 188 Cal.Rptr.3d 844 (2015) is another reminder to pay attention to boilerplate language in settlement agreements. In this case, the parties entered into a settlement agreement that released a whole catalog of individuals and entities (e.g., all past, present and future directors, officers, assignees, employees, etc.) from all manner of claims (i.e., all past, present, and future claims arising from some specified events). Later, more litigation ensued and two individuals who were not signatories to the agreement argued that the release applied to them because they were past employees and assignees and therefore neatly fit within categories of those being released. The court of appeal, citing *Rodriquez v. Otto*, 212 Cal.App.4th 1020 (2013), acknowledged that a release, if unambiguous, could apply to third parties. But here, the court held that looking at the release as a whole, it was ambiguous whether the parties relying on the release came within its bounds and the trial court should have considered extrinsic evidence on the point. Accordingly, the court reversed a summary judgment and remanded for trial.

Litigation—Trial—Five Year Requirement—Dismissal

If a case is not brought to trial within five years of its filing, it must be dismissed unless an exception applies. Under CCP § 583.330, the parties may stipulate to extend the time. But what must the stipulation say? In *Munoz v City of Tracy*, 238 Cal.App.4th 354, 189 Cal.Rptr.3d 590 (2015), the parties stipulated in writing to continue the trial date from October 28, 2013, to June 16, 2014—which was beyond the five year deadline. The stipulation did not mention section 583.330 or the five-year deadline. About a month before the continued trial, the City filed a motion to dismiss based on the five-year rule. The trial court granted the motion on the theory that the parties must "expressly waive" the five year requirement. The court of appeal reversed. It observed that the statute itself does not require any particular language and that a stipulation extending the trial date to a date certain beyond the five-year period "necessarily waives the right to a dismissal of the action under section 583." Nevertheless the parties would be well-advised to expressly waive the five-year period in any stipulation.

FEDERAL

Litigation—Stay—First-to-File Rule

Under the "first-to-file" rule, a district court may stay proceedings if a similar case with substantially similar issues and parties was previously filed in a different court. For a recent case discussing this rule, and pointing out that neither the issues nor the parties need be identical, see *Kohn Law Group v. Auto Parts Manufacturing Mississippi, Inc.*, 787 F.3d 1287 (9th Cir. 2015).

Litigation—Trial—Discharge of Jury—Recall

In a case of first impression in the Ninth Circuit, the court has held that a district court may re-empanel a jury after discharge, but only if during the period of the discharge, the jury was not exposed to any outside influences that would compromise their ability to fairly reconsider their verdict. *Dietz v. Bouldin*, ___ F.3d ___, 2015 WL 4493133 (July 24, 2015). In this case, the jury returned a verdict and the court discharged the jurors. The court and counsel very quickly realized, however, that the damages amount was a "legal impossibility" given a stipulation regarding damages. The court quickly recalled the jurors, told them their verdict violated the stipulation, asked them if they had been subject to any outside influence, and then directed them to reconvene after all denied any outside influence. Rejecting the rule in some courts forbidding reconvening the jury, and following the lead of most circuits, the Ninth Circuit said that its new rule permitting reconvening the jury "strikes a sensible balance between considerations of fairness and economy and allows for a cost-effective alternative to an expensive new trial."