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Newcases of BUSINESS LITIGATION INTEREST

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STATE

Arbitration Agreements—Unconscionability—Class Waivers

In light of the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the anti-waiver provision of the Consumers Legal Remedies Act "is preempted insofar as it bars class waivers in arbitration agreements covered by the FAA." So held the California Supreme Court in *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 190 Cal.Rptr.3d 812 (2015). The court also held, however, that *Concepcion* "does not limit the unconscionability rules applicable to other provisions of the arbitration agreement." Although cases have described the unconscionability defense using different language in the context of an arbitration agreement than other contexts, the Supreme Court made clear that these different formulations "mean the same thing." Thus, the unconscionability doctrine was consistent with *Concepcion*'s holding that the FAA did not preempt "generally applicable contract defenses, such as fraud, duress, or unconscionability."

Attorneys—Conflict of Interest

In *Coldren v. Hart, King & Coldren, Inc.*, 239 Cal.App.4th 237, 190 Cal.Rptr.3d 644 (2015), the court of appeal held that a lawyer may properly represent a partnership and current partner in defending against direct claims asserted by a retiring partner. There, the trial court recused the lawyers representing the partnership (HKC) and a remaining partner (Hart), concluding that a

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conflict existed because the plaintiff (Coldren) was a 50 percent shareholder of HKC and so HKC had duties to Coldren that were in conflict with Hart's interest in the litigation. The court of appeal reversed, holding that "Hart's interest is perfectly aligned with HKC's interest in seeing Coldren's claims defeated. Coldren's position seems to be that he can sue his company and then, because he is a 50 percent shareholder, have a say in its defense. That is not the law."

Attorneys—Malpractice—Limitation of Actions

A lawsuit against attorneys for malpractice must be filed within one year after the client discovers or should have discovered the facts constituting the wrongful act or omission. This period is tolled, however, if among other things, the client has not suffered actual injury or the attorney continues to represent the client regarding the specific subject matter in which the alleged wrongful act or omission occurred. Discussing these two tolling periods, the court in *Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Assocs.*, 238 Cal.App.4th 1031, 190 Cal.Rptr.3d 90 (2015), concluded that neither applied and the action was barred by the statute of limitations. As to the first, the court found the clients suffered injury when they lost their right to challenge a competing lien, not later when they settled their lien action for less than the full amount owing. As to the latter, the court found that representation ended when the defendant-attorneys substituted out of the case and that a promise to assist in the transition to new attorneys did not extend the period of representation.

Insurance—Attorney Fees—Recovery for Excessive Fees from *Cumis* Counsel

An insurer may sometimes be compelled to provide independent counsel—so-called *Cumis* counsel—to defend an insured in a third-party lawsuit even though the lawsuit may include claims outside policy coverage and the insurer reserves its rights to recover unnecessary or unreasonable fees. In *Hartford Cas. Ins. Co. v. J.R. Marketing, L.L.C.*, 61 Cal.4th 988, 190 Cal.Rptr.3d 599 (2015), the Supreme Court addressed the question "from whom" may the insurer seek reimbursement when it alleges that *Cumis* counsel unreasonably inflated their bills? The court held that the insurer may seek reimbursement directly from *Cumis* counsel. The court reasoned that "[i]f *Cumis* counsel, operating under a

court order that expressly provided the insurer would be able to recover payments of excessive fees, sought and received from the insurer payment for time and costs that were fraudulent, or were otherwise manifestly and objectively useless and wasteful when incurred, *Cumis* counsel have been unjustly enriched at the insurer's expense."

Interest—Reversal or Modification of Judgment—Start of Interest

Chodos v. Borman, 239 Cal.App.4th 707, 190 Cal.Rptr.3d 889 (2015), clearly explains when interest begins to run after a court of appeal reverses or modifies a trial court damage award. In short, when the court of appeal *modifies* the award—even if the language of the opinion is couched in terms of reversal—then interest starts at the time the original, now-modified order was entered. On the other hand, if the court reverses the order, then interest does not start to run until a new order or judgment is entered following remand.

Judgment—Vacating—Reconsideration—Attorney Fault

Does CCP § 473(b)'s statement that a trial court shall grant relief from default *whenever* an application is made based on attorney fault trump CCP § 1008's requirement that a court may grant reconsideration only when there are "new or different facts"? That was the question facing the Supreme Court in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, Ltd.*, 61 Cal.4th 830, 189 Cal.Rptr.3d 824 (2015). There, the trial court denied a motion to vacate a judgment based on attorney fault. Later, the same party brought a second motion to vacate without any new or different facts, but only facts that could be been raised the first time around. The trial court thought the attorney was not credible but granted relief under the compulsion of a case that section 473(b) takes precedence over section 1008's requirement that new or different facts must be shown for reconsideration to be granted. The Supreme Court reversed. It held that section 1008's requirements "apply to renewed applications for relief from default based on attorneys' affidavit," and such a holding "does not significantly impair the policies underlying section 473(b)."

Jurisdiction—Personal Jurisdiction—Out-of-State Attorney

A California superior court may exercise personal jurisdiction over an out-of-state attorney who makes a false representation of fact to a California lawyer in the process of negotiating a deal for the California lawyer's

client to buy assets owned by the out-of-state lawyer's client. *Moncrief v. Clark*, 238 Cal.App.4th 1000, 189 Cal.Rptr.3d 864 (2015). Here, an Arizona lawyer represented that his client owned certain assets free and clear. Based on that representation, the California client bought the assets. When it turned out the assets were liened, the California client sued its lawyer for malpractice. That lawyer cross-complained against the Arizona lawyer and the court of appeal held that he could be held to answer in a California court.

Litigation—Attorneys' Fees—Attorneys Not Admitted in California

In *Golba v. Dick's Sporting Goods, Inc.*, 238 Cal.App.4th 1251, 190 Cal.Rptr.3d 337 (2015), the court of appeal reaffirmed that an attorney may not recover fees for practicing law in California unless that attorney was a member of the bar or admitted pro hac vice at the time the services were performed. The court affirmed a trial court order denying attorneys' fees to out-of-state lawyers who represented plaintiffs in a class action settlement, even though (i) the defendant did not object to those fees, and (ii) the out-of-state attorneys had partnered with a California attorney in representing the class.

Litigation—Reconsideration of a Prior Judge's Ruling

A judge may only reconsider and reverse a ruling made by a previous judge under narrow circumstances, including where there are new facts, evidence or law, or where the original ruling was the result of inadvertence, mistake, or fraud. But a later judge may not reconsider a previous ruling merely because, after reviewing the evidence, he or she finds that the earlier decision was not supported by the evidence. *In re Marriage of Oliverez*, 238 Cal.App.4th 1242, 190 Cal.Rptr.3d 436 (2015).