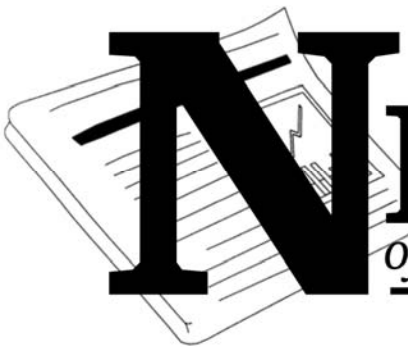
October–November 2015



Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Attorneys—Limitation of Actions—Professional Services

Section 340.6 of the Code of Civil Procedure provides for a statute of limitations against attorneys "for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services . . . ." But what is "arising in the performance of professional services"? In *Lee v. Hanley*, 61 Cal.4th 1225, 191 Cal.Rptr.3d 536 (2015), the plaintiff argued it meant only services that require a license to practice law; the defendant argued that any act in the course of the attorney-client relationship, except actual fraud, was covered by that phrase. The supreme court chose a middle ground. It held that section 340.6 would apply when the merits of the claim would require proof that the attorney violated a professional obligation. Here, the client argued that the lawyer failed to return unpaid fees at the conclusion of the representation. The supreme court held (5-2) while the complaint alleged conduct that amounted to a violation of professional obligations (and thus subject to section 340.6), it also could be construed as a conversion claim, not subject to section 340.6.

Damages—Punitive Damages—Evidence of Ability to Pay

Evidence of *revenues*, without any corresponding evidence of expenses necessary to determine profits or net worth, is insufficient evidence of a defendant's financial condition necessary to award punitive damages. *Soto v. BorgWarner Morse TEC Inc.,* 239 Cal.App.4th 165, 191 Cal.Rptr.3d 263 (2015). Moreover, while a trial

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court has authority to order financial discovery at the close of the liability phase, the court of appeal held that the trial court did not abuse its discretion in refusing to do so here, where plaintiffs only realized they needed additional information upon learning on the eve of the punitive damages trial "their expert had analyzed the wrong company"—parent company, not a subsidiary.

Litigation—Class Actions—Review

Tellez v. Rich Voss Trucking, Inc., 240 Cal.App.4th 1052, 193 Cal.Rptr.3d 403, is a good reminder that trial courts have additional obligations in ruling on class certification motions. The trial court is required to state its reasons, and on review, the court of appeal examines those reasons for correctness, unlike the ordinary situation where the court of appeal reviews the result, not the reasons. If the order does not state the reasons, but the court of appeal can nevertheless discern from the record whether the trial court engaged in the correct legal analysis, the order will not be reversed for failing to state reasons. Here, since the court of appeal could not figure out why the trial court denied the motion, it remanded to the trial court to reconsider the motion, "and in the event that it again denies the motion, articulate its reasoning."

Litigation—Default—Notice—Setting Aside

Questions surrounding defaults and default judgments can be tricky; maybe that's why there are three cases of interest this month on this topic. In *Behm v. Clear View Technologies,* 241 Cal.App.4th 1, 193 Cal.Rptr.3d 486 (2015), plaintiff made a motion for terminating sanctions, which defendants did not oppose. After the trial court issued a tentative ruling granting the motion, indicating that the court would strike the answer and enter a default against the company, plaintiff filed a notice under CCP § 425.115 reserving the right to seek $1 million in punitive damages. The trial court entered a judgment including $924,000 in punitive damages and later denied defendant's motion to vacate the judgment. On appeal, the defendant raised a host of issues, but for present purposes, the court of appeal held that due process required that the punitive damage award be vacated because the defendant lacked full knowledge of the consequences of foregoing opposing the terminating sanctions motion. While the code does not specify the time within which a notice under § 425.115 must be

served, the opinion makes it plain that due process requires notice while a defendant still has a chance to act. Due process also played a role in *Warren v. Warren*, 240 Cal.App.4th 373, 192 Cal.Rptr.3d 693 (2015). There, in an accounting action, the court recognized the general rule that where the defendant, not the plaintiff, has access to the information necessary to determine its liability, the defendant's due process right to notice of its potential liability is not "offended by a plaintiff's failure to serve a predefault notice of damages in accounting actions." But, here, the court went on, the plaintiff knew what his damages were and *defendant* did not have access to that information, so predefault notice was required. Finally, *Dhawan v. Biring*, __ Cal.App.4th ___, 194 Cal.Rptr.3d 515 (2015) makes it plain sometimes a statement of damages, even if served predefault, is insufficient. That case holds that a statement of damages is only effective where a plaintiff is not allowed to state a damage amount in the complaint, e.g., personal injury or wrongful death cases. Where a plaintiff is allowed to, but has not alleged a specific amount of damages in the complaint, a default judgment is void even if a statement of damages is served.

Litigation—Settlement—Statutory Offer; Electronic Service

Where 20 (count 'em) 20 parties make a joint statutory settlement offer, the case must be concluded as to all 20 parties before a court may determine whether the trial result was better or worse than the offer for purposes of CCP § 998. In *Kahn v. The Dewey Group*, 240 Cal.App.4th 227, 192 Cal.Rptr.3d 679 (2015), the 20 defendants jointly made a CCP 998 settlement offer. The trial court granted a nonsuit as to 14 of the defendants and the jury failed to reach a verdict as to the other 6. Before the second trial started, the 14 defendants who benefited from the nonsuit moved for their expert witness fees under section 998. The trial court awarded the fees, but the court of appeal reversed. It held that where multiple defendants make a joint § 998 offer, "whether the offer exceeds the judgment cannot be determined by comparing it to a judgment (or judgments) entered against only *some* of the offering defendants. Instead, the offer must be compared to the judgment(s) obtained against *all* defendants." On a procedural note, the court of appeal also held that the two-day extension for

electronic service in CCP § 1010.6 applies even if the party seeking to use the extra two days is the party who electronically served the document whose service triggers a deadline from the date of service.

FEDERAL

Securities Fraud—Imputation—Rogue Agent Doctrine

Here's the situation. The president of a company makes false representations about the company misleading investors and uses his position as president to loot the company. No doubt conduct such as this is securities fraud and violates rule 10b-5, justifying imposing liability *on the president himself*. But since the president acted adversely to the company's interest by looting it, can the *company* be held liable for the president's actions? Yes, said the court in *In re ChinaCast Educ. Corp. Sec. Lit.,* ___ F.3d ___, 2015 WL 6405680 (9th Cir. 2015). Acknowledging that a corporation is generally liable for torts of its agents acting within their actual or apparent authority, defendant ChinaCast nevertheless argued that it was protected by the "adverse interest exception." Under that exception, a rogue agent's actions or knowledge are not imputed to the principal where the agent is acting adversely to the principal and for his own purposes or those of another person. While that was true of ChinaCast's president, the argument still did not persuade the Ninth Circuit Court of Appeals. The opinion pointed out even where this exception may apply, the corporation remains liable to innocent third parties.