December 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

Arbitration—Public Policy—Review

The scope of review of an arbitrator's decision involving questions of public policy can be confusing. The latest case to discuss this issue is *SingerLewak LLP v. Gantman*, 241 Cal.App.4th 610, 193 Cal.Rptr.3d 672 (2015). An accounting firm sought payment from a departed partner on the ground that he had violated a covenant not to compete. The arbitrator awarded damages to the firm, and the partner sought to vacate the award on the theory it violated public policy because it enforced an illegal restraint on competition. The court of appeal affirmed the award. It held that although Bus. & Prof. Code § 16600 invalidates most covenants not to compete, § 16602 contains exceptions. Thus, an award finding that the particular circumstances came within the § 16602 exception "is not necessarily incompatible with the public policy in favor of open competition."

Litigation—Anti-SLAPP Motions—Claims Arising from Legal Services

In *Sprengel v. Zbylut*, 241 Cal.App.4th 140, 194 Cal.Rptr.3d 407 (2015), the court of appeal reiterated that actions based on an attorney's breach of professional duties generally are not subject to an anti-SLAPP motion. Following a corporate dissolution, the nonpetitioning 50% owner sued the law firm representing the company, alleging that the firm had breached its fiduciary obligations to her in the dissolution action. The firm sought anti-SLAPP protection, arguing that the complaint arose from protected petitioning activity—legal services

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

provided to the company. The argument failed. The court of appeal explained that "actions based on an attorney's breach of professional and ethical duties owned to a client are generally not subject to section 425.16 even though protected litigation activity features prominently in the factual background." The court said that the sole inquiry under the first prong of the anti-SLAPP statute is whether the claims arise from protected petitioning activity. Because Sprengel's claims did not, the court could not consider the veracity of Sprengel's allegations regarding the attorney-client relationship.

Litigation—Class Actions—PAGA Claims—Appealability—Death Knell Doctrine

A PAGA claim is one brought under the Private Attorneys Generals Act of 2004. Under that act, an employee may bring an action both individually and on behalf of other employees to enforce Labor Code violations. In *Miranda v. Anderson Ent., Inc.,* 241 Cal.App.4th 196, 193 Cal.Rptr.3d 770 (2015) an employee filed a class action, which included PAGA claims. The employer, relying on an arbitration clause that forbade class claims, moved to dismiss the class and representative claims and to arbitrate the individual claims. The trial court granted the motion, and plaintiff appealed. Was there an appealable order? Orders granting petitions to compel arbitration are *not* appealable. Plaintiff argued, however, that the order was appealable under the "death knell" doctrine because the class claims had been dismissed. The employer argued that the death knell doctrine should not apply to PAGA claims, which are different from a class action. The court of appeal acknowledged the differences, but held that the differences are not "material for purposes of the death knell doctrine." The appeal could proceed.

Litigation—Class Actions—Precertification Discovery

When can a plaintiff who seeks injunctive relief on behalf of a class of which the plaintiff is not a member obtain precertification discovery to seek out another lead plaintiff? That was the question in *CVS Pharmacy, Inc. v. Superior Court*, 241 Cal.App.4th 300, 193 Cal.Rptr.3d 574 (2015). There, a class plaintiff challenged CVS's alleged policy terminating employees who don't work for 45 consecutive days as discriminating against individuals with disabilities. That plaintiff was dismissed, however, for lack of standing as she was not disabled and had not been terminated under the alleged policy. Nonetheless,

the trial court granted plaintiff's motion to compel the names and contact information of current and former CVS employees in order to find a new class plaintiff. On petition for writ of mandate, the court of appeal found an abuse of discretion. The court held that "[t]he potential for abuse of the class action procedure is self-evident where the only named plaintiff has never been a member of the class." Potential class members would be aware of their claims, and the "requested discovery impinges on the privacy rights of potential class members."

FEDERAL

Arbitration—Enforceability—Federal Preemption

The Supreme Court issued another rebuke to California courts' treatment of arbitration agreements. *DIRECTV, Inc. v. Imburgia*, ___ S.Ct. ___, 2015 WL 8546242 (2015). DIRECTV entered into a service agreement with its customers that included a binding arbitration clause, but also stated that if the "law of your state" makes class arbitration waivers unenforceable, then the entire arbitration agreement was unenforceable. California law did, in fact, make such class waivers unenforceable, but in 2011, the Supreme Court held California law preempted in that regard. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). So, when Amy Imburgia filed a class action against DIRECTV, the company moved to compel arbitration. The superior court denied the request, however, and the court of appeal affirmed on the ground that the entire arbitration agreement was unenforceable because California law, though preempted, made class waivers unenforceable. The Supreme Court granted certiorari and reversed. According to the Supreme Court, the court of appeal's interpretation of "law of your state" to include *invalid* law was an attempt to skirt *Concepcion*. The Supreme Court explained that "nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of 'law of your state' in any context other than arbitration." Because California's interpretation of "law of your state" did not place arbitration agreements on equal footing with other contracts, that interpretation was preempted by the FAA.

Litigation—Evidence—Adoptive Admissions

Chevron and one its dealers got into a dispute over the sale of gas station property. The critical issue was the fair value of the station. As part of its financing efforts, the dealer obtained an appraisal, which it forwarded to a lender as part of its documentation seeking loan approval. Chevron wanted to admit the appraisal at trial but was met with a hearsay objection and testimony that the dealer had never read the appraisal. The district court excluded the appraisal, but the Ninth Circuit reversed. It held "as a matter of first impression" that when a party acts in conformity with a document, such an action constitutes an adoption of its statements "even if the party never reviewed the document's contents." It did not matter if the third party—here, the lender to whom the appraisal was forwarded—never itself uses or relies on the document. The court did say, however, that this adoptive admission rule would not apply where the "party forwards a document while acting as a mere messenger." *Transbay Auto Service v. Chevron USA,* ___ F.3d ___, 2015 WL 7717291 (9th Cir. 2015).

Litigation—FRCivP—Amending Complaints

Here's one for civil procedure nerds. Under FRCP, rule 15, a party may amend its pleading "once as a matter of course" within certain time limits. A party may also amend a pleading "with the opposing party's written consent or the court's leave." In *Ramirez v. City of San Bernardino*, 806 F.3d 1002 (9th Cir. 2015), plaintiff and defendant stipulated that plaintiff could file a first amended complaint. Defendants then filed a motion to dismiss that first amended complaint. Plaintiff responded by attempting to file a second amended complaint. The district court ignored the second amended complaint and dismissed the action for failure to oppose the motion. Did plaintiff need leave of court to file the second amended complaint? No. The Ninth Circuit held that since the first amended complaint was filed by stipulation and "not as a matter of course," plaintiff had not used his opportunity to amend once as a matter of course. Since the second amended complaint superseded the first amended complaint, the motion to dismiss which had been directed to the first amended complaint should have been treated as moot.