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# NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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## S T A T E

Arbitration—Arbitrability—  
Decision by Court or  
Arbitrator—Incorporation of  
Arbitration Rules

Incorporation of specific arbitration rules into a contract can have vast implications. In *Brinkley v. Monterey Financial Services, Inc.*, 242 Cal.App.4th 314, 196 Cal.Rptr.3d 1 (2015), the plaintiff brought a class action against Monterey Financial Services asserting claims arising out of allegations that Monterey unlawfully recorded telephone conversations. The trial court compelled arbitration of plaintiff's individual claims and dismissed the class claims. The court of appeal affirmed the trial court's conclusion that the plaintiff's claims fell within the scope of the arbitration clause in the parties' contract, but reversed the decision to dismiss the class claims. The parties' contract incorporated AAA rules, and the AAA rules provided that the arbitrator should decide whether class claims are arbitrable. The court of appeal concluded that incorporation of the AAA rules "is 'clear and unmistakable' evidence that the parties intended to delegate the resolution of that question [whether class claims were arbitrable] to the arbitrator."

Attorneys—Termination of  
Representation—  
Disqualification

*M'Guiness v. Johnson*, 243 Cal.App.4th 602, 196 Cal.Rptr.3d 662 (2015), which addresses the disqualification of a law firm when principals of a close corporation get into a dispute and the corporation is a party as well, shows the need for a law firm to have formally terminated representation of one client before taking on another to avoid the trap of concurrent

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representation. Here, one of the shareholders sought to use as his counsel the law firm that had represented the company in a number of matters. He argued that the firm had concluded its representation of the company and had did not currently represent the company in any matter, therefore no concurrent representation existed. The court of appeal, reversing the trial court's refusal to disqualify, found otherwise. While it may have been true that the firm was not *actively* representing the company, its engagement letter "was a broad and open-ended one," contemplating representation until the engagement had been terminated. Further, the firm still held funds in trust for the company, something that was unnecessary if the engagement truly had ended. The court also pointed to other facts that showed an on-going relationship. The lesson is clear: if you want to make a client a former client for conflicts purposes, review your retainer letter, follow it, and return all trust funds. The court also belied the notion that disqualification is a disfavored remedy, holding that in the case of concurrent representation, disqualification is not disfavored, but required.

#### Attorneys' Fees—Inadequate Justification by Trial Court

Although the amount and scope of a fee award is generally a matter for the trial court's discretion, the court is required to provide an explanation for its award that is adequate for appellate review, particularly where the court awards less than the calculated lodestar amount. As the court of appeal held in *Kerkeles v. City of San Jose*, 243 Cal.App.4th 88, 196 Cal.Rptr.3d 252 (2015): "If the record reveals no indication of the court's reasoning, the reviewing court may understandably conclude that the lower court, instead of independently reviewing counsel's records, merely threw up its hands and simply relied on the opposing party's suggested percentage cut." There, plaintiff was entitled to fees under a civil rights statute (section 1988), but the trial court cut plaintiff's fee request by more than 50%, explaining only that his attorneys "expended far more time than a reasonable attorney could ever bill a paying client for." The court held this explanation inadequate and remanded for reconsideration.

#### Enforcement of Judgment—Third Party Discovery

The decision in *SCC Acquisitions, Inc. v. Superior Court*, 243 Cal.App.4th 741, 196 Cal.Rptr.3d 533 (2015) raises

two interesting issues. The first is whether an order compelling a judgment debtor to produce documents to aid in enforcing a judgment is an appealable post-judgment order. The court of appeal examined several cases involving similar postjudgment discovery orders, but found them “inconclusive.” Ultimately, the court concluded that “whether the order granting the motion to compel is appealable is far from clear” and decided instead to treat the appeal as a petition for writ of mandate. It remains unclear, therefore, whether this type of order is appealable. The second issue is whether the trial court had authority to compel a judgment debtor to produce documents related to third parties. The judgment debtor objected on the ground that discovery directed to a third party is limited under CCP § 708.120 to an appearance before the court or a referee to answer questions. The court of appeal rejected this argument, holding that “there is a difference . . . between discovery *about* a third party and discovery *from* a third party.” The trial court had authority under CCP § 708.030(a) to compel production of documents in possession of the judgment debtor even if they were *about* a third party. The court of appeal also rejected any argument that the third parties’ right to privacy precluded the discovery request.

Litigation—Demurrer—Judicial  
Notice

While a court may take judicial notice of the existence of documents in a court file, a court may not take judicial notice of the truth of hearsay statements in other court decisions and court files. *Richtek USA, Inc. v. UPI Semiconductor Corp.*, 242 Cal.App.4th 651, 195 Cal.Rptr.3d 430 (2015). Thus, where a trial court relies on pleadings from another court to contradict allegations in the complaint, an order sustaining the demurrer will be reversed.

Litigation—Discovery—  
Sanctions

The decision in *Mitchell v. Superior Court*, 243 Cal.App.4th 269, 196 Cal.Rptr.3d 168 (2015) is a reminder that “exclusion of a party’s witness for that party’s failure to identify the witness in discovery is appropriate only if the omission was willful or a violation of a court order compelling a response.” There, the trial court granted defendant’s motion in limine to exclude any witnesses not previously disclosed in discovery. The

court of appeal issued an alternative writ, holding that because defendant had not submitted any evidence that plaintiff's failure was willful or in violation of a court order, the motion in limine should have been denied.

Privileges—Insufficient Privilege  
Log—Waiver

“May a trial court find a waiver of the attorney-client privilege and work product doctrine when the objecting party submits an inadequate privilege log that fails to provide sufficient information to evaluate the merits of the objections? No.” *Catalina Island Yacht Club v. Superior Court*, 242 Cal.App.4th 1116, 195 Cal.Rptr.3d 694 (2015). There, the trial court ordered defendants to produce 167 e-mails identified in their privilege log because the log failed to even describe the subject matter or content of the e-mails. The court of appeal held that the trial court exceeded its authority in ordering the e-mails produced. The court explained that when a privilege log fails to provide sufficient information for the trial court to decide the merits of a privilege claim, the court may impose sanctions—from monetary to terminating sanctions—but “a forced waiver is not authorized by either the statutory scheme establishing the attorney-client privilege or the discovery statutes . . . .”

F E D E R A L

Contracts—Rescission—Waiver  
of Right to Rescind

Applying California law, the Ninth Circuit affirmed an order granting summary judgment refusing a right to rescind on the ground rescission was barred by laches. *DM Residential Fund II, LLC v. First Tennessee Bank National Association*, \_\_\_ F.3d \_\_\_, 2015 WL 9487896 (9th Cir. 2015). There, the court found that a buyer of real property at a foreclosure sale had grounds to rescind and that the action was brought within the statute of limitations. The court affirmed summary judgment, however (over a strong dissent by Judge Kozinski) on the ground that the plaintiff was on notice that there had been some wrongdoing in connection with the sale and had a duty to investigate. Instead, the court found that plaintiff took actions inconsistent with unwinding the contract and had forfeited its right to rescind.