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Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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

STATE

Appeals—Supplementing the Record

The court of appeal will not normally consider evidence that was not part of the record in the trial court. In *Lewis v. YouTube, LLC*, 244 Cal.App.4th 118, 197 Cal.Rptr.3d 219 (2015), the appellant sought to invoke an exception under CCP section 909, which allows the court of appeal discretion to consider new evidence in "exceptional circumstances." As the court of appeal explained, however, section 909 only applies when there is no right to trial by jury, the evidence was unavailable before judgment, and the evidence supports affirmance. The declaration appellant sought to add to the record met none of those criteria and the court refused to consider it.

Litigation—Five-Year Period for Prosecuting Case—No Tolling for Private Mediation

CCP section 1775.7 provides that "[i]f an action is or remains submitted to mediation pursuant to this title" during the final six months of the five-year period for prosecuting a case, then the mediation will automatically toll the running of that five-year period. Does a private mediation trigger tolling under this provision? In *Castillo v. DHL Express (USA)*, 243 Cal.App.4th 1186, 197 Cal.Rptr.3d 210 (2015), the court of appeal answered "no." Interpreting the language "submitted to mediation pursuant to this title," the court held that section 1775.7 applies "only if the parties participate in a mediation conducted through a court-annexed mediation program." That section "has no application" where "the parties choose to mediate their dispute privately." The court

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

noted, however, "[n]othing in this opinion should be construed to impact the parties' ability to stipulate to a stay in the proceedings while they engage in mediation." Thus, parties who are approaching the 5-year period and who desire to engage in mediation should stipulate to such a stay and not rely on section 1775.7.

Litigation—Postjudgment Motions—Jurisdictional Deadlines

The deadlines for a trial court to rule on postjudgment motions can be a trap for the unwary, as many are jurisdictional and cannot be extended even by order of the court. A current example is *Garibotti v. Hinkle*, 243 Cal.App.4th 470, 197 Cal.Rptr.3d 61 (2015). Hinkle moved to vacate a default judgment under CCP section 663. Section 663a provides the power of the court to rule on a motion to vacate expires 60 days after service of notice of entry of judgment or service of the first notice of intent to vacate. At Garibotti's request, however, the trial court set a hearing date beyond the 60 days. The court then granted the motion to vacate and entered a new judgment for a lesser amount. The court of appeal reversed and reinstated the original judgment, holding that Hinkle's motion was denied by operation of law when the 60-day period expired. Noting that "California courts long have held section 660's deadline for a trial court to rule on a new trial motion is mandatory and jurisdictional," the court held that the plain statutory language, as well as the legislative history, requires the same result for a motion to vacate under section 663a.

Real Property—Antideficiency Provision—Short Sale

CCP section 580b's antideficiency provision provides that when someone borrows money from a bank to purchase a home and the bank forecloses on the home, the bank is entitled to the proceeds from the foreclosure sale but not for any remaining deficiency on the loan. In *Coker v. JPMorgan Chase Bank, N.A.*, 62 Cal.4th 667, 197 Cal.Rptr.3d 131 (2016), the California Supreme Court held that this antideficiency protection applies not only to foreclosures, but also to "short sales" where the bank agrees to release its lien on a property to facilitate a sale to a third party for an amount less than the outstanding loan. In so holding, the court rejected the bank's argument that the short sale "transformed the purchase money loan from a secured to an unsecured loan, thereby removing it from the ambit of section 580b."

FEDERAL

Appeal—Appellate Court Jurisdiction—Timely Filing the Notice of Appeal

The timely filing of a notice of appeal is a jurisdictional, and the Ninth Circuit cannot make exceptions "no matter how compelling an appellant's argument may be." *Melendres v. Maricopa County*, ___ F.3d ___, 2016 WL 860355 (2016). In 2015, the Ninth Circuit issued an opinion affirming a permanent injunction against Sheriff Arpaio and the Maricopa County Sheriff's Office ("MCSO"), enjoining racially discriminatory traffic stops. During the litigation, however, the Arizona court of appeal held that MCSO could not be subject to lawsuit. The Ninth Circuit, therefore, ordered Maricopa County substituted in the place of MCSO. Within 30 days of the Ninth Circuit's decision, Maricopa County appealed from the underlying district court orders, which had been issued between 2011 and 2014. Maricopa County argued that its appeal was timely because it was filed within thirty days after the Ninth Circuit's decision making the county a party. The county argued "it would be unfair" to dismiss the appeal because it "never had a chance to file a timely appeal." For various reasons, the court rejected Maricopa County's unfairness argument, but also held that even if dismissal was unfair, "we would still have no authority to entertain this appeal since the Supreme Court has made abundantly clear that federal courts cannot create equitable exceptions to jurisdictional requirements."

Litigation—Class Settlement—Attorneys' Fee Award—Abuse of Discretion

Failure to fully explain the basis for an attorneys' fee award is an abuse of discretion requiring reversal. *Stanger v. McGee*, ___ F.3d ___, 2016 WL 191986 (2016). In *Stranger*, after two years of litigating a securities class action, the parties reached a $3.78 million settlement, and plaintiffs' counsel sought 25% of the settlement for attorneys' fees. The district court declined to award a percentage of the settlement, instead calculating the amount of fees based on the lodestar method—multiplying a blended hourly rate by the hours class counsel had worked. The court then reduced the lodestar amount by 30%, explaining only that there were "numerous examples of legal tasks being improperly [lumped] together," that it was "a very simple case, and

that "a lot of high-cost lawyers were not doing work . . . that would . . . take their expertise to do." On appeal, the Ninth Circuit held that the district court had discretion to choose to award either a percentage of the settlement or the lodestar amount, but reversed the award because "the district court did not adequately explain its reasons for reducing the lodestar." Specifically, "the record lacks any explanation as to why the lodestar was reduced by 422 hours, as opposed to any other number of hours." The court also held that on remand the district court should explain why it rejected class counsel's contention that several factors required an upward adjustment of the lodestar. The court's failure to "explicitly consider" those upward adjusting factors was itself an abuse of discretion.

Litigation—Sealed Documents—Applicable Standards

In *Center for Auto Safety v. Chrysler Group*, LLC, 809 F.3d 1092 (2016), the Ninth Circuit clarified the proper standard a district court must apply when deciding whether to seal documents filed with a motion. The general rule is that a party seeking to seal the record must demonstrate "compelling reasons" for doing so. The Ninth Circuit has carved out an exception to this rule, however, for materials attached to a motion that was unrelated to the merits of the case, which only requires a showing of "good cause" to seal. In *Center for Auto Safety*, the parties sought to seal records in connection with a preliminary injunction motion. Relying on loose language from previous Ninth Circuit decisions, Chrysler argued the "good cause" standard should apply to all "non-dispositive" motions. The district court agreed and sealed the record, but the Ninth Circuit reversed over a strong dissent. Clarifying prior precedent, the decision held that a showing of "compelling reasons" was required whenever a motion is "more than tangentially related to the merits of the case." Because the preliminary injunction motion would have resolved a portion of plaintiff's claims, it was related to the merits and Chrysler was required to show compelling reasons for sealing the record. The dissent argued that the decision "overrules circuit precedent and vitiates [FRCP] Rule 26(c)," which allows the court for "good cause" to issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."