May 2016

Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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

STATE

Attorneys—Disqualification—Derivative Actions

Litigation involving members of close corporations makes for tricky representation problems. In *Ontiveros v. Constable*, 245 Cal.App.4th 686, 199 Cal.Rptr.3d 836 (2016), a minority shareholder brought direct and derivative claims against the corporation, the majority shareholder, and the majority shareholder's wife. They all retained the same counsel to represent them. The minority shareholder moved to disqualify defendants' lawyer and the trial court did so. On appeal, the court of appeal held that the lawyer could not represent the corporation because the corporation and the majority shareholder had conflicting interests and the majority shareholder alone did not have authority to waive the conflict. The court of appeal also held that the lawyer should not have been disqualified from representing the majority shareholder and his wife. In light of disqualifying counsel from representing the corporation the court of appeal analyzed the issue as to representing the shareholder as a successive representation problem (where the focus is on confidentiality), not a concurrent representation problem (where the focus is on loyalty), looking at the corporation as a former client and the shareholder as a current client. Relying on two earlier cases the court said that since counsel's relationship with the corporation was based solely on his interaction with the majority shareholder it was impossible to conceive of confidential information the lawyer received from the

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

corporation that is different from that received from the shareholder. Therefore, since counsel's continued representation of the shareholder (and his wife) posed no threat to counsel's continuing duty of confidentiality to the corporation, the trial court wrongly disqualified counsel from representing the majority shareholder.

Attorneys—Disqualification—Standing

In *In re Marriage of Murchison* (2016) 245 Cal.App.4th 847, 199 Cal.Rptr.3d 800, a husband moved to disqualify wife's lawyer in a martial dissolution case after the wife's lawyer bought the family home from the wife during the dissolution proceedings after the wife had been ordered to sell the home to extinguish husband's share of community debt on the property. Husband argued that the sale violated Rule 3-300 of the Rules of Professional Conduct which in essence prohibits unfair business transactions between lawyers and clients and mandates procedural requirements for such a transaction. The court of appeal reversed the disqualification order holding that (i) husband had no standing to seek disqualification based on a transaction to which he was not a party; and (ii) the trial court could not exercise its inherent powers to disqualify the lawyer because the alleged misconduct had no continuing effect on the dissolution proceedings

Litigation—Contracts—Internet—"Browsewrap" Agreements

I learned by reading *Long v. Provide Commerce, Inc.*, 245 Cal.App.4th 855, 200 Cal.Rptr.3d 117 (2016) that a "browsewrap" agreement is an agreement that may be inferred from a user's use of an internet site, as opposed to a "clickwrap" agreement where a user affirmatively clicks a box to indicate assent. The question in *Long* was how conspicuous "Terms of Use" must be to constitute a binding browsewrap agreement, binding a site user to them—an issue of first impression in California. The court relied on two federal circuit cases, one of which held that "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms are essential if electronic bargaining is to have integrity and credibility." The court here held that terms of use were too inconspicuous to bind the user to an arbitration provision buried in the terms of use.

FEDERAL

Litigation—Class Action—Settlement Offer of Full Individual Relief—Mootness

In *Chen v. Allstate Ins. Co.*, ___ F.3d ___, 2016 WL 1425869 (9th Cir. 2016), the Ninth Circuit addressed a question left open in the Supreme Court's 2016 decision in *Campbell-Ewald Co. v. Gomez,* 136 S.Ct. 663 (2016). In *Campbell-Ewald,* the Supreme Court held that an unaccepted settlement offer of all relief the plaintiff was requesting did not moot the action because an unaccepted settlement offer has no force. The court left for another day the question whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim into an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. The court said that question "is appropriately reserved for a case in which it is not hypothetical." *Chen* is that case. There, plaintiff brought a class action alleging violations of the Telephone Consumer Protection Act because he received unsolicited commercial telephone calls on his cell phone. In an effort to "pick off" the plaintiff and end the case, defendant deposited the full amount of plaintiff's monetary claims into an escrow account, pending entry of an order directing the escrow agent to pay the funds to plaintiff, directing defendant to cease unsolicited phone calls, and dismissing the action as moot. Plaintiff did not accept the offer; the court of appeals affirmed the district court order refusing to dismiss the case. It held that even though the offer provided for full relief to the individual plaintiff, (i) an action becomes moot only when the plaintiff actually receives relief and plaintiff here had not received any relief; and (ii) the court of appeals would not direct the district court to enter judgment on the individual claim until the plaintiff has had the opportunity to move for class certification.

Litigation—Mandamus—Forum Non Conveniens

The Ninth Circuit's 1977 decision in *Bauman v. United States*, 557 F.2d 650 (9th Cir. 1977) remains the gold standard by which the Ninth Circuit will decide whether to issue a writ of mandamus. In *Orange S.A. v. United States District Court*, __ F.3d ___, 2016 WL 1392381 (9th Cir. 2016), petitioner sought mandamus, arguing that the

district court wrongly refused to dismiss a case based on a forum selection clause in nondisclosure agreement calling for litigation in France. Applying the *Bauman* factors, the court denied mandamus. It held that the district court's refusal to dismiss could be reviewed on appeal from a final judgment, its conclusion that the nondisclosure agreement's forum selection clause did not apply to the claims was not clearly erroneous, and that if courts were routinely to issue writs of mandamus after denial of a motion to dismiss on forum non conveniens grounds it would amount to implementing a nonstatutory right of interlocutory appeal from such orders.