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# Newcases of BUSINESS LITIGATION INTEREST

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## STATE

**Appeal—Settlement—Appellate Jurisdiction**

The decision in *Kinda v. Carpenter*, 247 Cal.App.4th 1268, 203 Cal.Rptr.3d 183 (2016), is a good reminder that settlement does not always preclude an appellate court from deciding a pending appeal, particularly when the settlement comes late in the appeal process. There, two weeks after oral argument, the parties filed a notice of settlement with dismissal conditional on the fulfillment of specified terms. The court of appeal, however, declined to dismiss the appeal. The court recognized that "[a] valid settlement between the parties renders the appeal moot to the extent that it effectively extinguishes the judgment from which the appeal is taken, ending both the dispute and the possibility of further, effective relief from the court." The court noted, however, that where the settlement comes at an "extraordinarily late stage of the proceedings," dismissal is discretionary with the court. The court still has the "inherent power" to retain a matter where the issues are of public interest and likely to recur.

**Arbitration—Agreement to Arbitrate—Employee Manuals**

One would think there are enough published opinions on arbitration agreements in the context of employee manuals, but along comes *Harris v. TAP Worldwide LLC,* 248 Cal.App.4th 373, 203 Cal.Rptr.3d 522 (2016). The court held that a form given to prospective employees acknowledging receipt of both an employee manual and its attached arbitration agreement sufficed to



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demonstrate the existence of an arbitration agreement even if the employee chose not to read or take the time the understand what he was signing. Importantly, the court went on to say that acceptance can be express or implied-in-fact and that by commencing work under the employment agreement, the employee had assented to its terms. The court also discussed whether the arbitration agreement was illusory in light of the employer's ability to modify it, concluding that it was not. This is a good case to refer to for the basic principles a court will apply in looking at arbitration agreements in the employer-employee context.

Arbitration—Scope of Arbitration Clause

The decision in *Rice v. Downs*, 247 Cal.App.4th 1213, 248 Cal.App.4th 175 (2016) contains a good discussion regarding the scope of arbitration provisions and the attention that must be paid to their language. The facts there are somewhat complicated. According to the complaint, attorney Downs entered into a joint ownership agreement of an LLC with several others, including plaintiff Rice. Downs acted as the attorney for the joint owners in drafting the operating agreement and thereafter provided legal advice to the company and owners. When the business relationship went south, Rice (among others) sued Downs for legal malpractice, breach of fiduciary duty, breach of the operating agreement, and rescission. The trial court sent the case to arbitration and ultimately confirmed the arbitrator's award in Rice's favor on all claims except breach of contract. The court of appeal reversed, however, holding that none of the claims on which Rice prevailed were within the scope of the arbitration provision. The court noted that the parties agreed to arbitrate only controversies "arising out of" the agreement. By contrast, the parties consented to jurisdiction in California for actions "arising out of, under or in connection with" the agreement. The court explained that under both federal and state law, "arising out of" language standing alone narrowly applies "only to disputes relating to the interpretation and performance of the agreement"; whereas, adding the "in connection with" language expands the scope of an arbitration provision to encompass claims "having their roots in the relationship between the parties which was created by the contract." The court then concluded that the legal

malpractice, breach of fiduciary duty, and rescission claims did not "arise out of" the agreement because they were based on asserted duties that arose outside of and did not require interpretation of that agreement.

Corporations—Shareholder Inspection Rights

Corporations Code section 1601 grants shareholders the right to inspect certain corporate records. If those records are kept out of state, must the corporation bring them to California for inspection? No. *Innes v. Diablo Controls, Inc.*, 248 Cal.App.4th 139, 203 Cal.Rptr.3d 375 (2016). The court in *Innes* explained that section 1601 only required the records to be made available "at any reasonable time during usual business hours," which implied that the records could be inspected where they are kept. Moreover, although some statutes require corporate documents to be kept in California, there is "no authority" requiring a corporation to keep the section 1601 records here. The court opined, however, that "maintaining the records in a remote location to intentionally impede inspection would be contrary to the purpose of section 1601." Since "there is no evidence of such obstruction here," the shareholders' inspection rights had not been impeded.

Damages—Punitive Damages—Ratio

When an insurance company wrongfully withholds policy benefits in bad faith, the insured may recover attorney fees reasonably incurred to compel payment of the policy benefits. These are so-called *Brandt* fees, named after *Brandt v. Superior Court*, 37 Cal.3d 813 (1985). In *Nickerson v. Stonebridge Life Ins. Co.*, 63 Cal.4th 363, 203 Cal.Rptr.3d 23 (2016) the Supreme Court held that even where a trial court grants *Brandt* fees postverdict, the amount of the fees granted may be included with the jury's award of compensatory damages when a court is reviewing the ratio between compensatory and punitive damages to determine if the punitive damages are excessive. The court said that "to exclude the fees from consideration would mean overlooking a substantial and mutually acknowledged component of the insured's harm. The result would be to skew the proper calculation of the punitive-compensatory ratio, and thus to impair the reviewing courts' full consideration of whether, and to what extent, the punitive damages award exceeds constitutional bounds."

Sanctions—Safe Harbor—Standards

Code of Civil Procedure section 128.5 is back. It was suspended in 1994, when section 128.7 was enacted. But as of January 1, 2015, the Legislature revived section 128.5 with some revisions. A new case, *San Diegans for Open Government v. City of San Diego*, 247 Cal.App.4th 1306, 203 Cal.Rptr.3d 34 (2016) makes the following points: (i) new section 128.5 does not apply to discovery disclosures and motions; (ii) new section 128.5 applies to any action pending at the time it became effective; (iii) a motion under new section 128.5 does not need to comply with section 128.7's safe harbor requirement; and (iv) motions under new section 128.5 are to be determined by an objective standard of frivolousness from the standpoint of a reasonable person; subjective motives are not relevant.

## F E D E R A L

Anti-SLAPP—Federal Procedures

Ninth Circuit precedent has incorporated California's statutorily-mandated procedures concerning anti-SLAPP motions, including the right to an immediate appeal from an order denying such a motion. Now, in a concurring opinion which may be looked at as a call for en banc review, Judge Kozinski has said that these "interloping state procedures have no place in federal court" and "we should follow the D.C. Circuit in extirpating them." His complaints are two. First, anti-SLAPP motions, which require a plaintiff to show a probability of prevailing, conflict with FRCivP Rule 12, which requires only that plaintiff's claim be "plausible" to survive a motion to dismiss. That means, he says, that "some plaintiffs with plausible claims will have their cases dismissed before they've had a chance to gather supporting evidence." Second, "we made the problem worse by accepting interlocutory appeals." These are not final judgments appealable under 28 U.S.C. § 1291 and in Judge Kozinski's view they don't' qualify as appealable collateral orders either. Stay tuned.