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S T A T E

Appeal—Record—Settled Statement

It is hornbook law that an appellant must present an adequate record to the court of appeal. But in this day and age where courts do not automatically supply court reporters that can be easier said than done. Rule 8.137 does provide, however, for a "settled statement." Under that rule, an appellant may file a motion to proceed by way of settled statement if (i) a substantial savings will result and the statement can be settled without undue burden; *or* (ii) the oral proceedings were not reported; *or* (iii) appellant cannot pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund. In *Randall v. Mousseau,* 2 Cal.App.5th 929, 206 Cal.Rptr.3d 526 (2016), the trial court refused to settle a statement because preparing the settled statement would impose a significant burden on the court and the parties—even though the trial had not been reported. The court of appeal held that since the requirements for obtaining a settled statement are in the disjunctive, the trial court abused its discretion in refusing to prepare a statement.

Arbitration—Evidence—-Fairness—Vacatur

It is rare for arbitration awards to be vacated given the extremely narrow grounds for doing so. But it happens from tine-to-time, and *Royal Alliance Associates, Inc. v. Liebhaber*, 2 Cal.App.5th 1092, 206 Cal.Rptr.3d 805 is the latest example. In this case, a brokerage customer brought a claim for unsuitable investments. That claim

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settled after an arbitration panel was convened, but the case morphed into one whether the complaint against the broker should be expunged. The parties submitted some written materials, and the panel also held a telephonic hearing at which the broker was allowed to "testify" without being sworn. The panel refused to allow cross-examination or to allow the complaining customer to testify. The panel expunged the complaint, but the court of appeal affirmed the trial court's vacation of the award. Not allowing evidence from the complaining customer, the court held, violated the fundamental principle that "arbitration should give both parties an opportunity to be heard."

Commercial Law—Contracts—Acceptance or Counteroffer

A response to an offer that changes the offer's terms is a counteroffer that may be rejected by the initial offeror. *Flintco Pacific, Inc. v. TEC Management Consultants, Inc.*, 1 Cal.App.5th 727, 205 Cal.Rptr.3d 21 (2016). TEC bid $1.2 million to perform glazing work as a subcontractor. The general contractor, Flintco, used TEC's bid to obtain the project contract and sent TEC a "standard-form subcontract" which contained certain terms that differed from TEC's initial bid. When TEC refused to sign or negotiate further, Flintco sued, but the trial court entered judgment in favor of TEC, and the court of appeal affirmed. The court rejected Flintco's argument that it was customary to treat the bid price as the principal contract term, holding that "custom and practice" could not replace the actual bid terms. "[A]s soon as Flintco communicated a response to TEC's bid that differed materially from TEC's offer," that was a counteroffer and "Flintco lost its power to accept TEC's bid."

Courts—Jurisdiction—General and Specific Jurisdiction

In a hotly contested 4-3 decision, the California Supreme Court has waded into the general and specific jurisdiction quagmire and held that a California trial court may exercise specific jurisdiction over Bristol-Meyers Squibb in a suit brought by non-California plaintiffs alleging defects in the drug Plavix. *Bristol-Meyers Squibb v. Superior Court*, 1 Cal.5th 783, 206 Cal.Rptr.3d 636 (2016). All seven justices concluded that while BMS had substantial activities in California, those activities were insufficient to support general jurisdiction. They split on the question of specific jurisdiction, with all four Governor Brown appointees holding that such jurisdiction exists. The

opinions are long and complicated but must reading if you face this issue.

Litigation—Anti-SLAPP—Commercial Speech Exemption

Claims based on commercial speech are not subject to a special motion to strike under the anti-SLAPP statute. In *JAMS, Inc. v. Superior Court*, 1 Cal.App.5th 984, 205 Cal.Rptr.3d 307 (2016), the trial court refused to limit this exemption to cases involving "positive assertions of past or present conditions or events" and held it could apply to omissions. There, plaintiff hired Justice Sonenshine through JAMS as a temporary judge. Subsequently, plaintiff allegedly discovered that JAMS's website "omitted key information" about Justice Sonenshine. Plaintiff sued both JAMS and Justice Sonenshine claiming the omissions constituted fraud. Defendants moved to strike under the anti-SLAPP statute, but the trial court denied the motion on the ground that the website's statements were commercial speech. In affirming, the court of appeal rejected defendants' argument that the commercial speech exception only applies to positive statements of fact, as opposed to omissions.

Litigation—Judgment

The decision in *Torjesen v. Mansdorf*, 1 Cal.App.5th 111, 204 Cal.Rptr.3d 325 (2016), contains a good discussion of the difference between void and voidable judgments, which is important to understand because a void judgment may be collaterally attacked, but a voidable one may not be. In *Torjesen*, under the Enforcement of Judgments Act, a trial court invalidated a claim against a deceased debtor's property despite that Probate Code procedures, not the EJA, apply in such a case. The third party did not appeal, but two years later filed a motion to vacate. The court of appeal framed the question as whether the EJL deprived the trial court of "fundamental jurisdiction" with respect to enforcement of the judgment—which would make the EJL order void—or whether the court merely acted in "excess of its jurisdiction"—which would make the order only voidable. The court held that order was voidable, not void, and because the voidable order could have been addressed on appeal, that judgment was not subject to collateral attack.

Litigation—Settlement Offer—

The court of appeal's decision in *Ignacio v. Caracciolo*, 2 Cal.App.5th 81, 206 Cal.Rptr.3d 76 (2016), is a good

Cost Shifting

reminder that section 998 offers must be drafted narrowly to avoid inadvertently rendering the offer invalid. *Ignacio* involved claims arising out of an automobile accident. Defendant offered to settle the claims for $75,000, and then sought costs under section 998 when plaintiff rejected the offer and only recovered $70,000. The trial court and court of appeal both held that the settlement offer was "invalid" under section 998 because it required a release of "'all claims plaintiff may have against the released parties, without any limitation to claims arising from the accident." The release's "incredibly broad" language encompassed numerous claims beyond those at issue in the lawsuit and, therefore, could not be used as the basis for shifting costs.

Torts—Tortious Interference

The court of appeal in *Popescu v. Apple Inc.*, 1 Cal.App.5th 39, 204 Cal.Rptr.3d 302 (2016), addressed two important issues related to tortious interference claims. Popescu—a former at-will employee at Constellium—sued Apple alleging that Apple convinced Constellium to terminate him in retaliation for resisting Apple's anti-competitive conduct. The trial court sustained Apple's demurrer, but the court of appeal reversed. The court first rejected Apple's argument that it could not be liable for contract interference because it was "not a stranger" to the contract. Concededly Apple was not a party to the employment contract, but it argued that it had a "legitimate economic interest" in Popescu's employment because Popescu was working on an Apple project for his employer. The court rejected this argument. Apple next argued that Popescu has not alleged "independently wrongful conduct." Distinguishing the Supreme Court's decision in *Reeves v. Hanlon*, 33 Cal.4th 1140 (2004)—which held that a former employer suing a new employer for recruiting and hiring away an at-will employee had to show independently wrongful conduct—the court of appeal held that *Reeves* involved "dual policy concerns of employee mobility and the promotion of legitimate competition" that were not at issue here.