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# Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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## STATE

**Appeal—Requirement that Appellant Be "Aggrieved"**

Under section 902 of the Code of Civil Procedure, an "aggrieved" party may appeal from a judgment. In *People ex rel. Allstate Ins. Co. v. Dahan,* 3 Cal.App.5th 372, 207 Cal.Rptr.3d 569 (2016), Allstate brought a qui tam action for insurance fraud against defendant and recovered a judgment. Neither the district attorney nor the Insurance Commissioner intervened. In such circumstances the plaintiff is entitled to receive a portion of the proceeds plus costs. Postjudgment, the trial court allocated the proceeds between Allstate and the State. Defendant appealed from the allocation order—apparently because Allstate was aggressively trying to collect, though that is not clear from the opinion. The court of appeal dismissed the appeal. It held that since defendant was liable for the full amount no matter what, it was not aggrieved by the order allocating the judgment between Allstate and the State.

**Litigation—Closing Argument—Failure to Object**

*Regalado v. Callaghan*, 3 Cal.App.5th 582, 207 Cal.Rptr.3d 712 (2016) serves as a reminder that to preserve an appellate argument that opposing counsel committed misconduct in closing argument, one must make a proper objection *and* either move for a mistrial or ask for a curative instruction unless an admonition would have been inadequate under the circumstances. Here, the court of appeal found that plaintiff's closing argument was improper as appealing to the jury's self-interest, but



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that claim was waived by a failure to object and seek an admonition.

Litigation—Relief from Judgment—Abuse of Discretion—Reasonable Time

For a good example of how the abuse of discretion standard plays out on appeal, look no further than *Minick v. City of Petaluma*, 3 Cal.App.5th 15, 207 Cal.Rptr.3d 350 (2016). There, a lawyer did a bad job opposing summary judgment, which was granted against his client. Later, the lawyer filed a section 473 motion to vacate the judgment claiming that he had been under a debilitating illness which had impaired his judgment and ability to work. The trial court granted the motion and the defendant appealed. The court of appeal noted that the trial court was "faced with two competing versions of the facts . . . cognitive incapacity and professional dereliction." The court of appeal held that the trial court's acceptance of the cognitive disability argument was not an abuse of discretion, making it plain that had the trial court ruled the other way, that too, would have been a proper exercise of discretion. So the deference courts of appeal give to trial courts in such matters is on full display. The court of appeal also found that the motion had been brought within a reasonable time, stating that "a delay is unreasonable as a matter of law only when it exceeds three months and there is no evidence to explain the delay."

## FEDERAL

Complaint—Failure to Amend—Default—Relief

A district court dismissed a complaint with leave to amend. Plaintiffs missed the filing deadline to amend, and the next day, the defendant submitted a judgment, which the court entered a few days later, noting that plaintiff had failed to amend "within the time allowed." In between these two events—submission and entry of judgment—plaintiff filed her second amended complaint. After the district court entered judgment, plaintiff moved for relief, explaining that because of ambiguous docket entries, her lawyer had miscalculated the deadline. The district court refused relief, but the Ninth Circuit reversed. *M.D. v. Newport-Mesa Unified School Dist.*, ___ F.3d ___, 2016 WL 6091565 (9th Cir. 2016). It held that defendant had suffered no prejudice, the delay in seeking

relief was minimal, and there was no showing that plaintiff's lawyer was engaging in a "post-hoc rationalization . . . to secure additional time." "Defendants may lose a 'quick but unmerited victory,'" the court said, "but 'we do not consider this prejudicial.'"

Jurisdiction—Diversity Jurisdiction—Default—Remand—Remedy

In *NewGen LLC v. Safe Cig LLC*, ___ F.3d ___, 2016 WL 6137483 (9th Cir. 2016), the court called the case a "procedural tangle," and the court was surely right. On appeal from a default judgment, it became clear the plaintiff had failed to properly plead diversity jurisdiction, an issue defendant raised in its brief. While the appeal was pending, defendant also filed a motion in the district court under rule 60(b) to set aside the judgment as void for lack of jurisdiction. The district court allowed an amendment to the complaint to correct the allegations and in effect "reaffirmed" its original judgment—which was still on appeal. The Ninth Circuit remanded with instructions to the district court to reconsider the 60(b) motion. It reissued the same order reaffirming the judgment and defendant appealed a second time. The Ninth Circuit held that the district court properly allowed plaintiff to amend to cure the jurisdictional allegations without opening up the default and permitting an answer and a trial. The court held that the liberal amendment rule in 28 U.S.C. § 1653 applied not only to judgments on the merits but also to default judgments. As for jurisdiction, the court pointed out that defendant never argued that diversity did not exist in fact; only that it had not properly been pleaded initially.

Patent Law—Lanham Act—Attorneys' Fees

Section 35(a) of the Lanham Act authorizes a district court "in exceptional cases" to award attorneys' fees to the prevailing party. Relying on two recent Supreme Court cases, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014) and *Highmark, Inc. v. Allcare Health Mgmt. Sys. Inc.,* 134 S.Ct. 1744 (2014), the en banc court altered circuit law relating to attorneys' fee awards under this statute. *SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd.,* ___ F.3d ___, 2016 WL 6156039 (9th Cir. 2016). It held that a district court should look to the "totality of the circumstances" to determine if a fee award is warranted and that such a determination should be reviewed for abuse of discretion, not de novo.

Removal—Standing—Remand

When a district court dismisses a removed case for lack of Article III standing, it should remand, rather than dismiss, *state* claims. *Polo v. Innoventions International LLC*, 833 F.3d 1193 (9th Cir. 2016). The court pointed to some authority in the Ninth Circuit standing for the proposition that a district court may dismiss a removed case "without remanding it to state court if remand would be futile," but concluded that that case "has been questioned, and may no longer be good law." Moreover the court found that here remand would not be futile.

Mediation—Admissibility—Choice of Law

The Ninth Circuit has held that federal law (Fed. Rule of Evid. 501) rather than California's mediation confidentiality statute, Evidence Code § 1123(b), governs the admissibility of mediation exchanges when a settlement relates to federal claims and is sought to be enforced in federal court. *In re TFT-LCD (Flat-Panel) Antitrust Litigation*, 835 F.3d 1155 (9th Cir. 2016).