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Orange County Bar Association • Business Litigation Section

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STATE

Attorneys—Malpractice—Tolling—Continuing Representation

Under CCP § 340.6, the statute of limitations in an action against an attorney is tolled during the time the attorney "continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." In *Gotek Energy, Inc. v. Socal IP Law Group, LLP*, 3 Cal.App.5th 1240, 208 Cal.Rptr.3d 428, after being threatened with malpractice, the law firm sent a disengagement letter asking where to send the client files. The client responded, asking the firm to "immediately make all necessary preparations" to send the file to a particular lawyer. The firm did so a week later. The client ultimately filed suit more than one year after the disengagement letter, but less than one after the files had been transferred. Was the suit timely? No. Since the law firm had made it clear in its disengagement letter that it would perform no further legal services, the act of transferring the files was not a legal service that further tolled the statute of limitations, but a ministerial act that did not have tolling consequences.

Contracts—Indemnification—Attorneys' Fees

Indemnification provisions allowing the indemnified party to recover attorneys' fees generally apply only to fees incurred in actions brought by third parties. They are not a substitute for a prevailing party attorneys' fee provision authorizing an award between the contracting parties. *Alki Partners LP v. DB Fund Services LLC*, 4 Cal.App.5th 574, 209 Cal.Rptr.3d 151 (2016).

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Litigation—Arbitrability of Class and PAGA Claims—Appealability—Death Knell Doctrine

Two recent decisions affect how the court of appeal reviews labor cases that include claims under the Private Attorney General Act, or PAGA. First, the "death knell doctrine" provides that a trial court order terminating class allegations but allowing individual claims to continue, is immediately appealable. This doctrine often applies when a trial court orders individual labor claims to arbitration but strikes class allegations based on an arbitration agreement that waives class claims. In *Da Loc Nguyn v. Applied Medical Resources Corp.*, 4 Cal.App.5th 232, 209 Cal.Rptr.3d 59 (2016), however, the court of appeal held that such an order is not immediately appealable under the death knell doctrine if the plaintiff's complaint includes a PAGA claim that is not dismissed. In *Tanguilig v. Bloomingdale's, Inc.*, 5 Cal.App.5th 665, 210 Cal.Rptr.3d 352 (2016), the court of appeal held that PAGA claims—whether or not cognizable as an action on behalf of an individual plaintiff—may not be ordered to arbitration without the consent of the state.

Since under *Tanguilig*, PAGA claims are not arbitrable, and under *Da Loc Nguyn*, the dismissal of class claims is not immediately appealable as long as a PAGA claim remains, plaintiffs asserting both class and PAGA claims may be forced to make the difficult decision whether to await resolution of individual claims in arbitration to obtain review of the dismissal of class allegations or dismiss their PAGA claims to obtain immediate review.

Litigation—Class Actions—Conflicts—Disqualification

Does a law firm representing a class action plaintiff also represent unnamed class members for purposes of determining conflicts? In *Walker v. Apple, Inc.*, 4 Cal.App.5th 1098, 209 Cal.Rptr.3d 319 (2016), the court of appeal answered "yes," at least where the class has been certified and the unnamed class member's identity and significance to the conflicting representations are known. There, a firm represented class plaintiffs in two separate actions against Apple, one of which had already been class certified. In order to advance the interests of its clients in *Walker*, one of the unnamed plaintiffs in the other action (Walker's store manager) would need to be examined as a witness in an adverse manner. On Apple's motion, the trial court disqualified the plaintiff law firm, and the court of appeal

affirmed. The court refused, however, to make a broad rule that a law firm necessarily represents all unnamed plaintiffs in a certified class action for conflict purposes. Rather, the court held "it is the combination of class certification . . . and the undisputed evidence regarding [the unnamed class member's] identity and role in this case . . . that persuades us that the trial court did not err in finding the Firm represents [the unnamed class member] for conflicts purposes."

Litigation—Judgment—Default Judgment—Adding Alter Ego

Under section 187 of the Code of Civil Procedure, a court has jurisdiction to modify a judgment to add additional judgment debtors. To do so, however, the newly-added defendant must (i) be the alter ego of the existing party; *and* (ii) have controlled the litigation, "thereby having had the opportunity to litigate, in order to satisfy due process concerns." In *Wolf Metals, Inc. v. Rand Pacific Sales, Inc.*, 4 Cal.App.5th 698, 209 Cal.Rptr.3d 198 (2016), the court of appeal held that since the corporate judgment debtor had defaulted, the second criterion could not be met and vacated a trial court order adding an individual alleged to be an alter ego an as an additional judgment debtor.

Litigation—Jurisdiction—Parent and Subsidiary Companies

If a parent company lacks sufficient contacts with California to establish general jurisdiction, a plaintiff may sometimes impute the contacts of a California subsidiary through alter ego or agency theories. But is the reverse also true? May a plaintiff also impute a California parent company's contacts to an out-of-state subsidiary? In *Strasner v. Touchstone Wireless Repair and Logistics, LP*, 5 Cal.App.5th 215, 210 Cal.Rptr.3d 16 (2016), the court of appeal noted that although no California case has addressed this issue, "such 'reverse agency' theory appears at odds with the underlying principle of imputation through agency, which relies on a nonresident entity exerting power over the day-to-day operations of the resident corporation." The court ultimately did not decide the question, however, because even assuming the reverse agency theory were viable, the court held that plaintiff did not establish that the California parent's control over any subsidiary defendant was pervasive enough for imputation.

Litigation—Limitations—Cross-Complaint—Tolling Doctrine

When a complaint is filed, it generally tolls the statute of limitations for any mandatory cross-complaint. But does tolling also apply to *permissive* cross-claims? As the court of appeal noted in *ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.*, 5 Cal.App.5th 69, 209 Cal.Rptr.3d 442 (2016), that question "is not free of doubt." Treatises on California practice have answered the question both ways, and no recent appellate court has definitively addressed the question. After reviewing the case law, however, the court of appeal held that "we are bound by California Supreme Court precedent" to hold that "the tolling doctrine is applied broadly to both compulsory and permissive cross-complaints." The court of appeal recognized that the Supreme Court precedent predated the statutory change abolishing counterclaims and redefining the cross-complaint, but "view[ed] those cases as persuasive, if not controlling, authority . . . ."

Real Property—Agents and Brokers—Fiduciary Duties

Under California law, a real estate broker may act as a "dual agent" for both the buyer and the seller of property. Thus, large brokerages, like Coldwell Banker, will often have different salespersons represent the buyer and seller in the same transaction. The question arises: to whom do the salespersons owe a duty—only the individual party (buyer or seller) that salesperson represents, or also the other party since the brokerage was acting as dual agent? In *Horiike v. Coldwell Banker Brokerage Co.*, 1 Cal.5th 1024, 210 Cal.Rptr.3d 1 (2016), the supreme court held that the salesperson for a seller owes the buyer an "equivalent" fiduciary duty. According to the court, salespersons have "no power to act except as the representative of his or her broker. This means that [a salesperson] does not have an independent agency relationship with the clients of his or her broker, but rather an agency relationship that is derived from the agency relationship between the broker and the client." Thus, the salespersons "owe[] the parties to that transaction the same duties as the broker on whose behalf he or she acts."