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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Arbitration—Vacatur—Excess of Authority

Given the difficult burden to vacate an arbitration award, it makes sense to pay attention to those cases where it happens. *Emerald Aero, LLC v. Kaplan*¸ 9 Cal.App.5th 1125, 215 Cal.Rptr.3d 5 (2017), is one such case. There, the arbitration defendant had pleaded guilty to a wire fraud charge in connection with raising investment funds. Plaintiffs in the arbitration were seeking compensatory damages arising out of that conduct. By the time of the arbitration hearing, defendant was awaiting sentencing and was unrepresented. The day before the arbitration was to occur (by telephone!) plaintiffs filed a trial brief seeking punitive damages for the first time. Defendant did not appear at the hearing; the arbitrator awarded $30.8 million without specifying any breakdown, but the parties agreed on appeal that "a substantial portion of the award consists of punitive damages." The arbitration rules under which the parties were operating (AAA) restrict remedies to those of which the parties had reasonable notice, which the rules state is a minimum of 14 days. The court found that e-mailing a trial brief less than 24 hours before the hearing "did not constitute notice calculated to apprise the opposing party of a new and substantially increased monetary claim, nor did it provide the opposing party with a fair opportunity to assert a challenge to the new punitive damage claim." The court also noted that the "arbitration process had other procedural shortcomings that also call into question

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the fairness of the damages award."

Arbitration—Vacatur—Failure to Disclose—Knowledge Requirement

Under the California Arbitration Act, a court must vacate an arbitration award if the arbitrator "failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware." CCP § 1286.(a)(6)(A). The decision in *ECC Capital Corporation v. Manatt, Phelps & Phillips, LLP*, 9 Cal.App.5th 885, 215 Cal.Rptr.3d 492 (2017), illustrates that statute's knowledge requirement. There, in an arbitration where Manatt was a party, the arbitrator failed to disclose his prior participation as a panelist in an "uncontested, documents only" arbitration under the Uniform Domain Name Dispute Resolution Policy where a Manatt lawyer represented one of the parties. When the ECC sought to disqualify the arbitrator on that basis, the arbitrator refused, stating that he had served on 450 to 500 UDRP arbitration panels and that he was "unaware that an attorney from [Manatt] had been listed as counsel" in one of them. The trial court thereafter confirmed the award, and the court of appeal affirmed. The court of appeal rejected ECC's argument that the arbitrator "should have been aware" of the previous proceeding involving Manatt. The court held that "Section 1286.2, subdivision (a)(6)(A), requires actual awareness, not inquiry or constructive awareness." The court further held that, in light of the nature of the UDRP proceedings, the arbitrator's practice of not including those proceedings in his review of matters to disclose was reasonable.

Attorneys—Malpractice—Comparative Fault

It seems counterintuitive to apply comparative fault to a client in case claiming attorney malpractice, but in the right case, courts will uphold a jury instruction to that effect. *Yale v. Bowne*, 9 Cal.App.5th 649, 215 Cal.Rptr.3d 266 (2017). Here, a plaintiff sued her estate planning lawyer for the amount she paid to settle issues in her marital dissolution case relating to whether certain property was her separate property or had been transmuted by documents the lawyer had prepared. The client argued that applying comparative fault "defies reason" because of the disparity in knowledge between a lay person and lawyer. The court rejected that argument in the particular circumstances of this case. It first noted that legal malpractice cases are a subset of negligence

cases covered by that field's general rules. In ruling that the court properly instructed the jury on comparative negligence principles, the court said, "[plaintiff] read the granting clauses of the deeds before she signed them, understood the meaning of the terms she read, and chose to remain silent. There were sufficient facts, given [plaintiff's] very recent familiarity with the issue, for us to conclude that no public policy reason makes [plaintiff's] own conduct immune from consideration by the jury."

Legal Malpractice—Statute of Limitations—Motion to Withdraw as Trigger

Here's the scenario: An attorney moves to withdraw from representing his client, informing the client and the court that another attorney was already handling posttrial motions and would handle any appeal from the adverse judgment. Later, the client sues the now-withdrawn attorney; the lawsuit is filed more than one year after the motion to withdraw was filed, but less than one year after it was granted. Was the malpractice suit timely filed within the one-year limitations period? No. *Flake v. Neumiller & Beardslee*, 9 Cal.App.5th 223, 215 Cal.Rptr.3d 277 (2017). In *Flake*, the court of appeal affirmed a trial court's decision granting summary judgment to the attorney "on the ground that the client could not have had an objectively reasonable expectation that former counsel was continuing to represent him after the motion to withdraw had been served." The court held that after the attorney filed his motion to withdraw, "the client was on notice that former counsel was no longer working for him."

Litigation—Attorney-Client Privilege—Waiver by Communications with Third-Party Consultant

The decision in *Behunin v. Superior Court*, 9 Cal.App.5th 833, 215 Cal.Rptr.3d 475 (2017), is a good reminder that communications between an attorney, client, and a third-party consultant are only protected by attorney-client privilege if the communication is reasonably necessary to accomplish the purpose for which the client consulted the attorney. There, Behunin sued Charles and Michael Schwab over a failed real estate deal. To induce the Schwabs to settle the case, Behunin's attorney (Steiner & Libo) hired a public relations consultant (Levick Strategic Communications) to create a social media campaign linking the Schwabs to corruption and human rights violations in Indonesia. The Schwabs later sued Behunin for libel, among other things, and sought discovery of

communications among Behunin, Steiner, and Levick. The trial court granted the discovery motion, and in a written opinion on the merits, the court of appeal denied Behunin's writ petition. The court held that "although in some circumstances the attorney-client privilege may extend to communications with a public relations consultant, it did not do so in this case because Behunin failed to prove the disclosure of the communications to Levick was reasonably necessary for Steiner's representation of Behunin in his lawsuit against the Schwabs."

Litigation—Class Actions—"Pick Off" Exception to Mootness

When a class action defendant offers full relief to the representative plaintiff in an attempt to moot the plaintiff's claims, courts have held the plaintiff may continue to prosecute the class action lawsuit despite receiving full remedy for his individual claims. This is known as the "pick off" exception to the mootness doctrine because it prohibits defendants from picking off representative plaintiffs one-by-one to avoid class claims. In *Schoshinski v. City of Los Angeles*, 9 Cal.App.5th 780, 215 Cal.Rptr.3d 211 (2017), however, the court held that the pick off exception only applies where the defendant *voluntarily* seeks to provide relief to the representative plaintiff. There, the City settled a class action lawsuit over an allegedly illegal trash disposal fee. The settlement required the City to monitor for any overcharges and fully reimburse any person who is overcharged. In a later suit, representative plaintiffs—who had been paid under the previous settlement before the lawsuit was filed—sought to maintain a similar class action, and argued that the pick off doctrine allowed them to continue representing a class even though their individual claims were moot. The court of appeal disagreed, holding that the "critical issues are whether the defendant's actions are voluntary, rather than compulsory, and whether the relief provided is to the plaintiff alone or to the entire class the plaintiff seeks to represent." Because the City was legally obligated by the prior settlement to pay plaintiffs and the class that plaintiffs sought to represent, the pick off doctrine did not apply, and the trial court properly granted summary judgment to the City.