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# NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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## S T A T E

### Appeal—Appealability—CCP § 1008

An order denying a renewed motion to compel arbitration is not appealable. *Chango Coffee, Inc. v. Applied Underwriters*, 11 Cal.App.5th 1247, 217 Cal.Rptr.3d 924 (2017). Here, the defendant filed a motion to compel arbitration, which the trial court denied. Later, after some discovery had occurred, the defendant filed a renewed motion to compel arbitration under CCP § 1008(b), asserting that information learned in discovery showed that the dispute was arbitrable. The trial court denied the motion and defendant appealed. The court of appeal dismissed the appeal, relying on an earlier case holding that an order denying a renewed motion under § 1008(b) is not appealable. In reaching this conclusion, the court of appeal rejected defendant's argument that a legislative change in 2011 adding subdivision (g) to § 1008, which dealt with appealability of reconsideration motions under subdivision (a), undermined the earlier case. To the contrary, the court said, since the amendment did not address appealability under subdivision (b), that suggested the legislature did not intend to affect the holding of the earlier case which had been decided under subdivision (b).

### Appeal—Forfeiture—Liquidated Damages

A court of appeal has discretion to consider an argument not made in the trial court unless “the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial.” In *Krechuniak v. Noorzoy*,

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11 Cal.App.5th 713, 217 Cal.Rptr.3d 740 (2013), the parties settled their dispute on terms that required defendant to pay \$600,000 in installments, but provided that if defendant defaulted in payment, plaintiff could enter a stipulated judgment for \$850,000. After defendant defaulted, plaintiff moved for entry of judgment to enforce the settlement. The trial court enforced the settlement and entered judgment. On appeal, defendant argued that the \$250,000 “kicker” was an unenforceable liquidated damages clause, an argument he had not made to the trial court. The defendant nevertheless argued the court of appeal should decide the issue, asserting that the clause’s illegality (or not) was an issue of law and that there were no disputed facts. The court of appeal disagreed. It said that defendant’s burden to show a liquidated damages provision was unenforceable required him to demonstrate that it was “unreasonable under the circumstances existing at the time the contract was made,” citing Civil Code § 1671(b). Since no declarations had been submitted to the trial court concerning the negotiations for the liquidated damages clause, the court held that defendant was “precluded from arguing on appeal that the settlement memo includes an invalid penalty provision.”

#### Arbitration—Invocation by Nonsignatory

In certain circumstances a nonsignatory to an agreement containing an arbitration clause may compel arbitration. That was the case in *Garcia v. Pexco, LLC*, 11 Cal.App.4th 782, 217 Cal.Rptr.3d 793 (2017). There, plaintiff, Garcia, entered into an agreement with a temporary staffing company, Real Time. The agreement required Garcia arbitrate “any dispute” that Real Time and Garcia could not resolve informally. Real Time assigned Garcia to work for defendant Pexco. Later, Garcia sued Real Time and Pexco for Labor Code violations and unfair business practices. The court of appeal affirmed the trial court’s order granting Pexco’s motion to compel arbitration on two grounds: (i) equitable estoppel and (ii) the agency exception. As to equitable estoppel, the court held that a nonsignatory defendant may invoke an arbitration clause when the causes of action against the nonsignatory are “intimately founded in and intertwined with the contract obligations”—a circumstance the court found here. As to

the agency exception, that exception allows a nonsignatory to enforce an agreement when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement. The court found that Garcia's agency allegations linking Real Time and Pexco were not mere boilerplate that could be ignored for the purpose of this exception.

**Arbitration—Enforceability of  
Waiver of Statutory Remedies—  
FAA Preemption**

In *McGill v. Citibank, N.A.*, 2 Cal.5th 945, 216 Cal.Rptr.3d 627 (2017), the Supreme Court held invalid and unenforceable as against public policy an arbitration agreement that waived the right to seek the public injunctive relief available under certain consumer statutes. The court held that because waiver “would seriously compromise the public purposes of the statutes were intended to serve,” it was “unenforceable under California law.” The court further held that the Federal Arbitration Act did not preempt California law prohibiting waiver of those statutory remedies. The principle that renders a contract unenforceable where it contravenes public policy is a generally applicable contract defense, not one aimed at arbitration agreements in particular. “The FAA does not require enforcement of such a provision, in derogation of this generally applicable contract defense, merely because the provision has been inserted into an arbitration agreement.”

**Litigation—Attorneys' Fees—  
Prevailing Party**

When a defendant prevails on a motion to dismiss by successfully enforcing a forum selection clause in a contract-related action, is the defendant the prevailing party entitled to attorneys' fees under Civil Code section 1717? In *DisputeSuite, LLC v. Scoreinc.com*, 2 Cal.5th 968, 216 Cal.Rptr.3d 109 (2017), the Supreme Court held that the trial court did not abuse its discretion in denying fees under such circumstances. The court emphasized the “general principle” that “fees under section 1717 are awarded to the party who prevailed on the contract overall, not to a party who prevailed only at an interim procedural step.” That general principle applied equally where the defendant's procedural victory ended the litigation in California, at least where the plaintiff had already refiled the case in another jurisdiction. The court left open the possibility that a trial court would not abuse its discretion in awarding attorneys' fees where it was

only “speculative” whether plaintiff would refile.

Litigation—Forum Non-  
Conveniens

In an action brought by a nonresident plaintiff, must the defendant show that California would be a “seriously inconvenient” forum in order to prevail on a motion to dismiss or stay based on forum non conveniens? The court in *Fox Factory, Inc. v. Superior Court*, 11 Cal.App.5th 197, 217 Cal.Rptr.3d 366 (2017), answered “no.” The court held that “the forum choice of a *foreign* plaintiff is not entitled to a presumption of convenience” and “applying the ‘seriously inconvenient’ standard to plaintiff’s lawsuit would amount to according his forum preference ‘great weight’ . . . .” Finally, the court went a step further in stating that it would not apply the “seriously inconvenient” standard “[e]ven if we were reviewing a *dismissal* order in a suit brought by a *California* resident,” but the court acknowledged this is odds with some previous decisions.

Tort—Conversion—Right to  
Possession Sufficient

The right to possession is a proper basis for a conversion claim, even when the plaintiff did not have actual possession of the allegedly converted property. *Applied Medical Corporation v. Thomas*, 10 Cal.App.5th 927, 217 Cal.Rptr.3d 169 (2017). Defendant Thomas was a former board member of plaintiff Allied Medical. When Thomas was removed from the board, Allied exercised its right to repurchase shares of stock issued to Thomas during his tenure on the board. Thomas disputed the asserted repurchase price, refused to execute a stock assignment form, and refused to cash Allied’s check to purchase the stock. Allied then sued for conversion, among other things, but the trial court granted summary judgment against Allied on that cause of action. The trial court “concluded Applied’s conversion claim failed because Thomas had possession and title to the shares at the time of Applied’s exercise of its repurchase rights and, therefore, Applied could not show it owned or actually possessed the shares.” The court of appeal reversed, holding that “a plaintiff can base a cause of action for conversion on either ownership *or* right of possession.” The court recognized that a mere contractual right to *payment* will not suffice for a conversion claim, but held that right to *possession* of shares is sufficient.