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Newcases of BUSINESS LITIGATION INTEREST

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STATE

Appeal—Appealability—Finality of Administrative Mandate Proceedings

Generally, a losing party may only appeal from a final judgment that definitively resolves the dispute between the litigating parties. In administrative mandate proceedings, however, the trial court may grant a writ of mandate that remands the matter for further proceedings before an administrative body. Is such an order appealable even though it does not fully and finally resolve the parties' dispute? In *Dhillon v. John Muir Health*, 2 Cal.5th 1109, 218 Cal.Rptr.3d 119 (2017), the supreme court refused to answer "the broad question" whether such remand orders are "always immediately appealable." But the court held that the order before it was appealable—reversing the court of appeal—because the order "mark[s] the end of the writ proceeding in the trial court." The court also noted that given the peculiar administrative proceedings in the case, the trial court's order would evade review if there were no immediate right to appeal. Even after *Dhillon* it appears to remain an open question whether an order that terminated the writ proceedings in the trial court would be appealable even if the administrative procedures allowed for further review after remand.

Appeal—Appealability—Postjudgment Order Denying CCP § 663 Motion

Clearing up some confusion in its own cases, the California Supreme Court reaffirmed that a 1911 case, *Bond v. United Railroads*, 159 Cal. 270 (1911), has withstood the test time and that its holding an order

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denying a motion to vacate a judgment under section 663 of the Code of Civil Procedure is appealable remains good law. *Ryan v. Rosenfeld*, 3 Cal.5th 124, 218 Cal.Rptr.3d 654 (2017). The confusion arose from a 1978 case, *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865 (1978), which, in cryptic and brief language unsupported by authority, the court dismissed an appeal to the extent it had been taken from the denial of a section 663 motion. Overruling *Clemmer* and disapproving a number of cases that had relied on it, the court held that "a statutory appeal from a ruling denying a section 663 motion is indeed distinct from an appeal of a trial court judgment and is permissible without regard to whether the issues raised in the appeal from the denial of the section 663 motion overlap with issues that were or could have been raised in an appeal of the judgment."

Appeal—Notice of Appeal Broadly Construed

The court of appeal will liberally construe a notice of appeal, even where the notice lists the wrong date of the appealable order, so long as the responding party is not misled by the error. In *City of Morgan Hill v. Bushey*, 12 Cal.App.5th 34, 218 Cal.Rptr.3d 276 (2017), the appellant appealed from a March 30, 2016, order, even though the appealable order was actually filed March 29. The court refused to dismiss the appeal, however, holding that "[s]ince the superior court issued no order in this case on March 30, respondents could not possibly have been misled or prejudiced by this slight flaw in the notice of appeal." Relying on this liberal rule of construction is perilous, however, and counsel should always be careful to ensure that a notice of appeal, which is a jurisdictional document, is accurate.

Arbitration—Authority to Determine Section 998 Costs

Under Code of Civil Procedure section 998, a defendant is entitled to costs where the plaintiff turns down an offer of compromise and then fails to obtain a more favorable judgment or award. Section 998 explicitly applies to arbitrations, and courts have held that the arbitrator should determine any award of arbitration costs. But this raises a difficult issue of timing. Section 998(b)(2) precludes any party from putting on evidence of a rejected offer during the arbitration, and an arbitrator obviously cannot compare the favorability of the arbitration award against a compromise offer until after

the award is made. Yet, once a final arbitration award issued, the arbitrator generally lacks jurisdiction to make a supplemental award. So, when should a defendant present a request for section 998 costs? In *Heimlich v. Shivji*, 12 Cal.App.5th 152, 218 Cal.Rptr.3d 576 (2017), the court held that a section 998 request "should be deferred until after the arbitration award is made." Once such a request has been made, an arbitrator "is empowered to recharacterize the existing award as interim, interlocutory, or partial and proceed to resolve the section 998 request by a subsequent award." Because the arbitrator in *Heimlich* refused to hear any evidence regarding the section 998 offer and refused to reach the merits of the section 998 request, the court of appeal reversed the trial court's order confirming the arbitration award. The court remanded the matter to the trial court, and held that if the parties could not agree to resubmit the matter to the original arbitrator, then the trial court would be required to decide the 998 issue itself.

Attorneys' Fees—Damages vs. Costs—Jury Trial

Civil Code 1717 provides that where there is an attorneys' fee provision in a contract the prevailing party, whether specified in the contract or not, "shall be entitled to reasonable attorney's fees in addition to other costs [which] shall be fixed by the court, and shall be an element of the costs of suit." *Monster, LLC v. Superior Court*, 12 Cal.App.5th 1214, 219 Cal.Rptr.3d 814 (2017), however, is a reminder that where a party seeks attorney's fees as an element of damages and not as prevailing party costs, the issue is not determined by motion, but instead by a trier-of-fact at trial—here, a jury. The court said that to interpret section 1717 as withdrawing the issue of attorneys' fees as damages from a jury would "raise serious constitutional problems," because a statute "cannot override a constitutional requirement."

Litigation—Malicious Prosecution—Interim Adverse Judgment Rule

A party who brings a malicious prosecution action must show that the previous action was terminated in the now-plaintiff's favor, brought without probable cause, and with malice. The so-called adverse interim judgment rule deems that certain events in earlier case conclusively show that the malicious prosecution plaintiff cannot show the "without probable cause" element. *Hart v. Darwish*,

12 Cal.App.5th 218, 218 Cal.Rptr.3d 757 (2017) provides a clear explanation of this doctrine and concludes that where the court in the first action has denies a defendant's motion for judgment under CCP 631.8, the denial precludes a showing of lack of probable cause in the malicious prosecution suit, even if the court later ruled in defendant's favor in the underlying case.