September 2017

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STATE

Arbitration—Procedural Rules Governing Enforcement of Arbitration Agreements

Code of Civil Procedure section 1281.2(c) allows a trial court to refuse to enforce an otherwise valid arbitration agreement if a party to that arbitration agreement "is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction . . . and there is a possibility of conflicting rulings on the common issue of law or fact." Does this section apply where a contract involves interstate commerce and is, therefore, governed by the Federal Arbitration Act? In *Los Angeles Unified School Dist. v. Safety Nat. Cas. Corp.*, 13 Cal.App.5th 471, 220 Cal.Rptr.3d 546 (2017), the court held that section 1281.2(c) was procedural and, therefore, applied in California state proceedings absent a contractual provision stating the FAA's procedural provisions must govern. "[W]here, as here, the parties do not expressly designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law, California procedures necessarily apply." (Cleaned up).

Litigation—Slander of Title—Litigation Privilege

In *Schep v. Capital One, N.A.*, 12 Cal.App.5th 1331, 220 Cal.Rptr.3d 408 (2017), the court held that "a trustee's acts in recording a notice of default, a notice of sale, and a trustee's deed upon sale in the court of a nonjudicial foreclosure [are] privileged under Civil Code section 47," the litigation privilege. Thus, "a plaintiff does not state a

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cause of action for slander of title based on the recording of those documents." Applying that rule, the court affirmed a trial court order sustaining demurrer to a slander of title claim against the trustee.

Litigation—Work Product Privilege

California's work-product doctrine protects any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories. Code Civ. Proc § 2018.030. But who holds this privilege, the attorney who created the writing or the law firm that employs the attorney? In *Tucker Ellis LLP v. Superior Court*, 12 Cal.App.5th 1233, 220 Cal.Rptr.3d 382 (2017), the court of appeal held that the law firm holds the privilege. There, a former partner of Tucker Ellis sued the firm for disclosing documents that the former partner claimed were his work product related to conversations he had with an asbestos expert, which disclosures resulted in his termination from his new law firm and an inability to find new employment in his field. The trial court granted summary adjudication to the former partner, holding that the law firm had a legal duty to "take appropriate steps to ensure that work product created by [the partner] . . . was not disclosed to others without [his] permission." The court of appeal, however, issued a writ of mandate, and held that the law firm owned the privilege, not the individual attorney. The court noted that the expert in question was retained by the law firm, not the individual attorney, and the former partner created those documents while "acting in his capacity as an employee of Tucker Ellis." Finally, the court reasoned that its holding would "avoid undue intrusion into the equally sacrosanct duty of a law firm to zealously represent the interests of its clients with undivided loyalty."

Torts—Defamation—Internet—Compelling Identity of Anonymous Posters

Defamation claims filed against an anonymous speaker present "a conflict between a plaintiff's right to employ the judicial process to discover the identity of an allegedly libelous speaker and the speaker's First Amendment right to remain anonymous." Addressing this conflict, the court in *ZL Technologies, Inc. v. Does 1-7*, 13 Cal.App.5th 603 (2017), held that a plaintiff must make a prima facie showing of the elements of libel—including falsity—to obtain compulsory disclosure of a defendant's identity. The court recognized the need to "filter[] out those cases that are being filed primarily—or solely—as

an instrumentality for identifying an anonymous speaker," and further held that "[s]ome minimal precautions should be undertaken to protect the right of a speaker to put ideas into the public marketplace without fear of harassment or retaliation." Requiring defamation plaintiffs to make a prima facie showing of defamation met those needs without putting a heavy or unfamiliar burden on them.

F E D E R A L

Arbitration—Nonsignatories—Mandamus

The Ninth Circuit rarely issues writs of mandamus, so it's notable when it does. In *Henson v. United States District Court for the Northern District of California*, ___ F.3d ___, 2017 WL 3862458 (9th Cir. 2017), the court issued a writ of mandamus to vacate an order compelling arbitration sought by a nonsignatory to an arbitration agreement. The court discussed the five *Bauman* factors (*Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977)) a court weighs in deciding whether to grant mandamus, held that three were present, and issued the writ. The factors are: (i) no other adequate remedy; (ii) damage or prejudice not correctible on appeal; (iii) whether the order is clearly erroneous; (iv) whether the district court's order makes an oft-repeated error; and (v) whether the order raises new and important problems or issues of first impression. The Ninth Circuit found that here, that the order was not appealable, so mandamus was the only possible remedy; the prejudice to the plaintiff would be not correctible on appeal since holding an arbitration would likely preclude the plaintiff from proceeding as a class representative; the district court wrongly allowed the nonsignatory to invoke the contract's choice of law provision, and under the law of the forum state, which does apply, the nonsignatory would not be able to invoke equitable estoppel to compel arbitration. The court found that fourth and fifth factors were not present, but that the presence of the first three was enough to issue the writ.

Litigation—Settlement—Rule 68 Settlement Offers

Miller v. City of Portland, ___ F.3d ___, 2017 WL 3597012 (9th Cir. 2017), is a good reminder to pay attention when writing a statutory or rule-based settlement offer. Here, plaintiff sued the City of Portland in a section 1983 claim. In actions brought under that section, the plaintiff may be entitled to an attorneys' fee award under 28 U.S.C. § 1988. Under section 1988, "a plaintiff who receives a nominal damage award" is not "necessarily entitled to an award of fees." The City Portland made a settlement offer under Rule 68, offering to have judgment taken against it in the amount of $1,000, plus costs and "including reasonable attorneys' fees to be determined by the court." Applying a section 1988 analysis, the district court refused to award fees. On appeal the Ninth Circuit reversed. It stated that it had repeatedly emphasized that "Rule 68 offers of judgment are analyzed in the same manner as any contract," and not analyzed under section 1988 principles. Since the offer here authorized plaintiff to recover reasonable attorneys' fees, the Ninth Circuit remanded to have the trial court do just that.