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# NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

Richard A. Derevan\*

Todd E. Lundell\*

Jenny Hua

Snell & Wilmer L.L.P.

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## S T A T E

### Arbitration—Reviewability and Appealability—Partial Final Award

A judgment confirming an arbitration award is not appealable where the award itself does not finally determine the parties' rights. *Kaiser Found. Health Plan, Inc. v. Superior Court*, 13 Cal.App.5th 1125, 221 Cal.Rptr.3d 278 (2017). There, an arbitrator issued a "Partial Final Award" denying defendant's motion for summary adjudication, and the trial court entered a judgment confirming that award. Defendant appealed, and both parties contended that the judgment was appealable, but the court of appeal held to the contrary because the judgment did not finally determine the parties' rights. The court treated the appeal as a petition for writ of mandate for the limited purpose of directing the trial court to vacate its judgment, holding the trial court also lacked jurisdiction to confirm the award because it did not resolve all questions "necessary in order to determine the controversy."

### Business Organizations— Limited Liability Companies— Reverse Veil Piercing

In *Postal Instant Press, Inc. v. Kaswa Corp.*, 162 Cal.App.4th 1510, 1512-13, 77 Cal.Rptr.3d 96 (2008), the court held "a third party creditor may not pierce the corporate veil to reach corporate assets to satisfy a shareholder's personal liability." The court reasoned this "reverse veil piercing" could harm innocent shareholders and other corporate creditors. In *Curci Investments, LLC v. Baldwin*, 14 Cal.App.5th 214, 221 Cal.Rptr.3d 847

(2017), however, the court held reverse veil piercing could be proper to reach the assets of a closely-held LLC. In *Curci*, the court reasoned the concerns in *Postal Instant Press* were not present because the judgment debtor owned 99% of the LLC and his wife owned the other 1%. There was also no concern that a judgment creditor would bypass the normal collection procedures because, unlike the creditor of a corporation, the creditor of a closely-held LLC doesn't have the option to simply acquire shares in the corporation.

Ethics—Successive  
Representation in Derivative  
Action—Duty of Confidentiality

Where plaintiff brings a derivative suit on behalf of a closely-held company against the insiders who run the company, may an attorney who had previously represented the company regarding issues raised in the derivative suit represent the insider-defendants? Yes, so long as the attorney did not obtain confidential information in its previous representation that was not known to the insiders. *Beachcomber Management Crystal Cove, LLC v. Superior Court*, 13 Cal.App.5th 1105, 220 Cal.Rptr.3d 872 (2017). In the context of a derivative suit against insiders of a closely-held company, “the attorney’s representation of the insiders does not threaten the attorney’s duty of confidentiality to the company because the insiders already are privy to all of the company’s confidential information because the insiders are the source of that information.” Thus, in determining whether the attorney may represent the insiders, “the critical inquiry is whether the insiders possessed or had access to the same confidential information as the attorney who previously represented the company.”

Litigation—Appeals—Brief  
Requirements

The decision in *Ewald v. Nationstar Mortgage, LLC*, 13 Cal.App.5th 947, 220 Cal.Rptr.3d 751 (2017) illustrates that defective briefing by an appellant may lead to affirmance without even reaching the merits. In this case, the court affirmed a judgment based on procedural defects in appellant’s brief. Appellant, who was represented by counsel, failed “to articulate the standard of review on appeal,” which is “in and of itself a potentially fatal omission.” Appellant also “fail[ed] to provide any legal authority to support her arguments,” citing only a single case without explaining the holding or why the case was relevant to the appeal. Because of these

briefing failures, the court affirmed the judgment.

**Litigation—Attorney Fees—  
Affirmative Defense Not An  
“Action” Or “Proceeding”**

Does the assertion of a contract as an affirmative defense constitute an “action” or “proceeding” for purposes of contractual attorneys’ fees? In *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, 3 Cal.5th 744, 220 Cal.Rptr.3d 650 (2017), the Supreme Court held no. There, plaintiff sued for specific performance of an agreement to purchase real estate. Defendants asserted an affirmative defense of novation, claiming that the purchase agreement was superseded by a later option agreement. The trial court agreed with defendants, but denied defendants’ request for attorneys’ fees under the option agreement, which authorized fees to the prevailing party if a “legal action” or “proceeding” is “brought” for the enforcement of the agreement or because of an alleged dispute regarding the agreement. The Supreme Court ultimately agreed with the trial court’s conclusion that asserting the option contract as an affirmative defense did not constitute an “action” or “proceeding.” The court held that “while an affirmative defense is a real part of any action, it does not, in and of itself, constitute an ‘action’ for purposes of recovering attorney fees.” (Cleaned up.) Moreover, affirmative defenses “are generally pleaded, asserted, or raised, but typically not ‘brought’ by a party.” The court further held, however, that defendants were entitled to attorneys’ fees because the plaintiff’s action was brought as a result of an alleged dispute regarding the option contract.

**Litigation—Malicious  
Prosecution—Interim Adverse  
Judgment Rule**

A malicious prosecution plaintiff must show, among other things, that defendant brought or continued a previous action without probable cause. Under the interim adverse judgment rule, a plaintiff’s success on a motion for summary judgment ordinarily establishes the existence of probable cause as a matter of law. In *Parrish v. Latham & Watkins*, 3 Cal.5th 767, 400 P.3d 1 (2017), the Supreme Court held the interim adverse judgment rule applies even when a trial court initially denies summary judgment, but later finds the suit was brought in “bad faith.” The summary judgment ruling established that plaintiff’s position had arguable merit irrespective any later finding. Unless an interim decision on the merits is obtained by fraud or perjury, that decision precludes a

Litigation—Summary  
Judgment—Requirements of  
Separate Statement

malicious prosecution action as to those claims.

In *Rush v. White Corporation*, 13 Cal.App.5th 1086, 221 Cal.Rptr.3d 240 (2017), the court of appeal reaffirmed the trial court’s authority to grant summary judgment where plaintiff’s separate statement of facts is defective. There, in response to a motion for summary judgment, plaintiff filed a separate statement that was 155 pages long, and “improperly cit[ed] to numerous undisputed material facts for specific arguments in the opposition, which undisputed material facts were then supported by multiple paragraphs of multiple declarations, at times by every paragraph of nearly every declaration on file.” The trial court granted summary judgment after plaintiff failed to comply with the rules for the separate statement. The court of appeal affirmed, noting that the trial court had met its obligation to give plaintiff opportunity to correct the defect, after which the trial court had discretion to grant the motion.

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F E D E R A L

Litigation—Specific  
Jurisdiction—Not a “Sliding  
Scale”

The California Supreme Court previously adopted a “sliding scale approach to specific jurisdiction,” under which “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.” The United States Supreme Court, however, disagreed with that approach and reversed. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773 (2017). The court explained the “danger” in relaxing “the requisite connection between the forum and the specific claims” if the defendant “has extensive forum contacts that are unrelated to those claims,” calling California’s approach “a loose and spurious form of general jurisdiction.” The court reaffirmed that to assert specific jurisdiction, nonresident plaintiffs must show an adequate link between the defendant’s forum contacts and the specific claims at issue, regardless of the strength of defendant’s forum contacts that are unrelated to the claims.