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Newcases of Business Litigation Interest

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STATE

Arbitration—Review—Scope of Proceedings

For a case that discusses what language in an arbitration agreement suffices to require the arbitrator to follow specific legal standards and permits judicial review of an arbitration award similar to that accorded a judgment, see *Harshad & Nasir Corp. v. Global Sign Systems, Inc.*, 14 Cal.App.5th, 222 Cal.Rptr.3d 282 (2017). The court also held that an agreement made on the eve of trial to arbitrate "the amount of money FFC owes to Global for services performed"—which was the focus of the complaint—did not encompass claims for lost profits based on future services that had not been performed at the time of the breach. So this is a good case to review for jurisdictional issues arising out an arbitration.

Attorneys—Disqualification—Duties to Non-clients

The court of appeal's decision in *Lynn v. George*, 15 Cal.App.5th 630, 223 Cal.Rptr.3d 407 (2017) is a good reminder that an attorney may be subject to disqualification when it owes a duty to a nonclient to preserve confidential information. If an attorney is found to have a duty of confidentiality to a nonclient arising out of past representation, courts apply the same substantial relationship test that they do for the successive representation of clients. In *Lynn*, however, the court of appeal reversed a trial court's disqualification order, finding no substantial evidence that the attorney for defendants had formed a confidential nonclient

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relationship with plaintiffs, one of whom had acted as a broker for defendant in a proposed sale transaction. The court also found that any information the plaintiffs had disclosed to the attorney was not confidential because it was shared with other persons.

Finally, the court of appeal's decision has an interesting discussion regarding when the court will infer implied findings in support of a judgment. In disqualifying defendant's attorney, the trial court found that the attorney had formed a "potential" attorney-client relationship with an "alleged partnership" that included both plaintiffs and defendants. The court of appeal held that such a "potential" relationship was not enough to justify disqualification, and refused to infer that the trial court made an implied finding that a partnership existed "because that would be inconsistent with the court's express decision not to make such a finding."

Litigation—Motion Practice—Incorporation by Reference

In *Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 222 Cal.Rptr.3d 850, the court of appeal held that it was error for the trial court to refuse to consider previously-filed materials that were incorporated by reference into a motion for attorney's fees. Noting the well-established rule that documents incorporated by reference in summary judgment papers are properly before the court, the court of appeal held that "[w]e see no reason why incorporation by reference would be any less appropriate for a fee motion." Thus, a litigant may incorporate previously filed documents without re-filing them with its motion absent a rule precluding such incorporation. Nevertheless, "where practicable," litigants should refile previously filed documents with the motion.

Torts—Negligence—But-For Causation

Under California law, a defendant is liable for negligence where the defendant's conduct was a "substantial factor" in causing the plaintiff's harm. CACI 430, the "substantial factor" instruction, includes a bracketed sentence that reads: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." The instruction's use notes state, however, that this "last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, *each of which would have been sufficient by itself to bring about the same harm*."

(Emphasis added). But what if there are multiple forces that would not independently be sufficient to bring about the harm, but in some combination would be? In other words, what if none of the conduct of defendants A, B, or C would have been sufficient individually to cause the harm, but any combination of A + B, B + C, or C + A would have been sufficient? Is defendant A entitled to an instruction that includes the bracketed sentence? In *Major v. R.J. Reynolds Tobacco Company*, 14 Cal.App.5th 1179, 222 Cal.Rptr.3d 563 (2017), the court answered no. The court explained that "[w]ithout this gloss on the concurrent independent cause rule, each of three equally liable tortfeasors can escape liability on the basis that they are neither but-for causes nor concurrent independent causes—a wholly unjust result. . . . We therefore conclude that multiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm."

F E D E R A L

Appeal—Notice of Appeal—Extension of Time to File—FRAP 4(a)(5)(C)

FRAP 4(a)(5)(C) provides that no extension of time to file a notice of appeal "may exceed 30 days [from the normal date to file] or 14 days from the date of the order granting the [extension] motion . . . whichever is later." In *Hamer v. Neighborhood Housing Services of Chicago*, ___ U.S. ___, 2017 WL 5160782 (2017), the district court granted an extension motion that gave more time than the rule allowed. Nobody noticed, until the court of appeals on its own motion questioned whether the appeal was timely. The court of appeals dismissed the appeal as untimely, holding that the time limit in the rule was jurisdictional. The U.S. Supreme Court reversed. Holding that only Congress may impose jurisdictional deadlines, a unanimous court held the deadline imposed by the rule was not jurisdictional and remanded to the court of appeals to consider (i) whether the appellee's failure to object forfeited any timeliness objection; (ii) whether having failed to appeal from the time extension order, the appellees could seek review of that order; and

(iii) whether equitable considerations "may occasion an exception to Rule 4(a)(5)(C)'s time constraint."

Appeal—Notice of Appeal—Extension of Time to File—Fed. R. Civ. P. 23(f)

Coincidentally, just two months before the U.S. Supreme Court decision in *Hamer* (just above) the Ninth Circuit held that a provision in Fed. R. Civ. P. 23(f) requiring a party to file a petition for permission to appeal from an order granting or denying class certification is also not jurisdictional. That rule requires such a petition to be filed "within 14 days after the order is entered." In *Lambert v. Nutraceutical Corp.* 870 F.3d 1170 (9th Cir. 2017) the plaintiff sought reconsideration first, and then, once reconsideration was denied, filed the petition within 14 days of the reconsideration order, not the original denial. Faced with the timeliness issue, the Ninth Circuit held that the rule was not jurisdictional and could be tolled by equitable considerations and deemed the petition timely. The Ninth Circuit held that the rule was a procedural claim processing rule and not a jurisdictional rule. This decision is consistent with rulings from other circuits.