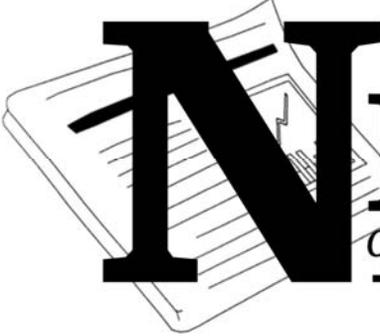


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NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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S T A T E

Appeal—Probate—Finality Issues

Following a court trial, the trial court issued an order removing an individual as personal representative of the estate and stating in the order that a written decision would follow. Given the statement of decision process, the statement of decision was not issued for a year. The disqualified personal representative then appealed and was met with a motion to dismiss claiming that the appeal was untimely because the personal representative should have appealed from the earlier order, not the statement of decision. The court of appeal denied the motion. It acknowledged that ordinarily statements of decision are not appealable, but concluded that because the earlier order referred to the forthcoming statement of decision, that order was not final and appealable until the statement of decision issued. *Estate of Reed*, 16 Cal.App.5th 1122, 225 Cal.Rptr.3d 27 (2017).

Appeal—Sanctions for Frivolous Appeal Taken for Improper Motive

When the court of appeal publishes an opinion sanctioning counsel for “sharp practices” it is worth paying attention. In *Diaz v. Professional Community Management, Inc.*, 16 Cal.App.5th 1190, 225 Cal.Rptr.3d 39 (2017), PCM filed an ex parte application to shorten time to hear a motion to compel arbitration 11 days before trial, which the trial court denied. PCM then filed a proposed order stating not only that the court denied

the ex parte application, but also that it denied PCM's motion to compel on the merits. The trial court signed the proposed order, and PCM appealed, which stayed the underlying trial. The court of appeal was not impressed. The court held PCM "invited the trial court's alleged error when it proposed the court issue the very ruling it now challenges on appeal." PCM and its counsel also "acted in bad faith, generating an appealable order they knew the trial court had not intended to issue at the ex parte hearing." The court thus sanctioned PCM and its attorneys for filing a frivolous appeal with the improper motive of delaying trial. Sanctions included \$8,500 payable to the clerk of the court, opposing counsel's fees for defending the appeal, and "the reasonable value of counsel's services in preparing for the aborted trial, to the extent preparation for trial must necessarily be repeated."

**Arbitration—Right to Court
Determination of Arbitrability—
Grounds for Partial Vacatur of
Award**

In the epilogue to Sargon Enterprises, Inc.'s lawsuit against the University of Southern California, Sargon sued its attorneys for malpractice. The trial court compelled arbitration, and the parties arbitrated both the malpractice claim and the attorneys' claim that Sargon's lawsuit breached the arbitration agreement. The arbitrator rejected Sargon's malpractice claim, held that Sargon breached the arbitration agreement by filing a court action, and ordered Sargon to pay \$200,000 in damages. The trial court confirmed the award, but the court of appeal reversed. *Sargon Enterprises, Inc. v. Browne George Ross LLP*, 15 Cal.App.5th 749, 223 Cal.Rptr.3d 588 (2017). The court held the arbitrator's decision on breach of the arbitration agreement violated Sargon's right under the California Arbitration Act to have a court determine arbitrability, and the arbitrator erred in finding the parties' agreement promised to forgo litigation. The court did not, however, vacate the award in its entirety. Rather, the court held that it could strike the damages for breach of contract without affecting the merits of the award properly adjudicating the malpractice claim.

**Attorneys—Disqualification—
Stay Pending Appeal**

Answering a question of first impression, the court of appeal has held that an order disqualifying counsel is automatically stayed pending appeal of the order, at least when the order can be construed to be a mandatory injunction. *URS Corp. v. Atkinson/Walsh Joint Venture*, 15

Cal.App.5th 872, 223 Cal.Rptr.3d 674. In resolving this question, the court relied heavily on a 1955 California Supreme Court case making such orders appealable in the first instance. The court noted that orders declining to disqualify counsel have no such automatic stay effect. The court then turned to the question whether besides staying the disqualification order, other trial court proceedings were automatically stayed as well. The court held that not all trial court proceedings were stayed pending appeal of the disqualification order, but only those proceedings relating to issues pertaining to the alleged disqualification—here alleged improper use of confidential documents. Issues pertaining to the underlying construction dispute—unrelated to the confidential documents—were not stayed. Hence the upshot is that counsel found to be disqualified are able to participate in the underlying case while the appeal is pending. The court of appeal also discussed considerations the parties and the trial court may wish to take into account in thinking about *discretionary* stays pending appeal, making this case a must-read for any party on the moving or receiving end of a motion to disqualify counsel.

Attorneys' Fees—Prevailing Party—Interim Victory

City of West Hollywood v. Kihagi, 16 Cal.App.5th 739, 224 Cal.Rptr.3d 577 (2017) is another example of the rule that an interim victory does not make a litigant a prevailing party for attorneys' fees purposes, but that prevailing status is determined at the conclusion of the case. Here, defendant had successfully moved to vacate a judgment based on improper service of a motion to enforce a settlement agreement and sought fees for winning that motion, but that wasn't the end of the case. The city refiled its motion to enforce the settlement agreement and ultimately prevailed in part. The trial court denied the fee motion. In these circumstances, the court of appeal said, the defendant was not a prevailing party for attorneys' fees purposes.

Litigation—Civil Procedure—Dismissal for Inconvenient Forum

On the motion of a party or on its own motion, the trial court has authority under CCP § 410.30 to dismiss a complaint based on a contractual forum selection clause. But what if a party files a demurrer that incorporates the forum challenge rather than filing a separate motion? Is the forum challenge waived? Not according to the court

of appeal in *Laboratory Specialists International, Inc. v. Shimadzu Scientific Instruments, Inc.*, 17 Cal.App.5th 755, 225 Cal.Rptr.3d 494 (2017). Although the court of appeal there affirmed the trial court’s authority to dismiss based on the forum selection clause, the court also held that the court could not sustain the demurrer on that basis because issues relating to forum selection are distinct from questions of subject matter jurisdiction that are implicated in a demurrer. Instead, the court can consider the forum selection issue on its own motion or allow the demurring party to file a separate motion. Nonetheless, practitioners would be wise to heed the court’s admonition that filing a separate motion before filing a demurrer helps to conserve judicial resources.

Litigation—Settlement—
Improper Penalty v. Liquidated
Damages

When negotiating a settlement, plaintiffs will sometimes want a defendant to enter a stipulated judgment on the underlying claims, which the parties agree will be filed only if defendant breaches the terms of the settlement agreement. The decision in *Vitatech International, Inc. v. Sporn*, 16 Cal.App.5th 796, 224 Cal.Rptr.3d 69 (2017) is a good reminder that those stipulated judgments may not be enforceable. There, plaintiff agreed to accept \$75,000 as “full settlement” of its claims if paid by a certain date, and the parties stipulated to entry of judgment “in the full prayer of the Complaint” that would be filed if defendants breached the settlement. When defendants failed to pay, the trial court entered judgment for more than \$300,000, and refused to vacate that judgment on defendants’ motion. The court of appeal reversed, holding that the \$300,000 judgment was an unenforceable penalty, not a permissible liquidated damages provision. The court reaffirmed that “the amount of the judgment must reasonably relate to the damages likely to arise from the breach of the stipulation, not the alleged breach of the underlying contract, because it is the breach of the stipulation that allows [plaintiff] to enter judgment against [defendant].” The court recognized that a stipulated judgment for the full amount of the claim would be valid if defendant expressly admitted liability and the amount of damages on the underlying claim. But absent such an acknowledgement from defendant, the stipulated judgment was an unenforceable penalty.