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Newcases of BUSINESS LITIGATION INTEREST

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STATE

Litigation—Attorney Fees on a Void Contract

In *California-American Water Co. v. Marina Coast Water Dist.*, 18 Cal.App.5th 571, 227 Cal.Rptr.3d 110 (2017), the court of appeal reminded us that the prevailing party in a lawsuit that ultimately declares a contract to be void may still obtain fees based on an attorney fee provision in that contract. There, the California-American Water Company entered several contracts with two water districts. The contracts provided that the prevailing party in any action arising from the agreements would be entitled to fees and costs. Thereafter, California-American successfully sued to have the contracts declared void, and the trial court awarded California-American (and the one district that had agreed with California-American's position regarding the contract) its fees. On appeal, Marina Coast Water District, which was obligated to pay the fees, argued that fees were improper because (i) this case was not an "action on the contract" under section 1717 since the contracts were declared void, and (ii) because the contracts were declared void, any award based on those contracts is against public policy. The court of appeal rejected those arguments. The court explained that the primary purpose of section 1717 is to ensure "mutuality of remedy" for attorney fee claims. Here, had Marina prevailed on its claim that the contract was valid, Marina would have been entitled to fees under

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the contract. Therefore, under mutuality of remedy principles, California-American also has a right to its fees even though the contract was ultimately declared void. The court also explained that although the contracts "were ultimately declared void . . ., there was nothing illegal about their subject matter . . . ." Therefore, allowing fees under the attorney fee provision did not violate public policy.

Litigation—Derivative Actions—Demand Futility Allegations

A shareholder asserting a derivative claim must plead with particularity the presuit demands made to the board to take the desired action or must plead the factual basis for believing that a demand would be futile. In *Apple Inc. v. Superior Court*, 18 Cal.App.5th 222, 227 Cal.Rptr.3d 8 (2017), the court of appeal considered an issue of first impression regarding what happens when there has been a change in a defendant company's board of directors between the filing of the original and an amended complaint. Relying on a rule enunciated by the Delaware Supreme Court, the court of appeal held that "when a trial court declares derivative claims to be legally insufficient and grants leave to amend, the demand requirement must be reassessed against the disinterest and independence of the board of directors in place when the amended derivative claims are filed." By contrast, "[i]f the suit is properly initiated and the derivative claims are validly in issue, the presuit demand requirement has been met; hence, the filing of an amended complaint arising from those same claims will not trigger reassessment of the demand requirement."

Litigation—Integrated Contract—Parol Evidence

In *Kanno v. Marwit Capital Partners II, L.P.*, 18 Cal.App.5th 987, 227 Cal.Rptr.3d 334 (2017), the court addressed whether a claim for breach of an oral agreement was barred by the parol evidence rule where the transaction was documented by writings containing integration clauses. The court explained that California's parol evidence rule creates two "levels" of contract integration depending on whether the parties intended the writing to be: (1) the final expression of their agreement (partial integration) or (2) the complete and exclusive expression of their agreement (complete integration). For the former, evidence of oral agreements with additional terms may be admissible if they do not contradict the writing. For the latter, evidence of

additional terms cannot be admitted. Regarding the contract at issue, the court found the writings were, at most, partial integrations and, therefore, evidence of an oral agreement was admissible because it did not contradict the written terms but was merely in addition to those terms. Despite the court's decision, it bears reiterating the importance of including integration clauses if the parties intend to preclude evidence of oral agreements; such a clause may not be conclusive evidence, but it will be "very persuasive."

Litigation—Prejudgment Attachment

For certain contract claims, a plaintiff may ask the court for prejudgment attachment of the defendant's property by, among other things, demonstrating the probable validity of its claim—that it is "more likely than not" that it will obtain a favorable judgment. Whether the claims are "actually valid" is determined through subsequent trial. Prejudgment attachments can thus be powerful tools to prevent a defendant from diverting its assets before judgment. In *Santa Clara Waste Water Company v. Allied World National Assurance Company* (2017) 18 Cal.App.5th 881, the trial court held that plaintiff insurer had established the probable validity of both its unjust enrichment and rescission claims, each of which would have been sufficient to support an order for prejudgment attachment. Defendants have immediate recourse if the trial court errs in its determination, as an order granting an attachment is immediately appealable. In *Santa Clara Waste Water*, the trial court's attachment order was affirmed because the court's finding that plaintiff established the probable validity of its claim was supported by substantial evidence.

Litigation—Summary Judgment—D'Amico Rule

The Supreme Court in *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1 (1974) established the rule that if a plaintiff makes a "clear and unequivocal admission in a deposition," an attempt to contradict the admission in a declaration opposing summary judgment will be disregarded and will not give rise to a triable issue of fact. In *Turley v. Familian Corp.*, 18 Cal.App.5th 969, 227 Cal.Rptr.3d 321 (2017), the court analyzed that rule, explaining that cases had applied it only where the testimony and declaration were "contradictory and mutually exclusive," "diametrically opposed," "in

conflict," or where the declaration contradicts "unequivocal admissions" in discovery. The court examined the record here, held that none of these situations was present, and therefore concluded the trial court erroneously disregarded the declaration. There was one twist here, which the court concluded it did not need to decide: does the *D'Amico* rule apply where the declaration is filed first, and then the deposition is taken?