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# Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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## STATE

**Ethics—Conflict of Interest—Disqualification of Attorneys**

In *California Self-Insurers' Sec. Fund v. Superior Court*, 19 Cal.App.5th 1065, 228 Cal.Rptr.3d 546 (2018), the court of appeal addressed whether Nixon Peabody was prohibited from representing a plaintiff where one of the firm's lawyers had previously represented a defendant in the action before joining the firm, even though that lawyer had since left the firm. The court held that disqualification was not automatic. Instead, the trial court must analyze whether confidential information was transmitted from the former Nixon Peabody attorney to the firm's attorneys working on the case. If the lawyer's short tenure at the firm did not endanger the duty of confidentiality, then the court must exercise its discretion to determine whether other reasons compel disqualification. The court reasoned that "[i]ndividual assessment of the facts, rather than automatic disqualification, is a modern rule that better reflects the current realities of law firm life in the 21st century."

**Legal Services—Dissolved Law Firm's Property Interest in Hourly Fee Matters**

When a law firm dissolves, does the dissolved firm retain any property interest in the profits generated by former partners who continue to handle hourly fee matters that originated in the dissolved firm? The Supreme Court in *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 4 Cal.5th 467, 229 Cal.Rptr.3d 371 (2018), answered "no." When Heller dissolved, its dissolution plan contained an



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explicit waiver of any right to seek payment of legal fees for hourly work generated after the departure of any lawyer. In Heller's bankruptcy, the plan's administrator moved to set aside the waiver as a fraudulent transfer of Heller's property rights to postdissolution fees. The bankruptcy court agreed, but was reversed by the district court. The Ninth Circuit then certified the question to the California Supreme Court, which held that "a dissolved law partnership is not entitled to profits derived from its former partners' work on unfinished hourly fee matters." The court reasoned that to hold otherwise would (i) "risk intruding without justification on clients' choice of counsel," (ii) "risk[] limiting lawyers' mobility postdissolution," and (iii) risk "incentivizing partners' departures predissolution, and perhaps even increasing the risk of a partnership's dissolution."

Litigation—Attorney Fees—Multiple Prevailing Parties

The decision in *Burkhalter Kessler Clement & George LLP v. Hamilton*, 19 Cal.App.5th 38, 228 Cal.Rptr.3d 154 (2018) reminds us that "[i]n some lawsuits involving more than two parties, there may be more than one 'prevailing party' entitled to contractual attorney fees under Civil Code section 1717." There, Burkhalter sued Eclipse Group for breach of a sublease contract, and named Eclipse's managing partner as an alter ego defendant. Burkhalter prevailed against Eclipse on breach of contract, but Hamilton prevailed against Burkhalter on the alter ego theory. The trial court granted Burkhalter's motion for prevailing party fees, but denied Hamilton's motion. The court of appeal reversed, holding that Hamilton was a prevailing party and was entitled to fees under section 1717 even though she was not a party to the contract because "Burkhalter would have bene entitled to recover its attorney fees against Hamilton had it prevailed on its alleged alter ego theory of liability."

Litigation—Class Actions—Admissibility of Expert Opinion Evidence in Class Certification

Deciding an issue of first impression, the court in *Apple Inc. v. Superior Court*, 19 Cal.App.5th 1101, 228 Cal.Rptr.3d 668 (2018) held that the standard of admissibility for expert opinion evidence in *Sargon Enterprises, Inc. v. University of Southern California* 55 Cal.4th 747, 149 Cal.Rptr.3d 614 (2012) applies at the class certification stage. The trial court may disregard irrelevant or unnecessary evidence, but must assess

evidence regarding numerosity, ascertainability, commonality, and superiority based on *Sargon*, which requires the court to consider the material and methodologies of proposed expert evidence.

Litigation—Class Actions—Unnamed Class Members' Right to Appeal

More than seventy years ago, the Supreme Court held that unnamed class members have no right to appeal a class settlement, judgment, or fee award unless they formally intervene in the class litigation. *Eggert v. Pac. States S.&L. Co.*, 20 Cal.2d 199 (1942). More recently, courts of appeal began to incorporate the federal practice to give unnamed class members who appeared and objected at a final fairness hearing the right to appeal. In *Hernandez v. Restoration Hardware, Inc.*, 4 Cal.5th 260, 228 Cal.Rptr.3d 106 (2018), however, the Supreme Court reaffirmed *Eggert*. The court held that section 902 only allows appeals by an aggrieved "party," and a class member becomes a "party" to the litigation only by formally intervening or filing a motion to vacate the judgment under section 663. Justice Liu wrote a separate concurring opinion "to highlight significant changes in class action litigation practice since *Eggert* was decided," and urged that the Legislature "may wish to revisit the controlling statute in light of those changes."

Litigation—Malicious Prosecution—Favorable Termination Requirement

One of the elements a plaintiff must show to be successful on a malicious prosecution claim is that the underlying action was terminated on the merits in favor of the malicious prosecution plaintiff, i.e., the defendant in the underlying action. Threading its way through two seemingly contradictory supreme court cases, the court of appeal held that if the plaintiff in the underlying action prevails on any single cause of action, the defendant cannot establish the favorable termination element necessary to bring a malicious prosecution action even if the defendant prevails on all remaining claims. *Lane v. Bell* 20 Cal.App.5th 605, 228 Cal.Rptr.3d 605 (2018).

Litigation—Settlement—Statutory Settlement Offers—Expert Fees in FEHA Case

Code of Civil Procedure § 998 allows parties to make an "offer to compromise" and provides that if plaintiff does not accept defendant's offer and fails to obtain a more favorable award, then plaintiff must pay defendant's post-offer costs. The Fair Employment and Housing Act (FEHA), however, allows prevailing defendants to recover costs and fees only if plaintiff's claims were

frivolous. In *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 18 Cal.App.5th 1098, 228 Cal.Rptr.3d 120 (2018), the court held expert witness fees are available only for frivolous FEHA claims even where a § 998 offer was made by a prevailing defendant.

Litigation—Settlement—Statutory Settlement Offers—Jointly Made

Settlement offers under Code of Civil Procedure section 998 must be clear and the party receiving the offer must be able to evaluate whether the party making the offer is likely to obtain a more favorable verdict. This requirement makes joint 998 offers tricky. For example, an unallocated offer to multiple defendants is unlikely to be valid because it requires a defendant who wants to accept to be at the mercy of unreasonable codefendants who don't want to settle. In *Gonzalez v. Lew,* 20 Cal.App.5th 155, 228 Cal.Rptr.3d 775 (2018), however, the court upheld a joint offer made by two plaintiffs to a single defendant. There, separate heirs sued for the deaths of two people in a single home fire. The plaintiffs offered to settle both claims for $1.15 million. Defendant declined. One set of heirs recovered $2.2 million; the second, $347,000. Did the offer entitle the plaintiffs to interest and attorneys' fees or was it unenforceable? The court of appeal held that unallocated offers are not always invalid. Here, the court found the offer valid, stating that defendants could have evaluated the prospect that the combined awards could exceed the amount of the offer and one award did so all by itself. This opinion nicely summarizes different situations in which unallocated offers may or may not be valid.

# F E D E R A L

Appeal—Appealability—Consolidated Cases

Reversing the Third Circuit, the United States Supreme Court has held that when one of several consolidated cases is completed, the judgment is immediately appealable even if other consolidated cases are still continuing. The court said that FRCivP 42 effects a joining of cases and not a merger of them. *Hall v. Hall*, ___ U.S. ___, 138 S.Ct. 1118 (2018).