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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Appeals—Preservation of Issues for Appeal—Failure to Object—Futility Doctrine and Foreseeability

Generally, the failure to object to an error in the trial court will not forfeit an issue for appeal if an objection would have been futile. The decision in *People v. Blessett*, 22 Cal.App.5th 903, 232 Cal.Rptr.3d 164 (2018), however, illustrates the limits on that futility doctrine. There, defendant appealed his conviction arguing that the trial court admitted expert testimony in violation of the hearsay rule in *People v. Sanchez*, 63 Cal.4th 665 (2016), a case decided after defendant's conviction. Defendant had not raised the hearsay objection during trial, but argued it would have been futile to do so because the expert's reliance on hearsay testimony was unobjectionable pre-*Sanchez*. The court of appeal nonetheless held the issue forfeited because "the change in the law was foreseeable given the state of the decisional law prior to the introduction of the evidence at trial." In a memorable quip, the dissent argued that the majority's decision "renders the futility doctrine futile."

Arbitration—Grounds to Vacate Award—Undue Influence

The decision in *Baker Marquart LLP v. Kantor*, 22 Cal.App.5th 729, 231 Cal.Rptr.3d 796 (2018) is a rare case where an arbitration award was vacated for "corruption, fraud or other undue means." CCP § 1286.2(a)(1). There, a client filed an arbitration demand asserting that his former law firm, Baker Marquart, had failed to complete two of nine tasks outlined in their

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agreement. Before the hearing, the client filed a confidential brief asserting Baker Marquart failed to complete each of the nine the tasks. Baker Marquart objected to the new claims, but the panel would not allow it to review the confidential brief, and the panel's award in favor of the client referenced the new claims. On review, the court of appeal held the award was procured by "undue means" and must be vacated because Baker Marquart did not have an adequate opportunity to respond to the new claims. To the extent it was difficult to decipher which specific task the panel considered as a basis for its award, the court concluded that the submission of and reliance on the ex parte confidential brief corrupted the entire proceeding and award.

Arbitration—Nonsignatory—Compelling Arbitration

Who makes the decision whether a nonsignatory to an arbitration agreement is subject to arbitration, the court or the arbitrator? The court does; accordingly in *Benaroya v. Willis*, 23 Cal.App.5th 462, 232 Cal.Rptr.3d 808 (2018) the court of appeal vacated an award against a nonsignatory the arbitrator held could be compelled to arbitrate on the theory he was the alter ego of a signing party. The court explained that an arbitration agreement "cannot bind nonsignatories, absent a judicial determination that the nonsignatory falls within the limited class of third parties who can be compelled to arbitrate."

Labor and Employment—Hours and Wages—Employee v. Independent Contractor

The Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1 (2018) clarified the standards for classifying workers as independent contractors for purposes of California wage orders. Citing the "substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors," the court adopted the "ABC" test that other jurisdictions have used to distinguish employees from independent contractors. Under that test, a worker may be considered an independent contractor only if the employer establishes: "(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of

the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."

Litigation—Costs—Clarifying Ambiguity in Section 998 Offer

In *Prince v. Invensure Insurance Brokers, Inc.*, 23 Cal.App.5th 614, 232 Cal.Rptr.3d 887 (2018), the court held that an ambiguous section 998 offer that is clarified in writing may be valid. Prince filed a complaint against Invensure, and Invensure counterclaimed. "Plaintiff: Duncan Prince" made a section 998 offer to have judgment entered in his favor and against "defendant" Invensure for $400,000. Invensure declined the offer, and a jury ultimately awarded Prince $647,706, and Invensure nothing on its cross-complaint. Nonetheless, the trial court denied Prince's request for expert-related costs, and Prince appealed. The court of appeal recognized that the scope of the original offer was ambiguous as it did not explicitly mention Invensure's cross-claims. But the court found that ambiguity "resolved" by an e-mail from Prince's counsel to Invensure before the offer was rejected confirming that the offer was intended "to dispose of the entire action." The court held, "[i]n the context of this case, where two sophisticated parties are represented by counsel, allowing an offer to compromise to be clarified in writing after the offer was made serves the purposes of section 998."

Litigation—Judgment—Default Judgment Void or Voidable as Exceeding Demand in Complaint

Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc., 23 Cal.App.5th 1013, 233 Cal.Rptr.3d 1013 (2018) reminds litigators (again) of the importance of specifying an amount of damages in a complaint if a default judgment is a possibility. In this case, the complaint alleged "damages in an amount to be proven at trial." Following an answer and discovery, the parties stipulated that defendant would withdraw its answer and that plaintiff would seek a default. Following a prove-up hearing, the trial court entered judgment in excess of $3 million. Five years later, defendant moved to vacate the judgment. The court of appeal reversed the trial court's refusal to vacate the judgment, holding that *formal* notice in the complaint of the amount of damages is required. The court rejected the argument that notice of the amount of damages sought from discovery is sufficient to

support a default judgment in an amount exceeding the prayer. The court also rejected plaintiff's alternative argument, namely, that the judgment was voidable, not void, and therefore by waiting more than six months (CCP § 473(b)) defendant was not entitled to relief. The court held that a default judgment that awards more than is demanded in the complaint is "void as beyond a court's jurisdiction."

Litigation—Pleadings—Amendment

Code Civ. Proc. section 472 provides that a party "may amend its pleading once without leave of the court" within specified time restrictions. While this right "has long been regarded as confined to the original complaint," no published decision explicitly addressed whether the right attaches to an amended complaint filed after a demurrer has been sustained with leave to amend. In other words, once a party files an amended complaint, does it have the right to further amend that complaint under section 472? As a matter of first impression, the court in *Hedwall v. PCMV, LLC*, 22 Cal.App.5th 564, 231 Cal.Rptr.3d 560 (2018), answered "no."

Litigation—Trial—Mistrial—Waiver

Tierney v. Javaid, 24 Cal.App.5th 99, 233 Cal.Rptr.3d 774 (2018), presents an unusual situation, but one worth being aware of. There, a complicated real estate transaction was tried to a jury. The jury reached a decision on a quantum meruit claim, but was deadlocked on the main claim for breach of contract. The trial court declared a mistrial on that claim. The plaintiff then asked the court to decide the contract claim by statement of decision since the court had heard all the evidence. The court did so, and ruled against plaintiff. On appeal, plaintiff argued that the trial court made several errors leading up to the mistrial and erroneously granted it. The court found that by asking for a statement of decision, the plaintiff waived any error in the jury trial, including the mistrial issues plaintiff raised on appeal. As an aside, an order granting a mistrial is not appealable, but since the court entered judgment following the statement of decision, the mistrial issues could be considered on appeal under the general rule that an appeal from the judgment includes review of all interlocutory orders preceding entry of judgment.