August 2018

Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

*Richard A. Derevan**
*Todd E. Lundell**
Jenny Hua
Snell & Wilmer L.L.P.

STATE

Arbitration—Arbitrability Decision by Court or Arbitrator

Parties are generally free to delegate to an arbitrator questions regarding the arbitrability of any particular dispute. Even where the parties have done so, however, courts may nevertheless deny a motion to compel arbitration if the assertion of arbitrability is "wholly groundless." In *Smythe v. Uber Techs., Inc.*, 24 Cal.App.5th 327, 233 Cal.Rptr.3d 895 (2018), the court found that Uber's assertion of arbitrability did not meet this low bar where it sought to arbitrate claims bought by one of its drivers who also drove for Lyft, where the driver alleged that Uber engaged in unfair practices that harmed Lyft drivers. The court reasoned that there was no plausible argument that this dispute related to or arose from the driver's contract with Uber as it could have been brought by any Lyft driver who did not drive for Uber.

Litigation—Derivative Actions—Form Selection Provision

A certificate of incorporation is a contractual agreement between the corporation and its shareholders, and courts will enforce a certificate's forum selection clause in derivative actions. In *Bushansky v Soon-Shiong*, 23 Cal.App.5th 1000, 234 Cal.Rptr.3d 54 (2018), the court was asked to interpret a certificate that selected Delaware as the proper forum for all derivative suits "subject to the court's having personal jurisdiction over the

* Certified Specialist, Appellate Law
The State Bar Board of Legal Specialization

indispensable parties named as defendants." More specifically, the question was whether, given that language, personal jurisdiction over all indispensable defendants must exist at the time the lawsuit was filed. The court answered "no." There, one of the defendants in the derivative suit (the auditor) was not subject to personal jurisdiction in Delaware when the suit was filed. Nonetheless, the auditor joined the company's motion to dismiss, indicating that "for this derivative action, [it] consents to venue in the Delaware Court of Chancery." The trial court granted the motion to dismiss, and the court of appeal affirmed. The court held that nothing in the certificate specified that personal jurisdiction over all indispensable defendants needed to exist at the time the suit was filed. In the face of that silence, the court would apply the rule that the condition must be met within a "reasonable time," and submitting to jurisdiction in connection with a motion to dismiss was reasonable. The court warned, however, that "this opinion should not be read as an endorsement of unwarranted and unfair gamesmanship through a tactically timed consent to personal jurisdiction."

Litigation—Judgment—Issue Preclusion

Often a trial court's decision will rest on more than one ground, and when that decision is appealed, the appellate court will affirm on one ground without considering the other. In those circumstances, claim and issue preclusion does not apply to the "conclusion relied on by the trial court and challenged on appeal, but not addressed by the appellate court." *Samara v. Matar*, 5 Cal.5th 322, 234 Cal.Rptr.3d 446 (2018). Rather, "the preclusive effect of the judgment should be evaluated as though the trial court had not relied on the unreviewed ground." In so holding, the Supreme Court overruled its own Civil War-era decision, which had held to the contrary.

Litigation—Reconsideration Motion—Sanctions—Safe Harbor

Does Code of Civil Procedure section 128.7's safe harbor requirement apply to sanctions issued under the reconsideration statute, CCP § 1008? Yes. In *Moofly Productions, LLC v. Favila*, 24 Cal.App.5th 993, 234 Cal.Rptr.3d 769, plaintiff filed a motion to vacate an order issuing terminating sanctions. Opposing the motion, defendants sought sanctions on the theory that plaintiff failed to show any new facts, circumstances, or law as required by section 1008. On the same day the

trial court denied the reconsideration motion, it issued an order to show case re sanctions. In response, plaintiff tried to withdraw the already-denied reconsideration motion. The trial court imposed sanctions and plaintiff appealed. The court of appeal reversed the sanctions award, holding that the requirements of section 128.7 must be complied with in issuing a sanctions order under section 1008, and since the trial court failed to do so, the award could not stand.

FEDERAL

Appeal—Dismissal—Appealability—-Class Certification

In *Microsoft Corp. v. Baker,* 137 S.Ct. 1702 (2017), relying on the balance struck by F.R.Civ.P. Rule 23, the Supreme Court held that a plaintiff could not voluntarily dismiss an action to obtain review as matter of right of an earlier order denying class certification when plaintiff's request for discretionary appeal had already been denied. In a twist on that case, in *Rodriguez v. Taco Bell Corp.*, ___ F.3d ___, 2018 WL 3446948 (9th Cir. July 18, 2018), plaintiff filed a class action seeking damages for alleged meal break violations. The district court granted Taco Bell summary judgment on two claims and denied plaintiffs' summary judgment motion on the remaining claims. Plaintiff then requested dismissal of the remaining claims and once the court did so, appealed from the dismissal order, seeking to challenge the summary judgment issued in Taco Bell's favor. Did *Microsoft* bar the appeal? No. The general rule is that a dismissal with prejudice of remaining claims results in an appealable final judgment permitting review of earlier orders. Here, plaintiff did not seek review of class certification which would implicate F.R.Civ.P. Rule 23's structure as had been the case in *Microsoft,* but instead sought review of the summary judgment in favor of Taco Bell.

Contracts—Enforceability—Restraint on Competition

In *Golden v. California Emergency Physicians Med. Grp.*, No. 16-17354, 2018 WL 3542837 (9th Cir. July 24, 2018), the Ninth Circuit reemphasized California's disapproval of contracts that restrain trade. Section 16600 of the California Business and Professions Code provides, with certain exceptions not relevant here, that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any

kind is to that extent void." The Ninth Circuit previously held, in *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1093 (9th Cir. 2015), that section 16600 applied not only to noncompetition agreements, but also to any contractual provision that places a "restraint of substantial character" on a person's ability to practice a profession, trade, or business. The Ninth Circuit then remanded for a finding on whether a provision in a settlement agreement that barred a doctor from working at any facility contracted, owned, or managed by his former employer ("CEP"), and allowed CEP to terminate his employment if it contracted to provide services to or acquired rights in a facility where the doctor was working as an emergency room physician or hospitalist constituted a "restraint of substantial character" on the doctor's practice. The district court found that it was not. The Ninth Circuit reversed, reiterating "how broadly California's courts have read section 16600," and finding that the standard is "undemanding." Indeed, the Ninth Circuit stressed that it would be the "rare contractual restraint whose effect is so insubstantial that it escapes scrutiny under section 16600." The Court thus concluded that while CEP could bar the doctor from working for facilities it already owned or managed, CEP's attempt to bar him from working for any CEP-contracted facility or any facility with which CEP later contracts with "easily rises to the level of substantial restraint, especially given the size of CEP's business in California." The Court thus struck the entire agreement as void because the provision was material to the parties' settlement agreement.