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Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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Arbitration—Scope of Arbitration Agreement

Although doubts regarding the arbitrability of any dispute are resolved in favor of arbitration, the court of appeal's decision in *Howard v. Goldbloom*, 30 Cal.App.5th 659 (2018) is a reminder that arbitrability is still governed by the agreement's specific language. When Jeremy Howard was terminated as Kaggle, Inc.'s president, he held nearly half of Kaggle's stock. Subsequently, Kaggle's CEO and board members increased Kaggle's outstanding stock tenfold, thereby diluting the existing stock without compensating the minority shareholders. Howard sued, alleging the CEO and board members abused their corporate power and breached their fiduciary duties. Defendants moved to compel arbitration based on several employment agreements and a separation agreement. The court of appeal carefully analyzed the language of each agreement to hold that Howard's claims were not arbitrable. The separation agreement only covered disputes arising out of the agreement itself or matters released in the agreement, which did not include the defendants' alleged misconduct. The provisions in the employment agreements were broader, providing the parties would arbitrate "any and all controversies, claims or disputes . . . arising out of, relating to, or resulting from" his stock agreement or his employment. Nonetheless, the court held Howard's claims fell outside the scope of those provisions. The court reasoned that Howard's claims were not based on his employment, but instead rooted in his

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rights as a company stockholder, and that defendants' fiduciary duties to minority shareholders existed independently of the parties' employment relationship.

Attorney's Fees—Fees on Appeal Not Affected by Award of Costs

California Rules of Court Rule 8.278(d)(2) provides that "[u]nless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." In *Stratton v. Beck*, 30 Cal.App.5th 901 (2018) a creative appellant contended that this rule precluded the prevailing respondent from seeking attorney's fees because the court of appeal ordered the parties to bear their own costs. According to appellant, this was an "order otherwise" precluding fees along with costs. The court of appeal rejected that contention, holding that the order regarding "costs" on appeal did not affect a party's ability to recover attorney's fees.

Stratton presents a textbook case of why an attorney should not represent himself. The dispute, which resulted in two trips to the court of appeal and a petition for review to the California Supreme Court, arose over approximately $300 in unpaid wages.

Attorneys—Disqualification—Conflict of Interest

When an attorney receives confidential information while employed by a company as a non-lawyer, must that attorney be disqualified from representing a party in later litigation against the company where the confidential information is implicated? Yes. *O'Gara Coach Co., LLC v. Ra*, 30 Cal.App.5th 1115 (2019). Darren Richie was the former president and COO of O'Gara Coach Company. After leaving O'Gara Coach, Richie passed the California bar and opened Richie Litigation, P.C. An attorney at Richie Litigation then began representing former O'Gara Coach senior executive, Joseph Ra, in litigation against the company involving allegations that Ra had committed fraud. O'Gara Coach moved to disqualify Richie Litigation claiming Richie had obtained confidential information related to the fraud when he was employed by the company. The trial court denied the motion, however, holding that O'Gara Coach failed to establish an attorney-client relationship between it and Richie. The court of appeal reversed. The court agreed that Richie could not be disqualified on a theory of successive representation because he never had an attorney-client relationship with O'Gara Coach. But the court held "disqualification of Richie and his law firm was

required as a prophylactic measure because the firm was in possession of confidential information protected by O'Gara Coach's attorney-client privilege, concerning Ra's allegedly fraudulent activities at issue in this litigation." As the holder of the privilege over that information, O'Gara "is entitled to insist that [Richie] honor his ethical duty to maintain the integrity of the judicial process by refraining from representing former O'Gara Coach employees in litigation against O'Gara Coach that involve matters as to which he possesses confidential information."

Attorneys—Disqualification—Conflict of Interest—Consent

Former Rule of Professional Conduct 3-310 provided that an attorney "shall not" "accept representation of more than one client in a matter in which the interests of the clients" potentially conflict without the "written consent of each client." Does the absence of written consent require the disqualification of a law firm representing more than one client in a litigation matter? In *Antelope Valley Groundwater Cases*, 30 Cal.App.5th 602 (2018), the court of appeal rejected a rule of automatic disqualification, holding "a trial court may deny a disqualification motion when it finds the moving party by its conduct gave knowing and informed consent to the concurrent representation of themselves and another client." In 2004, Best, Best & Krieger (BB&K) began representing Los Angeles County Water District No. 40 in consolidated groundwater cases. BB&K also had an existing general counsel relationship with Antelope Valley—East Kern Water Agency (AVEK), which became enmeshed in the groundwater cases in 2006. AVEK hired separate counsel to represent it in those cases. Ten years later, however, AVEK decided to terminate BB&K as its general counsel and moved to disqualify BB&K from the groundwater litigation on the ground that AVEK had never provided written consent to BB&K's representation of District No. 40. The trial court denied the motion, citing years of conduct to demonstrate that AVEK effectively consented to BB&K's representation. The court of appeal affirmed. The court found "no authority" that would require a trial court to automatically disqualify a firm despite "substantial evidence supporting the factual determination that the client made an informed decision to agree to a law firm's concurrent representation of themselves as well as another client with potentially adverse interests . . . ."

Litigation—Default Judgment—Pleadings Must State Damages

As a matter of both statute and due process, a default judgment is void to the extent it exceeds the amount of damages demanded in the complaint or where the complaint fails to state an amount. In *Yu v. Liberty Surplus Ins. Corp.*, 30 Cal.App.5th 1024 (2018), the court of appeal held that a cross-complaint that prayed for "damages according to proof," could not support a default judgment even though the initial complaint prayed for damages not less than $10 million dollars and the cross-complaint incorporated the complaint by reference. The court of appeal recognized that a cross-complaint may incorporate a complaint by reference, but held the cross-complaint at issue did not properly incorporate the complaint's specific allegation of damages. First, the cross-complaint repeatedly stated that the damages were "subject to proof" or "in an amount precisely unknown." Second, the cross-complaint stated that the incorporation was "for identification and informational purposes only."

Litigation—Enforceability of Forum Selection Clause in Corporate Bylaws

"Unilaterally adopted forum selection bylaws have become increasingly popular in recent years." In *Drulias v. 1st Century Bancshares, Inc.*, 30 Cal.App.5th 696 (2018), the court of appeal held, in a case of first impression, that California law does not render such unilateral bylaws unenforceable. There, plaintiff filed a class-action lawsuit in California alleging 1st Century and its directors breached their fiduciary duties in connection with a merger. Defendants moved to dismiss, citing a Delaware forum selection bylaw that was unilaterally adopted by the directors in connection with the merger. The parties agreed the bylaw was valid under controlling Delaware law. The plaintiff argued, however, that the bylaw was unenforceable in California because it conflicted with Corporations Code section 2116, which provides that actions for breach of a corporate director's duties "may be enforced in the courts of this state." The court of appeal disagreed, holding that section 2116 "merely codifies the modern view of the internal affairs doctrine under which courts will not decline to exercise jurisdiction over cases merely because they involve the internal affairs of a foreign corporation." That section does not create a substantive right to sue directors in California. Regarding the board's unilateral adoption of the bylaw, the court held "neither California nor Delaware law requires forum selection clauses be freely negotiated to be enforceable."