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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Attorney—Disqualification—Representing 50/50 Partnership

Jarvis v. Jarvis, 33 Cal.App.5th 113 (2019) is an interesting case involving disqualification of an attorney representing a partnership owned by two brothers, Todd and James Jarvis. James filed a partition action, naming Todd and the partnership as defendants. Todd hired counsel for himself and separate counsel (William Roscoe) for the partnership. But Todd and James were both 50% owners, which was less than the majority required to act for the partnership. Thus, James moved to disqualify Roscoe, asserting that Roscoe was not authorized to act by the requisite majority. In affirming the trial court's order granting the motion, the court of appeal noted that although the case did not involve typical conflicts of interest, "we find the principles underlying disqualification useful in our analysis here." The court found that because Todd selected and paid Roscoe, it could appear that Roscoe would advance Todd's interest over the partnership's. The court also found "troubling" Roscoe's assertion that "he could represent the Partnership without direction from either partner" because "by eschewing direction from either partner, Roscoe may have assumed the client's role in the attorney-client relationship." Finally, the court noted there were alternatives to Roscoe's representation. The parties could stipulate to litigate the dispute among themselves, or could ask the court to appoint a tie-breaking provisional partner, neutral counsel, or receiver.

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Arbitration—Employment—Consent by State Required for Pre-dispute Waiver of PAGA Claim

In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the California Supreme Court held that agreements to waive the right to bring PAGA representative actions are unenforceable and reasoned that this rule was not preempted by the FAA because PAGA claims belong to the state. That decision left open the question of whether PAGA claims could be sent to arbitration. The central questions in *Correia v. NB Baker Elec., Inc.*, 32 Cal.App.5th 602 (2019) were: (1) whether *Iskanian* remains good law in light of *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 and (2) whether a pre-dispute arbitration agreement on a PAGA claim is enforceable. The court of appeal in *Correia* answered "yes" and "no" respectively. First, the *Correia* court reasoned that *Epic Systems* did not overrule *Iskanian* because *Epic Systems* did not consider the central issue in *Iskanian*, but addressed "a different issue pertaining to the enforceability of an individualized arbitration requirement" in a Fair Labor Standards Act claim. Second, the *Correia* court held that a PAGA claim cannot be sent to arbitration based on a pre-dispute agreement between an employee and employer without a waiver from the state because the state deputizes the employee to bring a PAGA claim "on *behalf of the state, not on behalf of other employees*." (Emphasis in original). The *Correia* court recognized, however, that "several federal courts have reached a different conclusion on this issue regarding the enforceability of a PAGA arbitration requirement contained in a predispute arbitration agreement."

Arbitration—Enforceability of Agreement Entered into After Filing of Lawsuit

An employer and employee sign an agreement to submit all disputes to arbitration. Does the agreement apply to disputes that arose prior to the execution of the agreement? In *Salgado v. Carrows Restaurants, Inc.*, 33 Cal.App.5th 356, (2019), the court of appeal answered "yes." There, the court of appeal found that the dispute fell within the scope of the broad language of the arbitration agreement, and held that an agreement to arbitrate need not pre-date the actions giving rise to the dispute. The court of appeal nevertheless remanded for the trial court to determine whether the agreement was unconscionable.

Business Organizations—Internal Affairs Doctrine

The decision in *Boschetti v. Pacific Bay Investments Inc.*, 32 Cal.App.5th 1059 (2019) contains a good discussion of the internal affairs doctrine, which recognizes that the law of the state of a business's incorporation governs the rights of

a shareholder to participate in the internal affairs of the business. In *Boschetti*, defendants in a business dispute cross-complained for dissolution of a general partnership. In response, plaintiff asserted certain rights under California law to buy out defendants' interest in several out-of-state LP's and LLC's that held title to some of the general partnership's property. The trial court rejected plaintiff's contention because there was no pending claim for dissolution of the LPs and LLCs. The court of appeal affirmed, but on other grounds. The court held that under the internal affairs doctrine, the law of the states where the LPs and LLCs were organized governed and did not provide buyout rights. The court rejected plaintiff's argument that the doctrine did not apply to the transfer of property, holding that a claim for dissolution involves "quintessential internal governance issues." The court also was not persuaded that California has a more significant relationship with the entities than the states of their organization or that California had an overriding interest in avoiding the entities' dissolution.

Collections—Judgment Debtor Examination—Third-Party Subpoenas

In *Shrewsbury Mgmt., Inc. v. Superior Court*, 32 Cal.App.5th 1213 (2019), judgment creditor Shrewbury initiated a judgment debtor examination and moved for an order directing Wells Fargo Bank to comply with subpoenas requesting records for entities related to the judgment debtor. The trial court denied the motion, holding that a subpoena may only issue to a third party if it is tethered to an examination *of the third party*. The court of appeal first acknowledged the split of authority on the appealability of third-party postjudgment discovery orders in enforcement proceedings. Without resolving the split, the court exercised its discretion to treat the appeal as a petition for a writ of mandate. The court then held that a judgment creditor may issue a third-party subpoena in connection with an examination of the judgment debtor without separate examination of the third party.

Litigation—Judgment—Default Judgment

In *Sass v. Cohen*, 32 Cal.App.5th 1032 (2019), the court of appeal addressed two "unsettled" questions regarding default judgments. First, the court considered whether "a default judgment [may] be entered for an amount in excess of the demand in the operative pleadings when the plaintiff seeks an accounting or valuation of a business." The court held it may not, disagreeing with the decision in *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157. The

court held the plain language of CCP section 580 precluded plaintiff from obtaining "more relief than is asked for in the complaint," and that *Cassel*'s rule improperly "risks depriving defaulting defendants of their due process-based right to proper notice of their maximum exposure." Second, the court held that "the comparison of whether a default judgment exceeds the amount of compensatory damages demanded in the operative pleadings [should] examine the *aggregate* amount of non-duplicative damages," rather than "proceed on a claim-by-claim or item-by-item basis." (emphasis in original). This made a significant difference in the allowable default judgment because plaintiff's complaint did not include any allegations regarding the valuation of the business for which she recovered damages, but included specific amounts for damages claims that were rejected by the trial court at the prove up hearing.

FEDERAL

Employment—Classification—Consent by State Required

Last April, the California Supreme Court in *Dynamex Operations W. v. Superior Court*, 4 Cal.5th 903 (2018), made it more difficult to classify a worker as an independent contractor by adopting the ABC test, under which a worker can be classified as an independent contractor only if: (A) the worker is free from control and direction of the hirer; (B) the work is outside the usual course of the hiring entity's business; *and* (C) the worker is customarily engaged in an independent business of the same nature as the work performed. The Ninth Circuit has now held that *Dynamex* applies retroactively. In *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, No. 17-16096, 2019 WL 1945001 (9th Cir. May 2, 2019), janitors working for Jan-Pro claimed that Jan-Pro had misclassified them as independent contractors. The district court granted Jan-Pro's motion for summary judgment before *Dynamex* was decided. The Ninth Circuit nevertheless vacated the order and remanded for the district court to apply *Dynamex*, reasoning that judicial decisions are presumptively given retroactive effect and *Dynamex* was a clarification rather than departure from established law. Recognizing that many companies rely on independent contractors and workers have legitimate reasons for working as independent contractors, the California legislature is considering several bills to limit or reverse *Dynamex*.