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Newcases of BUSINESS LITIGATION INTEREST

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STATE

Arbitration—Arbitration Clause Survives Termination of Agreement

If the parties to an agreement that contains an arbitration clause enter into a subsequent agreement that terminates the rights and obligations of the initial agreement, does that subsequent agreement also terminate the arbitration clause as to disputes that arose before the termination date? In *Oxford Preparatory Acad. v. Edlighten Learning Sols.*, 34 Cal.App.5th 605 (2019), the court of appeal answered no. There, Oxford and Edlighten entered into three agreements, including a management services agreement with an arbitration clause. Subsequently, the parties entered an agreement that terminated the parties' rights and obligations under all three previous agreements save for two payment obligations. When Oxford sued Edlighten asserting breach of the management services agreement, the trial court denied Edlighten's motion to compel arbitration finding the arbitration clause was not among the surviving obligations. The court of appeal reversed, holding the termination agreement "merely divided the rights and obligations of the parties on a temporal basis," and did not supersede the obligation to arbitrate disputes arising before the termination agreement. Oxford "may not rely on the [termination agreement's] silence about dispute resolution to establish that such agreement superseded [the arbitration clause]."

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Evidence—Expert Disclosures—Right to Designate Rebuttal Experts

In *Du-All Safety, LLC v. Superior Court*, 34 Cal.App.5th 485 (2019), the court of appeal held that a party need not designate every expert witness it anticipates using to rebut the opposing parties' experts until after those opposing experts have actually been disclosed. Plaintiff Krein and his wife sued Du-All for failing to properly inspect a plant where Krein was injured. The parties served their initial expert witness disclosures on the same day. Du-All identified two experts it expected to call at trial. The Kreins identified two experts in those fields and five other experts on different subjects. Du-All timely retained and disclosed five rebuttal witnesses. Nonetheless, the trial court granted the Kreins' motion to exclude four of Du-All's rebuttal experts on the ground that Du-All should have anticipated the Kreins would designate experts on those subjects, and, therefore, Du-All should have disclosed rebuttal experts in those subjects with its initial designation. The court of appeal granted Du-All's petition for writ of mandate, holding "Du-All had a *right* to do what it did." (Emphasis in original). Defendants have no responsibility to anticipate what experts plaintiffs might designate and designate rebuttal witnesses in their initial disclosure.

Labor and Employment—Arbitrability of Individual PAGA Claims

The California Supreme Court has granted review to resolve a split in authority on whether a trial court may compel arbitration of an employee's individual damages claims under the Private Attorneys General Act, while retaining jurisdiction to award additional statutory penalties. (*Lawson v. Z.B., N.A.*, S246711). In *Zakaryan v. The Men's Wearhouse, Inc.*, 33 Cal.App.5th 659 (2019), the Second District joined those courts denying arbitration in such situations, but analyzed the question differently than previous courts of appeal. First, the court held that splitting the damages remedy from the statutory penalties "runs afoul of the primary rights doctrine," which precludes dividing a single primary right into two separate suits. Splitting a PAGA claim into two separate claims "impermissibly divides a single primary right" because an employee bringing a PAGA claim acts on behalf of the state's law enforcement agency when seeking both underpaid wages and statutory penalties. Second, the court held that splitting the PAGA claim "cannot be squared with the labor law that PAGA is designed to enforce." Among other things, "[b]reaking off the portion of a PAGA claim seeking underpaid wages on the ground that those wages

constitute 'victim-specific relief,' . . . ignores the representative nature of a PAGA claim . . . ."

Litigation—Class Actions—Death Knell Doctrine—Five-Year Dismissal Statute

Does an order dismissing class claims qualify as a "trial" under CCP § 583.310, which requires an action to "be brought to trial" within five years? As a matter of first impression, the court of appeal in *Rel v. Pacific Bell Mobile Services*, 33 Cal.App.5th 882 (2019), answered "no" and affirmed the trial court's order dismissing the action because plaintiffs failed to bring it to trial within five years. The court held that "trial" in the dismissal statute means the determination of an issue that brings the action to the point where "final disposition can be made." The trial court's order dismissing the class claims did not bring the action to "a final disposition." And while such an order is "treated as a final judgment" under the death knell doctrine, which allows the plaintiff a right to appeal the dismissal order, "the rationale for the death knell doctrine does not apply to the five-year dismissal statute." The court, therefore, refused to "create an exception whereby class actions get a free pass on the dismissal statute whenever a trial court issues a death knell order, regardless of whether the plaintiff has been diligent."

Litigation—CCP § 664.6—Retaining Jurisdiction to Enforce a Settlement

When parties settle litigation, CCP § 664.6 allows a court to enter judgment on the settlement agreement and, "if requested by the parties," retain jurisdiction to enforce the settlement. *Mesa RHF Partners, L.P. v. City of Los Angeles*, 33 Cal.App.5th 913 (2019), is a stark reminder that the process for requesting a court to retain jurisdiction "need not be complex. But strict compliance demands that the process be followed." There, after settling the parties' dispute and agreeing the court would retain jurisdiction to enforce the settlement, counsel for the plaintiffs filed a request for dismissal stating the "[c]ourt shall retain jurisdiction to enforce settlement per C.C.P. § 664.6." Unfortunately, courts have construed section 664.6 to require the request be made *by the parties themselves*, not counsel for the parties. Because the request for dismissal was not signed by the parties, but only by counsel for plaintiffs, it did not satisfy section 664.6. Thus, the court of appeal held the trial court had no jurisdiction to enforce the settlement. The court explained that a proper request could have been made by filing a stipulation and proposed order signed by the parties noting the settlement and

requesting the court retain jurisdiction over its enforcement.

Litigation—Punitive Damages—Evidence of Financial Condition

It is well settled that evidence of defendant's financial condition is required to support punitive damages. *Farmers & Merchants Tr. Co. v. Vanetik*, 33 Cal.App.5th 638 (2019) reminds us that the trial court must scrutinize the admissible evidence of defendants' current financial condition to determine whether it supports the award of punitive damages. There, although plaintiff's expert purported to testify regarding defendants' "net worth," the expert only considered defendants' assets and not their liabilities. The expert's testimony as to defendants' incomes and interest in real properties were likewise unsupported by the record, which included purported gross sales numbers on old bank applications and evidence of defendants' credit card expenditures from four years before trial. Such evidence was not relevant to defendants' *current* financial conditions. The consequence of failing to make the requisite showing is fatal, and the court of appeal reversed the awards of punitive damages with no new trial.

Torts—Malicious Prosecution Against Attorney—Statute of Limitations

CCP § 340.6(a) provides a one-year statute of limitations for "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." Does this provision apply to malicious prosecution claims against attorneys who performed professional services in the underlying litigation? Courts are divided on that issue. Most recently, the First District, Division Five concluded that it does. *Connelly v. Bornstein*, 33 Cal.App.5th 783 (2019). The court held "malicious prosecution, in certain pertinent respects, closely resembles legal malpractice" as it implicates the obligations contained in the Rules of Professional conduct not to bring or continue an action without probable cause. Thus, "to the extent that legal malpractice concerns an attorney's failure to competently and professionally perform legal services—a highly relevant point of comparison for our purposes—malicious prosecution is a very similar claim." By contrast, malicious prosecution is unlike those claims against attorneys that are usually identified as falling outside the scope of section 340.6(a)—e.g., garden-variety theft or sexual battery, even when the conduct takes place during the representation.