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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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

STATE

Agreement—Attorney Approval—Obligation on Attorney

When an attorney signs his clients' settlement agreement with a notation approving the agreement "as to form and content," can he be personally bound by provisions in the agreement? In *Monster Energy Co. v. Schechter*, 7 Cal.5th 781 (2019), the Supreme Court answered "yes." There, parties in a tort action entered into a settlement agreement that imposed confidentiality obligations on the parties and their attorneys. Plaintiffs' attorney Schechter signed the agreement with a notation that he approved the agreement as to form and content. When Schechter and his firm were sued for, among other things, breach of the agreement's confidentiality provisions, they brought an anti-SLAPP motion asserting the suit lacked minimal merit because they were not bound by the confidentiality provisions. The Supreme Court disagreed, holding an attorney's signature on a document with a notation that it is approved as to form and content does not, as a matter of law, preclude a finding that the attorney intended to be bound by the document's terms. Where the agreement contains no provision purporting to impose an obligation on counsel, the notation shows only his approval of the agreement for his client's signature. Where, however, the agreement contains substantive provisions imposing duties on counsel, his signature may also reflect his intent to be bound.

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

Anti-SLAPP Statute—First Prong—Claim "Based On" Protected Activity

In *ValueRock TN Properties, LLC v. PK II Larwin Square SC LP*, 36 Cal.App.5th 1037 (2019), the court of appeal once again emphasized the distinction between petitioning activity that is merely related to a claim and a claim *based on* petitioning activity. There, a landlord repeatedly refused to consent to the proposed assignment of a lease. The tenants and the party that agreed to take the assignment sued, alleging the landlord's refusal violated the lease. During that litigation, plaintiffs made an amended assignment request, and when that request was denied, filed a second amended complaint asserting this refusal again violated the lease. The landlord filed an anti-SLAPP motion to strike the second amended complaint, contending the complaint was based on protected activity because the landlord's response to the amended assignment request constituted settlement communications and statements made in litigation. The court of appeal rejected this argument: "To be sure, [the landlord] withheld consent to the amended assignment request *during* the litigation, which presumably *prompted* the filing of the second amended complaint. But that is not to say the second amended complaint was *based on* [the landlord's] litigation conduct."

Breach of Contract—Prejudgment Interest—Contractual v. Statutory Rate of Interest

Civil Code section 3289 sets forth the chargeable interest rates following a breach of contract. Subdivision (a) states the "rate of interest stipulated by a contract remains chargeable after a breach thereof," and subdivision (b) states if the contract "does not stipulate" to a rate, "the obligation shall bear interest at a rate of 10 percent per annum after breach." In *Cavalry SPV I, LLC v. Watkins*, 36 Cal.App.5th 1070 (2019), the court interpreted this statute in a collection action where the creditor sold its account to a debt collection agency, which sought prejudgment interest based on a statutory rate rather than the contractual rate. The court framed the question as follows: "if the contract sets forth a legal rate of interest, can the creditor ignore the contract interest provision and instead choose to collect prejudgment interest at the statutory rate set forth in section 3289, subdivision (b)?" The court answered "no." Because this "appears to be a question of first impression in California," the court looked to cases interpreting statutes in other states and to the legislative history of section 3289. Unsurprisingly, the court concluded "if the creditor entered into a contractual

agreement containing a legal rate of interest, it remains bound by the terms of that agreement; prejudgment interest at the statutory rate is available only in the absence of an applicable contractual provision."

Litigation—Class Certification—Ascertainability

The Supreme Court's unanimous decision in *Noel v. Thrifty Payless, Inc.*, 7 Cal.5th 955 (2019) gives a masterclass on the ascertainability requirement for class certification. There, plaintiff brought a putative class action against Rite Aid and moved to certify a class of "[a]ll persons who purchased the Ready Set Pool at a Ride Aid store located in California within the four years preceding the date of the filing of this action." The trial court denied certification, explaining: "[w]hile the court might reasonably infer that the class, as defined by [p]laintiff, could be ascertained based on common business practices and record keeping, [p]laintiff has presented no evidence on this subject." The court of appeal affirmed, finding although plaintiff "was not required to actually identify the 20,000-plus individuals who bought pools, his failure to come up with any *means* of identify them was a legitimate basis for denying class certification." The Supreme Court granted review to clarify the ascertainability requirement and reversed. Drawing from an extensive review of case law on ascertainability, the Supreme Court held a class is ascertainable when it is defined "in terms of objective characteristics and common transactional facts" that make "the ultimate identification of class members possible when that identification becomes necessary." This standard was satisfied in *Noel* because the class definition provided a basis for class members to self-identify. The Court also held "[a]s a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." Finally, the Court made clear the ascertainability requirement does not impose any requirement "that the identification of class members must occur without unreasonable expense or time." The Court, however, left the door open for inquiry into the provision of notice to class members as part of "another requirement for proper class proceeding."

Litigation—Costs—Proving Truth of Matters in RFAs

When a party denies a request for admission (RFA), the propounding party can recover its reasonable expenses for proving the matters asserted in its RFA unless: (1) an

objection to the request was sustained or a response to it was waived; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe it would prevail on the matter; or (4) there was other good reason for the failure to admit. CCP § 2033.420. In a matter of first impression, the court in *Samsky v. State Farm Mutual Automobile Ins. Co.*, 37 Cal.App.5th 517 (2019) applied the general rule on burdens of proof—that the party seeking to benefit from an exception to a general statute bears the burden to establish the exception—to section 2033.420. In other words, once the propounding party has proven the truth of the matters in his RFAs, it can recover its reasonable expenses unless the denying party proves that an exception applies.

Litigation—Damages—Discount Rate on Future Damages

In a case of first impression, the court in *Lewis v. Ukran*, 36 Cal.App.5th 886 (2019), held the party seeking to reduce an award of future damages to present value bears the burden of proving an appropriate method of doing so, including the appropriate discount rate. A party who seeks an upward adjustment of a future damages award to account for inflation likewise bears the burden of proving an appropriate method and inflation rate. Finding no California case directly on point, the court followed Ninth Circuit precedent in *Alma v. Manufacturers Hanover Trust Co.,* 684 F.2d 622, 626 (9th Cir. 1982), which reasons the proper rate is an evidentiary issue that should be borne by the party seeking to adjust the award. This rule is consistent with the Directions for Use to CACI 3904A on Present Cash Value, which states: "It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate." Where the defendant fails to carry its burden, the trial court should not discount an award of future damages.

Litigation—Enforcement of Judgment Pending Appeal—One Judgment Rule

Where the trial court orders a new trial limited to punitive damages, does the portion of the judgment awarding compensatory damages remain enforceable? In *Newstart Real Estate Investment LLC v. Huang*, 37 Cal.App.5th 159 (2019), the court answered "no." There, a jury awarded plaintiff more than $1.6 million in compensatory damages and $280,000 in punitive damages. After entry of judgment, the court granted a new trial on punitive damages after plaintiff rejected a remittitur of the punitive

award to $10,000. Plaintiff appealed the new trial order, but also sought to enforce the compensatory damages portion of the judgment. In several orders relating to plaintiff's enforcement efforts, the trial court held there was no judgment to enforce. The court of appeal affirmed, holding "when a court grants a partial new trial, the new trial order has the effect of vacating the entire judgment and holding in abeyance the portions which are not subject to a new trial until one final judgment can be entered."

Litigation—New Trial Motion—Trial Court's Broad Discretion

The decision in *Pearl v. City of Los Angeles*, 36 Cal.App.5th 475 (2019) is a good reminder of the broad discretion trial courts have in ruling on new trial motions. There, a jury awarded plaintiff Pearl more than $17 million in damages, and defendant City of Los Angeles moved for a new trial. In ruling on that motion, the trial court found that some of the jury's award was intended to punish the City rather than compensate Pearl. The trial court, therefore, conditionally granted the new trial motion unless Pearl agreed to a remittitur reducing damages by $5 million, which Pearl accepted. On appeal, the City argued that once the court found a portion of the jury's award was punitive, it should have granted new trial on damages, not remittitur. The court of appeal disagreed. Emphasizing the trial court's role as "independent trier of fact" in ruling on a motion for new trial, the court held because the trial court could determine the proper amount of damages from the evidence, remittitur was an appropriate remedy to cure the defective jury verdict.