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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Anti-SLAPP Statute—Commercial Speech Exemption—Denial of Anti-SLAPP Motion Not Appealable

In *Benton v. Benton*, 39 Cal.App.5th 212 (2019), the court held an order denying an anti-SLAPP motion on the ground the commercial speech exemption applies is not subject to interlocutory appeal. Pursuant to CCP section 425.17, which the Legislature adopted in 2003, the court of appeal has no jurisdiction to review the merits of such a denial. Approving an earlier court of appeal decision and adopting dicta from the Supreme Court's decision in *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, *Benton* held the order was not appealable even where the trial court *also* denied the motion on the ground defendant's conduct was not covered by the primary anti-SLAPP provisions in section 425.16, which would normally create an appealable order.

Arbitration—Unconscionability—Waiver of Berman Hearing

The California Labor Code provides an administrative process called a Berman hearing as an informal and affordable method for resolving wage claims. In *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), the California Supreme Court held an arbitration agreement that waives an employee's right to a Berman hearing is not categorically unconscionable so long as it provides "an accessible and affordable process for resolving those disputes." In *OTO, L.L.C. v. Kho*, 8 Cal.5th 111 (2019), the Supreme Court considered the question "whether an arbitral scheme resembling civil litigation can constitute a sufficiently accessible and affordable process." The court

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ultimately declined to reach that broad question because it held "[e]ven if a litigation-like arbitration procedure may be an acceptable substitute for the Berman process in other circumstances, an employee may not be coerced or misled into accepting this trade." This holding is notable for many reasons, but perhaps most important is how the Supreme Court blurs the line between procedural and substantive unconscionability, both of which are required for a finding of unconscionability. That the agreement at issue was significantly procedurally unconscionable is indisputable. Among other things, it was "a paragon of prolixity" written in extremely small font with long, complex sentences containing statutory references and legal jargon, and the employee was given neither time to read the agreement nor a copy after signing. In discussing substantive unconscionability, however, the court went to great lengths to "stress that the waiver of Berman procedures does not, in itself render an arbitration agreement unconscionable." And the court did not hold the litigation-like procedures provided by the arbitration agreement were necessarily substantively unconscionable. The court only held that "[c]onsidering the unusually coercive setting in which this bargain was entered, we conclude it was sufficiently one-sided as to render the agreement unenforceable." It will be worth watching whether this type of analysis finds its way into other arbitration decisions. Notably, Justice Chin wrote a lengthy dissent, in which he accuses the majority of creating a "new rule" that "will significantly impact the enforceability of virtually all mandatory, predispute arbitration agreements in the employment context."

Attorneys—Disqualification—Conflict of Interest

The different outcomes in the Second District decisions in *O'Gara Coach Co., LLC v. Ra*, 30 Cal.App.5th 115 (2019) and *Wu v. O'Gara Coach Co., LLC*, 38 Cal.App.5th 1069 (2019), illustrate important principles governing attorney disqualification. Both cases concerned whether an attorney (Richie), who was the former president and COO of O'Gara Coach, could represent a party in litigation against the company. In *Ra*—which we summarized in the March 2019 issue of this newsletter—the court held Richie was disqualified where the evidence showed he had obtained confidential information while employed by the company that was relevant to the fraud claims at issue in the lawsuit. In *Wu*, by contrast, the court held Richie was not

disqualified from representing the plaintiff against O'Gara Coach in a race discrimination lawsuit. The trial court in *Wu* had disqualified Richie because he had helped formulate and implement the company's anti-discrimination policies. The court of appeal reversed, however, holding the evidence at most established Richie possessed so-called "playbook information" regarding O'Gara Coach's general policies and litigation strategies. "Nowhere does O'Gara Coach demonstrate the required material link between Richie's knowledge of the development and implementation of the company's workplace policies and the issues presented by Wu's lawsuit."

Employment—PAGA Claim— No Private Right of Action to Recover Unpaid Wages

Under the Private Attorneys General Act of 2004 (PAGA), an employee may seek civil penalties for Labor Code violations committed against her and other aggrieved employees by bringing, on behalf of the state, a representative action against her employer. In what should have been another Supreme Court case on the arbitrability of PAGA claims, the Court in *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175 (2019) called an audible and instead resolved a more fundamental question: whether a PAGA claim could be brought to recover unpaid wages. The Court answered "No." Labor Code section 558 gives the Labor Commissioner authority to issue penalties "in addition to an amount sufficient to recover underpaid wages." Disapproving several court of appeal decisions, the Supreme Court held the penalties recoverable by a plaintiff do not include these "underpaid wages," which would be owed "on top of" the penalties. The Court thus held PAGA does not provide a private right of action for employees seeking these wages.

Litigation—Relief from Jury Trial Waiver—Showing of Prejudice Not Required on Appeal

The holding of *Mackovska v. Viewcrest Rd. Properties LLC*, 40 Cal.App.5th 1 (2019) is grounded in litigants' "inviolate" right to a jury trial. Under CCP section 631, a civil litigant waives its right to jury trial when it fails to timely deposit jury fees. The trial court should, however, grant a motion for relief of a jury waiver "unless, and except, where granting such a motion would work serious hardship to the objecting party." In *Mackovska,* two plaintiffs sued Viewcrest Road Properties after Viewcrest purchased their property in foreclosure. The trial court sustained Viewcrest's demurrer as to one plaintiff's claim and later

found the other plaintiff waived his right to a jury trial by failing to timely post jury fees. Nine days later, the remaining plaintiff filed a motion for relief, which the trial court denied. Notably, that plaintiff did not seek immediate appellate review by writ, and raised the issue on appeal from his adverse judgment following a bench trial. Nonetheless, the court of appeal reversed, finding Viewcrest failed to show the requisite prejudice for opposing a motion for relief. Specifically, Viewcrest's complaint about the "[s]ignificant additional expense" of jury trial, the low amount in dispute, and the lack of a contract providing for recovery of attorneys' fees to the prevailing party fell far short. Noting a split in authority on the issue, the court also held the party moving for relief need not show actual prejudice on appeal even if it did not previously seek review by writ. The court reasoned it was "difficult, if not impossible, . . . to show prejudice from the denial of the constitution right to a jury trial."

Litigation—Settlement—Liquidated Damages v. Penalty

The court of appeal published its decision in *Red & White Distribution, LLC v. Osteroid Enterprises, LLC*, 38 Cal.App.5th 582 (2019) "to remind practitioners whose clients settle a dispute involving payments over time how to incentivize prompt payment properly, and what may happen if done incorrectly." There, the parties settled litigation over a defaulted loan by agreeing the borrower would pay $2.1 million in installment payments over a year. The parties also executed a stipulated judgment providing in the event of a default, the borrower was liable to pay $2.8 million. The court of appeal held the additional $700,000 was an improper penalty because it bore no relationship to the actual damages the lender would suffer from breach of the $2.1 million settlement. The court explained the parties properly could have structured the agreement to settle for $2.8 million with a $700,000 discount for timely payments. Such an agreement would be enforceable, but a $700,000 penalty is not. While these rules "may be subject to legitimate criticism," "on this issue both the Legislature and our Supreme Court have spoken . . . and we are bound by their pronouncements."

FEDERAL

Arbitration—Vacatur of Award—Evident Partiality

The Ninth Circuit's holding in *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019) that arbitrators have a duty to disclose ownership interest in their arbitration organizations and their organizations' "nontrivial" business dealings with the parties to the arbitration has immediate ramifications for arbitrations, particularly those currently underway or recently completed. There, Monster arbitrated a dispute with its distributor pursuant to the parties' contract, which specified use of JAMS Orange County. The arbitrator's disclosure statement provided that he, like all JAMS neutrals, had "an economic interest in the overall financial success of JAMS." The arbitrator also disclosed he had conducted one arbitration in which Monster was a party and had been selected to decide another case involving Monster and a different distributor. The arbitrator ultimately issued an award in favor of Monster, which the district court confirmed. In a split decision, the Ninth Circuit reversed, holding the arbitrator's "partial disclosure" was insufficient. The arbitrator's failure to disclose his ownership interest in JAMS and the fact that JAMS had administered 97 arbitrations for Monster over the past 5 years required vacatur of the arbitration award on the ground of evident partiality. The dissent warned the decision "is likely to generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system," particularly because approximately a third of JAMS arbitrators have ownership interests.