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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

Appeals—Standing of Unnamed Class Member—Filing of Motion to Vacate Judgment Insufficient

In *Hernandez v. Restoration Hardware, Inc.,* 4 Cal.5th 260, 263 (2018), the Supreme Court reaffirmed that unnamed class members do not become parties of record with the right to appeal a class settlement, judgment, or attorney fee award unless they: (1) move to intervene before the action is final or (2) move under section 663a to vacate the judgment. If either motion is unsuccessful, the class member may appeal from the denial. In *Eck v. City of Los Angeles*, 41 Cal.App.5th 141 (2019), Carmen Balber, an unnamed class member, timely objected and filed an ex parte application to intervene after the trial court preliminarily approved a class settlement. The court denied Balber's application as untimely, overruled her objection, and approved the settlement. Balber moved to vacate the resulting judgment, which motion was also denied. Balber then filed a notice of appeal identifying only the order denying her application for leave to intervene. In her briefs, however, Balber did not challenge the court's ruling on her request for intervention, but argued the judgment should have been vacated. The court of appeal held she lacked standing to make such arguments because she had not appealed the order denying her motion to vacate. The court rejected Balber's contention that filing the motion to vacate created standing and held there is no harmless error exception for her failure to appeal from the denial of her motion to vacate.

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

Attorneys—Professional Responsibility—Duty of Candor Toward the Court

The court of appeal published its decision in *Davis v. TWC Dealer Group, Inc.*, 41 Cal.App.5th 662 (2019) to "affirm—and remind the profession of—the importance of candor toward the court." The appeal concerned a trial court decision denying the defendant Toyota dealership's (TWC's) motion to compel arbitration of an employment dispute on the ground the arbitration provision in the dealership's employment contract was unconscionable. Notably, the Supreme Court in *OTO, LLC v. Kho*, 8 Cal.5th 111 (2019) recently affirmed a similar decision in a case involving another Toyota dealership and "an arbitration provision that was virtually identical (if not identical) to that involved" in *Davis*. Nonetheless, counsel for TWC failed to inform the *Davis* court of the *Kho* decision. The court noted it is "hard to imagine a more obvious violation of Rule 3.3 [of the Rules of Professional Conduct]," which requires attorneys to disclose adverse, controlling legal authority. The court also called out counsel's use of ellipses to omit "thirty-eight lines" from a "49-line paragraph" of the arbitration agreement, which was the same paragraph the Supreme Court in *Kho* described as a "paragon of prolixity." The attorney's misrepresentation of the substance of the agreement through ellipses "is not to be condoned."

Contracts—Forum Selection Clause—Jury Trial Waiver

Under California law, a predispute jury trial waiver is unenforceable. But what if the parties' contract includes both a jury trial waiver and a forum selection clause designating New York as the proper forum and governing law, where it is undisputed that the jury trial waiver is enforceable? In *Handoush v. Lease Finance Group, LLC*, 41 Cal.App.5th 729 (2019), the court of appeal held that such a forum selection clause is unenforceable. The court explained that "because enforcement of the forum selection clause here has the potential to contravene a fundamental California policy of zealously guarding the inviolate right to a jury trial, which is unwaivable by predispute agreements," the defendant has the burden to show that litigating in the alternative forum "will not diminish in any way [the plaintiff's] substantive rights" under California law. The defendant could not meet that burden once plaintiff properly invoked his right to a jury. The court also rejected defendant's argument that "the issue of whether to enforce the jury trial waiver should properly be decided by a New York court," holding that

"case law demonstrates that choice of law is commonly considered together with a forum selection clause."

Litigation—Anti-SLAPP Statute—Timeliness of Motion re Amended Complaint

CCP section 425.16(f) provides an anti-SLAPP motion may be filed within 60 days of the service of the complaint. An anti-SLAPP motion may be brought within 60 days of service of an *amended* complaint "if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion." *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 641 (internal quotation marks omitted). In *Starview Property, LLC v. Lee*, 41 Cal.App.5th 203 (2019), defendants Stephen and Tracy Lee filed an anti-SLAPP motion directed at three newly alleged claims within 60 days of plaintiff Starview's filing of an amended complaint. The trial court denied the motion as untimely, reasoning the new claims were based on facts alleged in the original complaint, which was served more than 60 days prior. The court of appeal reversed, emphasizing that "[b]y its terms, the anti-SLAPP statute is directed at striking causes of action, not merely factual allegations." Starview's three newly pled causes of action "plainly could not have been the target of a prior motion, even if they arise from protected activity alleged in the original complaint."

Litigation—Evidence—Former Testimony Hearsay Exception

Attorneys who represent the same client in multiple lawsuits involving similar issues should be aware of the recent decision in *Berroteran v. Superior Court*, 41 Cal.App.5th 518 (2019), and may need to adjust their deposition strategy in light of the court's holding. There, the court of appeal held deposition testimony of witnesses (the defendant's employees and former employees) taken in separate litigation is admissible under Evidence Code section 1291(a)(2), which makes former testimony of an unavailable witness admissible if "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." In so holding, the court disagreed with the decision in *Wahlgren v. Coleco Industries, Inc.*, 151 Cal.App.3d 543 (1984), which held a party's motive to examine its own witnesses at deposition differs from its

motive to do so at trial because a deposition is only a discovery device and parties generally avoid cross-examining their own witnesses during a deposition. According to the court in *Berroteran*, that assumption about depositions "is at best outdated given the prevalence of videotaped deposition testimony in modern trial practice" and "appears inconsistent with the reality of often overlapping lawsuits in different jurisdictions and the prospect that an important witness could retire or otherwise become unavailable." The *Berroteran* court placed the burden on the party seeking to exclude former testimony to "demonstrate that it lacked a similar motive to examine its witnesses in the former litigation" and held the defendant there failed to do so.

Litigation—Statute of Limitations—Timing of Actual Injury

Under CCP section 340.6, a legal malpractice action must be brought within the shorter of: (1) one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the attorney's wrongful act or (2) four years after the act. The claim does not begin to accrue until the client has suffered "actual injury" or "appreciable harm as a consequence of [the] attorney's negligence." In *Sharon v. Porter*, 41 Cal.App.5th 1 (2019), the court of appeal considered when the limitations period expired where the alleged malpractice was the attorney's failure to specify damages in the complaint, resulting in a void default judgment. There, the possible dates were: (1) 2008, when the default judgment was entered, (2) October 2015, when the judgment debtor wrote to the plaintiff/client, Sharon, claiming the judgment was void, (3) November 2015, when Sharon's new attorney, representing her on a contingency fee basis, opines the judgment was indeed void, or (4) September 2016, when the judgment debtor filed a motion to vacate the judgment. The trial court settled on September 2016, reasoning Sharon was not injured until she began incurring hourly attorney fees to oppose the debtor's motion to vacate. The court of appeal reversed. The court held the default judgment was void at its inception. Thus, Sharon discovered both the facts of her attorney's wrongful conduct and had suffered injury by at least November 2015, when her own attorney confirmed the judgment was void. Sharon's action, which was brought May 2017, was thus barred.