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Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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STATE

Appeals—Appealability and Standing—Order Striking and Sealing Documents

The court of appeal's decision in *Six4Three, LLC v. Facebook, Inc.*, 49 Cal.App.5th 109 (2020) is interesting for its discussion on appealability and standing. There, an app developer sued Facebook and its officers, alleging Facebook destroyed its business by preventing its app from accessing content. The trial court entered a protective order allowing the parties to designate documents as confidential and laid out a process for objecting to those designations. In opposing an anti-SLAPP motion, the developer submitted over 200 exhibits, and Facebook moved to seal some of them as confidential. The trial court ultimately struck 182 exhibits as irrelevant or improperly submitted and sealed 26 of the exhibits. The app developer appealed, asserting orders sealing documents are appealable under the collateral order doctrine. The court of appeal dismissed the appeal on two grounds. First, the court rejected the developer's contention that the striking order was appealable because it was part of the sealing order, noting "[a] single order of judgment can be in part appealable and in part nonappealable." Second, the court held the developer had no standing to appeal the sealing order because that order did not impair the developer's ability to use the documents. Thus, the developer was not "aggrieved" by the order. To the extent the developer was aggrieved, it was by Facebook's designation of documents as confidential, to which the developer failed to object.

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Arbitration—Limited Grounds for Vacatur—Arbitrator May Retain Jurisdiction To Address Contingencies

In *VVA-TWO, LLC v. Impact Development Group, LLC*, 48 Cal.App.5th 985 (2020), the court of appeal reaffirmed an arbitrator's broad authority to fashion appropriate remedies, even when doing so requires the arbitrator to retain jurisdiction to address future contingencies. Thus, in a 2-1 decision, the court rejected appellant VVA's attempt to vacate an arbitration award in favor of Impact Development Group (IDG). The award found VVA breached the parties' contract, under which the parties were developing low-income housing with certain third-party lenders and investors. The award provided that IDG could specifically enforce the contracts as the buyer of VVA's interest. Because those contracts required third-parties to consent to the purchase, however, the arbitrator retained jurisdiction to address the possibility that IDG would be unable to obtain third-party consent. On appeal, VVA argued the award should be vacated as "incomplete" because it failed to expressly address the question of third-party consent. The court of appeal rejected this argument, finding "the award provides a complete but potentially incremental remedy tailored to address a challenging situation," which is "within the 'broad scope' of an arbitrator's authority to a fashion an appropriate remedy." There was no need for the arbitrator to address third-party consent because the issue was only a theoretical possibility. And because the parties asked the arbitrator to award specific performance, they "consented to the possibility of a specific performance award dependent on a factor outside of the arbitrator's control and knowledge." The dissent argued that the arbitrator did not actually retain jurisdiction over the parties' dispute, but if he did, then the judgment confirming that partial award was interlocutory and not appealable.

Litigation—Alter Ego—Amending Judgment by Independent Action

"In petitioning the trial court to amend a judgment to add an alter ego defendant, must the plaintiff proceed by a motion in the original action, or may plaintiff proceed by complaint in an independent action on the judgment? Either procedure will do." *Lopez v. Escamilla*, 48 Cal.App.5th 763 (2020). There, Lopez recovered a judgment for $157,370 against Magnolia Home Loans, Inc. in 2012. Six years later, Lopez brought a separate action against Escamilla, asking the court to find he was Magnolia's alter ego. Escamilla moved for judgment on the pleadings on the theory that a request to find a person an

alter ego is not a separate cause of action and that a separate lawsuit was barred by the statute of limitations. The trial court granted his motion. The court of appeal reversed, finding "[i]t does not matter whether the petition alleging Escamilla is an alter ego of the corporation is labeled a complaint or a motion, or whether the petition is assigned a case number different from the underlying action. The substantive question is whether Escamilla is, in fact, an alter ego." Nor would such a complaint be barred by the statute of limitations. A money judgment is enforceable for ten years and subject to further renewal. By adding an alter ego defendant, the court is not entering a new judgment, but merely inserting the correct name of the real defendant.

Litigation—Expert Evidence—Testimony on Possibilities Speculative

In *Waller v. FCA US LLC*, 48 Cal.App.5th 888 (2020), the court of appeal affirmed a trial court decision excluding a plaintiffs' expert's testimony regarding "possible" causes of a vehicle defect because the expert could not testify to a "probable" cause for the same. Plaintiff Waller sued a vehicle manufacturer for breach of express and implied warranties and fraudulent concealment after his car intermittently lost power. Plaintiff's expert was prepared to testify that a faulty fuel pump relay was a "possible" cause of the lost power, but the expert "admitted several times in his deposition that the fuel pump relay was only a possible, not a probable, cause of the power loss." The trial court excluded the testimony, and the court of appeal affirmed. The court of appeal explained that because Waller bore the burden of proof, the jury could not rely on the expert's testimony regarding a "possible cause" to conclude the fuel pump relay more likely than not caused the power loss. The trial court, therefore, properly excluded the expert's testimony as speculative.

Litigation—Punitive Damages—Managing Agent

A corporate employer can only be held liable for punitive damages for wrongful acts committed by its officers, directors, or managing agents. The court of appeal's decision in *Colucci v. T-Mobile USA, Inc.*, 48 Cal.App.5th 442 (2020) is notable for its broad interpretation of who can be considered a managing agent. There, a jury awarded approximately $1 million in compensatory damages and $4 million in punitive damages to a former employee who had sued T-Mobile for workplace retaliation. T-Mobile appealed arguing, among other things, that the district

manager—who had fired the plaintiff without complying with T-Mobile's express, progressive discipline policy—was not a "managing agent." The court of appeal disagreed, rejecting T-Mobile's argument that only its "corporate leaders who played a role in setting official corporate policies—e.g., those contained in an employee handbook—could be considered managing agents." The court explained that "[m]anaging agents are not limited to those individuals with the ability to set handbook policies," but also include those who formulate "operational policies" through "discretionary decisions." Because T-Mobile's district manager "had substantial discretionary authority to override" T-Mobile's general written policies and because his discretionary decisions "affected company policy over a significant aspect of T-Mobile's business," he was properly considered a managing agent. The court of appeal did, however, reduce the punitive award to a 1.5-to-one ratio based on T-Mobile's "low to moderate degree of reprehensibility."

Litigation—Unfair Competition and False Advertising—No Right to Jury Trial

California's unfair competition and false advertising statutes (UCL and FAL) authorize the government to bring a civil action against companies for deceptive business practices and provide the government with several remedies, including civil penalties, injunctive relief, and restitution. Resolving a recent split among court of appeal decisions, the California Supreme Court in *Nationwide Biweekly Administration, Inc. v. Superior Court*, 9 Cal.5th 279 (2020) held that even when the government seeks civil penalties, claims under the UCL and FAL "are equitable in nature and are properly tried by the court rather than a jury." As the Supreme Court explained, "the legislative history and underlying purpose of the statutory provisions in question demonstrate that these very broadly worded consumer protection statutes were fashioned to permit courts to utilize their traditional flexibly equitable authority, tempered by judicial experience and familiarity with the treatment of analogous business practices in this and other jurisdictions, in evaluating whether a challenged business act or practice or advertising should properly be considered impermissible under these statutory provisions."