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Newcases of BUSINESS LITIGATION INTEREST

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Appeals & Writs—Distinction Between Alternative Writ and Order to Show Cause

In *Paul Blanco's Good Car Co. Auto Group v. Superior Court*, 56 Cal.App.5th 86 (2020) the court issued a peremptory writ of mandate reversing a trial court order striking defendants' answer, holding that where the State files an unverified false advertising complaint, defendants are entitled to file a general denial in answer. For purposes of this newsletter, however, the more interesting part of the opinion is the court's discussion of the distinction between an alternative writ and an order to show cause. There, in response to defendants' writ petition, the court of appeal issued an order to show cause requiring the court to "show cause" as to "why the relief requested in the petition should not be granted." Thereafter, a different judge in the trial court vacated the order striking defendants' answer. The court of appeal held that the second judge's order was "invalid" under the "good-sense rule that one trial judge cannot overrule another." The court of appeal also explained that while the issuance of an alternative writ invites the trial court to change its order, an order to show cause does not. Courts "carefully choose between the alternative writ and OSC procedures, cognizant of the difference between the two." In *Paul Blanco*, the court of appeal issued an OSC because the writ petition "raised a question of first impression appropriate for resolution in a published opinion" and an alternative writ "would have permitted reversal of the challenged order with the undesirable result of potentially rendering the issue moot."

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And while the court of appeal acknowledged that "a trial court retains power to change an order embraced by an appellate court's OCS, it should refrain from doing so."

Arbitration—FAA—Unconscionability

In *Epstein v. Vision Serv. Plan*, 56 Cal.App.5th 223 (2020), optometrist Gordon Epstein sought to invalidate his arbitration agreement with Vision Service Plan. The court of appeal, however, rejected Epstein's argument the agreement was unconscionable, finding "some degree of procedural unconscionability," but no substantive unconscionability. While the agreement provided the arbitrator was to be selected from a list provided by VSP, there were safeguards against a biased arbitrator, including the ability for either party to object to any proposed arbitrator and strike up to two additional names. The court also rejected Epstein's claim that confidentiality provisions prevented him from discussing the process or strategy with "others" rendered the agreement unconscionable. The court reasoned the medical context of the proceedings may require heightened confidentiality. Next, the court upheld limitations on discovery, as an "important component" of arbitration. Finally, the arbitration agreement included a two-step dispute resolution procedure whereby the dispute went to arbitration only if the parties could not resolve their dispute through an internal hearing with VSP. Somewhat surprisingly, the court upheld the contractual provision requiring the request for arbitration be made within 30 days of receipt of the hearing panel's decision. The court analogized the 30-day period to the 60-day period in which a party may appeal from a judgment and noted that some administrative writs must be challenged within 30 days.

Invasions of Privacy Act—One-Way Recording of Telephone Conversations Illegal Without Consent

Sections 632 and 632.7 of the California Invasions of Privacy Act (Pen. Code § 630 et seq.) impose civil liability on persons who record telephone conversions without the consent of all parties. The court of appeal in *Gruber v. Yelp Inc.*, 55 Cal.App.5th 891 (2020) considered whether those sections apply where "a defendant records its voice but not the voice of the other party to the call." There, Gruber filed a class action against Yelp asserting violations of the Privacy Act. The evidence showed that Yelp, for training purposes, made several one-way recordings of conservations with Gruber—recordings that captured the Yelp employees' voices, but not Gruber's. There was no

evidence Yelp made any two-way recordings. The trial court granted summary judgment to Yelp on the ground the Privacy Act sections do not apply to one-way recordings, but the court of appeal reversed. The court held that while the Privacy Act "does not preclude a corporation such as Yelp from engaging in one-way recordings for the indicated purpose of sales training or quality control," such recordings are "illegal under [the Privacy Act] if consent is not first obtained from all the participants of the call."

Litigation—Default Judgment—Allegations of Specific Dollar Amount Required in Accounting Actions

It is well established that the relief granted in a default judgment cannot exceed the amount plaintiff demanded in the complaint. E.g., CCP § 580(a). In an accounting action, however, the plaintiff does not know the sum certain owed by a plaintiff and, therefore, cannot state the precise amount of damages sought. Courts had previously reached conflicting results as to whether, in an accounting action, it was sufficient under section 580(a) to identify the assets at issue and request their value. In *Sass v. Cohen*, __ Cal.5th __, 2020 WL 7653773 (Dec. 24, 2020), the Supreme Court resolved this conflict by holding that "a plaintiff seeking an accounting is not excused from section 580's requirement to state a specific dollar amount to support a default judgment granting monetary relief." This result is required to satisfy the statute's purpose, which is to "guarantee defaulting defendants adequate notice of the maximum judgment that may be assessed against them." (Internal quotation marks omitted). Moreover, this approach is not unfair to plaintiffs asserting an accounting action because those plaintiffs "(1) are generally able to estimate their damages, (2) must ultimately prove the sums to which they are entitled after default, and (3) may request that the trial court take an accounting in circumstances where an accounting is necessary to discover the information needed to determine the amount owing."

Litigation—§ 998 Offer—Requirements for Validity

In *Auburn Woods I Homeowners Association v. State Farm General Insurance Company*, 56 Cal.App.5th 717 (2020), the court of appeal considered the validity of plaintiffs' § 998 offer. First, the court rejected defendants' claim that the offer was defective because it did not identify the accepting party in the signature line. The court held it was sufficient that the offer identified the accepting party in the final paragraph and concluded with a signature block for

defendant's counsel. Second, the court rejected defendants' claim the offer was defective because it included an overbroad and ambiguous settlement agreement and release. The court held that while an offer must be sufficiently specific to allow the offeree to evaluate the offer's value and allow the trial court to determine whether a judgment is more favorable than the offer, a 998 offer is not rendered invalid by a provision requiring the offeree to release all claims between the parties in the current action. Finally, the court rejected defendants' claim the offer was invalid because it referred to "an extraneous agreement that was not part of the offer." The court found that claim meritless given plaintiffs' proposed settlement agreement was attached to their 998 offer, which gave defendants notice of its terms.

Litigation—Statute of Limitations—No Tolling Under CCP § 351 Where Defendant Conducts Interstate Commerce

In 1997, Arrow Highway Steel, Inc. entered into a stipulated judgment with Robert Dubin. Dubin moved to Nevada in 1998 and founded a new accounting business. In 2018, Arrow filed suit against Dubin to enforce the 1997 judgment. The question in *Arrow Highway Steel, Inc. v. Dubin*, 56 Cal.App.5th 876 (2020) was whether CCP section 351—which tolls the statute of limitations when a defendant "departs from the State" "after [a] cause of action accrues" for the period defendant is away from California—saved Arrow's otherwise time-barred action. The court answered "no," holding the application of section 351 violated the dormant Commerce Clause. In so doing, the court relied *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988) 486 U.S. 888, in which the U.S. Supreme Court held a similar Ohio statute to be unconstitutional because the law placed a "significant" burden on interstate commerce because it "forces" an out-of-state defendant to choose between exposure to the general jurisdiction of the state by becoming a resident and forfeiting the limitations defense by remaining out of state. The Supreme Court found the state's interest in tolling was weak since the state's long-arm statute permitted the plaintiff to serve the out-of-state defendant. The *Arrow* Court, finding Dubin had been engaged in interstate commerce, held section 351 unconstitutional as applied, calling it a "quaint relic of a bygone era" in light of long-arm statutes.