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STATE

Arbitration—Grounds to Vacate Award—Award Cannot Be Inconsistent with Statutory Rights

It is well established that arbitrators exceed their powers when their award violates an explicit legislative expression of public policy. The decision in *Brown v. TGS Mgmt. Co., LLC*, 57 Cal.App.5th 303 (2020) is one of the rare cases that applies that rule to vacate an arbitration award. The arbitration there concerned, among other things, a former employee's claim seeking a declaration that the broad confidentiality provision in his employment agreement violated Business and Professions Code Section 16600, which voids any contract "by which anyone is restrained from engaging in a lawful profession . . . ." The arbitrator denied this claim as "without merit," and the trial court confirmed the arbitrator's resulting award. The court of appeal reversed, holding the arbitration award "conflicts with [the plaintiff's] broad right under section 16600 to pursue lawful employment." The court found the confidentiality provisions in question so broadly defined "confidential information"—which the plaintiff was precluded from using in future employment—that they "operate as a de facto noncompete provision," barring the plaintiff "in perpetuity from doing any work in the securities field . . . ." The arbitrator exceeded his powers by allowing those provisions "to stand as a perpetual restriction on [the plaintiff's] right to compete with [his former employer]."

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Arbitration—No Agreement to Arbitrate Where Arbitration Provision is Hidden

If you want to create an enforceable agreement to arbitrate, do not put the arbitration provision on the back of a single paged, double-sided document where the signature line is on the front, and do not bury the provision in a "thicket of fine print" without providing "a heading, boldface, italics, or capitalization to draw attention to it." That is the lesson from *Domestic Linen Supply Co. v. L J T Flowers, Inc.*, 58 Cal.App.5th 180 (2020), which described the arbitration clause at issue as being "as inconspicuous as a frog in a thicket of water lilies," and, therefore, held "the trial court could reasonably determine that there was no agreement to arbitrate."

Litigation—Amending Judgment to Add Alter Ego

In two separate cases, courts of appeal affirmed trial court orders adding corporate principals and directors as alter ego judgment debtors. In each case, the court refused to add additional requirements to the well-recognized standard that alter ego liability depends on whether (1) the parties to be added to the judgment had control of the litigation, (2) there is such a unity of interest that the separate personalities of the corporation and the individual no longer exist, and (3) adherence to the separate corporate form would create injustice. In *Triyar Hospitality Management, LLC v. WSI (II) HWP, LLC*, 57 Cal.App.5th 636 (2020), the court rejected appellants' argument that "there must be some conduct amounting to bad faith that makes it inequitable to hide behind the corporate form," holding that "all the moving party is required to prove is that the alter ego's acts caused an inequitable result." And in *Ming-Hsiang Kao v. Holiday*, 58 Cal.App.5th 199 (2020), the court rejected appellants' argument that alter ego liability could not attach absent a finding the company was undercapitalized or was a mere shell or conduit for the business of appellants. The court held that while undercapitalization was one factor the court could consider in determining whether alter ego liability was warranted, the trial court's reliance on other factors—such as commingling of funds and unauthorized use of corporate assets—was sufficient.

Litigation—Attorney's Fees—Tort Action Against Alter Ago May Be Action "On a Contract"

Civil Code Section 1717 entitles the prevailing party to attorney's fees "[i]n any action on a contract," where the contract provides for that recovery. In *347 Group., Inc. v. Philip Hawkins Architect, Inc.*, 58 Cal.App.5th 209 (2020), the court held a suit involving tort claims against alter egos

of the contracting party was an action "on a contract." 347 Group, Inc. obtained default judgment against Philip Hawkins Architect, Inc. for breach of contract. 347 Group also brought claims against Philip Hawkins individually and Design-Build, Inc. for breach of contract, fraudulent conveyance, and conspiracy, alleging they were alter egos of Architect Inc. 347 Group voluntarily dismissed its contract claim. After the alleged alter egos prevailed on the tort claims, the trial court denied their motion for attorney's fees under section 1717. The court of appeal reversed, noting the California Supreme Court has held a party sued as an alter ego is entitled to attorney's fees in a breach of contract action. Relying heavily on *MSY Trading Inc. v. Saleen Automotive, Inc.*, 51 Cal.App.5th 395 (2020), which expanded that right where there was no breach of contract claim, the court of appeal reasoned the fraudulent conveyance and conspiracy claims were "on a contract"; it made no difference that 347 Group had dismissed its contractual claim.

Litigation—Class Action—*American Pipe* Tolling

The appeal in *Hildebrandt v. Staples the Office Superstore, LLC*, 58 Cal.App.5th 128 (2020) presented a single issue: Was Hildebrandt entitled to the benefit of the class action tolling rule due to the pendency of class certification proceedings in two other actions—the *Hatgis* and *Wesson* actions? In *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 (1988), the California Supreme Court adopted the tolling rule established by the United States Supreme Court in *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974) that in some cases, "if class certification is denied, the statute of limitations is tolled from the time of commencement of the suit to the time of denial of certification for all purported members of the class who . . . timely file their individual actions." The trial court in *Hildebrandt* determined the denial of class certification in the *Wesson* action due to lack of commonality gave rise to a "presumption" against tolling. The trial court also found: (1) tolling would be prejudicial to Staples because the earlier actions did not put it on notice that it needed to preserve evidence with respect to all its general managers, including Hildebrandt and (2) the denial of class certification in the earlier case was not unforeseeable. The court of appeal reversed, rejecting the "factual inquiry" embraced by the trial court and finding *Jolly* and *American Pipe* "require only that the original class action complaint

notifies the defendants of the substantive claims being brought against them, and of the number and generic identities of the potential plaintiffs who may participate in the judgment.” (Cleaned up). “As long as the pleading provides this notice, there is no further requirement that the defendant also be able to predict which of the potential plaintiffs will decide to bring suit.”

Litigation—Peremptory Challenges—Single Challenge in Coordinated Proceedings

In *Prescription Opioid Cases*, 57 Cal.App.5th 1039 (2020), the court of appeal held that in a Judicial Council Coordination Proceeding—which coordinates separate complex civil actions pending in different counties into a single coordination proceeding—each side may challenge either the coordination motion judge or the trial judge, but not both. Rule 3.516 establishes special rules for peremptory challenges in coordinating proceedings. In addition to defining all plaintiffs and all defendants as “a side” for purposes the one-challenge-per-side limitation, the rule provides that a peremptory challenge must be filed within 20 days of “the order assigning the judge to *the coordination proceeding*.” (Emphasis added.) Petitioners argued that “different judicial assignments for different purposes are *discrete coordination proceedings* within the umbrella of a [Judicial Council Coordination Proceeding],” which allowed them to challenge a coordination motion judge and then later challenge the assigned trial judge. (Emphasis in original.) The court of appeal disagreed, holding that “[w]hile this language can account for two separate orders assigning different judges to a coordination proceeding—one for the coordination motion judge and one for the trial judge—the language does not necessarily imply that each side gets a separate peremptory challenge for each judicial assignment.” Instead, the court interpreted the rule to require “a side to file a peremptory challenge within 20 days of *either* the assignment of the coordination judge *or* the assignment of the trial judge,” but not to “displace the one-challenge-per-side limitation . . . .” (Emphasis in original.)

Remedies—Breach of Fiduciary Duty—No Monetary Damages Needed to Recover Disgorgement

In *Center for Healthcare Education and Research, Inc. v. International Congress for Joint Reconstruction, Inc.*, 57 Cal.App.5th 1108 (2020), the court held no showing of monetary harm is needed to establish a right to disgorgement of profits for breach of fiduciary duty. There, ICJR retained Mark Sacaris to help produce medical

education conferences. Sacaris was given full control over ICJR's bank accounts and later was made ICJR's COO. Sacaris provided services through a company in which he had 50% interest, CHE, at rates he set, but he failed to disclose the rates or his interest in CHE. ICJR eventually terminated its relationship with Sacaris and CHE after learning it owed CHE $2 million. When CHE sued to recover the debt, ICJR filed a cross-action against CHE and Sacaris, seeking disgorgement of profits for their breach of fiduciary duty. Even though the trial court found CHE and Sacaris breached their fiduciary duty to ICJR by failing to disclose its management fees, it denied ICJR's request for disgorgement of those fees on the grounds ICJR did not suffer monetary damages. The court of appeal reversed, reasoning the remedy of disgorgement is broader than restitution or restoration of what the plaintiff lost and focuses on the wrongdoer's enrichment rather than the victim's loss. Once ICJR met its burden to establish a reasonable approximation of the amount CHE and Sacaris profited through their misconduct, the court was required to exercise its discretion to fashion a remedy.