



Civil Procedure Update

A review of recent decisions on civil procedure, discovery and evidence of interest to the plaintiff's bar



Finz

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In *Postal Instant Press, Inc. v. Kaswa Corp* (2008) 162 Cal.App.4th 1510 [77 Cal.Rptr.3d 96], the Fourth District rejected for California the doctrine known as "outside reverse piercing of the corporate veil," under which some jurisdictions hold a corporation liable for non-corporate debts of individual shareholders. The court cited several cases from other jurisdictions, including *Kingston Dry Dock v. Lake Champlain Transp. Co.* (2d Cir. 1929) 31 F.2d 265.

In *Myerchin v. Family Benefits, Inc.* (2008) 162 Cal.App.4th 1526 [76 Cal.Rptr.3d 816], the Fourth District said that, in spite of plaintiff's claim that defense counsel communicated with him knowing he was represented, in the absence of evidence that plaintiff was unable to make a reasoned decision about settlement, or that plaintiff's consent to it was improperly induced, summary judgment for defendant was proper in an action by a plaintiff who had settled the matter, received the proceeds, spent them, and was unable to rescind the settlement by returning them. The court cited *Sime v. Malouf* (1949) 95 Cal.App.2d 82, noting that a plaintiff who seeks to rescind a settlement agreement must effectuate that rescission before he is free to pursue the released claim.

In *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107 [76 Cal.Rptr.3d 585], the Second District noted that the use of special interrogatories in a verdict form should not be disturbed except for a clear abuse of the trial court's discretion. Although plaintiff asserted that the form used unduly emphasized defendant's theory of the case, the court found no abuse, since the questions asked embraced both parties' theories. In support of this conclusion, it cited *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467. The court added that when a

plaintiff receives a money judgment and defendant receives a declaratory judgment, determination of which is the prevailing party is in the trial court's discretion.

In *Zagami Inc. v. James A. Crone Inc.* (2008) 160 Cal.App.4th 1083 [74 Cal.Rptr.3d 235], the Fourth District held that in an action based on the claim that defendant failed to return equipment it rented from plaintiff, the jury's awards of \$15,000 for rental value and \$30,000 for the value of the equipment were inconsistent, making the verdict hopelessly ambiguous. Citing *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, it concluded that therefore the trial court's entry of judgment for \$30,000 must be reversed.

In *Kimball Ave v. Franco* (2008) 162 Cal.App.4th 1224 [76 Cal.Rptr.3d 628], the Fourth District held that the sole consequence of a party's and the court clerk's failure to serve notice of entry of a judgment as required is that the time to appeal is extended from 60 to 180 days. Citing *Baldwin Park Redevelopment Agency v. Irving* (1984) 156 Cal.App.3d 428, the court added that such failure does not make the judgment void.

In *Roman v. Liberty University, Inc.* (2008) 162 Cal.App.4th 670 [75 Cal.Rptr.3d 828], the Fourth District held that a Virginia university did not purposefully avail itself of California law by sending a recruiter for its football program to California to induce a California resident to attend. Citing *Von's Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434; and *Snowney v. Harrah's* (2005) 35 Cal.4th 1054, P/AT 7/05, it concluded that in a personal injury action brought against the university by the California resident for an injury that occurred at the school, California courts lacked jurisdiction. Since this made Virginia the only jurisdiction



in which an action could be brought against the university and an individual defendant who asserted he was a Virginia resident, the trial court was correct in dismissing the action against the individual under the doctrine of *forum non conveniens*. Plaintiff contended that Virginia principles of contributory negligence and assumption of the risk would result in his losing the case there, but the court said as long as Virginia permitted him to bring the action, it was a suitable forum regardless of whether he could win. Although the expired Virginia statute of limitations might prevent Virginia from being a suitable forum, the court treated as a binding stipulation that the statute of limitations would not be raised as a defense in Virginia a representation by defense counsel that running of the statute was tolled in Virginia pending resolution in the California court.

In *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950 [76 Cal.Rptr.3d 396], the Fourth District held that a defendant successfully moving for dismissal of a complaint in its entirety on jurisdictional grounds is the prevailing party for purposes of an award of attorney fees called for in the contract that was the subject of the litigation. The court cited *Hsu v. Abbata* (1995) 9 Cal.4th 863.

In *Miller v. Campbell, Warburton, Fitzsimmons, Smith Mendel & Pastore* (2008) 162 Cal.App.4th 1331 [76 Cal.Rptr.3d 649], the Sixth District held that in awarding fees to an executor's attorney, the probate court's exclusion of some of the requested fees upon finding they were for services rendered to the client personally, rather than in her capacity as executor, did not result in issue preclusion (i.e., collateral estoppel) to prevent the attorney from bringing a

subsequent quantum meruit action against the client for the fees that had been excluded. The court noted that *In re Estate of Kelleher* (1928) 205 Cal. 757, held that an attorney who is not satisfied with the amount awarded by the probate court must attack its order, rather than bring a quantum meruit action against the executor outside the probate proceeding. But in this case, the probate court had excluded the fees because it found they were not involved in the probate matter and had made no finding at all regarding the client's personal indebtedness.

In *Blickman Turkus LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858 [76 Cal.Rptr.3d 325], the Sixth District acknowledged the authority of *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, which held that a party suing or being sued as the alter ego of a contracting party might be entitled to recover attorney fees as a prevailing party under a contract calling for fees to the prevailing party in litigation between contracting parties. However, it found that one suing as a third-party beneficiary of such a contract is not entitled to fees.

In *Enpalm LLC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770 [75 Cal.Rptr.3d 902], the Second District held that if a party entitled to attorney fees engaged in improper conduct that made much of the litigation unnecessary, reduction of the fee award accordingly is not an abuse of discretion. Although *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553 held that a fee award may not be manipulated to punish a party for its conduct, the court noted that the reduction in this case was based on a determination of the time reasonably required, rather than imposed as a punishment for the improper conduct.

In *Loeb v. Record* (2008) 162 Cal.App.4th 431 [75 Cal.Rptr.3d 551], the Fifth District discussed the Mandatory Fee Arbitration Act (Bus. & Prof. Code, § 6200 et seq.), citing *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076. It noted that a party seeking a trial must either start a new lawsuit or, if an action for the fee is pending, file a motion in that action. Under Code of Civil Procedure section 1287.4, a party seeking payment of an arbitration award must file a petition to confirm it. The court found that motions made in a pending personal injury action from which the fee dispute in question arose did not satisfy either requirement.

In *Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc.* (2008) 162 Cal.App.4th 468 [75 Cal.Rptr.3d 763], the Second District cited *Guseinov v. Burns* (2007) 145 Cal.App.4th 944 as authority for holding that a neutral arbitrator who has no pecuniary interest in profits generated by his/her employer's business relationship with a party has no duty to disclose that relationship under Code of Civil Procedure section 1287.9.

In *Luce, Forward Hamilton & Scripps, LLP v. Koch* (2008) 162 Cal.App.4th 720 [75 Cal.Rptr.3d 869], the Fourth District cited *Guseinov v. Burns* (2007) 145 Cal.App.4th 944 in support of its conclusion that the fact an arbitrator had served on boards of directors with a witness and one of the attorneys in the case before him did not require disclosure under Code of Civil Procedure section 1287.9. The court went on to say that the arbitrator's abundantly cautious disclosure of that fact did not subject him to disqualification.



In *Gueyffier v. Ann Summers, Ltd* (2008) 43 Cal.4th 1179 [77 Cal.Rptr.3d 613], the California Supreme Court noted that unless the agreement by which a matter is submitted to arbitration provides otherwise, an arbitrator has the authority to find facts and interpret a contract in dispute. It held that in the case before it, upon finding as a fact that a breach was not curable, the arbitrator's determination that a notice-and-cure provision in the contract did not apply was a valid exercise of this authority, was not a modification of the contract by the arbitrator, and was not in excess of the arbitrator's powers.

In *San Joaquin County LAFCO v. Superior Court* (2008) 162 Cal.App.4th 159 [76 Cal.Rptr.3d 93], the Third District found that a "deliberative process privilege" protects all three branches of government against disclosure concerning mental processes, conversations, discussions, debates, deliberations and

materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated. The court cited *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255 and *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559.

In *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014 [76 Cal.Rptr.3d 559], the Second District cited language in *Urban Pacific Equities Corp. v. Superior Court* (1997) 59 Cal.App.4th 688, which found a reporter's charge for a deposition transcript unconscionable, but said that reporters are free to charge whatever the traffic will bear. But this court said that while contracting parties may agree to any price at all without interference from the court, if a party who did not contract with the reporter is entitled to a copy of the transcript, the court has discretion to order its delivery for payment of a reasonable fee and to determine what fee is reasonable.

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