



California Case Summaries Civil Update Annual™

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CALIFORNIA SUPREME COURT

Arbitration

McGill v. Citibank (2017) 2 Cal.5th 945: In a class action alleging claims under the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.), the unfair competition law (UCL; Bus. & Prof. Code, § 17200 et seq.), the false advertising law and the Insurance Code arising from a credit card agreement, the California Supreme Court reversed the Court of Appeal ruling ordering the trial court to order all of plaintiff's claims to arbitration. The California Supreme Court ruled that a provision in a predispute arbitration agreement that waived the right to seek the statutory remedy of injunctive relief under the CLRA, UCL and the false advertising law was contrary to California public policy and thus was unenforceable under California law. The Supreme Court further hold that the Federal Arbitration Act did not preempt this rule of California law or require enforcement of the waiver provision. The Court of Appeal's judgment was reversed and the matter was remanded for further proceedings consistent with the opinion. (April 6, 2017.)

Attorney Fees

DisputeSuite.com v. Scoreinc.com (2017) 2 Cal.5th 968: The California Supreme Court affirmed the trial court's finding that defendants were not prevailing parties for purposes of an attorney fee award under Civil Code section 1717, even though they successfully obtained a dismissal from a California court on the ground that the agreement at issue contained a forum selection clause specifying the courts of another jurisdiction. The Supreme Court ruled that, under the circumstances of the case, where action had already been refiled in the chosen jurisdiction and the parties' substantive disputes remained unresolved, the trial court reasonably concluded that neither party had yet achieved its litigation objectives to an extent warranting an award of fees. (April 6, 2017.)

Attorneys

Barry v. State Bar of California (2017) 2 Cal.5th 318: The California Supreme Court reversed the judgment of the Court of Appeal holding that, in the absence of subject matter jurisdiction, the trial court had no power to hear or decide an anti-SLAPP motion to strike under Code of Civil Procedure section 425.16. The California Supreme Court ruled that a court that lacks subject matter jurisdiction over a claim may grant an anti-SLAPP motion to strike and may award attorney fees and costs to the defendant. Because the court lacked subject matter jurisdiction, plaintiff could not show a probability of prevailing on the merits. Here is the procedural summary of the case: After the State Bar commenced disciplinary proceedings, plaintiff stipulated to violations of the rules of professional conduct and agreed to the recommended discipline. Plaintiff then filed a writ petition with the California Supreme Court, the court with jurisdiction over disciplinary proceedings, seeking to set aside the stipulation. The Supreme Court denied the petition and imposed the discipline. Plaintiff then filed this complaint against defendant in the Superior Court. (January 5, 2017.)

Civil Code

Flethez v. San Bernardino County Employees Retirement Association (2017) 2 Cal.5th 630: The California Supreme Court affirmed the Court of Appeal's decision holding that the trial court had erred in awarding plaintiff prejudgment interest after it had determined that defendant had wrongfully denied plaintiff the correct starting date for his disability retirement allowance. The only issue appealed was the prejudgment interest award. The California Supreme Court ruled that it is only when a board wrongfully denies an application for disability benefits and withholds disability retirement payments that prejudgment interest begins to run as damages under section California Civil Code section 3287(a). The decision in *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528 was disapproved to the extent it was inconsistent with this opinion. (March 2, 2017.)

Leider v. Lewis (2017) 2 Cal.5th 1121: In a taxpayer case alleging elephant abuse at the Los Angeles Zoo, the California Supreme Court reversed the Court of Appeal's decision concluding that its earlier decision established law of the case that barred defendants' new argument that the claim for equitable relief was precluded by Civil Code section 3369, and ruling that the "as otherwise provided by law" exception in section 3369 permitted equitable relief in a taxpayer action seeking to restrain "illegal" public expenditures under Code of Civil Procedure section 526a. The Supreme Court ruled that this case was governed by the

general rule that law of the case does not apply to arguments that might have been but were not presented and resolved on an earlier appeal. The earlier appeal court fully resolved the justiciability issue before it without having to consider whether section 3369's limitation on equitable relief would apply in plaintiffs' taxpayer action. The Supreme Court also ruled that the Legislature did not intend to overturn the long-established law governing equitable relief for violations of penal law when it amended Civil Code section 3369 in 1977. Rather, when it added the "except . . . as otherwise provided by law" exception, it maintained the rule that a taxpayer action will not lie to enforce a Penal Code provision. The action was remanded for further proceedings. (May 25, 2017.)

Scher v. Burke (2017) 3 Cal.5th 136: The California Supreme Court affirmed the Court of Appeal's holding that Civil Code section 1009(b), which limits the circumstances in which courts may find implied dedication of private coastal property section 1009, unambiguously bars all public use, not just recreational use, from developing into an implied public dedication. (June 15, 2017.)

Civil Procedure

Dhillon v. John Muir Health (2017) 2 Cal.5th 1109: The California Supreme Court reversed the Court of Appeal's decision dismissing defendant's appeal on the basis that the trial court's order granting a petition for writ of administrative mandamus and remanding the matter for proceedings before an administrative body was not an appealable final judgment. The action was a writ proceeding by a doctor challenging discipline imposed on him by a hospital. The California Supreme Court ruled that, under the circumstances of this case, the order partially granting the writ petition was an appealable final judgment under Code of Civil Procedure section 904.1. The order either granted or denied each of the claims, it set aside the discipline imposed against the doctor and remanded with instructions to hold a hearing before the judicial review committee or another appropriate body, the court did not reserve jurisdiction to consider any issues, and, once the writ was issued no issue was left for the court's future consideration except the fact of compliance or noncompliance with the terms of the writ decree. (May 25, 2017.)

Kabran v. Sharp Memorial Hospital (2017) 2 Cal.5th 330: The California Supreme Court affirmed the judgment of the Court of Appeal that upheld the trial court's order granting a motion for new trial even though the plaintiff had failed to timely file the necessary filing fee for expert affidavits in support of the motion. Defendant did not object to the timeliness of the affidavits in the trial court. However, on appeal it argued for the first time that, under *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663 (*Erikson*), because the affidavits were not timely filed, the trial court lacked jurisdiction to rely on them in hearing the new trial motion. The California Supreme Court ruled that the 30-day aggregate period for the submission of affidavits under Code of Civil Procedure section 659a is not jurisdictional, and disapproved *Erikson* to the extent it was inconsistent with the decision. Because defendant failed to assert the timeliness objection in the trial court, it could not raise this argument for the first time on appeal. The lack of timeliness did not deprive the trial court of jurisdiction to consider the affidavits. (January 19, 2017.)

Park v. Board of Trustees of the California State University (2017) 2 Cal.5th 1057: The California Supreme Court reversed the Court of Appeal's decision that had reversed the trial court's denial of an anti-SLAPP motion to strike a complaint filed by a person of Korean origin who had been denied tenure that alleged violations of the California Fair Employment and Housing Act (Government Code, section 12900 et seq.) for national origin

discrimination and failure to receive a discrimination-free workplace. The California Supreme Court ruled that a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. A claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted. (May 4, 2017.)

Perry v. Bakewell Hawthorne (2017) 2 Cal.5th 536: The California Supreme Court affirmed the Court of Appeal's decision affirming the trial court's order granting summary judgment for defendant. The California Supreme Court ruled that, when a court determines an expert opinion is inadmissible because disclosure requirements were not met, the opinion must be excluded from consideration at summary judgment if an objection is raised. (February 23, 2017.)

Ryan v. Rosenfeld (2017) 3 Cal.5th 124: The California Supreme Court vacated the Court of Appeal's dismissal of an appeal from a motion to vacate a judgment under Code of Civil Procedure section 663. An order denying a motion under section 663 is appealable even if it raises issues that could have been litigated via an appeal of the judgment. The rule announced in *Bond v. United Railroads* (1911) 159 Cal. 270, 273 is still valid. (June 15, 2017.)

Weatherford v. City of San Rafael (2017) 2 Cal.5th 1241: The California Supreme Court reversed the trial court's judgment of dismissal of plaintiff's action under Code of Civil Procedure section 526a because plaintiff had not paid property tax. The California Supreme Court ruled that, for a person to have standing to sue the government for wasteful or illegal expenditures under section 526a, it is sufficient for a plaintiff to allege she or he has paid, or is liable to pay, to the defendant locality a tax assessed on the plaintiff by the defendant locality. (June 5, 2017.)

Employment

Augustus v. ABM Security Services (2017) 2 Cal.5th 257: The conclusion of the decision, previously published on December 22, 2016, was modified to state: "California law requires employers to relieve their employees of all work-related duties and employer control during 10-minute rest periods. The trial court's summary adjudication and summary judgment orders were premised on this understanding of the law. Rightly so: Wage Order 4, subdivision 12(A) and section 226.7 prohibit on-duty rest periods. What they require instead is that employers relinquish any control over how employees spend their break time, and relieve their employees of all duties—including the obligation that an employee remain on call. A rest period, in short, must be a period of rest. We accordingly reverse the Court of Appeal's judgment on this issue. The matter is remanded to the Court of Appeal for further proceedings consistent with this opinion." (June 8, 2017.)

Mendoza v. Nordstrom, Inc. (2017) 2 Cal.5th 1074: The California Supreme Court issued an opinion to resolve unsettled questions concerning the construction of the day of rest statutes in California Labor Code sections 550–558.1, which prohibit an employer from causing employees to work more than six days in seven (section 552), but do not apply when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof (section 556). Answering three questions posed by the Ninth Circuit Court

of Appeals, the California Supreme Court ruled as follows: (1) A day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited. (2) The exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply. (3) An employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however, forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest. (May 8, 2017.)

Shaw v. Superior Court (2017) 2 Cal.5th 983: The California Supreme Court affirmed in part and reversed in part the ruling of the Court of Appeal in an action for wrongful termination and violation of Health and Safety Code section 1278.5(g). The California Supreme Court ruled that a trial court ruling denying a request for a jury trial in a civil action is reviewable before trial by a petition for an extraordinary writ, and there is no statutory right to a jury trial for retaliatory termination under the Health and Safety Code 1278.5(g). However, Health and Safety Code section 1278.5(m) preserves a plaintiff's right to a jury trial for wrongful termination in violation of public policy authorized under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. (April 10, 2017.)

Environment

Central Coast Forest Association v. Fish and Game Commission (2017) 2 Cal.5th 594: The California Supreme Court ruled the Court of Appeal had erred in reversing the trial court's order overruling a decision of the Fish and Game Commission regarding locations where coho salmon is on the endangered species list. The Court of Appeal erred in finding the writ petition was procedurally improper. The California Supreme Court reversed and remanded to the Court of Appeal for consideration of the petition's merits. (February 27, 2017.)

Government

Association of California Insurance Companies v. Jones (2017) 2 Cal.5th 376: The California Supreme Court reversed the decision of the Court of Appeal affirming the trial court's order ruling that the California Insurance Commissioner had exceeded his authority in issuing a 2011 regulation covering replacement cost estimates for homeowners insurance (California Code of Regulations, title 10, section 2695.183). The California Supreme Court ruled that the statutory authority supported the Insurance Commissioner's regulation. Because the regulation had been invalidated below solely under the Administrative Procedure Act and plaintiff's remaining challenges to the regulation had not yet been considered, the matter was reversed and remanded for further proceedings consistent with the opinion. (January 23, 2017.)

City of San Jose v. Superior Court (2017) ___ Cal.5th ___, 2017 WL 818506: The California Supreme Court reversed the judgment for defendant entered after the Court of Appeal granted a writ petition directing the trial court to change its order compelling petitioner to produce records under the California Public Records Act (CPRA, Government Code, section 6250). The California Supreme Court ruled that a city employee's writings about public

business are not excluded from CPRA simply because they have been sent, received, or stored in a personal account. (March 2, 2017.)

J.M. v. Huntington Beach Union High School District (2017) 2 Cal.5th 648: The California Supreme Court affirmed the decision of the Court of Appeal that had affirmed the trial court's decision to deny a petition for relief from the government claim filing requirement under Government Code section 946.6. Petitioner suffered a double concussion syndrome playing football that was diagnosed on October 31, 2011. Petitioner did not timely file a government tort claim within six months as required by Government Code sections 945.4 and 911.2. Petitioner did timely present an application under Government Code section 911.4 to present a late claim, but respondent did not act on the application, and it was deemed denied by operation of law under Government Code section 911.6. Petitioner later filed a petition in the trial court under section 946.6 for relief from the claim requirement. The trial court properly denied the petition as untimely because it was not filed within six months of the date on which his application to present a late claim was deemed denied by operation of law. The California Supreme Court disapproved of *E.M. v. Los Angeles Unified School District* (2011) 194 Cal.App.4th 736. (March 6, 2017.)

Taxes

926 North Ardmore v. County of L.A. (2017) ___ Cal.5th ___, 2017 WL 2806261: The California Supreme Court affirmed the Court of Appeal's decision affirming the trial court's denial of plaintiff's action seeking a refund of its payment of the documentary transfer tax. Revenue and Taxation Code section 11911 permits the imposition of a documentary transfer tax whenever a transfer of an interest in a legal entity results in a change in ownership of real property within the meaning of section 64(c) or (d), so long as there is a written instrument reflecting a sale of the property for consideration. There were written instruments reflecting the transfer of beneficial ownership of the building. The evidence at trial demonstrated that the two trusts of the sons paid their mother's subtrusts for the interests they acquired in the building, and this payment was consideration for the sale. (June 29, 2017.)

Williams & Fickett v. County of Fresno (2017) 2 Cal.5th 1258: The California Supreme Court ruled that, when an assessment on nonexempt property is challenged on the ground that the taxpayer does not own the property involved, a taxpayer must first apply to the local board of equalization for assessment reduction under Revenue and Taxation Code section 1603 and file an administrative tax refund claim under section 5097, or obtain a stipulation under section 5142(b) that such proceedings are unnecessary, in order to maintain a postpayment superior court action under section 5140 that seeks reduction of the tax. (June 5, 2017.)

Torts

Roy Allan Slurry Seal v. American Asphalt South (2017) 2 Cal.5th 505: The California Supreme Court reversed the Court of Appeal decision that had found plaintiff's complaint sufficient to plead interference with prospective economic advantage in a case filed by a contractor that was the second lowest bidder for public works projects. To prove the tort of intentional interference with prospective economic advantage, a plaintiff must establish the existence of an economic relationship with some third party that contains the probability of

future economic benefit to the plaintiff. The California Supreme Court found that no such relationship exists between a bidder for a public works contract and the public entity soliciting bids, and the trial court had properly sustained a demurrer without leave to amend. (February 16, 2017.)

Trusts and Estates

Carmack v. Reynolds (2017) 2 Cal.5th 844: In this case the California Supreme Court answered a request from the United States Court of Appeals for the Ninth Circuit to clarify whether California Probate Code section 15306.5 caps a bankruptcy estate's access to a spendthrift trust at 25 percent of the beneficiary's interest where the trust pays entirely from principal. The California Supreme Court ruled that a bankruptcy trustee, standing as a hypothetical judgment creditor, can reach a beneficiary's interest in a trust that pays entirely out of principal in two ways. It may reach up to the full amount of any distributions of principal that are currently due and payable to the beneficiary, unless the trust instrument specifies that those distributions are for the beneficiary's support or education and the beneficiary needs those distributions for either purpose. Separately, the bankruptcy trustee can reach up to 25 percent of any anticipated payments made to, or for the benefit of, the beneficiary, reduced to the extent necessary by the support needs of the beneficiary and any dependents. (March 23, 2017.)

CALIFORNIA COURTS OF APPEAL

Appeals

Chango Coffee, Inc. v. Applied Underwriters, Inc. (2017) 11 Cal.App.5th 1247: The Court of Appeal dismissed defendant's purported appeal from the trial court's order denying its renewed petition to compel arbitration under Code of Civil Procedure section 1008(b) because an order denying a renewed motion or application under section 1008(b) is not appealable. (C.A. 2nd, May 26, 2017.)

Arbitration

Betancourt v. Prudential Overall Supply (2017) 9 Cal.App.5th 439: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration in a case alleging violations of the Private Attorneys General Act (PAGA) in California Labor Code section 2698, et seq. The trial court correctly denied defendant's motion to compel arbitration because a defendant cannot rely on a predispute waiver by a private employee to compel arbitration in a PAGA case, which is brought on behalf of the state. (C.A. 4th, March 7, 2017.)

ECC Capital v. Manatt, Phelps & Phillips (2017) 9 Cal.App.5th 885: The Court of Appeal affirmed the trial court's judgment confirming a final arbitration award of almost \$7 million against plaintiff. The award was for attorneys' fees, expert fees, and costs incurred by defendant as the prevailing party in an arbitration of legal malpractice claims by plaintiff against defendant. The Court of Appeal rejected plaintiff's arguments that the arbitrator violated mandatory disclosure rules, the engagement agreement was illegal, defendant

obtained the award by fraud, and that the arbitrator improperly limited plaintiff's discovery rights. (C.A. 2nd, filed March 15, 2017.)

Emerald Aero v. Kaplan (2017) 9 Cal.App.5th 78: The Court of Appeal reversed the trial court's order confirming an arbitration award of over \$30 million (mostly punitive damages) following a telephonic arbitration hearing. The Court of Appeal ruled the trial court erred in entering judgment on the award because the arbitrator exceeded his powers by issuing an award that violated applicable arbitration rules and procedural fairness principles. (California Code of Civil Procedures, section 1286.2(a)(4).) Less than 24 hours before the arbitration hearing, plaintiffs notified defendant for the first time they were seeking punitive damages. Plaintiffs did so by requesting punitive damages in a late-filed arbitration brief attached to an email sent to the arbitrator and copied to defendant (who was not represented by counsel at the time). This notice violated the parties' arbitration agreement because it was not reasonably calculated to inform defendant of the punitive damages claim and precluded a fair arbitration proceeding. The notice defects were also compounded by other procedural irregularities in the arbitration process. (C.A. 4th, February 28, 2017.)

Farrar v. Direct Commerce, Inc. (2017) 9 Cal.App.5th 1257: The Court of Appeal reversed the trial court's order denying defendant's petition to compel arbitration in an action by a former employee. The Court of Appeal did not find procedural unconscionability because this case was a negotiated employment agreement for a top level executive who had extensive experience in sales and business development and was experienced in contract negotiations. While the Court of Appeal found that substantive unconscionability was present because of a "carve-out" provision for claims related to the Assignment of Inventions & Confidentiality Agreement between plaintiff and defendant was not limited to provisional judicial remedies, it concluded that the trial court abused its discretion in refusing to sever out the offending exception for claims arising from the confidentiality agreement. The case was remanded with directions to sever the exception for claims arising from the confidentiality agreement, declare an implied requirement that defendant bear all arbitration forum costs, and grant defendant's petition to compel arbitration. (C.A. 1st, March 23, 2017.)

Garcia v. Pexco (2017) 11 Cal.App.5th 782: The Court of Appeal affirmed the trial court's order granting defendant's motion to compel arbitration. Plaintiff signed an arbitration agreement with a temporary staffing company, who assigned plaintiff to work with defendant Pexco. Although defendant Pexco was not a signatory to the arbitration agreement, the Court of Appeal held that plaintiff was equitably estopped from denying Pexco's right to arbitrate and the agency exception applied. (C.A. 4th, filed April 24, 2017, published May 16, 2017.)

Heimlich v. Shivji (2017) 12 Cal.App.5th 152: The Court of Appeal reversed the trial court's order confirming an arbitration award but denying defendant's request for Code of Civil Procedure section 998 costs. The trial court had determined that defendant had failed to make a timely section 998 claim to the arbitrator, but the Court of Appeal disagreed. It held that defendant was not required to present his section 998 cost request to the arbitrator during the arbitration hearing because an offer which is not accepted "cannot be given in evidence upon the trial or arbitration." (Section 998(b)(2).) In the request to confirm the

arbitration award, defendant established that the arbitrator had refused to hear any evidence of plaintiff's rejection of defendant's section 998 offer. The Court of Appeal concluded that defendant had timely presented his 998 claim to the arbitrator, the arbitrator should have reached the merits of that claim, and the arbitrator's refusal to hear evidence of the 998 offer warranted partially vacating the arbitration award. (C.A. 6th, May 31, 2017.)

Hernandez v. Ross Stores (2017) 7 Cal.App.5th 171: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration in a case where plaintiff filed a single-count representative action under the California Private Attorney General Act (PAGA), Labor Code section 2698 et. seq., alleging defendant had violated numerous Labor Code laws and seeking to recover PAGA civil penalties. The trial court properly denied the motion based upon *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, 387. The PAGA claim was a representative action brought on behalf of the state that did not include individual claims. There were no individual claims or disputes that could be separately arbitrated. (C.A. 4th, filed December 17, 2016, published January 3, 2017.)

Hutcheson v. Eskaton Fountainwood Lodge (2017) 12 Cal.App.5th 899: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration. The Court of Appeal ruled that admission of decedent to a residential care center for the elderly was a health care decision, and the attorney-in-fact who admitted her, acting under the Power of Attorney Law (Prob. Code, section 4000 et seq. (PAL)), was not authorized to make health care decisions on behalf of the principal. Because the attorney-in-fact acting under the PAL did not have authority to admit the principal to the residential care facility for the elderly, her execution of the admission agreement and its arbitration clause were void. (C.A. 3rd, June 14, 2017.)

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