



The Litigation Reporter

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Arbitration

Signing Arbitration Agreement as “Responsible Party” Does Not Waive Right to Jury

Plaintiff signed defendant health care facility’s admission form as a “responsible party” for her mother; she also signed two arbitration agreements as a “responsible party,” leaving the signature lines for “resident” and “agent” blank. After her mother passed away, plaintiff, individually and as her mother’s successor in interest, sued for her mother’s personal injuries and wrongful death. In affirming the denial of defendant’s motion to compel arbitration, the Court of Appeal held that by signing as a “responsible party,” plaintiff accepted financial responsibility for her mother’s nursing home bills. However, plaintiff could not be viewed as an agent with the authority to waive her mother’s right to a jury trial, particularly since she had not signed as “agent,” but had left that line blank. As to plaintiff’s individual claim for wrongful death, her signature as a “responsible party” did not waive her right to a jury trial; nothing in the arbitration form indicated that she had signed in her individual capacity. (*Goliger v. AMS Properties, Inc.*, 123 Cal. App. 4th 374, 19 Cal. Rptr. 3d 819 (Cal. Ct. App. 2nd Dist. 2004))

Banking

Actual Injury Not Required to Support Failure to Comply With Reporting Obligations

Following an overdraft, plaintiff sued defendant bank, asserting that its delay in posting a debit card transaction led him to believe he had a greater balance than he did. According to plaintiff, defendant had violated the Electronic Funds Transfer Act by (i) failing to post the transaction in a “timely manner”; and (ii) fulfill certain reporting obligations that it owed to him.



On appeal following dismissal of both claims, the Seventh Circuit affirmed as to the delayed posting claim and reversed as to the reporting obligations claim. It explained that while plaintiff must demonstrate some injury to recover for the bank's delay to timely post, he did not need to show an actual injury to recover for the bank's failure to meet its obligation to investigate errors reported by plaintiff and to determine whether errors had occurred. (*Gale v. Hyde Park Bank*, ___ F.3d ___, 2004 WL 2073520 (7th Cir. Sept. 17, 2004))

Bankruptcy

Funds For Civil Defense Costs of Debtor's Former Executives Remain Frozen

The Bankruptcy Court, having previously frozen assets of certain executives and entities controlled by them, modified its order to carve out reasonable living and defense expenses of \$12.8 million. On the debtor's appeal, the District Court upheld the carve out for criminal defense funds. However, it rejected the executives' cross-appeal of the denial of additional funds for civil defense costs, holding that such denial was within the Bankruptcy Court's discretion. The District Court noted that the executives had repeatedly taken the Fifth Amendment in failing to disclose assets or comply with directives to liquidate or mortgage holdings. (*Adelphia Communications Corp. v. Rigas*, 231 N.Y.L.J. 22, col. 3 (S.D.N.Y. Oct. 8, 2004))

Constitutional Law

Restricting Demonstrators to Peripheral Areas Unconstitutionally Limits Free Speech

Plaintiff, a demonstrator on behalf of animal rights at a state-owned performance facility operated by defendant, challenged the constitutionality of defendant's "First Amendment Expression Policy" limiting demonstrations to designated "free expression zones" in a parking lot far away from any entrance to the building. Despite recognizing that a parking lot qualified as public forum; that the protest activity was not "inherently incompatible" with the normal activity of parking lots and walkways; and that defendant's interest in preventing traffic congestion and ensuring pedestrian and traffic safety were significant, the Ninth Circuit held that defendant had failed to meet its burden of showing that the demonstrators' activities would cause danger and congestion, particularly because there was no reason to expect more than a handful of people to demonstrate. Defendant's policy was not narrowly tailored; relegating communicative activity to small, peripheral areas does not "sufficiently match" defendant's interest in preventing congestion. As a result, its policy unconstitutionally restricted plaintiff's free speech rights. (*Kuba v. 1-A Agricultural Assoc.*, ___ F.3d ___, 2004 WL 2340052 (9th Cir. 2004))



Civil Procedure

Lack of Diligence in Completing Discovery Justifies Denial of Continuance of Hearing

Nearly nine months after plaintiff filed a complaint for medical negligence, she served her initial discovery requests, including a notice scheduling defendant's deposition the week after plaintiff's opposition to defendant's summary judgment motion was due. When filed, that opposition consisted of a request to continue the hearing supported by a declaration from her attorney stating the necessity for plaintiff's expert to review the outstanding discovery responses and deposition testimony before submitting a declaration. On the scheduled summary judgment hearing date, plaintiff filed an *ex parte* application to continue the hearing, supported by declarations from her expert and her attorney. The Court of Appeal affirmed the trial court's order denying plaintiff's request for continuance. Although section 437c(h) of the California Code of Civil Procedure provides that a summary judgment hearing may be continued upon a good faith showing that additional time is needed to obtain essential facts, the declarations submitted by plaintiff were insufficient because they failed to explain (1) how the outstanding discovery was relevant to issues raised in defendant's motion; or (2) why the discovery sought could not have been completed sooner. (*Cooksey v. Alexakis*, 123 Cal. App. 4th 246, 19 Cal. Rptr. 3d 810 (Cal. Ct. App. 2nd Dist. 2004))

Contracts

Promissory Estoppel Claim Fails For Lack of Reasonable Reliance

Plaintiffs, a fledgling marketing company and its principals, sued defendants, an investment company and one of its executives, for damages on a promissory estoppel theory, alleging an unequivocal promise to complete a transaction under which defendants and a third party would invest in plaintiffs' business. According to plaintiffs, they were repeatedly told that the investment company's commitment was unconditional and, in reliance thereon, had incurred costs, forgiven personal loans and lost other opportunities. In affirming summary judgment for defendants, the Seventh Circuit held that defendants' promises could have not been reasonably understood by financially-sophisticated parties to be promises rather than mere expressions of optimism and determination. (*Garwood Packaging, Inc. v. Allen & Co., Inc.*, 378 F.3d 698 (7th Cir. 2004))



Damages

Award of Post-Judgment Interest Properly Modified

After plaintiff prevailed in a breach of contract arbitration and a final judgment was entered for post-judgment interest at the California statutory rate of 10%, the District Court, granting defendant's Rule 60(b) motion for relief from judgment due to inadvertence, lowered the interest rate to the federal rate of 1.76%. The Ninth Circuit affirmed. Under 28 U.S.C. § 1961, interest on a money judgment is calculated at a rate equal to the weekly average 1-year constant maturity Treasury yield which, at the time of the award, was 1.76%. The Court held that an exception to § 1961 for parties who contractually agree to waive this provision was inapplicable, noting that a California choice-of-law clause in the parties' underlying agreement was not a waiver of §1961. (*Fidelity Federal Bank, FSB v. Durga Ma Corporation*, ___ F.3d ___, 2004 WL 2415050 (9th Cir. 2004))

Federal Jurisdiction

Professional Corporation is Citizen of State of Incorporation For Purpose of Diversity

Following a judgment dismissing a malpractice lawsuit filed in federal court on diversity grounds, plaintiff, a citizen of Illinois, appealed. Defendant law firm was a Missouri professional corporation with members who were Illinois citizens. Determining that a professional corporation should be treated like other corporations for jurisdictional purposes and that, therefore, the state of its incorporation governs citizenship, the Seventh Circuit reversed, holding that federal jurisdiction had been properly invoked. (*Hoagland v. Sandberg, Phoenix and Von Gontard, P.C.*, ___ F.3d ___, 2004 2102792 (7th Cir. Sept. 22, 2004))

Patents

Federal Circuit Overturns Rule Requiring Adverse Inference in Patent Cases

The Federal Circuit has held that in determining willful patent infringement, "no adverse inference that an opinion of counsel was or would have been unfavorable flows from an alleged infringer's failure to obtain or produce an exculpatory [legal] opinion." In doing so, it rejected long-standing precedent requiring a negative inference against an alleged infringers who did not (i) obtain legal advice relating to the patent at issue; or (ii) identify the advice received. The Court found that the prior rule inappropriately burdened and infringed on the attorney-client relationship and created an otherwise non-existent duty to secure a legal



opinion. (*Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 01 Civ 1357, 2004 WL 2049342 (Fed. Cir. Sept. 13, 2004))

Securities

Claim Dismissed For Failure to Plead With Particularity

The Southern District of New York has dismissed securities fraud claims because plaintiff failed to plead fraud with the heightened particularity required by the Private Securities Litigation Reform Act (“PSLRA”). Plaintiff, a security technology company alleged that defendants, including a former officer of plaintiff, manipulated the market for plaintiff’s stock by falsely stating that plaintiff’s officers were engaged in misconduct. The PSLRA requires allegations of fraud to specify the time, place, speaker, and content of the alleged misrepresentations. Because the complaint at issue “ambiguously refer[red]” to [mis]statements made to “an investor” and “another potential funding source” without any further specification, the Court held that it failed to state a claim. (*E-Smart Tech., Inc. v. Corse*, 03 Civ. 7060 (RO), 2004 U.S. Dist. LEXIS 18741 (S.D.N.Y. Sept. 17, 2004))

Standing

Condominium Association Has Exclusive Right to Pursue Claims

Individual unit owners within the same condominium brought suit alleging conversion and constructive fraud related to the payment of funds from the condominium association’s account to various defendants, including the developer of the condominiums. The trial court dismissed the complaint, finding that the association, not the individual owners, had standing to bring these claims. Noting that it was a question of first impression, an Illinois appellate court upheld the dismissal, agreeing that the association had the exclusive right to bring fraud and conversion claims related to its own account. It reasoned that a different interpretation would hinder an association’s ability to speak with one voice in dealing with third parties and would deprive the association of the right to act on behalf of all unit owners. (*Poulet v. H.F.O.*, No. 2109, 2004 WL 2192400 (Ill. App. Ct. Sept. 30, 2004))



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