

VERDICTS & SETTLEMENTS

THIS WEEK IN VERDICTS & SETTLEMENTS

Hair Fray:

Attorneys Neville L. Johnson, Douglas L. Johnson, and Jordanna G. Thigpen of Johnson & Johnson LLP in Beverly Hills, were among the legal team that helped garner a \$26 million settlement against a haircare manufacturer.

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Technical Difficulties:

Attorneys Stephen J. Tully and Trang T. Tran of Garrett & Tully in Westlake Village successfully defended a public accounting firm that was sued by a memory modules manufacturer that claimed the firm overstated the amount of royalties it owed, and caused the manufacturer to be sued by its supplier, who stopped selling to plaintiff. Plaintiff alleged that as a result, it incurred \$11.765 million defending the suit, and lost \$13 million in profits it otherwise would have earned had the sales occurred.

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They've got your back:

Sand Diego-based attorney Erwin L. Cena of Kilpatrick, Townsend & Stockton LLP, along with Sean P. DeBruine of Kilpatrick, Townsend & Stockton LLP in Menlo Park, were among a legal team that obtained over \$20 million in a patent infringement case in a Texas district court.

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Check out Top Verdicts on page 2 for this week's biggest results.

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By Douglas E. Noll

One might think that being an arbitrator is a pretty good gig, and it is, for the most part.

However, if you are appearing before arbitrators with any frequency, it might be useful to know what they think and fret about.

The first rule for an arbitrator: protect the award. Nothing is worse for an arbitrator than for a judge to vacate an award, especially in larger, complex cases. From the moment of initial inquiry, an arbitrator is thinking about how to protect the award. While the grounds for vacatur are narrow, some of those grounds can be widened into a superhighway by a judge who doesn't like a result or doesn't like arbitration generally. Arbitrators know that and are paranoid because of it.

Protecting the award starts with full and complete disclosures. It is not unheard of for a lawyer to sandbag knowledge of a potential undisclosed fact for later use if the award goes the wrong way. Arbitrators know that, too. Arbitrators worry that their disclosures are never enough and look for every opportunity to reveal information that might, possibly, conceivably, in some small way, have a bearing on some arbitral bias. Sometimes what seems innocuous, like a testimonial that is 10 years old on a social media website, can bite back hard. Disclosures become particularly important when there are repeat players involved.

In arbitration, jurisdiction over issues of arbitrability are split between the courts and the arbitrator. Generally, the courts decide if the parties entered into an agreement to arbitrate, while the arbitrator decides everything else.

What's on an arbitrator's mind



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Joinder issues can be very complex, especially when there is a danger of inconsistent results between arbitration and trial. Arbitrators have virtually no power to force nonsignatories into arbitration. That task is usually left to the court to puzzle through. Thus, the

arbitrator will protect the award by not extending the arbitration to nonsignatories unless a court has ordered the joinder.

Protecting the award also means conducting a very, very fair process. This means that the arbitrator will bend over backwards

to let each side have its say, present evidence and make whatever arguments need to be made. Although an arbitrator may, depending on the rules, have the power to rule on dispositive motions, unless there is truly indisputable facts, most issues will be resolved

at hearing rather than by dispositive motion, such as granting the arbitrator, test reaction to arguments, and but don't expect to see motions granted.

The rules of evidence in arbitration are relaxed. What this in practical terms is that everything will be admitted as evidence. Just because the rules are relaxed does not mean everything plus the kitchen sink needs to be thrown at the arbitrator. Most arbitrators operate their "BS radar" on high. The more garbage you throw into the hearing, the greater the chance that you will be weakened. Your credibility and the credibility of your case. The junk will be disregarded. The good stuff will be disregarded too.

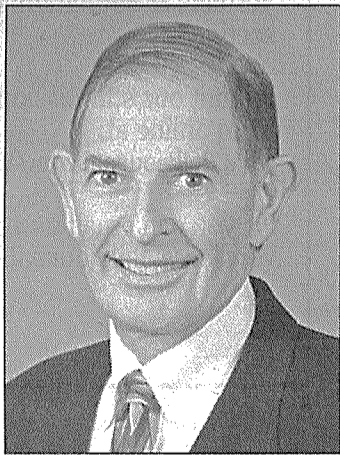
Arbitration hearings are generally more relaxed affairs. However, the degree of formality varies by arbitrator. Some formality precludes a fairer process, which protects the award. Do not let the more relaxed environment lull you into thinking that your presentation can be sloppy and unprepared. Arbitrators prefer crisp, succinct presentations of argument and evidence. Most will not be impressed by bluster.

The arbitrator will be concerned about the structure of the award very early on. The evidence will be evaluated in terms of whether it is clear, well-reasoned award. Such is called for, as opposed to a summary decision) that withstand judicial scrutiny. Arbitrators are well aware that awards vacated for manifest disregard of the law in some instances.

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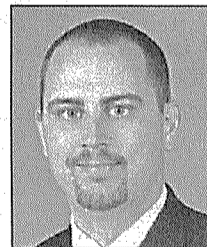
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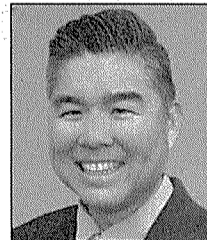
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Sr. Construction
Manager



connection with a contractual dispute.

PLAINTIFF'S CONTENTIONS:

Plaintiff purchased an industrial parcel of real estate located in Wilmington, California. Plaintiff obtained a loan from the Bank of Yorba Linda to purchase the property, secured by a deed of trust. The bank later assigned the rights to the loan to First Bank. In 2010, First Bank initiated foreclosure proceedings following plaintiff's default. Plaintiff later entered into a forbearance agreement with First Bank. Plaintiff subsequently made payments pursuant to the agreement. In June 2011, First Bank sold the note and deed of trust to USA Consolidators. The property subsequently sold at a trustee's sale for nearly \$300,000. Plaintiff filed this action, alleging breach of contract and promissory estoppel.

DEFENDANTS' CONTENTIONS:

USA Consolidators moved for summary judgment. USA Consolidators was not a party to the underlying forbearance agreement, accordingly, it could not be held liable for the alleged breach. Moreover, plaintiff allegedly lacked standing to sue for loss of the real property. First Bank also moved for summary judgment for the sole remaining action against it (breach of contract) given that the second cause of action for promissory estoppel had already been dismissed.

DAMAGES: Ace sought \$3 million in damages.

RESULT: The court granted summary judgment in favor of the defense.

OTHER INFORMATION: FILING DATE: June 22, 2015.

CONTRACTS

FRAUD

Intentional and Negligent Misrepresentation

VERDICT: Defense

CASE/NUMBER: PNY

Technologies Inc. v. Miller, Kaplan, Arase & Co., LLP / 3:15-cv-01728-MMC

COURT/DATE: USDC Northern / Nov. 15, 2016

JUDGE: Hon. Maxine M. Chesney.

ATTORNEYS: Plaintiff - Thomas P. Lane, Sean R. Anderson (Winston & Strawn LLP, New York, N.Y.); Drew A. Robertson (Winston &

for breach of a non-disclosure agreement, fraud, intentional misrepresentation, negligent misrepresentation and interference with contractual relations. PNY claimed Miller Kaplan had made misrepresentations regarding its independence and in its examination report. Upon removal of the case to federal court and on the motion of Miller Kaplan, venue was changed to US Northern District Court.

On Sept. 28, 2016, the court granted partial summary judgment in favor of Miller Kaplan on PNY's claims of misrepresentations in the examination report, and on the cause of action for interference with contractual relations. The case went to trial on Oct. 31, 2016 on PNY's claims of misrepresentations regarding independence and breach of the non-disclosure agreement by Miller Kaplan, and PNY's damage claims of over \$11 million in attorney fees, \$13 million in lost profits, and a loss of market share.

During trial, the court granted non-suit on PNY's cause of action for breach of the non-disclosure agreement and its damage claim for loss of market share. PNY's claims of misrepresentation by Miller Kaplan regarding its independence, and PNY's remaining damage claim went to the jury.

PLAINTIFF'S CONTENTIONS: PNY claimed that an intentional or negligent misrepresentation by Miller Kaplan that it could be independent in 2010 caused PNY to submit to Miller Kaplan's royalty examination. PNY further claimed that that examination overstated the amount of royalties it owed, and caused SanDisk to file the Santa Clara lawsuit, and to refuse to sell product to PNY. PNY alleged that as a result, it incurred \$11.765 million defending the SanDisk suit, and lost \$13 million in profits it otherwise would have earned had the SanDisk sales occurred.

DEFENDANT'S CONTENTIONS: Miller Kaplan claimed that it was independent, and that in all events PNY disagreed with, and did not rely on Miller Kaplan's representation concerning independence. Miller Kaplan further contended that its report, which disclaimed an opinion and warned that the numbers in it may be unreliable due to PNY's failure to provide needed information, had no causal connection to SanDisk's

Jr., and Joseph O. Williams Jr., individually, sued Gary Berger,

PLAINTIFFS' CONTENTIONS:

Plaintiffs' parents set up the trust in 1998 with the assistance of a non-defendant attorney. Plaintiff were the intended beneficiaries for the trusts. In 2000, their parents amended the estate plan and attendant trust documents with the assistance of attorney-defendant. Defendant's allegedly faulty preparation caused the estate to fail to capture an available \$300,000 tax deduction, causing more than \$25,000 in damages. Hence, plaintiffs asserted causes of action for negligence and breach of fiduciary duty.

DEFENDANT'S CONTENTIONS: Defendant moved for judgment on the pleadings on the grounds that the causes of action were barred by the statute of limitations.

RESULT: The court granted Berger's motion for judgment on the pleadings without leave to amend.

OTHER INFORMATION: FILING DATE: May 4, 2016.

EMPLOYMENT LAW

WAGE AND HOUR Meal and Rest Period

SETTLEMENT: \$1,350,000

CASE/NUMBER: Manny Ponce v. Pentair Water Pool and Spa Inc., Roth Staffing Companies LLC, and Does 1 through 50, inclusive / 30-2013-00647036-CU-OE-CXC

COURT/DATE: Orange Superior / Dec. 2, 2016

JUDGE: Hon. Thierry P. Colaw.

ATTORNEYS: Plaintiff - Eliot J. Rushovich, Aanand Ghods-Mehtani (Rushovich Mehtani LLP, Los Angeles).

Defendant - Carrie A. McAtee (Shook, Hardy & Bacon LLP, Kansas City, Mo.) for Pentair Water Pool and Spa Inc.; Scott C. Lacunza (Jackson Lewis PC, Irvine) for Roth Staffing Companies LLC.

FACTS: Plaintiff brought a wage and hour class action against his employer and its staffing company, asserting various violations of the labor code.

PLAINTIFF'S CONTENTIONS: Plaintiff contended that defendants failed to pay wages, failed to provide overtime compensation, failed to pay wages upon termination, failed to provide accurate itemized wage statements,

M. Monte (Latter Mendelson P.C., Chicago, Ill.).

FACTS: Plaintiff brought a collective action on behalf of herself and other employees of PLS Check Cashers of California.

PLAINTIFF'S CONTENTIONS:

Plaintiff contended that defendant failed to pay them all minimum wages and overtime compensation due, in violation of the Fair Labor Standards Act.

DEFENDANT'S CONTENTIONS:

Defendant claimed plaintiff's claims were barred by res judicata.

RESULT: The court granted defendant's motion to dismiss and dismissed the complaint with prejudice.

OTHER INFORMATION: Plaintiff has filed a Notice of Appeal.

INSURANCE

DECLARATORY RELIEF Mistaken Receipt, Unjust Enrichment

BENCH DECISION: Defense

CASE/NUMBER: General Star Indemnity Company v. Thunderbutte Enterprises LLC dba Sierra Nevada House / 2:16-cv-00628-MCE-AC

COURT/DATE: USDC Eastern / Nov. 17, 2016

JUDGE: Hon. Morrison C. England, Jr.

ATTORNEYS: Plaintiff - Alan H. Barbanel, Paul A. Impellezzeri (Barbanel & Treuer PC, Los Angeles).

Defendant - Ivo Labar, Daniel J. Veroff (Kerr & Wagstaffe LLP, San Francisco).

FACTS: General Star Indemnity Co. filed a complaint for declaratory judgment and mistaken receipt (unjust enrichment) claim against Thunderbutte Enterprises LLC dba Sierra Nevada House.

PLAINTIFF'S CONTENTIONS:

Plaintiff issued a commercial property insurance policy to defendant, which operated a historic hotel and restaurant in Coloma. The policy provided \$1 million in loss coverage and additional coverage for personal property and business income losses. Plaintiff's agent inspected the premises in September 2015, and made certain required loss control recommendations. Defendant failed to confirm completion of the loss control recommendations. Thereafter,

