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Discovery: Duty To Preserve Former Employees' Personal Emails

In *Puerto Rico Tel. Co., Inc. v. San Juan Cable LLC*, Civil No. 11-2135 (GAG/BJM) (D. P.R. Oct. 7, 2013), Magistrate Judge McGiverin held that the defendant was obligated to preserve relevant emails within its control, even when the emails were located in the personal email accounts of its former officers. The defendant was aware that the officers used their personal email accounts for company business. However, the Magistrate Judge denied the plaintiff's motion for sanctions based on the absence of bad faith by the defendant and the plaintiff's failure to demonstrate prejudice. He left open the possibility of sanctions in the future if "[f]orensic analysis of [the former officers'] personal email accounts and computers" showed "critical emails have been deleted."

RICO: A Tempting Route For Companies Facing Tort Trickery

The American Tort Reform Association (ATRA) is recommending that companies use the Racketeer Influenced and Corrupt Organizations Act (RICO) against plaintiffs' attorneys who advance fraudulent litigation, a tactic that some legal experts believe would be a more effective deterrent to fraudulent litigation than government or bar investigations. RICO allows private parties to sue for racketeering activities that involve illegal acts such as mail or wire fraud. In an October 17, 2013 op-ed published in the *Pittsburgh Post-Gazette*, ATRA President Tiger Joyce wrote that companies frequently targeted by fraudulent allegations are using RICO as a means to strike back against the attorneys who file the claims. She cited as examples two recent RICO cases -- (1) a suit brought by CSX Transportation Inc. that resulted in more than $1 million in damages against two lawyers who allegedly fabricated asbestos claims, and (2) a case involving alleged attorney fraud in connection with a $19 billion pollution judgment against Chevron Corporation. Some legal experts agree that RICO can be a powerful weapon for companies defending against fraudulent litigation, because it gives them control over the attempt to penalize the responsible attorneys.

Arbitration: Ninth Circuit And California Supreme Court Hold California Contract Law Of Unconscionability Not Preempted By The FAA Under Concepcion

Under the Federal Arbitration Act, an arbitration agreement is valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Consistent with the liberal federal policy favoring arbitration, state rules that disproportionately impact arbitration agreements as compared to contracts generally are preempted by the FAA. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

The Ninth Circuit recently held that California's unconscionability rules are not preempted by the FAA under *Concepcion* in *Chavarria v. Ralph's Grocery Co.*, No. 11-56673 (Oct. 28, 2013). The Court explained that California law requires both procedural and substantive unconscionability to invalidate a contract. The Court found the procedural rules do not disproportionately affect arbitration agreements because "they focus on the

parties and the circumstances of the agreement and apply equally to the formation of all contracts." The Court reached the same conclusion with respect to the substantive rules, because they were not arbitration-specific and did not disfavor arbitration simply by requiring that the arbitration process be fair.

Similarly, the California Supreme Court concluded that state courts may continue to enforce unconscionability rules that do not "interfere with fundamental attributes of arbitration" under *Concepcion* and remanded a case to the trial court to determine whether the arbitration agreement at issue was unconscionable under the principles set forth in the opinion. *Sonic-Calabasas A., Inc. v. Moreno*, No. S174475 (Cal. Sup. Ct., Oct. 17, 2013).

Offer Of Judgment: Ninth Circuit Deepens Circuit Split By Holding That An Unaccepted Offer That Would Fully Satisfy A Plaintiff's Claim Is Insufficient To Render The Claim Moot

The Ninth Circuit has joined the Second Circuit in holding that an unaccepted offer of judgment made under Federal Rule of Civil Procedure 68 does not render a plaintiff's claim moot even though it would have fully satisfied the claim. *Diaz v. First Am. Home Buyers Protection Corp.*, No. 11-57239 (Oct. 4, 2013). This result may surprise litigators because the court stated the opposite conclusion in dicta in a recent case in which it held that such an offer did not render a class action moot. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011). The Sixth and Seventh Circuits are in accord with the Ninth Circuit's prior dicta, and as the Ninth Circuit pointed out, so are the majority of commentators. Nonetheless, the Ninth Circuit concluded that an unaccepted offer "is a legal nullity, with no operative effect." The court highlighted that this view was shared by the four Supreme Court justices who reached the issue in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

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