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PERSPECTIVE

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Treble damages among a handful of recent important decisions

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This inaugural article assesses the practical implications of significant recent and forthcoming California Supreme Court opinions related to timely contract drafting principles, as well as important damages assessments in certain civil theft and fraud cases.

Settlement Agreements and Contractual Liability

In *Grande v. Eisenhower Medical Center*, S261247 (P.3d (June 30, 2022)), the California Supreme Court determined that a class plaintiff who settled with a staffing agency was not precluded from bringing the same claims in a second action against her employer, the staffing agency's client. The Court made two observations that, while arguably dicta, have important implications for settlement drafting and general agency relationships. First, the Court stated that there is a "strong argument" that "the scope of the [settlement] release controls the preclusive effect of the judgment." Id. at 6-8. Second, the Court explicitly cast "doubt" on "the broader notion that a client is an 'agent' of a staffing agency" and thus falls under express terms of the settlement agreement that released the staffing agency and "all present and former . . . agents." Id. at 6-7.

Grande has direct, immediate implications for any staffing agency and any business using their ser-

vices. Following Grande, parties should carefully consider which parties (and non-parties) should be released by a settlement agreement. Should a plaintiff sue a staffing agency or its client, these businesses should ensure that any potential settlement agreement directly and unequivocally releases claims against both entities. The

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settling entity should explicitly state, by name, the parties who will be released by the settlement and not rely on generic language like "agent" or "affiliate." By extension, Grande also means that when negotiating the scope of a staffing agency and client relationship, parties should consider expressly contracting for the right to review and consent to any settlement agreements that could affect the other's rights. Additionally, businesses should not rely on common-law agency principles and should consider including indemnification provisions that make clear the parties' respective liabilities.

Arbitration Provisions

The upcoming decision in *Ramirez v. Charter Communications, Inc.*, S273802, will likely have important contract ramifications. The

Court, which granted the petition on June 1, 2022, will determine whether the 5th District Court of Appeal erred when it held that a provision of an arbitration agreement that allowed for the recovery of interim attorney's fees after a successful motion to compel arbitration was so substantively unconscionable that it voided the

appellate court found that the contract provision was unambiguous as written and disagreed with other California appellate decisions that allowed FEHA's restrictive standard to be read into similar fee-shifting provisions. Id. at 377-82.

If the Court agrees with the appellate court and finds the attorney fee provision unconscionable, companies should revisit their arbitration agreements to ensure that they do not include similar provisions. Specifically, companies should align arbitration agreements or provisions with FEHA's fee-allocation provisions.

By contrast, if the Court overturns the appellate court, FEHA may continue to be incorporated into contractual fee-shifting provisions. In this context, employers may be able to craft enforceable fee-shifting provisions. While employees could still successfully challenge ambiguous fee-shifting provisions, the face of such contracts could possibly deter employees from doing so.

Regardless of the Supreme Court's ultimate holding, businesses should revisit employment contracts to assess the language undergirding employer and employee rights.

Treble Damages and Attorney's Fees

In *Siry Investment, I.P. v. Farkhondehpour*, S262081, the California Supreme Court determined that a plaintiff may seek treble damages and attorney's fees in an action brought for fraudulent diversion of a partnership's cash distributions under California Penal Code Section 496. The al-

entire arbitration agreement.

At issue in *Ramirez* is an arbitration agreement that Charter Communications, Inc. required all employees to execute as a condition of employment. The arbitration agreement provided that should either party bring a lawsuit and subsequently lose a motion to compel arbitration, the winning party would be entitled to attorneys' fees. 75 Cal.App.5th 365, 377 (2022). The appellate court held that the fee-shifting provision was unconscionable, determining that the provision was in violation of the Fair Employment and Housing Act ("FEHA") because FEHA includes its own cost-allocation provisions allowing for a prevailing defendant to recover attorneys' fees "only if the action was frivolous, unreasonable, or groundless." Id. at 377-78, 382. In so holding, the

lowance of treble damages under these circumstances is significant, as it permits plaintiffs to bring an action for exemplary damages when property has been obtained “in any manner constituting theft.” Id. at 37-38. The possible broad ramifications of this holding were acknowledged by the Court, which notably cabined its holding, stating that: “not all commercial or consumer disputes

alleging that a defendant obtained money or property through fraud, misrepresentation, or breach of [contract] will amount to a theft.” Id. at 38. The Court emphasized that theft as used by this statute requires “criminal intent on the part of the defendant beyond mere proof of nonperformance or actual falsity.” Id. (internal quotations omitted).

The Court’s holding has two

major implications. First, limited partners seeking to bring an action for diversion of partnership assets now have an established avenue to recover triple the amount of their out of pocket losses. Second, although explicitly narrowed, the Court’s decision in *Siry* opens the door for plaintiffs to recover treble damages and attorney’s fees in certain other commercial disputes. To do so, plaintiffs need only

plead that a defendant acted with “careful planning and deliberation” rather than “innocently and inadvertently” when receiving stolen property to establish the requisite criminal intent. *Siry*, S262081 at 39. Moving forward, this is an important new arrow in the quiver of plaintiffs’ counsel in commercial suits, where the circumstances support a finding of theft with criminal intent.

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