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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Arbitration—California Arbitration Act (CAA)—Review of Partial Final Award

In *Maplebear, Inc. v. Busick*, 26 Cal.App.5th 394, 237 Cal.Rptr.3d 98 (2018), the court of appeal held that under the CAA, the trial court lacked jurisdiction to review an arbitrator's partial final award that determined the parties' arbitration agreement permitted class arbitration. The court concluded that an "award" is only reviewable if it "include[s] a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." *Id*. at 99. Although the partial final award in *Maplebear* did not address whether class certification should be granted, the court of appeal's reasoning suggests that a partial final award granting or denying class certification would likewise not be reviewable.

The FAA, in contrast, appears to allow judicial review of partial final awards. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 670, n.2 (2010). And to allow judicial review, the AAA and JAMS class arbitration rules require the arbitrator to issue a partial final award determining (1) whether an agreement allows for class arbitration, and another determining (2) whether an arbitration should proceed as a class. Counsel should consider the differences between the CAA and FAA when deciding which statute to

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incorporate.

Arbitration—Failure to Disclose—Vacatur

"The arbitrator disclosure rules are strict and unforgiving. And for good reason." *Honeycutt v. JPMorgan Chase Bank, N.A.,* 25 Cal.App.5th 909, 236 Cal.Rptr.3d 255 (2018). A failure to make proper disclosures can lead to vacatur of an award, as happened here. But in some circumstances a right to assert improper disclosures may be waived. As to waiver, here the arbitrator's disclosure statement served on the parties was missing pages. The court held that by waiting until after the arbitration award had been issued the losing party waived any argument based on this defect. But that did not end the matter. Separately, the arbitrator failed to disclose four arbitrations involving counsel for the winning party. In opposing vacatur, counsel for the winning party argued that it was not enough to show that the arbitrator was aware of the undisclosed arbitrations (a given) but also that the arbitrator was unaware of the failure to disclose. The court of appeal rejected this argument because the arbitrator had not complied with Ethics Standard 12(d), and in such a case, Ethics Standard 7(d) holds that failure to disclose the other arbitrations was enough.

Attorney-Client Relationship—Fraud and Intentional Breach of Fiduciary Duty Claims Against Former Attorney

In *Knutson v. Foster*, 25 Cal.App.5th 1075, 236 Cal.Rptr.3d 473 (2018), a former elite-level swimmer, Knutson, sued her former attorney for fraudulent concealment and intentional breach of fiduciary duty for failing to disclose a laundry list of facts before advising Knutson to sign a settlement agreement with USA Swimming over Knutson's claim that USA Swimming breached its oral agreement. The decision is notable for two reasons. First, the court of appeal held that "claims of fraudulent concealment and intentional breach of fiduciary duty by a client against his or her attorney are subject to the substantial factor causation standard, not the 'but for' or 'trial within a trial' causation standard employed in cases of legal malpractice based on negligence." Second, the court held that Knutson's own testimony was sufficient to support her claim for emotional distress damages without the need for expert testimony: "[W]here the plaintiff's emotional distress consisted of anxiety, shame, a sense of betrayal, and a continuing impact on personal relationships, the testimony of the plaintiff alone is sufficient to support

emotional distress damages."

Attorney-Client Relationship—Settlement of Malpractice Claim by Reducing Fees

In *Property California SCJLW One Corp. v. Leamy*, 25 Cal.App.5th 1155, 236 Cal.Rptr.3d 500 (2018), the court of appeal held that a settlement between a law firm and its clients reducing fees in exchange for the release of legal malpractice claims was supported by consideration. That result may seem obvious, but when the law firm sought to enforce the settlement agreement, the clients argued that the firm gave up nothing of value in the settlement because the firm had committed malpractice and, therefore, had no right to fees. The trial court granted summary judgment in favor of the law firm, and the court of appeal had no problem affirming, reasoning that even if the law firm's "claim for attorney fees was meritless, there is no evidence that [the firm] pursued its fees in bad faith or that it lacked a 'colorable claim' to the fees." Thus, reducing its incurred fees was sufficient consideration for the settlement agreement.

Litigation—Costs Under CCP §§ 998 and 1032

CCP section 1032 provides that a prevailing party "is entitled as a matter of right to recover costs in any action or proceeding." In determining whether and in what amount to award costs under this provision, does the trial court have discretion to consider the losing party's inability to pay? In *In re LAOSD Asbestos Cases*, 25 Cal.App.5th 1116, 236 Cal.Rptr.3d 490 (2018), the court of appeal answered "no." There, the trial court denied the prevailing defendants' request for nearly $200,000 in costs under section 1032 and $115,000 in expert witness fees under section 998. The trial court held that the requirement in section 1033.5 that costs be "reasonable in amount" permitted the court to take plaintiff's inability to pay into account in determining any cost award. The court of appeal reversed. The court explained that section 1033.5 simply permits the court to determine "whether certain claimed costs were reasonable or necessary" to the litigation, not whether the costs were reasonable in light of plaintiff's financial circumstances. As to the expert witness fees, the court of appeal recognized that "[i]n contrast to the restriction in section 1032, courts have interpreted the discretionary authority in section 998 to allow the consideration of a party's ability to pay when determining the appropriate recovery under that statute," but the court remanded for further consideration because

the trial court had not considered all the relevant factors under section 998.

Litigation—Dismissal—Five Year Limit to Bring Case to Trial

In determining whether a plaintiff has brought an action to trial within the required five-year period, courts must exclude any time during which "bringing the action to trial. . . was impossible, impracticable, or futile." CCP § 583.340. In *Martinez v. Landry's Restaurants, Inc.*, 26 Cal.App.5th 783, 237 Cal.Rptr.3d 379 (2018), the court of appeal considered whether the trial court's decision not to exclude (1) the time in which plaintiffs' appeal of the district court's remand order was pending and (2) the time for defendant to fully comply with the trial court's discovery order—was an abuse of discretion. The court of appeal concluded that it was not, rejecting plaintiffs' claim that was it was impossible, impracticable, or futile to bring the action to trial during these periods and affirming dismissal of the case. This case highlights the importance of diligent prosecution. The plaintiffs in this case gambled on the court's discretion in a "fact-sensitive inquiry" and lost.

Litigation—Settlement Agreement—Consent of Attorney

Monster Energy Co. v. Schechter, 26 Cal.App.5th 54, 236 Cal.Rptr.3d 669 (2018) clarifies that even where a settlement agreement provides that the parties and their attorneys are bound by a confidentiality provision, the attorneys are not actually bound unless they consent. And an attorney does not consent where it merely approves the agreement "as to form and content." Recognizing the importance of confidentiality, the court of appeal proposes a solution: "It seems easy enough . . . to draft a settlement agreement that explicitly makes the attorneys parties (even if only to the confidentiality provision) and explicitly requires them to sign as such."

Litigation—Summary Judgment—Continuance

It's a complicated case, but *Levingston v. Kaiser Foundation Health Plan, Inc.*, 26 Cal.App.5th 309, 237 Cal.Rptr.3d 45 (2018) makes the point that an order granting summary judgment based on a procedural error is akin to terminating sanctions, so where counsel's failure to file a timely opposition is not willful, it is an abuse of discretion to refuse a continuance.