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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Appeals—Standard of Review for Evidentiary Rulings on Summary Judgment

In *Ducksworth v. Tri-Modal Distribution Services*, 47 Cal.App.5th 532 (2020), the Second District, Division Eight, weighed in on the "controversy" over the correct standard of review for a trial court's evidentiary rulings in connection with a summary judgment motion. The Supreme Court mandates independent review where the trial court fails to rule on evidentiary objections, which has led two courts of appeal to hold that independent review also applies where the trial court does rule on the objections. The court in *Ducksworth*, however, joined the "vast majority of courts of appeal" that apply the abuse of discretion standard of review. The court held "[b]ecause of the daunting complexity, volume, and pace" of the trial court's task in ruling on written objections to a summary judgment motion, "the latitude implied by the abuse-of-discretion standard thus does make great sense." (Internal quotation marks omitted.)

Arbitration—FAA v. CAA—Incorporation of Procedural Rules

Under CCP section 1281.2(c) of the California Arbitration Act (CAA), a court may refuse to compel arbitration if "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." The Federal Arbitration Act (FAA) gives courts no such authority. Thus, whether the court applies the CAA or FAA may have

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profound effects, particularly where the plaintiff does not have an arbitration agreement with all defendants. In *Victrola 89, LLC v. Jaman Properties 8 LLC*, 46 Cal.App.5th 337 (2020), the court held the parties incorporated the FAA's procedural rules where their agreement provided, "Enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act" even though the agreement called for application of California law and CCP. The court focused on the term "enforcement," citing decisions that found parties agreed to apply the CAA where "enforcement" was governed by state rules. The court also rejected the argument that "enforcement" referred only to the "enforcement of any judgment resulting from arbitration" and reiterated "doubts and ambiguities . . . should be resolved in favor of arbitration."

Ethics—Referral Fees—Requirement of Client's Written Consent

The Rules of Professional Conduct require an attorney to obtain the client's written consent to any referral fee paid to another attorney. In *Reeve v. Meleyco*, 46 Cal.App.5th 1092 (2020), the court of appeal held the client had not given consent despite signing an acknowledgment of receipt indicating he understood the terms of a referral fee set forth in an accompanying letter. The court held "[c]onsent is different from disclosure or receipt, and it is also different from understanding." Thus, "[w]ritten consent requires written words expressing agreement or acquiescence, not just words expressing receipt or understanding." Although *Reeve* was decided under the old Rules of Professional Conduct (Rule 2-200), the decision is still important because the new rule pertaining to referral fees (Rule 1.5.1) also requires written consent.

Litigation—Equitable Tolling—Subsequent Class Actions Does Not Provide Tolling

"*American Pipe* tolling" allows equitable tolling of an individual's claim against a defendant during the pendency of a class action. The U.S. Supreme Court in *China Agritech, Inc. v. Resh,* 138 S.Ct. 1800 (2018) held *American Pipe* tolling does not toll the statute of limitations during the period of a second class action for purposes of whether yet a third class action could be timely. In a matter of first impression, the court in *Montoya v. Ford Motor Company*, 46 Cal.App.5th 493 (2020) held a second class action likewise does not toll an individual's claim. The court reasoned *American Pipe* tolling "was developed to strike a balance between the judiciary's need for economy and efficiency and the policy against stale claims that animates

statutes of limitations," but not to "save members of the purported class who have slept on their rights." Looking to *China Agritech*, the court agreed that extending equitable tolling to a second class action would "contravene[] the judicial economy and efficiency that *American Pipe* was trying to achieve." The court noted: "We publish because no other California court has addressed multiple tolling since *China Agritech*, and we feel publication will facilitate appellate discussion in case we have it wrong."

Litigation—International Service—Agreement to Alternate Method of Service Waives Hague Convention Process

In *Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co.*, 9 Cal.5th 125 (2020), the California Supreme Court addressed the question whether the Hague Convention procedures for service of process abroad preempted the parties' agreement that notice and service of process could be made through other means. The question arose in the context of an arbitration agreement wherein the parties agreed to submit to the jurisdiction of California courts, to resolve all disputes through California arbitration, and to provide notice and "service of process" through Federal Express or similar courier. Ultimately, the trial court confirmed an arbitration award and entered judgment against Sinotype, a company based in China. Sinotype did not appear at either the arbitration or the proceedings where the award was confirmed. Thereafter, Sinotype moved to set aside the judgment as void because Sinotype was not properly served under the Hague Convention. The trial court denied the motion, but the court of appeal reversed, and the Supreme Court granted review. The Supreme Court held service according to the parties' agreement was proper because "the Convention does not apply when parties have agreed to waive formal service of process in favor of a specified type of notification." The court further reasoned that "[r]equiring formal service abroad under California law where sophisticated business entities have agreed to arbitration and a specified method of notification and document delivery would undermine the benefits arbitration provides."

Appeals—Dismissal Orders—Appealability in Class Actions

Once notice of entry of judgment is served, a party seeking to appeal that judgment must file its notice of appeal within 60 days. In *Fidelity National Home Warranty Company Cases*, 46 Cal.App.5th 812 (2020), the court's threshold question was whether two related appeals were

timely. There, homeowners brought two class actions against Fidelity—the Kaplan Action and the Fistolera Action—alleging unfair and unlawful business practices. Following years of motion practice, certification of the Kaplan Action, an appeal, and coordination of the cases, Fidelity moved to dismiss both actions for failure to timely prosecute. In December 2017, the trial court issued a minute order granting Fidelity's motions, and Fidelity promptly served its notice of entry. In February, the trial court issued two orders pertaining to notices of dismissals to the class members; notice of entry of these orders were served on February 9, 2018. The trial court entered judgments dismissing the two cases on March 7, 2018 and April 2, 2018. On May 1, 2018—less than 60 days from the March and April judgments but more than 60 days from notice of entry of the December and February orders—plaintiffs filed a notice of appeal. The court of appeal, *sua sponte*, considered whether the December or February orders constituted final judgments, as to render the appeals untimely. It was undisputed the December order would have constituted a final judgment had the actions not been class actions. However, citing CCP section 581(k), which provides no class actions may be dismissed until "notice that the court deems adequate has been given and the court orders the dismissal," the court concluded the December order was not a final judgment as to the Kaplan Action because no such notice had been given. Citing CRC Rule 3.770(c), which provides putative class actions "may be dismissed without notice to the class members *if the court finds that the dismissal will not prejudice them"* the court likewise found the December order was not a final judgment as to the Fistolera Action because the trial court had not yet determined whether the putative class members would be prejudiced by dismissal. Thus, as a matter of first impression, the court held the order dismissing the actions did not constitute a final judgment, and the plaintiffs' appeals from the ensuing judgments were timely.