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Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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Appeals—Standard of Review—Findings Made by Clear and Convincing Standard

In *Conservatorship of O.B.*, 9 Cal.5th 989 (2020), the Supreme Court granted review "to clarify how an appellate court is to review the sufficiency of the evidence associated with a finding made by the trier of fact pursuant to the clear and convincing standard." Prior to the court's decision, there was a split in authority over whether the clear and convincing standard had any bearing on an appellate court's review. The Supreme Court clarified that it does, holding "appellate review of the sufficiency of the evidence in support of a finding requiring clear and convincing proof must account for the level of confidence this standard demands." In such cases, "the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true." The court held this result was compelled not only by logic, but also by policy—that is, review under a heightened standard "reaffirms that the interests involved are of special importance, that their deprivation requires a greater burden to be surmounted, and that the judicial system operates in a coordinated fashion to ensure as much."

Arbitration—California Arbitration Act—What Constitutes an "Award"

Once an arbitrator issues an "award" under CCP section 1283.4, its power to modify that award is limited, and the arbitrator may no longer reconsider its merits. In *Lonky v. Patel*, 51 Cal.App.5th 831 (2020), the court was called to

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determine what constituted an "award" and in doing so clarified that an arbitrator's interim awards are subject to modification until the arbitrator decides all questions necessary to the dispute between the parties. There, the parties to an arbitration stipulated to trifurcate the proceedings into three phases: (1) decision on liability, the amount of compensatory damages, and eligibility for punitive damages; (2) decision on the amount of punitive damages and entitlement to attorney's fees and costs; and (3) decision on the amount of attorney's fees and costs. The arbitrator's Second Interim Ruling awarded plaintiffs compensatory and punitive damages, and found plaintiffs were the "prevailing party" for purposes of awarding attorney's fees and costs, but did not fix the amount of fees and costs. After the third phase, the arbitrator's Final Award provided attorney's fees and costs but also corrected its Second Interim Ruling by increasing compensatory damages. Faced with competing motions to confirm and correct the Final Award, the trial court held that the arbitrator exceeded its powers by issuing a Final Award that corrected the Second Interim Ruling. But the court of appeal reversed, finding the Second Interim Ruling did not constitute an "award." It reasoned the CAA defines an "award" as a written ruling that "include[s] a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy." § 1283.4. The Second Interim Award, which did not fix the amount of attorney's fees and costs, did not determine all issues necessary to the resolution of the controversy and was therefore not an "award" under the CAA. The arbitrator therefore retained authority to modify the Second Interim Ruling, and the Final Award should have been confirmed.

Arbitration—Class Arbitration—Express Provision for Class Arbitration

In *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019), the U.S. Supreme Court held that a court may not compel class arbitration when the arbitration agreement does not expressly provide for such arbitration and that an ambiguity about whether class claims may be arbitrated does not constitute consent to arbitrate class claims. *Garner v. Inter-State Oil Company*, 52 Cal.App.5th 619 (2020) includes an example of language that provides for class arbitrations when "read as a whole." Here, the availability of class arbitration hinged on two sentences in the parties' agreement. The first provides: "To resolve

employment disputes in an efficient and cost-effective manner, [employee] and [employer] agree that any and all claims arising out of or related to [employee's] employment that could be filed in a court of law, including but not limited to, claims of unlawful harassment or discrimination, wrongful demotion, defamation, wrongful discharge, breach of contract, invasion of privacy, or class action shall be submitted to final and binding arbitration, and not to any other forum." A second relevant sentence appears in bold: "**This Arbitration Agreement Is A Waiver Of All Rights To A Civil Jury Trial Or Participation In A Civil Class Action Lawsuit For Claims Arising Out Of [Employee's] Employment**." Relying on the second sentence, the trial court concluded the parties waived their right to class arbitration. The court of appeal disagreed, finding the agreement "contains an express agreement to arbitrate class action claims," based on the first sentence, which includes claims regarding "class action." The court concluded the second sentence waived only the right to participation in a civil class action *lawsuit* and did not waive all class action claims.

Arbitration—Equitable Estoppel to Compel Arbitration Against Non-Signatories

Generally, only a party to an arbitration agreement may compel arbitration of claims asserted against it. The doctrine of equitable estoppel, however, provides an exception to that rule where the plaintiff's claims against a nonsigntatory defendant are intertwined with the underlying contractual obligations. The court of appeal's recent decision in *Felisilda v. FCA US LLC*, 53 Cal.App.5th 486 (2020) provides a good example. There, consumers brought claims under the Song Beverly Act against the car dealership and the vehicle's manufacturer. The dealership moved to compel arbitration of plaintiffs' claims against both defendants based on an arbitration agreement between the plaintiffs and the dealer that required arbitration of "any claim or dispute" that "arises out of or relates to" the "condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) . . . ." The trial court compelled arbitration, and on appeal from the order confirming the arbitration award, the court of appeal affirmed. The court held that "because the [plaintiffs] expressly agreed to arbitrate claims arising out of the condition of the vehicle—even against third party nonsignatories to the sales contract—they are

estopped from refusing to arbitrate their claim against [the manufacturer]." The court distinguished several cases where trial courts refused to compel arbitration of claims against a vehicle manufacturer, holding those cases "lacked the key language present in this case, namely an express extension of arbitration to claims involving third parties that relate to the vehicle's condition."

Arbitration—No Pre-Hearing Discovery from Third Party

Can an arbitrator compel a nonparty to produce documents for purposes of pre-hearing discovery? In a matter of first impression, the court in *Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal.App.5th 360 (2020) answered "no," regardless of whether the Federal Arbitration Act (FAA) or California Arbitration Act (CAA) applied. In holding the FAA does not grant an arbitrator such powers, the court noted a split of authority in the federal courts regarding the scope of the arbitrator's subpoena power under 9 U.S.C. § 7, which authorizes arbitrators to subpoena nonparties to appear and produce evidence. Some federal courts, including the Ninth Circuit, have held section 7 restricts the arbitrator's subpoena power to hearings, while other federal courts have held an arbitrator's power extends to pre-hearing discovery. In adopting the Ninth Circuit's interpretation, the court in *Aixtron* agreed the FAA does not give the arbitrator the "full range of discovery powers that courts possess," particularly with respect to nonparties who have not agreed to the arbitrator's jurisdiction. The court also held, as a matter of first impression, the CAA likewise did not grant the arbitrator such powers. The right to discovery under the CAA is "generally limited" and "highly restricted" unless the parties agree otherwise. Finding the parties' arbitration agreement did not provide for additional discovery, the court found the arbitrator's subpoena powers under CCP section 1282.6 extended to subpoenas for the arbitration hearing and for certain depositions, but not to pre-hearing discovery. Finally, the court found the JAMS Rules did not change the result because the nonparty had not agreed to those rules.

Litigation—Order Granting New Trial—Statement of Reasons Required

When a trial court grants a new trial, CCP section 657 requires the court to specify both the grounds for its order and "the court's reason or reasons for granting the new trial upon each ground stated." This requirement has real teeth, as illustrated in *Estes v. Eaton Corp.*, 51 Cal.App.5th

636 (2020). There, after a month-long jury trial in an asbestos-related personal injury action, the jury returned a verdict in favor of defendant Eaton. The trial court, however, granted plaintiff's new trial motion, finding plaintiff has presented sufficient evidence that he was exposed to asbestos manufactured by Eaton and that the exposure may have been a substantial factor in causing plaintiff's injury (a question the jury did not reach because it found no defect or negligence). The court of appeal reversed, holding the trial court's statement of reasons was deficient because it "did not discuss any of the evidence that convinced it the jury should have reached a verdict in [plaintiff's] favor," nor did it make any detailed factual findings. The statement of reasons was also not clear which of plaintiff's several theories the trial court believed regarding when and how the plaintiff was exposed to the asbestos or why it rejected the defendant's expert evidence to the contrary. Because the trial court's statement of reasons was defective, the judgment in favor of the defendant was automatically reinstated. The court of appeal then ruled against plaintiff on his protective cross-appeal arguing the evidence was insufficient to support the verdict. Given the deferential standard of review for an order granting a new trial, the new trial order would likely have been upheld as a proper exercise of the trial court's role as the 13th juror, but since that new trial order was faulty, the court of appeal reviewed the judgment under the ordinary substantial evidence standard.