Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Iskanian v. CLS Transportation, Los Angeles (2012) __ Cal.App.4th __ (2d Dist., Div. 2.)

Who needs to know about this case? Lawyers litigating issues of the enforceability of class-action waivers in arbitration agreements, and lawyers litigating claims that California public policy or statutory law limits the availability of arbitration; lawyers seeking to assert PAGA claims in arbitration.

Why it's important: Holds that *ATT Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, operates not only to require enforcement of class-action waiver provisions in arbitration agreements subject to the Federal Arbitration Act ("FAA"), but also overrules the *Broughton-Cruz* line of California decisions that limit the availability of arbitration to enforce certain public rights. Also holds that claims under the Private Attorney General Act ("PAGA"), are subject to *Concepcion* and therefore PAGA claims must be litigated individually in arbitration if the arbitration clause bars class actions. Accordingly, plaintiff's class-action suit to recover unpaid overtime pay and for other employment-related claims must be resolved in an arbitration where only the plaintiff's claims are at issue.

Synopsis: Iskanian worked as a driver for CLS, and during his employment signed an arbitration agreement requiring that all claims arising out of his employment would be submitted to binding arbitration. The provision also barred class actions and representative actions in the arbitration. Iskanian filed a class action against CLS alleging that it failed to pay overtime, provide meal and rest breaks, reimburse business expenses, and pay final wages in a timely manner. The trial court granted a motion to compel arbitration and to dismiss class claims. Affirmed.

In *Concepcion* (2011) 131 S.Ct. 1740, the U.S. Supreme Court held that California's *Discover Bank* rule, which prohibited some class-action waivers in arbitration agreements, violated the FAA and that class-action waivers should be enforced. In this case, the court held that *Concepcion* overruled the California Supreme Court's decision in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, which held that a class-action waiver in an arbitration provision should not be enforced if class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration. It read *Concepcion* to establish the primacy of the FAA, even if interfering with arbitration rights was otherwise necessary to vindicate state public-policy goals. The fact that a plaintiff brings a class action to vindicate statutory rights is irrelevant in the wake of *Concepcion* – states have no power to require procedures that are inconsistent with the FAA, "even if it is desirable for unrelated reasons."

The court went on to agree with the Ninth Circuit in *Kilgore v. Keybank, NA* (9th Cir. 2012) 673 F.3d 947, which held that *Concepcion* functionally overruled the California Supreme Court's decisions in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, and *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303. *Broughton* held that prohibiting the arbitration of Consumers Legal Remedies Act (CLRA) claims for injunctive relief did not contravene the FAA had "never directly decided whether a [state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." That rule was extended in *Cruz*, to include claims for public injunctive relief under the UCL. *Kilgore* held that post-*Concepcion*, the issue of whether a particular statute falls outside of the FAA's reach applies only to federal, not state statutes. The Ninth Circuit observed that, "the very nature of federal preemption *requires* that state law bend to conflicting federal law–no matter the purpose of the state law. It is not possible for a state legislature to avoid preemption simply because it intends to do so."

The *Iskanian* court applied this reasoning to Iskanian's PAGA claim, finding that he could bring it in arbitration on his own behalf, but not as a class action. The court expressly disagreed with, and declined to follow *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, which held that *Concepcion* does not apply to representative actions under the PAGA, and therefore a waiver of PAGA representative actions is unenforceable under California law.

Short(er) takes

Asbestos claims; loss of consortium; accrual of claims: *Vanhooser v. Superior Court* (*Hennessy Industries, Inc.*) (2012) __ Cal.App.4th __ (2d Dist., Div. 3.)

The first element of a loss-of-consortium claim is the existence of a marriage at the time of injury to the plaintiff's spouse. This case holds that this element

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is satisfied if the plaintiff's marriage to the injured spouse predates discovery of symptoms, or diagnosis, of an asbestos-related disease. This is so even if the marriage postdates the spouse's exposure to the asbestos that ultimately results in the injury. Hence summary judgment for the defense on plaintiff's loss-of-consortium claim, which was predicated on the theory that the exposure to asbestos pre-dated the marriage, was vacated. The court held that for the purposes of a loss-of-consortium claim in a latent-disease context, the "injury" to the spouse does not occur when the spouse is first exposed to the harmful substance, but rather occurs when the illness or its symptoms are discovered or diagnosed. The court distinguished *Zwicker v. Altamont Emergency Room Physicians Medical Group* (2002) 98 Cal.App.4th 26, on which the trial court relied, because that case did not deal with a latent disease. Rather, in *Zwicker*, the tortious act and injury occurred almost simultaneously, and both occurred before the victim was married.

Juror misconduct; Facebook; Stored Communications Act (18 U.S.C. § 2701)("SCA"); right to privacy; compelled disclosure: *Juror No. One v. Superior Court* (2012) _ Cal.App.4th __ (3d Dist.)

Juror Number One served on a criminal trial stemming from the beating of a young man on Halloween night 2008. All defendants were convicted of various offenses. After the trial, one of the trial jurors submitted an affidavit stating that Juror Number One had posted comments about the evidence as it was being presented at trial on his Facebook "Wall," inviting his Facebook "friends" who had access to his Facebook page to respond.

The trial court held a hearing, in which Juror Number One admitted he had posted items about the trial on his Facebook account while the trial was in progress, but that the posts contained no information about the trial or the evidence, and only indicated that he was still on jury duty. He acknowledged that he did make one post stating that the case had been boring that day and that he had almost fallen asleep. At the end of the hearing, the trial court indicated that there had been clear misconduct by Juror Number One, but that the degree of the misconduct was still at issue. Following that, counsel for real party in interest, one of the convicted defendants, issued a subpoena to Facebook to produce all postings by Juror Number One for a six-month period that included the trial. Facebook moved to quash the subpoena, asserting that disclosure of the requested information would violate the SCA. Real party's counsel then issued a subpoena to Juror Number One to produce all Facebook posts while he was a juror.

The trial court granted Juror Number One's motion to quash, but ordered Juror Number One to submit all the material to the court for an in camera inspection. Specifically, it ordered Juror Number One to execute a consent form under the SCA that would allow Facebook to comply with the subpoena. Juror Number One petitioned for a writ. The Court held that Juror Number One failed to provide it with sufficient information about how Facebook operated to enable it to determine whether the SCA applied to the information at issue in the case. But even if the statute applied, it would protect compelled disclosure of stored information by Facebook – here the compulsion is directly on Juror Number One. "Thus, the question here is not whether respondent court can compel Facebook to disclose the contents of Juror Number One's wall postings but whether the court can compel Juror Number One to do so. If the court can compel Juror Number One to produce the information, it can likewise compel Juror Number One to consent to the disclosure by Facebook. The SCA has no bearing on this issue."

The court rejected Juror Number One's arguments that his Facebook information and postings were absolutely protected by the Fourth, and Fifth Amendments to the U.S. Constitution, and to the right to privacy under the California Constitution. The court held that his privacy rights should yield, given the record presented, to the trial court's investigation of whether his admitted misconduct was prejudicial.

ERISA; Mental Health Parity Act; Medically Necessary treatment; *Harlick v. Blue Shield of California* (9th Cir. 2012) __ F.3d __

In August 2011, the Ninth Circuit withdrew its prior opinion in this case, which held that under the California Mental Health Parity Act (Health & Saf. Code, § 1374.72) ("Parity Act"), Blue Shield was required to pay for its subscriber's residential treatment for anorexia nervosa at a facility in Missouri. On June 4, 2012, the panel filed a new opinion, reaching the same result, but using a different analysis. One judge dissented from the new opinion. The new opinion holds, like the prior opinion, that Blue Shield's policy does not provide coverage for residential treatment. But a majority of the court continued belief that treatment was required by the Parity Act. The court continued to reject Blue Shield's argument that the mandatory coverage required by the Parity Act was no broader than the care required for physical conditions under the Knox-Keene Act. Rather, the court noted that the regulations promulgated by the California Department of Managed Health Care ("DMHC") make clear that the Parity Act requires plans to provide treatment including, but not limited to, the basic services mandated by the Knox-Keene Act. In the court's view, the Parity Act's mandate that plans provide all "medically-necessary treatment for severe mental illness," which in the plaintiff's case, included residential treatment for her anorexia nervosa.

Interest on Attorney Fee awards; date of accrual: *Khazan v. Braynin* (2012) __ Cal.App.4th __ (1st Dist. Div. 4.)

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After plaintiffs prevailed on their claims against defendants, they sought and obtained an award of attorneys' fees under Civil Code section 1717. That award was reversed on appeal, with directions to the trial court to recalculate it. The trial court did recalculate it on remand, and ruled that interest on the fee award should run from the date of the fee award on remand; not from the date of the original judgment. Affirmed. As a general rule, when a judgment is modified on appeal, the new sum draws interest from the amount of the original order; not the date of the new judgment. But if the judgment is reversed on appeal, the new award bears interest only from the date of the new judgment. These rules are to be applied based on the substance of what transpires, not on formalism. Here, the appellate court's order reversing the original fee award operated as a reversal, not a modification. Interest therefore should run from the date of entry of the new award, not from the date of the original judgment.

ADR; binding mediation; enforcement of settlements; Code of Civil Procedure section 664.6: *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) __ Cal.App.4th __ (4th Dist., Div. 1)

Plaintiffs sued defendant for defamation and related business torts. Their claims were sent to arbitration. After several days of arbitration, the parties announced to the arbitrators that they had agreed to settle their case by way of a one-day mediation, with a binding "baseball style" arbitration component, between $100,000 and $5 million. This was put on the record. The parties later executed a settlement agreement providing that the parties would mediate the case for a day, and if no agreement was reached, the parties would give the mediator their last, best and final offer, which would be between $100,000 and $5 million, and the mediator would then be empowered to set the amount of the judgment in favor of plaintiffs and against the defendant by choosing the plaintiffs' demand or the defendant's offer, which would result in a binding "mediator judgment" to then be entered by the Superior Court as a legally binding judgment.

The parties were unable to reach an agreement after a day of mediation, and provided the mediator with their final offers: a $100,000 offer by the defendant against a $5 million demand by plaintiff. The mediator selected $5 million. The defendant then obtained new counsel, who wrote to the mediator requesting that the proceeding be reopened, or that the mediator reconsider. Plaintiff's counsel moved to confirm the mediator's award as an arbitration award. The trial court declined to do that, but treated the award as a binding settlement and enforced it under Code of Civil Procedure section 664.6. Defendant appealed, arguing: (1) the defendant never agreed to resolve the case through binding mediation; (2) a contract term providing for binding mediation is too uncertain to be enforceable; and (3) binding mediation is not among the constitutionally and statutorily permissible means of waiving jury trial rights. Affirmed.

The court held that the terms of the contract were clear, and that the record showed the parties had mutually consented to the procedure used to resolve the case. There was no evidence that the parties intended that if no agreement was reached after the mediation that there would be a full-scale arbitration with an evidentiary component. The court viewed the defendant's failure to request an arbitration hearing after the mediation ended, or to object because the mediator failed to commence an arbitration, was strong evidence of the defendant's intent to allow the mediator to resolve the case based on the parties' final proposals. The court also found that the parties stated on the record what their agreement was, then reduced it to writing and modified it to make it even clearer, and then followed the procedure they had agreed to. Their agreement was therefore certain enough to enforce.

Finally, the court noted that the procedures recognized by the constitution and statutes for waiving jury trial rights do not encompass a party's decision to avoid trial entirely by not submitting the case to a court for resolution in the first case. "Indeed it has always been understood without question that parties could eschew jury trial either by settling the underlying controversy, or by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 713.) Here, the parties agreed to settle their case using binding mediation in a nonjudicial forum.

Attorney's fees; prevailing party; Civil Code section 1717: *Frog Creek Partners LLC v. Vance Brown, Inc.* (2012) __ Cal.App.4th __ (1st Dist., Div. 5.)

Brown entered into a contract with Frog Creek to build a home. Frog Creek filed suit against Brown in the superior court for breach of contract and other claims arising out of the contract. Brown moved to compel arbitration and the trial court denied the motion, finding that Frog Creek had not agreed to the version of the contract relied on by Brown. This ruling was affirmed on appeal. On remand, Brown moved to compel arbitration based on the version of the contract that Frog Creek claimed was controlling. The trial court denied the petition, but was reversed on appeal. The case was arbitrated, with an award issued in favor of Brown. Brown then moved for pre-arbitration fees and costs under Civil Code section 1717; Frog Creek filed its own application, arguing that it was the "prevailing party" on Brown's unsuccessful first attempt to compel arbitration. The trial court found that Brown was the prevailing party in the arbitration and awarded pre-and post-arbitration fees. But it also found that Frog Creek was the prevailing party on the initial petition to arbitrate,

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and awarded fees on that, which it ultimately set off against the award to Brown. Brown appealed. In an opinion exhaustively examining the evolution and legislative history of Civil Code section 1717, the court concluded that under section 1717 there can only be one "prevailing party" entitled to fees on a contract in a given lawsuit. On remand, the trial court was directed to award Brown fees for the proceedings on the first, unsuccessful petition to compel arbitration, and also for the appeal.

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