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ADR Case Update – CCP § 998 Pitfall for the Unwary Plaintiff

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Dismissal with prejudice pursuant to settlement triggered CCP § 998 and denial of plaintiff's attorney fees since settlement amount was less than 998.

In *Madrigal v. Hyundai Motor America*, 90 Cal. App. 5th 385 (April 11, 2023), a case of first impression, a divided panel of the California Court of Appeal, Third District, held that plaintiffs were *not* entitled to post-Code of Civil Procedure Section 998 attorney fees and costs, even though the parties had stipulated to a settlement providing for them as determined by the trial court on motion, because the settlement amount was less than defendant's 998 offer.

Oscar Madrigal sued Hyundai for breach of express and implied warranties under the Song-Beverly Consumer Warranty Act after purchasing an allegedly defective vehicle. Hyundai made two offers to compromise under section 998. After a jury was sworn in on the first day of trial, the parties entered into a stipulated settlement for a payment of $39,000 to Madrigal and left the issue of costs and attorney fees for resolution on Madrigal's subsequent motion. Madrigal would thereafter file a dismissal with prejudice.

"If a CCP Section 998 offer has been made, Plaintiff's counsel should ensure … the settlement is more than the 998. If it is less, include language … that the cost-shifting … shall not be applied …."

Madrigal filed a motion for fees and costs. Hyundai moved to strike or, alternatively, to tax Madrigal's costs and expenses because the settlement was less than the second Section 998 offer. The trial court denied Hyundai's motion, reasoning that Section 998's cost-shifting provisions are inapplicable to cases that end in settlement, and granted Madrigal's motion in part, awarding statutory attorney fees of $81,142.50 and $17,681.05 in costs and expenses. Hyundai appealed.

Reversed and remanded. Under Section 998(b), a valid offer under Section 998 must "allow judgment to be taken," and set forth the "terms and conditions of the judgment." The cost–shifting provision of Section 998(c)(1) applies to a plaintiff who rejects a Section 998 offer and "fails to obtain a more favorable judgment." This provision applies when parties enter into a settlement agreement since the term "judgment" in subdivision (c)(1) must be interpreted broadly in the same way courts have construed the term "judgment" in the context of Section 998(b). Such an interpretation is consistent with the statute's purpose to encourage parties to make and accept reasonable offers to compromise, permitting the statute to effectuate settlements based on a practical, rather than a literal, definition of "judgment." Therefore, the term "judgment" must include a dismissal with prejudice pursuant to a settlement like the one agreed to by the parties in this case.

Practice Pointer: If a CCP Section 998 offer has been made, Plaintiff's counsel should ensure that the settlement amount is more than the 998. If it is less, counsel should include language in the stipulated settlement to the effect that the cost-shifting provisions of Section 998(c)(1) shall *not* be applied by the trial court when ruling on the subsequent motion for fees and costs.

Former employee entitled to unilaterally withdraw from arbitration due to employer's failure to timely pay arbitration fees despite arbitrators' attempt to cure breach.

In *Cvejic v. Skyview Capital, LLC*, 2023 WL 4230980 (June 28, 2023), Milan Cvejic sued Defendant Skyview Capital, LLC, after his termination. Skyview moved to compel arbitration, and was required to pay arbitration fees before the final hearing date. Skyview did not pay by the due date. Its counsel had no explanation for the lack of payment. The panel of arbitrators set a new payment due date. Cvejic's counsel wrote the panel to say Cvejic was withdrawing from the arbitration under Code of Civil Procedure Section 1281.98. The panel chair responded that Cvejic's request was "premature" because a new payment deadline had been set. Thereafter the panel ruled Section 1281.98 was not in play because Skyview "came into compliance with the Panel's Orders regarding posting deposits." Skyview ultimately paid its fee by the new due date. Nevertheless,
Cvejic filed a motion with the trial court to withdraw from the arbitration and sought sanctions. The trial granted the motion and awarded Cvejic reasonable expenses under Section 1281.99. Skyview appealed.

"The statute does not empower an arbitrator to cure a party's missed payment. Doing so would render Section 1281.98 meaningless, and perpetuate the "procedural limbo" the statute was enacted to address."

Affirmed. Skyview was in material breach of the parties' arbitration agreement when it missed the original payment date. Section 1281.98 entitled Cvejic to withdraw from the arbitration. The statute does not empower an arbitrator to cure a party's missed payment. Doing so would render Section 1281.98 meaningless, and perpetuate the "procedural limbo" the statute was enacted to address.

U.S. Supreme Court holds that district court should have granted stay while interlocutory appeal from denial of motion to compel arbitration was pending since the entire case was involved in the appeal.

In *Coinbase, Inc. v. Bielski*, 2023 WL 4138983 (Jun. 23, 2023, U.S. Sup. Ct.), Coinbase Operated in online platform enabling users to buy and sell cryptocurrencies. Abraham Bielski filed a putative class action in district court against Coinbase alleging that it failed to replace funds fraudulently taken from users' accounts. Coinbase responded with a motion to compel arbitration based upon Bielski's user agreement that included an arbitration provision. The court denied the motion. Coinbase subsequently filed an appeal under 9 U.S.C. Section 16(a), which authorizes appeals from orders denying motions to compel arbitration; and moved to stay the proceeding pending resolution of the appeal. The district court denied the motion for a stay as did the Ninth Circuit. The U.S Supreme Court granted certiorari.

"The district court should have granted the motion for a stay while the interlocutory appeal on arbitrability was pending."

Reverse and remanded. Section 16(a) of the Federal Arbitration Act allows interlocutory appeals from denial of a motion to compel arbitration. An interlocutory appeal divests the district court of its control over aspects of the case involved in the appeal. Here, the only question was whether the *entire* case belong in district court or arbitration. Accordingly, the district court should have granted the motion for a stay while the interlocutory appeal on arbitrability was pending.

California Supreme Court holds that CCP § 1288.2's deadline to seek vacatur of an arbitral award is a nonjurisdictional statute of limitations subject to equitable tolling and estoppel.

"The California Supreme Court held that the Section 1288.2 deadline neither jurisdictional nor otherwise precluded equitable tolling or estoppel."

In *Law Finance Group, LLC v. Key*, 2023 WL 4168752 (Cal. Sup. Ct., June 26, 2023), Sarah Key became embroiled in a probate dispute with her sister, and ultimately recovered one-third of her parents' estate, equivalent to $20 million. To pursue the litigation, she borrowed $2.4 million from Law Finance Group (Lender), which was repaid at the conclusion of the probate litigation. However, Key disputed about $3.5 million in unpaid interest and fees sought by Lender, claiming violation of the California Financing Law (CFL). Pursuant to an arbitration agreement between Key and Lender, the dispute was submitted to arbitration. The arbitration panel found that the interest and fee provisions violated the CFL, but still awarded Lender approximately $800,000. Lender filed a petition to confirm the award, and Key filed a response seeking vacatur. The trial court deemed Key's petition to vacate outside the 100-day deadline prescribed by Code of Civil Procedure section 1288.2, but considered her objections to Lender's petition to confirm because counsel for the parties had agreed to waive the 10-day filing requirement for a vacatur petition. The Court of Appeal held that the 100-day deadline was jurisdictional and not subject to the equitable doctrines of tolling and estoppel.

Reversed and remanded. The California Supreme Court held that the Section 1288.2 deadline neither jurisdictional nor otherwise precluded equitable tolling or estoppel. The case was remanded for the Court of Appeal to determine in the first instance whether Key was entitled to equitable relief from the deadline.

The Ninth Circuit holds that Amazon may not compel arbitration because plaintiff's wiretapping and invasion of privacy claims did not did not fall within the scope of his arbitration agreement.

"Because the dispute fell outside the scope of the arbitration provision, the district court properly denied Amazon's motion to compel."

In *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093 (9th Cir. Apr. 19, 2023), Drickey Jackson was an Amazon Flex driver, delivering Amazon products using his own car. He signed up through the Amazon Flex app, and accepted the 2016 Terms of Service Agreement that included an arbitration clause covering "any dispute or claim ... arising out of or relating in any way to this Agreement, including ... participation in the program or ... performance of services." He filed a class action against Amazon on behalf of himself and other Flex drivers contending that Amazon monitored and wiretapped the drivers' conversations when they communicated during off hours in closed Facebook groups. Amazon filed a motion to compel arbitration that the district court denied because the dispute did not fall within the scope of the arbitration clause.

Amazon appealed, arguing that the district court should have applied the broader arbitration clause in a 2019 Terms of Service Agreement, and that even if the arbitration clause in the 2016 Terms of Service Agreement applied, this dispute fell within its scope.

Affirmed. A divided Ninth Circuit panel affirmed the denial of Amazon's motion to compel arbitration. For a dispute to fall within the scope of an arbitration clause, it must minimally pertain to the matters dealt with in the clause. In essence, the claim's factual allegations must be within the clause's scope. That is, the

allegations of misconduct must relate to the parties' agreement. Here, Jackson's claims fell outside the contract's broadly–framed arbitration provision. His claims did not depend on any contractual term pertaining to the Amazon Flex work. Instead, Jackson's claims concerned Amazon's purported violations of wiretapping statutes and invasion of privacy laws. These claims were not only completely unrelated to the driver's agreement with Amazon, but they could also have been asserted by individuals who were not Flex drivers. Therefore, the claims were completely independent of the Amazon Flex employment. Because the dispute fell outside the scope of the arbitration provision, the district court properly denied Amazon's motion to compel.

Employer may compel arbitration of former employee's *individual* PAGA claim, but not his nonindividual PAGA claims.

In *Nickson v. Shemran, Inc.*, 90 Cal.App.5th 121 (April 7, 2023), Blaine Nickson brought a Labor Code Private Attorneys General Act of 2004 (PAGA, Lab. Code, § 2698 et seq.) action against his former employer, Shemran, Inc., seeking civil penalties on behalf of himself and other aggrieved employees for wage and hour violations. Shemran moved to compel arbitration based on Nickson's agreement to arbitrate all *individual* claims arising from his employment. The agreement contained a severability clause providing that if any provision was found to be void or unenforceable, such determination would not affect the validity of the remainder of the agreement. The trial court denied Shemran's motion, citing *Iskanian CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), which held that an employee's waiver of the right to bring a PAGA action is unenforceable, and prohibits splitting PAGA actions into separate individual and nonindividual actions. Shemran appealed.

"Nickson's individual PAGA claims could be arbitrated while his nonindividual PAGA claims could not."

Reversed in part. In *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), the U.S Supreme Court held that the Federal Arbitration Act (9 U.S.C., § 1 et seq.) preempted *Iskanian*. However, the FAA is concerned with the forum in which disputes are resolved, not with the substantive law that governs them. Therefore, under Iskanian, Nickson's waiver of the right to bring a PAGA action was still unenforceable. However, where a predispute agreement provides for arbitrating only individual PAGA claims, that portion of the action may be severed and compelled to arbitration, while the remaining nonindividual claims are litigated in court. Accordingly, the trial court's order denying the motion to compel arbitration was reversed. Nickson's individual PAGA claims could be arbitrated while his nonindividual PAGA claims could not.

So also, employer's motion to compel arbitration of former employee's PAGA wage and hour claim was denied where agreement unambiguously excluded PAGA claims.

In *Duran v. EmployBridge Holding Co.*, 92 Cal.App.5th 59 (May 30, 2023), Griselda Duran sued her former employer, EmployBridge, LLC, doing business as Select Staffing, to recover civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.) for wage and hour violations. EmployBridge moved to compel arbitration under the agreement Duran electronically signed at the outset of her employment. The agreement stated that arbitrable disputes included wage and hour claims, but also contained a class and representative action waiver that stated, "except as prohibited under applicable law," representative actions were not assertable claims. Finally, the

arbitration agreement specified that PAGA claims were not arbitrable. The trial court denied the motion, determining that the agreement to arbitrate specifically excluded PAGA claims.

Affirmed. The trial court correctly interpreted the agreement's carve-out provision stating that "claims under PAGA ... are not arbitrable under this Agreement." This provision was not ambiguous. EmployBridge argued the clear intent of the carve-out provision was to identify claims that applicable law prohibits from being arbitrated so that the individual claims would be arbitrable. Under this interpretation, the modifier "nonarbitrable" would be inserted before "claims under PAGA" so the provision would read "[nonarbitrable] claims under PAGA ... are not arbitrable under this Agreement." Under Code of Civil Procedure section 1858, judges may only declare an agreement's terms, not insert or omit terms. It is not objectively reasonable to interpret the phrase "claims under PAGA" to include some PAGA claims while excluding others. If EmployBridge sought another interpretation of its agreement, it could have provided specific terms to that effect. Thus, the carve-out provision excluded all the PAGA claims from the agreement to arbitrate.

"Thus, the carve-out provision excluded all the PAGA claims from the agreement to arbitrate."

Arbitration compelled even though agreement was procedurally unconscionable – party seeking to invalidate agreement must also show substantive unconscionability.

In *Fuentes v. Empire Nissan, Inc.*, 90 Cal.App.5th 919 (Apr. 21, 2023), Evangelina Yanez Fuentes signed an arbitration agreement with Empire Nissan, Inc. She brought an action against Nissan after her termination, and Nissan moved to compel arbitration. The trial court denied the motion finding the arbitration agreement was both procedural and substantively unconscionable. Nissan appealed.

The unconscionability defense has two mandatory elements: a party must establish both procedural and substantive unconscionability."

Reversed. The unconscionability defense has two mandatory elements: a party must establish both *procedural* and *substantive* unconscionability. Here, although Fuentes presented evidence of procedural unconscionability, there was a fatal omission: she failed to show substantive unconscionability. The agreement between Fuentes and Nissan bound both to arbitrate disputes, and there was no other evidence of substantive unfairness. The trial court should have granted the motion to compel arbitration.

Likewise, online arbitration agreement between car dealership and its general manager was enforceable because it contained no substantive unconscionability.

"Basith presented evidence of only procedural unconscionability …. He presented no evidence of substantive unconscionability,"

In *Basith v. Lithia Motors, Inc.*, 90 Cal.App.5th 951 (Apr. 21, 2023), Mohammad Basith was required to sign an online arbitration agreement to become a general manager of Lithia Motors, a car dealership doing business as Nissan of Carson. He also signed a paper version of a two-page General Manager Compensation Plan that included an acknowledgement that all claims against Nissan would be arbitrated. Basith was terminated and brought an action asserting various employment claims. Nissan moved to compel arbitration based on the agreements. The trial court denied the motion finding the online arbitration agreement was unconscionable. Nissan appealed.

Reversed. Basith presented evidence of only procedural unconscionability, which concerns the fairness of the procedures surrounding the formation of the contract. He presented no evidence of substantive unconscionability, which pertains to the unfairness of the agreement itself, and is indispensable to the unconscionability defense. The trial court should have granted the motion to compel arbitration.

In lemon law cases, the standard California car sales contract between the buyer and dealer does *not* require the buyer to arbitrate warranty claims against the vehicle manufacture (*Ford Motor Warranty Cases*).

In *Ochoa v. Ford Motor Company*, 89 Cal.App.5th 1324 (Apr. 4, 2023), Martha Ochoa and others purchased vehicles manufactured by Ford Motor Company that were financed through the dealerships that sold the cars. Ford was not a party to the purchase contracts between the dealerships and plaintiffs. The contracts required disputes, including "any such relationship with third parties who do not sign this contract," to be arbitrated. After plaintiffs experienced transmission problems, they sued Ford based on various consumer–related violations, but did not include the dealerships in the lawsuits. Ford moved to compel arbitration based on the arbitration provision allowing for the inclusion of nonsignatory third-parties. Ford argued that equitable estoppel principles and agency allegations in plaintiffs' complaints entitled it to enforce the arbitration provisions as an undisclosed principal or an intended third–party beneficiary. The trial court denied the motion and Ford appealed.

"Here, the claims were independent of the purchase agreements' obligations because, under California law, manufacturer warranties are not part of the sale contract."

Affirmed. Equitable estoppel permits nonsignatories to compel arbitration despite lacking an agreement to do so if the claims are intertwined with the obligations being imposed by the agreement containing the arbitration clause. Here, the claims were independent of the purchase agreements' obligations because, under California law, manufacturer warranties are not part of the sale contract. Similar reasoning necessitated rejecting Ford's arguments based on an agency relationship, which requires a nexus between the claims and agreement. With these cases, the only agency connection clearly communicated in some complaints was that the dealerships were "agents for vehicle repairs," a statement and argument falling short of establishing an agency relationship.

This holding is consistent with Ninth Circuit and other federal precedent, and is one of several decisions that has distinguished *Felisilda v. FCA US LLC*, 53 Cal. App.5th 486 (2020) (See *Ngo v. BMW of North America*, 23 F.4th 943 [9th Cir 2022]).

Similarly, in a subsequent case, Ford could not compel arbitration against car buyers since their underlying claims arose under Ford's express warranty that were independent of the purchase contract.

In *Montemayor v. Ford Motor Co.*, 2023 WL 4181909 (June 28, 2023), Rosanna and Jesse Montemayor purchased a 2013 Ford Edge from AutoNation. The purchase contract included an arbitration clause. After experiencing numerous problems with the vehicle, they filed suit against AutoNation and Ford Motor Company alleging violation of the Song-Beverly Consumer Warranty Act and breach of express warranty. Both defendants moved to compel arbitration. Although a nonsignatory to the contract, Ford sought to compel arbitration under equitable estoppel principles set forth in *Felisilda v. FCA US LLC*, 53 Cal. App.5th

486 (2020). The Montemayor's distinguished *Felisilda* by noting their claims against Ford were not "intimately founded and intertwined with" the AutoNation sales contract. The trial court granted Ford's motion to compel the breach of implied warranty of merchantability claim, but denied the motion as to the other causes of action because those claims were independent of the sales contract and arose under Ford's express warranty. Ford appealed.

"Since the Montemayors' causes of action against Ford did not involve AutoNation, but were based on Ford's written warranty, they were independent of the sales contract. The trial court correctly declined to compel arbitration of those claims."

Affirmed. This appellate court declined to follow *Felisilda*. As set forth in the *Ford Motor Warranty Cases*, manufacturer vehicle warranties accompanying the sale of motor vehicles are independent of the sales contract. To compel arbitration, a nonsignatory to the contract must show the plaintiff's claims depended upon and coalesced with the contract's obligations (DMS Services, LLC v. Superior Court, 205 Cal. App. 4th 1346 [2012]). Instead, Plaintiffs' claims against Ford were based on Ford's express, written warranty; and did not rely on the AutoNation contract, which specifically disclaimed any warranties while acknowledging the possibility of a separate manufacturer's warranty. Since the Montemayors' causes of action against Ford did not involve AutoNation, but were based on Ford's written warranty, they were independent of the sales contract. The trial court correctly declined to compel arbitration of those claims.

Employer may not compel arbitration because improper PAGA waiver and ambiguous poison pill provision rendered the entire arbitration agreement unenforceable.

In *Westmoreland v. Kindercare Education LLC*, 90 Cal.App.5th 967 (Apr. 24, 2023), Rochelle Westmoreland sued her former employer, Kindercare, for wage and hour violations under the California Labor Code and Private Attorneys General Act (PAGA). Kindercare successfully moved to compel arbitration. However, the Court of Appeal issued an alternative writ of mandate denying the emotion because the invalid PAGA waiver rendered the entire agreement unenforceable under the agreement's poison pill provision, which purported to invalidate the entire agreement if the PAGA waiver was found to be unenforceable. Kindercare unsuccessfully petitioned the California Supreme Court for review and the United States Supreme Court for certiorari.

"The poison pill provision made clear that the entire arbitration agreement was invalid if the PAGA waiver was found to be unenforceable."

Kindercare then filed a renewed motion to compel arbitration based on "new law" under *Western Bagel Co., Inc. v. Superior Court* (2021) 66 Cal.App.5th 649. The trial court denied the motion because *Western Bagel* did not reflect an intervening change in law under Code of Civil Procedure section 1008. Kindercare appealed the denial requesting the court to treat its appeal as a writ of mandate

Affirmed. "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of the arbitration itself." *Western Bagel Co., Inc. v. Superior Court*. Meanwhile, under the doctrine of contra proferentem, "a court should construe ambiguous language against the interest of the party that drafted it … to the extent the dispute resolution agreement's language is uncertain on the point and one can glean a different outcome from the language." *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109.

Here, nothing in the Kindercare arbitration agreement required the court to apply contra proferentem or any other default rules based on public policy

considerations. The poison pill provision made clear that the entire arbitration agreement was invalid if the PAGA waiver was found to be unenforceable. Consequently, the dueling presumptions regarding agreement construction, the principle of contra proferentem in *Securitas*, and silence presumptions found in *Western Bagel*, were irrelevant because the agreement's language superseded these principles of construction. Accordingly, the arbitration agreement was invalid, and the motion to compel arbitration correctly denied.

Employer may not compel arbitration under unconscionable employee agreements that included illegal, one-sided terms purporting to enjoin wage discussions and representative actions.

In *Alberto v. Cambrian Homecare*, 91 Cal.App.5th 482 (May 10, 2023, Cal. Ct. App., Second Dist., Div. 4), Jennifer Alberto sued her former employer, Cambrian Homecare, under the Private Attorney
Generals Act for Labor Code wage and hour violations. Cambrian moved to compel arbitration based upon the Arbitration and Confidentiality Agreements that she signed as part of her employment. The agreements were not signed by her managing director. Cambrian petitioned for arbitration. The trial court denied the petition and found that even if the parties had formed an arbitration agreement, the agreement had unconscionable terms that so permeated the agreement they could not be severed.

"Thus, the trial court's refusal to sever the unconscionable terms and deny the motion to compel arbitration was proper."

Affirmed. The agreements contained unconscionable terms, both procedural and substantive. They were adhesion contracts that Alberto had to sign as part of her employment and required arbitration of her claims but not Cambrian's. The Confidentiality Agreement's prohibition against discussing wages (defining compensation and salary data as a "trade secret") was illegal under the Labor Code. Finally, the blanket waiver of representative claims in the Arbitration Agreement was substantively unconscionable because it prevented PAGA claims. Thus, the trial court's refusal to sever the unconscionable terms and deny the motion to compel arbitration was proper.

Forms signed by adult children placing mother in care facility did not establish agency relationship that would bind nonsignatory mother to arbitrate her elder abuse claims.

In *Kinder v. Capistrano Beach Care Center*, 91 Cal.App.5th 804 (May 18, 2023), Nancy Kinder was a resident at the Capistrano Beach Care Center. After falling from an elevated bed without guardrails and breaking her hip, she sued for elder abuse. Capistrano moved to compel arbitration based upon arbitration agreements signed by her adult children, James and Barbara, when they placed her in the facility. The trial court denied the motion because Capistrano failed to provide evidence that Nancy's children had authority to sign the agreement and bind their mother to arbitrate. Capistrano appealed.

"Here, Capistrano failed to introduce admissible evidence establishing that the principal (Nancy) specifically authorized Barbara and James to act as her agent and enter into an arbitration agreement on her behalf."

Affirmed. Agency relationships are established by the conduct of both the principal and agent, evidenced by words or actions surrounding the purported establishment of the relationship. The party seeking to compel arbitration has the burden of proof. Here, Capistrano failed to meet that burden by attempting to establish an agency relationship strictly based on Barbara and James certifying on the agreement that they were Nancy's agents. Here, Capistrano failed to introduce admissible evidence establishing that the principal (Nancy) specifically

authorized Barbara and James to act as her agent and enter into an arbitration agreement on her behalf.

Arbitration clause was unenforceable because it contained ambiguous language regarding arbitrability as well as language prohibiting public injunctive relief.

In *Jack v. Ring LLC*, 91 Cal.App.5th 1186 (May 25, 2023), Brandon Jack and Jean Alda purchased video doorbell and security camera products from Ring LLC. Plaintiffs subsequently filed a class action complaint against Ring asserting claims under various consumer protection statutes, and sought injunctive relief requiring Ring to prominently disclose to consumers certain information about its products and services.

"Challenges to an arbitration agreement are for the arbitrator to decide. However, objections to the validity of the arbitration clause itself are generally resolved by the court in the first instance."

Ring moved to compel arbitration based on an arbitration provision in its terms of service. Opposing the motion, plaintiffs did not dispute that they agreed to Ring's terms of service, but they argued the applicable arbitration provision violated the California Supreme Court's holding in *McGill v. Citibank, N.A*., 2 Cal.5th 945 (2017), that a pre-dispute arbitration agreement is invalid and unenforceable insofar as it purports to waive a party's statutory right to seek public injunctive relief. The trial court denied the motion to compel arbitration, and Ring appealed, arguing that the trial court erred in deciding the threshold issue of whether the arbitration provision was enforceable under *McGill* because the parties clearly and unmistakably delegated authority to the arbitrator to decide that issue.

Affirmed. Challenges to an arbitration agreement are for the arbitrator to decide. However, objections to the validity of the arbitration clause itself are generally resolved by the court in the first instance. Here, the arbitration provision at issue stated both that enforceability of the arbitration provision was to be decided by the arbitrator, and that a court might also find provisions in the contract unenforceable. Because of this uncertainty, it could not be said that the parties clearly and unmistakably delegated to the arbitrator exclusive authority to decide whether the arbitration provision was valid. Furthermore, the appellate court agreed with the trial court that the arbitration provision at issue prohibited public injunctive relief, in violation of *McGill*.

In lawsuit between attorney and client, trial court properly found client was prevailing party under Mandatory Fee Arbitration Act for purposes of attorney fees award, because client obtained judgment confirming that award.

"Bus. & Prof. Code Sections 6203 and 6204 govern the award of attorney fees. Tierney was the prevailing party for purposes of an award of attorney fees under either statute."

In *Soni v. Cartograph, Inc.*, 90 Cal.App.5th 1 (Mar. 23, 2023), Timothy Tierney and his company, Cartograph, Inc., requested arbitration against his former attorney, Surjit P. Soni, under the Mandatory Fee Arbitration Act (Bus. & Prof. Code, § 6200 et seq.), challenging charges Tierney claimed were not authorized. The arbitrator awarded Soni net fees of $2.50. Soni brought an action against Tierney for breach of their attorney-client agreement 33 days after service of the arbitration award. The trial court found in favor of Soni and awarded $2,890, plus $79,898 in attorney fees. The appellate court reversed because Soni failed to file an action within 30 days of service of the award. On remand, Tierney obtained a judgment affirming the arbitration award. The trial court awarded Tierney $334,458.41 in attorney fees and costs. Soni appealed.

Affirmed. Bus. & Prof. Code Sections 6203 and 6204 govern the award of attorney fees. Tierney was the prevailing party for purposes of an award of attorney fees under either statute.

Arbitrator's duty to disclose does not require a continuing disclosure of the results of proceedings that were pending and disclosed at time of nomination.

In *Perez v. Kaiser Foundation Health Plan*, 91 Cal.App.5th 645 (May 16, 2023), Andrea Perez sued Kaiser for allegedly failing to diagnose and treat her cancer. Kaiser moved to compel arbitration. Andrea passed away, but her parents, Maria and Vincent Perez, continued with wrongful death and survival actions. The parties selected an arbitrator from a list of candidates, and received a disclosure statement that listed prior and pending cases involving Kaiser in which the arbitrator had served. The arbitrator sent a supplemental disclosure to the parties regarding additional cases involving Kaiser in which he had agreed to provide services. Those cases were resolved while the arbitration between Kaiser and the Perezes was still pending. However, the arbitrator did not disclose the results of those proceedings when they were rendered. Ultimately, the arbitrator concluded Kaiser was not viable for Andrea's death. The Perezes appealed.

"While arbitrators have a continuing duty to disclose grounds for disqualification until the conclusion of the proceeding, that duty does not require disclosing the results of proceedings that were pending and disclosed at the time of the proposed nomination."

Affirmed. While arbitrators have a continuing duty to disclose grounds for disqualification until the conclusion of the proceeding, that duty does not require disclosing the results of proceedings that were pending and disclosed at the time of the proposed nomination.

Arbitrator's subpoena power to compel non-party witness to produce documents is limited to arbitration hearing only, *not* pre-trial discovery proceeding.

In *McConnell v. Advantest America*, 2023 WL 4014295 (June 15, 2023), Advantest America, Inc. asserted claims against Samer Kabbani, its former senior executive, and Lattice Innovation, Inc., a company Kabbani allegedly managed and majority-owned at the same he was working for Advantest. Advantest alleged Kabbani "improperly exploited" his position at Advantest and, without disclosing his ties to Lattice, arranged to have Lattice selected as one of Advantest's sub-suppliers and personally profited from the arrangement. Tim McConnell was the president of Lattice.

Upon discovering those facts, Advantest initiated arbitration proceedings against Kabbani and Lattice. During a deposition, Kabbani admitted to deleting Whatsapp messages from his phone before turning it over to Advantest, but identified several parties with whom he may have communicated regarding Lattice using the application, including McConnell. After requests for the messages went unfulfilled, Advantest requested the arbitrator issue a subpoena requiring McConnell to produce his Whatsapp messages. The arbitrator issued subpoenas requiring McConnell to upload responsive documents to a website controlled by Advantest's counsel, set a hearing to ensure the documents were received, and set a follow up hearing on the merits one year later. McConnell's counsel appeared at the initial hearing and refused to comply with the subpoenas, claiming they were impermissible discovery subpoenas. The

arbitrator ordered compliance. McConnell petitioned the trial court to vacate the order. The trial court denied the petition, concluding the subpoenas were statutorily authorized "hearing" subpoenas, not subpoenas issued for the purposes of discovery. McConnell appealed.

Reversed. The California Arbitration Act (CAA; Code Civ. Proc., § 1280 et seq.) confers upon an arbitrator the power to issue "[a] subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents and other evidence, *at an arbitration proceeding*[.]" (§ 1282.6, subd. (a), italics added.) Interpreting section 1282.6, subdivision (a), as a matter of first impression, the Court of Appeal in *Aixtron, Inc. v. Veeco Instruments, Inc.*, 52 Cal.App.5th 360 (2020), concluded the subpoena provisions of the CAA did not give an arbitrator the power to issue "*prehearing* discovery subpoenas."

"In short, the subpoenas were an impermissible use of the arbitrator's subpoena powers, used for pre-hearing discovery, rather than to compel production at the arbitration hearing."

Although the subpoenas in this case were labeled "hearing" subpoenas, they sought to compel pre-hearing discovery. The responsive documents were to be uploaded to a website controlled by Advantest, there was no indication the arbitrator would be able to review or evaluate them, and the objective of the initial hearing was to simply collect the documents. In short, the subpoenas were an impermissible use of the arbitrator's subpoena powers, used for pre-hearing discovery, rather than to compel production at the arbitration hearing. The trial court erred in failing to grant McConnell's petition to vacate the arbitrator's order to comply with the subpoenas.

Effective pre-litigation policy-limits demands must comport to new legislation.

New Legislation was enacted, effective January 1, 2023, regarding pre-litigation/pre-arbitration limited-time insurance settlements. California Code of Civil Procedure §§999-999.5 govern "limited time, policy limit demands" made before the filing of a lawsuit or a demand for arbitration. The Legislature had the support of the Plaintiff and Defense bar in order to eliminate ambiguous policy limit demand letters, which were resulting in so-called bad faith "set ups" of insurers.

"In any lawsuit filed by a claimant … a time-limited demand that does not substantially comply with the terms of this chapter shall not be considered to be a reasonable offer to settle the claims against the tortfeasor for an amount within the insurance policy limits for purposes of any lawsuit alleging extracontractual damages against the tortfeasor's liability insurer."

A time-limited demand is defined as "an offer prior to the filing of the complaint or demand for arbitration to settle any cause of action or a claim for personal injury, property damage, bodily injury, or wrongful death made by or on behalf of a claimant to a tortfeasor with a liability insurance policy for purposes of settling the claim against the tortfeasor within the insurer's limit of liability insurance, which by its terms must be accepted within a specified period of time." (CCP §999(b)(2).)

These sections apply to demands made after Jan. 1, 2023, and will apply to causes of action and claims covered under automobile, homeowner, or commercial premises liability insurance policies for property damage, personal or bodily injury, and wrongful death claims. These sections do not apply to self-represented claimants.

A “Limited-Time Demand” must be in writing and include material terms set forth in the statue. It must include a clear and unequivocal offer to settle all claims within policy limits, including the satisfaction of all liens The insurance carrier must be provided with at least 30 days to respond.

In any lawsuit filed by a claimant, or by a claimant as an assignee of the tortfeasor, or by the tortfeasor for the benefit of the claimant, a time-limited demand that does not substantially comply with the terms of this chapter shall not be considered to be a reasonable offer to settle the claims against the tortfeasor for an amount within the insurance policy limits for purposes of any lawsuit alleging extracontractual damages against the tortfeasor’s liability insurer.

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