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Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

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STATE

Arbitration—Labor and Employment—Waiver of Right to Bring PAGA Claims in Court

Under the Private Attorney General Act an employee may, as a proxy for the state's labor enforcement agency, bring a civil action personally and on behalf of other employees to recover for Labor Code violations. An employee may only bring such an action after it gives the enforcement agency and employer notice of the alleged violations and the enforcement agency gives the employee notice that it does not intend to investigate those violations. In *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, the court of appeal held that an employee cannot waive its right to bring a PAGA action in a judicial forum by agreeing to arbitration until he is authorized by the enforcement agency to bring such an action. The court reasoned that until the authorization occurs, the claim still belongs to the state.

Appeals—Appealability—Final Judgment—Partial Dismissal of Trial Court Action

To avoid piecemeal appeals, normally an appeal lies only from a final judgment. The would-be-appellant in *Kurwa v. Kislinger*, 4 Cal.5th 109, 226 Cal.Rptr.3d 328 (2017) found how difficult obtaining a final judgment can be sometimes. Following adverse pretrial rulings, the parties desired to test on appeal the trial court's ruling dismissing certain claims. But instead of then completing their trial, the parties dismissed their other claims without prejudice and agreed to waive the statute of limitations so they

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could be decided following the appeal. On their first trip to the Supreme Court in 2013 (57 Cal.4th 1097), the court found that there was no appealable judgment because of the reserved claims. On remand, however, the trial court refused to rescind the stipulation (thinking it had no jurisdiction to do so) and the defendant declined to convert his dismissal without prejudice to one with prejudice (as the appellant had done with its claims on remand). The case worked its way back to the Supreme Court which held appellant's dismissal of his remaining claims with prejudice did not make the judgment final and appealable since defendant's other claims were still reserved. But the court expressly held that the trial court was mistaken about its lack of jurisdiction to fix the problem. The Supreme Court held that since the judgment was still not final, the trial court had jurisdiction to vacate the defective stipulation and judgment so that the parties could obtain a final judgment either by dismissing the remaining claims with prejudice or proceed to trial and dispose of them that way.

Appeals—Settled Statement—Trial Court's Obligation to Provide

Appellants have an obligation to provide the court of appeal with an adequate record, which includes a record of what occurred at relevant hearings. When there is no court reporter to record those hearings, Rule 8.137 provides a process whereby the appellant may obtain a "settled statement," which is a summary of the proceedings approved by the superior court. What happens if the trial court refuses to provide the settled statement? In *Rhue v. Superior Court of Los Angeles County*, 17 Cal.App.5th 892, 225 Cal.Rptr.3d 825 (2017), the court of appeal issued a writ of mandate reaffirming the trial court's obligation to provide a settled statement upon proper request. There, the trial court denied appellant's motion for a settled statement, finding that "no settled statement is necessary or required" for the appeal and, in any event, "[i]t is impossible to attempt to reconstruct" what happened at the hearing. In its writ of mandate instructing the trial court to issue the settled statement, the court of appeal held that it was not the trial court's role to decide whether a record of the hearing was necessary for the appeal, and "a trial court's stated difficulty in remembering what happened during the

proceedings is not a ground to deny a settled statement."

Litigation—Costs—Limitation on Court Reporters' Transcription Fees

In *Burd v. Barkley Court Reporters, Inc.* (2017) 17 Cal.App.5th 1037, an enterprising attorney brought a putative class action, alleging that private court reporters had charged excessive transcription fees. The case centered on the question whether Government Code sections 69950 and 69954—which cap the rates that court reporters may charge for transcribing courtroom proceedings—applied only to the rates of court-employed reporters, or also to the rates that private reporters may charge. The court of appeal ultimately held that the statutes applied to both groups, reasoning that the plain language of these statutes fails to distinguish between the two. The court acknowledged that such a ruling may result in the dearth of private reporters willing to transcribe courtroom proceedings, but left it to the legislature to remedy such a consequence. The court, however, noted that the statutes regulate only transcription fees for court proceedings and do not prevent a private reporter from charging contract rates for court appearances or for producing deposition transcripts. Sounds like a loophole.

Litigation—Court's Retained Jurisdiction to Enforce Settlements

CCP section 664.6 provides a summary procedure for enforcing a settlement agreement without the need for a new lawsuit. As the decision in *Sayta v. Chu*, 17 Cal.App.5th 960, 225 Cal.Rptr.3d 845 (2017) demonstrates, however, the parties must be careful to comply with that section's procedural requirements. There, parties to pending litigation settled their disputes with a written agreement that included a provision for the trial court to retain jurisdiction to enforce the agreement. The parties did not, however, request the trial court retain jurisdiction before dismissing the complaint and cross-complaint. Thereafter, plaintiff moved the trial court for an order enforcing the agreement, which the trial court denied on the merits holding that the agreement had not been breached. On appeal, the court of appeal held that the trial court's order was void. The court held that in order for the trial court to properly retain jurisdiction, the parties were required to present to that court a proper request before dismissing the litigation. Having failed to do so, the trial court lacked subject matter jurisdiction over the parties' dispute

regarding the settlement. By not asking the court to reserve jurisdiction, therefore, the party claiming breach was relegated a lengthier approach to enforcing the settlement.

Trial—Statement of Decision—Failure to Render on Request

Reviewing the legislative history of CCP § 632 and its own inconsistent precedents, the Supreme Court has ruled that a failure to give a statement of decision is not a structural error requiring automatic reversal, but instead an error that will not be reversed unless the appealing party shows prejudice. *F.P. v. Monier*, 3 Cal.5th 1099, 225 Cal.Rptr.3d 504 (2017). The court found that nothing in the legislative history or text of § 632 establishes a rule of automatic reversal or intent to be excepted from the prejudice requirement in CCP § 475 or article VI, § 13 of the state constitution. Just how an appellant should go about demonstrating prejudice was left unsaid and the court acknowledged that "a trial court's failure to issue a properly requested statement of decision may effectively shield the trial court's judgment from adequate appellate review."