

AGENDA ITEM

JANUARY 113

State Bar Sponsored
Legislation – Mandatory Fee
Arbitration

DATE: December 10, 2009

TO: Members, Board of Governors
Members, Board Committee on Operations

FROM: Jill Sperber
Director, Office of Mandatory Fee Arbitration

SUBJECT: State Bar Sponsored Legislation – Mandatory Fee Arbitration

EXECUTIVE SUMMARY

Currently, Business & Professions Code Section 6204 requires the filing of an action for a new trial in court to reject a non-binding mandatory fee arbitration (MFA) award. In *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, the California Supreme Court concluded that enforcement of a pre-existing private arbitration agreement to resolve a fee dispute between the parties following non-binding MFA, in lieu of a new trial in court as provided in the MFA statute, is consistent with the MFA statutory scheme. The State Bar's Committee on Mandatory Fee Arbitration recommends proposed amendments to one of the MFA statutes, recognizing a party's right to seek private arbitration following non-binding MFA, pursuant to a pre-existing arbitration agreement. The November 12 – 14 Board of Governors meeting included this same agenda item. The item was discussed during the Board Committee on Operations meeting on November 12. Consideration of the item was deferred until the January Board meeting, in light of the veto of the State Bar's fee bill for 2010, and the status of legislation to extend the State Bar's authority to assess membership fees for active members for 2010. This item is being presented again, pending further discussion of the status of the State Bar's fee bill for 2010. Questions regarding this agenda item should be directed to Anthony Williams at (916) 448-4000 or Jill Sperber at (415) 538-2023.

INTRODUCTION

The November 12 - 14 Board of Governors meeting included this same agenda item. The item was discussed during the Board Committee on Operations meeting on November 12. Consideration of the item was deferred until the January Board meeting, in light of the veto of the State Bar's fee bill for 2010, and the status of legislation to extend the State Bar's authority to assess membership fees for active members for 2010. This item is being presented again, pending further discussion of the status of the State Bar's fee bill for 2010.

BACKGROUND

At its July 31, 2009 meeting, the State Bar's Committee on Mandatory Fee Arbitration (MFA Committee) agreed to recommend proposed amendments to one of the mandatory fee arbitration (MFA) statutes, recognizing a party's right to seek private arbitration following non-binding MFA, pursuant to a pre-existing arbitration agreement. This issue arises from a recent California Supreme Court case interpreting the MFA statutory scheme to permit a private arbitration to replace a new trial in court following a non-binding MFA award, pursuant to a pre-existing arbitration agreement between the parties.

Currently, Business & Professions Code Section 6204 requires the filing of an action for a new trial in court to reject a non-binding MFA award. If no action is already pending, the party seeking rejection of the award must file an action in the court having jurisdiction over the amount in controversy within 30 days of mailing of the award. (Bus. & Prof. Code § 6204(c).) Until recently, parties with a pre-existing private arbitration agreement lacked guidance as to whether a private arbitration could proceed in lieu of a party's statutory right to a trial in court following non-binding MFA.

In *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, the California Supreme Court decided that issue. In *Schatz*, the Court examined the interplay between the California Arbitration Act and the MFA Act. It concluded that enforcement of a pre-existing private arbitration agreement to resolve a fee dispute between the parties following non-binding MFA, in lieu of a new trial in court as provided in the MFA statute, is consistent with the MFA statutory scheme.

Because Section 6204 provides that the only way to reject a non-binding MFA is to proceed to a new trial in court after non-binding arbitration, legislation is needed to reflect the Court's holding in *Schatz*, i.e., authorizing a party to proceed to a subsequent arbitration pursuant to a pre-existing arbitration agreement between the parties in lieu of a new trial in court. The MFA Committee's proposal suggests a new subdivision (new subsection (d) of Bus. & Prof. Code § 6204) reflecting this holding.

In arriving at the wording of this draft language, the MFA Committee grappled with the issue of whether the parties should continue to be required to file some type of pleading with the court to ensure timely rejection of a non-binding arbitration. Having a

bright line filing with the court would ostensibly avoid potential litigation over whether a MFA award was timely rejected. Failure to file a timely action in court carries significant consequences: a non-binding MFA award becomes binding by operation of law. (Bus. & Prof. Code § 6203(b).)

On the other hand, the MFA Committee also recognized that parties with an enforceable pre-existing arbitration agreement would have to expend additional resources and time to file a pleading in court even though both parties agreed to and still want to submit their fee dispute to subsequent arbitration. On balance, the MFA Committee recommends that the statute reflect that a party who wishes to reject a non-binding MFA award be permitted to either file a pleading in court or request subsequent arbitration directly with the parties' pre-selected arbitration provider, and pay the required filing fee, within 30 days of mailing of the award.

There are several other places in the statute that warrant amendments to track post-fee arbitration trials to apply those provisions to a subsequent arbitration following non-binding MFA. It is also recommended that Section 6204(a) be amended to apply the existing provision that a party who willfully fails to appear in a fee arbitration has no right to a new trial after non-binding arbitration to requests for a subsequent arbitration. In addition, Section 6204(d) should also be amended to provide that the attorney's fees and costs to the prevailing party in a new trial after non-binding MFA also applies to a subsequent arbitration.

For all of these reasons, the MFA Committee recommends that Business & Professions Code Section 6204 be amended to read as follows:

§ 6204. Agreement to be bound by award of arbitrator; trial after arbitration in absence of agreement; private arbitration pursuant to pre-existing agreement; prevailing party; effect of award and determination

(a) The parties may agree in writing to be bound by the award of arbitrators appointed pursuant to this article at any time after the dispute over fees, costs, or both, has arisen. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days, pursuant to subdivisions (b) ~~and (c)~~, or (d) except that if either party willfully fails to appear at the arbitration hearing in the manner provided by the rules adopted by the board of governors, that party shall not be entitled to a trial or private arbitration pursuant to subdivision (d) after arbitration. The determination of willfulness shall be made by the court, or subsequent arbitrators in proceedings brought under subdivision (d). The party who failed to appear at the arbitration shall have the burden of proving that the failure to appear was not willful. In making its determination, the court, or subsequent arbitrators in proceedings brought under subdivision (d), may consider any findings made by the arbitrators appointed pursuant to this article on the subject of a party's failure to appear.

(b) If there is an action pending, the trial in court after arbitration shall be initiated by filing a rejection of arbitration award and request for trial after arbitration in that action

within 30 days after mailing of notice of the award. If the rejection of arbitration award has been filed by the plaintiff in the pending action, all defendants shall file a responsive pleading within 30 days following service upon the defendant of the rejection of arbitration award and request for trial after arbitration. If the rejection of arbitration award has been filed by the defendant in the pending action, all defendants shall file a responsive pleading within 30 days after the filing of the rejection of arbitration award and request for trial after arbitration. Service may be made by mail on any party who has appeared; otherwise service shall be made in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure. Upon service and filing of the rejection of arbitration award, any stay entered pursuant to Section 6201 shall be vacated, without the necessity of a court order.

(c) If no action is pending, the trial in court after arbitration shall be initiated by the commencement of an action in the court having jurisdiction over the amount of money in controversy within 30 days after mailing of notice of the award. After the filing of such an action, the action shall proceed in accordance with the provisions of Part 2 (commencing with Section 307) of the Code of Civil Procedure, concerning civil actions generally.

(d) If there is a written agreement between the parties for arbitration of controversies including attorney's fees, or costs, or both, either party may request that the trial after the award by arbitrators appointed pursuant to this article be held in an arbitration pursuant to the written agreement of the parties. If there is an action pending between the parties, the party desiring such arbitration shall file a petition in that action to compel arbitration in accordance with Section 1281.2 of the Code of Civil Procedure within 30 days after mailing of notice of the award, or within the time to respond if the other party timely filed a rejection of the award and request for trial as set forth in subdivision (b) or timely initiated court proceedings as set forth in subdivision (c). If there is no action pending, the party desiring such arbitration shall either file a request for arbitration and pay any filing fee with the arbitration provider designated in the parties' written agreement within 30 days after mailing of the award or file a petition to compel arbitration in an action to compel arbitration in the court having jurisdiction over the amount of money in controversy within 30 days after mailing of notice of the award. If it is thereafter determined that there is no enforceable written agreement between the parties for arbitration of the controversy, the party who timely requested arbitration may proceed with a trial in court after the arbitration pursuant this article.

~~(d)~~ (e) The party seeking a trial after arbitration shall be the prevailing party if that party obtains a judgment or subsequent arbitration award more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court or subsequent arbitrators, be entitled to an allowance for reasonable attorneys' fees and costs incurred in the trial after arbitration, which allowance shall be fixed by the court or subsequent arbitrators. In fixing the attorneys' fees, the court or subsequent arbitrators shall consider the award and determinations of the arbitrators appointed pursuant to this article, in addition to any other relevant evidence.

(e) Except as provided in this section, the award and determinations of the arbitrators shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding.

FISCAL/STAFF IMPACT

This legislative proposal does not require additional personnel or increased expenses.

BOARD BOOK IMPACT

None.

RULE AMENDMENTS

This legislative proposal will not result in any rule amendments, but there are some Rules of Procedure of the State Bar regulating the MFA program that may also need to be amended to track the proposed legislative amendments.

RECOMMENDATION

Staff recommends that the Board of Governors, pending further discussion of the status of the State Bar's fee bill for 2010, approve State Bar pursuit of proposed amendments to Business & Professions Code Section 6204, recognizing a party's right to seek private arbitration following non-binding MFA, pursuant to a pre-existing arbitration agreement.

PROPOSED BOARD COMMITTEE RESOLUTION

If the Board Committee on Operations agrees with the above recommendation, the following resolution is suggested:

RESOLVED that the Board Committee on Operations recommends that the Board of Governors approve State Bar pursuit of proposed amendments to Business & Professions Code Section 6204, recognizing a party's right to seek private arbitration following non-binding mandatory fee arbitration, pursuant to a pre-existing arbitration agreement.

PROPOSED BOARD RESOLUTION

If the Board of Governors concurs with the recommendation of the Board Committee on Operations, the following resolution is suggested:

RESOLVED that, upon recommendation of the Board Committee on Operations, the Board of Governors hereby approves State Bar pursuit of proposed

amendments to Business & Professions Code Section 6204, recognizing a party's right to seek private arbitration following non-binding mandatory fee arbitration, pursuant to a pre-existing arbitration agreement.