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FEE ARBITRATION

California Law

By Jennifer A. Becker

Ervin, Cohen & Jessup, LLP v. Kassel (2007) 147 Cal.App.4th 821

The Second District holds that a pre-dispute binding fee arbitration provision may be enforced if the client waives his or her rights under the Mandatory Fee Arbitration Act

Steven H. Kassel retained Ervin, Cohen & Jessup to represent him pursuant to a written agreement containing a binding fee arbitration provision. When a fee dispute arose Ervin served Kassel with a Notice of Client's Right to Arbitration and informed him of his right to invoke the provisions of the Mandatory Fee Arbitration Act (MFAA). Kassel did not do so. Ervin filed an action to secure a right to attach order and a motion to invoke the binding arbitration provision.

In opposition to Ervin's motion to compel arbitration under the written agreement, Kassel argued that a retainer agreement requiring fee disputes to be resolved by binding arbitration is invalid as a matter of law. The trial court agreed that the binding arbitration clause violated the MFAA provision precluding pre-dispute binding fee arbitration agreements.

The Court of Appeal noted that the MFAA gives a client an opportunity to resolve a fee dispute through nonbinding arbitration before a local or state bar

association. The client retains the right to trial if he or she rejects the award. The statute requires the attorney to serve a notice of the client's rights, but the client waives the right to MFAA arbitration if he or she fails to respond within 30 days after receipt of notice. The California Supreme Court has held that a client who waives rights under the MFAA is no longer entitled to MFAA protections and can be bound by a binding arbitration provision in a fee agreement.

The Kassel court considered whether later amendments to the MFAA should render the Supreme Court decision inapplicable. The MFAA provision precludes pre-dispute agreements to be bound by an MFAA arbitration award. It does not preclude binding arbitration agreements outside of that forum. As long as the client retains the MFAA right to try to resolve the fee dispute via nonbinding arbitration and trial de novo, the MFAA does not render a pre-dispute agreement for binding arbitration invalid or unenforceable.

If Kassel had invoked his MFAA rights he would have been entitled to a trial in the event he rejected the non-binding award. Ervin gave Kassel the opportunity to pursue this right. Since Kassel did not choose MFAA arbitration or properly invoke it, the court would not invalidate the parties' agreement for resolution through binding arbitration.

Comment: Courts will honor binding fee dispute arbitration provisions as long as the client retains rights under the MFAA.