4th Civil Nos. G031410, G031684

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PROSPECT MEDICAL GROUP, INC.,

Plaintiff, Respondent and Cross-Appellant,

vs.

ST. JUDE HOSPITAL, INC., and

Defendant and Appellant,

PACIFICARE OF CALIFORNIA,

Defendant and Cross-Respondent.

Appeal from the Orange County Superior Court
Honorable David R. Chaffee, Judge
Orange County Superior Court Case No. 815670

SUPPLEMENTAL BRIEF OF PACIFICARE OF CALIFORNIA

K & R LAW GROUP LLP
Gary S. Pancer, State Bar No. 160223
350 South Grand Avenue, Suite 2100
Los Angeles, California 90071
Telephone: (213) 229-0990

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates, State Bar No. 110364
Cynthia E. Tobisman, State Bar No. 197983
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036
Telephone: (310) 859-7811

Attorney for Defendant and Cross-Respondent
PACIFICARE OF CALIFORNIA

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

(continued)

TABLE OF AUTHORITIES

(continued)

Statutes

Other Authority

INTRODUCTION

The Court has requested supplemental briefing on the following question:

> Assuming that (1) an arbitration agreement provides that errors of law or legal reasoning are outside the scope of the arbitrator's authority, and (2) a party now wants judicial review to vacate an award on this ground, "would judicial review in such circumstances negatively impact the court's institutional integrity?"

The answer is yes. The California Arbitration Act ("CAA") mandates that courts *may not* review of the underlying merits of an arbitration award. The courts, in turn, have construed the CAA to mean what it says: Only limited review of arbitration awards to ensure *procedural fairness* is permitted. This is a sound position as a matter of both statutory construction and public policy.

As Professor Cole's article posits, a court should ask two questions before acceding to a litigant's request to step outside its traditional role (i.e., by reviewing an arbitrator's award for "errors of law"). Those questions are:

(1) Whether "approval of the parties' request [would] be consistent with the court's statutory and constitutional mandates?" and

(2) "[W]hether approval of the parties' request will impermissibly undermine the institutional integrity of the court?" (Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy In Dispute Resolution* (2000) 51 Hastings L.J. 1199, 1205 ("Cole").)

Here, St. Jude's request for judicial review for "errors of law" founders on both fronts:

First, the statutory scheme bars courts from reviewing the legal merits of an arbitrator's decision. Although the Legislature has amended the CAA numerous times, it has *consistently declined* to add "errors of law" as a ground for vacating or correcting arbitration awards.

The Supreme Court, in turn, has construed the statutory omission of "errors of law" as a legislative choice to decline to expand judicial review of arbitration awards to include that ground. Stare decisis requires this Court to abide by that holding.

Second, any attempt by a court to expand the scope of judicial review of arbitration awards would undermine the institutional integrity of the courts. By reviewing the underlying merits of arbitration decisions, the

courts would place their imprimatur on a system devoid of the rules of evidence, rights to discovery and cross-examination, and lacking in well-documented factual records. Moreover, if this Court sanctioned review of arbitration awards for "errors of law" even where such ground was not raised in the trial court, this Court would undercut the institutional role of the lower courts by encouraging litigants to circumvent the trial courts altogether in favor of the more lax world of contractual arbitration.

In sum, expanding judicial review of arbitration decisions to encompass "errors of law" would overstep this Court's statutory authority and do damage to the courts' institutional integrity.

ARGUMENT

I. COURTS LACK THE STATUTORY AUTHORITY TO REVIEW THE LEGAL MERITS OF ARBITRATION AWARDS.

"Any proposed request [for judicial action] must first satisfy existing legal constraints on the exercise of judicial power. In *the absence of statutory authorization*, the parties' request must be rejected." (Cole at pp. 1222-1223, emphasis added.)

That is precisely the case here.

Both the statutory scheme and the case law interpreting that scheme *preclude* the courts from expanding the scope of judicial review of arbitration awards to include "errors of law."

A. The Legislature Has Limited The Courts' Power To Review Arbitration Awards And Has *Declined* To Sanction Review For "Errors Of Law."

The Legislature has strictly limited judicial review of arbitration awards by promulgating an exclusive list of situations under which review is permitted. Tellingly, that list *does not* include "errors of law." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 14 ["[a]n error of law is not one of the grounds" set forth by the Legislature "for vacation

(§ 1286.2)[1] and correction (§ 1286.6)[2] of an arbitration award"].) This omission speaks volumes. (See Cole at pp. 1224-1225 ["courts find that omissions from a statute should be understood as exclusions"].)

While the Legislature has had numerous opportunities to add "errors of law" as a ground for vacating or correcting arbitration awards, it has repeatedly chosen not to do so. For example, in 1927, the Legislature amended the statutes governing private arbitration to add provisions permitting vacation when an arbitration award was procured by "undue means" or when the arbitrators "so imperfectly executed [their powers] that

---

[1] California Code of Civil Procedure section 1286.2 sets forth the exclusive grounds for vacation of an arbitrator's award. It states in pertinent part: "[T]he court shall vacate the award if the court determines any of the following: (1) The award was procured by corruption, fraud or other undue means. (2) There was corruption in any of the arbitrators. (3) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator. (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title."

[2] Code of Civil Procedure section 1286.6 provides grounds for correction of an arbitration award. That section states in pertinent part: "[T]he court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that: (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or (c) the award is imperfect in a matter of form, not affecting the merits of the controversy."

a mutual, final and definite award . . . was not made." (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at pp. 20-21 [citing Former § 1288, Stats. 1927, ch. 225, § 9, p. 407].) The Legislature *did not* add "errors of law" as a ground for vacation or correction.

In 1956, the Legislature again declined to expand judicial review of arbitration awards to include "errors of law." At that time, the Legislature authorized the California Law Revision Commission to study and determine whether the statutory arbitration scheme should be revised. (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 24 [citing Assem. Conc. Res. No. 10, Stats. 1957 (1956 Reg. Sess.) res. ch. 42, Topic 14, p. 264; Recommendation and Study Pertaining to Arbitration (Dec. 1960) 3 Cal. Law Revision Com. Rep. (1960) ("Arbitration Study")].)

The Commission's Arbitration Study ultimately declined to recommend that "errors of law" be added to the statutory grounds for review, expressly stating instead: "'Even a gross error or mistake in an arbitrator's judgment is not sufficient grounds for vacation.'" (*Id.* at p. 25, fn. 10 [citing Arbitration Study, *supra*, p. G-55].) The Supreme Court later noted, "[t]he Arbitration Study emphasized that arbitration should be the end of the dispute and that '*the ordinary concepts of judicial appeal and*

review are not applicable to arbitration awards.'" (*Id.* at p. 25, emphasis added [citing Arbitration Study, *supra*, at p. G-54].)[3/]

The Legislature's intent is further revealed by an examination of other statutes, including Code of Civil Procedure section 1296, which provides for the arbitration of disputes arising from public construction contracts.[4/] Section 1296 directs that "a court shall . . . vacate the award if after review of the award it determines either that the award is not supported by substantial evidence or *that it is based on an error of law.*" (Emphasis added.) Thus, the Legislature knows how to empower the courts to review for errors of law when it chooses to do so.

As our Supreme Court later observed: "By specifically providing in that provision for judicial review and correction of error, but not in section 1286.2, we may infer that the Legislature did not intend to confer traditional judicial review in private arbitration cases." (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 26 [citing *People v. Drake* (1977) 19 Cal.3d 749, 755 ("Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute

---

[3/] The Arbitration Study ultimately concluded that "the 'present grounds for vacating an award should be left substantially unchanged.'" (*Ibid.* [citing Arbitration Study, *supra*, at p. G-57].) Subsequently, the Legislature enacted a revision of the arbitration statute that did not add "errors of law" to the list of statutory grounds for vacation or correction.

[4/] All statutory references are to the Code of Civil Procedure unless otherwise noted.

concerning a related subject . . . is significant to show that a different intention existed")].)

In other words, the omission of "errors in law" from the list of grounds for vacating or correcting a private arbitration award is deliberate. "If that were not the case section 1296 would be superfluous." (*Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal.App.4th 730, 738 [citing *Leeth v. Workers' Comp. Appeals Bd.* (1986) 186 Cal.App.3d 1550, 1556 ("a statute should be construed so that effect is given to all its provisions, leaving no part superfluous or inoperative, void or insignificant")].)

By declining to add any provision permitting vacation or correction for "errors of law," the Legislature has opted to ensure that parties receive a fair arbitration *procedure*, if not a *substantive* decision supported by correct legal reasoning. (See *Moncharsh, supra,* 3 Cal.4th at p. 13.) As discussed in section II, *infra*, this decision to limit judicial review of arbitration decisions to matters of procedural fairness, not substantive merit, makes sense as a matter of both policy and practicality.

Thus, there is simply no statutory basis upon which this Court can review an arbitration award for "errors of law."

B. The Courts Have Expressly Construed The Statutory Scheme To Preclude Judicial Review Of The Underlying Legal Merits Of Arbitration Awards.

In addition to a statutory scheme that omits "errors of law" as a permissible ground for reviewing arbitration awards, ample case law—including Supreme Court authority—amplifies the conclusion that there can be no judicial review of the legal merits of such awards. This Court must follow such preeminent authority. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"].)[5/]

Indeed, a review of case law reveals no available avenue by which this Court may conclude that judicial review of the instant arbitration award for "errors of law" is permissible. Consider the following:

First, the courts consistently construe the CAA to limit judicial review of arbitration awards to the *exclusive* grounds articulated in the statutory scheme. (See *Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at

---

[5/] See also *People v. Latimer* (1993) 5 Cal.4th 1203, 1213 ["Considerations of stare decisis have special force in the area of statutory interpretation, for . . . [the Legislature] remains free to alter what we have done"].

pp. 27-28 [statutory bases for vacating and correcting arbitration awards are exclusive].)[6/]

Second, the courts uniformly note that the statutory list *does not include* "errors of law." (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 14 ["the Legislature has set forth grounds for vacation (§ 1286.2) and correction (§ 1286.6) of an arbitration award and '[a]n error of law is not one of the grounds'"]; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 377, fn. 10 ["an award generally may not be vacated or corrected, under California law, for errors of fact or law"].)[7/]

[6/] See also *A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, 1475 ["Section 1286.2 sets forth the exclusive grounds for vacating an arbitration award. Except on these grounds, arbitration awards are immune from judicial review in proceedings to confirm or challenge the award"]; *Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1188 ["Section 1286.2 lists the exclusive grounds for vacating an arbitration award"]; *Marsch v. Williams* (1994) 23 Cal.App.4th 238, 243-244 ["Unless one of the enumerated grounds exists, a court may not vacate an award even if it contains a legal or factual error on its face which results in substantial injustice"].

[7/] See also *Konig v. Fair Employment & Housing Com.* (2002) 28 Cal.4th 743, 754 ["Courts generally may not correct arbitration awards, which are both binding and final, even if an award is based on an arbitrator's factual or legal error"]; see also *Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp.* (1994) 29 Cal.App.4th 1459, 1470 ["[A]rbitration awards are subject to an extremely narrow judicial review. We cannot review the merits of the controversy, the validity of the arbitrator's reasoning, or the sufficiency of the evidence supporting an arbitrator's award. The exclusive grounds for vacating an arbitration award are those listed in [Code of Civil Procedure] section 1286.2"]; *Marsch v. Williams*, *supra*, 23 Cal.App.4th at pp. 243-244 ["the exclusive grounds for vacating an arbitration award are the five statutory grounds found in Code of Civil

Third, the courts regularly hold that the parties *cannot* circumvent the statutory limitations on the judicial review of arbitration awards by attempting to contractually confer jurisdiction on courts to review awards for "errors of law." (See *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 Cal.App.4th 631, 639 [declining to enforce an arbitration agreement purporting to give appellate court right to review arbitrator's findings of fact and conclusions of law; held, "[t]he parties cannot by their stipulation confer jurisdiction upon this court where none exists"]; *Crowell v. Downey Community Hospital Foundation, supra*, 95 Cal.App.4th at p. 739 ["Because the Legislature clearly set forth the trial court's jurisdiction to review arbitration awards when it specified grounds for vacating or correcting awards in sections 1286.2 and 1286.6, we hold that the parties cannot expand that jurisdiction by contract to include a review on the merits"].)[8/]

Procedure section 1286.2. Unless one of the enumerated grounds exists, a court may not vacate an award even if it contains a legal or factual error on its face which results in substantial injustice"].

[8/] Although the Supreme Court has not spoken directly on the issue of whether the parties can expand the scope of judicial review by agreement, *Moncharsh v. Heily & Blase, supra*, 3 Cal.4th 1, suggests the Court will not be amenable to such an expansion. *Moncharsh* concluded that the statutory bases for vacating and correcting arbitration awards are *exclusive*. (*Moncharsh, supra*, 3 Cal.4th at pp. 27-28 [statutory scheme clearly "limit[s] judicial review of private arbitration awards to those cases in which there exists a statutory ground to vacate or correct the award"].) None of the grounds for vacating or correcting an award suggests that a court can review the merits of an award for errors of law.

Fourth, the courts uniformly conclude an arbitrator *does not* exceed his authority under section 1286.2, subdivision (d) by rendering a legally erroneous decision. (*Moncharsh, supra*, 3 Cal.4th at p. 28 ["It is well settled that "arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision"].)[9/] As our Supreme Court held, any other result would "would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers." (*Moncharsh, supra*, 3 Cal.4th at p. 28.) Thus, St. Jude's attempt to construe the "exceeding the arbitrator's powers" ground to encompass "errors of law" has been rejected by the courts.

The "exceeding the arbitrator's powers" ground is available in the following situations:

(1) Where an arbitrator decides an issue *not submitted* to arbitration by the parties (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 952); or

(2) Where an arbitrator *imposes a remedy* that the parties' arbitration contract makes unavailable (*O'Flaherty v. Belgum*

[9/] See also *Advanced Micro Devices, Inc. v. Intel Corp., supra*, 9 Cal.4th at p. 366 ["arbitrators do not exceed their powers merely by erroneously deciding a contested issue of law or fact"].

(2004) 115 Cal.App.4th 1044, 1056; *Advanced Micro Devices, Inc. v. Intel Corp.*, *supra*, 9 Cal.4th at p. 381); or

(3) Where an arbitrator acts without subject matter jurisdiction (*National Union Fire Ins. Co. v. States Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1724).[10/]

There is a vast difference between reviewing an award to ensure the arbitrator decided an issue submitted to him by the parties and reviewing the award for "errors of law." To determine whether an arbitrator exceeded his powers (as the Legislature and the courts have construed that ground), the reviewing court generally need only perform a *cursory* review of the parties' arbitration agreement and the arbitrator's decision.

For example, it is a simple matter to discern whether an arbitrator applied the correct state's law or imposed a remedy barred by the parties' agreement or decided an issue not submitted to arbitration. Such review *does not* require an arbitrator to delve deeply into the factual record or the details of the arbitrator's legal reasoning. This is not so where a court reviews an arbitrator's award for "errors of law."

Unlike the cases St. Jude cites involving judicial review of arbitration awards to ensure that *the remedy* imposed by the arbitrator is

---

[10/] In the same vein, St. Jude correctly suggests that the "exceeding the arbitrator's powers" ground should apply where an arbitrator applies the wrong state's law. (Appellant's Supplemental Brief ("ASB") 9, fn. 4.)

one the parties agreed would be available (ASB 26-27), judicial review for "errors of law" is considerably broader. It requires a court to review the evidence and the application of the law to that evidence. Such review jeopardizes the courts' institutional integrity by requiring the courts to base their decisions on factual records and awards created without uniform procedures. (See pp. 16-20, *infra.*) It is no wonder that the Legislature declined to include "errors of law" as a permissible ground for vacating or correcting an award.

Because there is no statutory basis upon which judicial review of arbitration awards for "errors of law" can be premised, this Court must decline St. Jude's request for such review.

II. JUDICIAL REVIEW OF THE UNDERLYING MERITS OF ARBITRATION AWARDS WOULD NEGATIVELY IMPACT THE COURTS' INSTITUTIONAL INTEGRITY.

Assuming the statutory impediments to judicial review of arbitration awards for "errors of law" may be overcome, another significant obstacle to such review still remains: The institutional integrity of the courts.

As Professor Cole correctly notes, courts "are public institutions, funded by public resources, designed to serve a public function." (Cole at pp. 1201-1202.) Accordingly, "courts must act in a manner consistent with their institutional duties and obligations." (*Id.* at p. 1202.) In requesting

supplemental briefing, this Court has created a list of specific concerns stemming from Professor Cole's conclusions:

(1) Is there a danger of insufficient public confidence in judicial decisions arising out of private arbitration, given that (a) the courts lack control over the parties, the procedures, the evidence and the decision-maker, and (2) the parties can waive the rules applicable to court-annexed alternative dispute resolution?

(2) Did the legislature intend contractual arbitration proceedings, shielded from the public eye and exempt from uniform rules, to be the basis for precedential decisions through judicial review?

(3) Can alleged legal error by an arbitrator be raised for the first time in the reviewing court, or does the doctrine of waiver apply?

(4) Does the absence of procedures intended to sharpen the issues for effective review (i.e., summary judgment and demurrer procedures) in the CAA lessen public confidence in potential judicial review of an arbitration and indicate the Legislature did not intend expansive judicial review of private arbitrations?

(5) Would a judicial opinion deciding matters of law be merely advisory since, if the arbitration is vacated, the court loses jurisdiction and cannot bind the parties to the result required by its decision? (Order at pp. 1-2.)

Both the Supreme Court and the Courts of Appeal have addressed many of these issues, which we now address seriatim.

A. The Public Will Lack Confidence In Judicial Decisions Arising From Arbitration Given That The Courts Lack Control Over The Parties, The Procedures, The Evidence And The Decision-Maker.

1. Arbitration proceedings may be conducted without any of the usual rules of evidence or procedure.

Contractual arbitrations function according to their own mandates (i.e., speed, efficiency, low cost) and proceed according to their own streamlined procedures. (See *Marsch v. Williams, supra*, 23 Cal.App.4th at p. 243 ["arbitration [is] a speedy and relatively inexpensive means of settling disputes"].) In particular, "the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under

oath, are often severely limited or unavailable." (*Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 57-58 [94 S.Ct. 1011, 1024, 39 L.Ed.2d 147].)

As the California courts recognize, "an arbitration has a life of its own outside the judicial system," and need not comport with procedural requirements imposed by the judicial system. (See *Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 489; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 831 ["private arbitration is a process in which parties voluntarily trade the safeguards and formalities of court litigation for an expeditious, sometimes roughshod means of resolving their dispute"]; *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1508 ["controversy [in arbitration] was removed from the procedures applicable to trials"]; Cole at pp. 1233-1234 ["The parties may choose the extent to which they wish to be bound by formal procedural rules and may define their own procedure. Arbitration proceedings, for instance, need not follow the rules of evidence and often limit, or even eliminate, discovery"].)

By the same token, the courts lack any control over the manner by which the arbitrator conducts the proceedings. Once a matter is submitted to arbitration, "[t]he trial court may not step into a case submitted to arbitration and tell the arbitrator what to do and when to do it: it may not resolve procedural questions, order discovery, determine the status of

claims before the arbitrator or set the case for trial because of a party's alleged dilatory conduct." (*Titan/Value Equities Group, Inc., supra,* 29 Cal.App.4th at p. 489.)

Thus, an arbitrator—unguided by the mandates of procedural rules or the requirements of judicial conduct—may tolerate or even sanction any sort of procedural disadvantage affecting one party or the other.

2. Judicial review in the absence of procedural or evidentiary constraints, as well as the inability of courts to affect the procedures used in the arbitration, implicates the courts' institutional integrity.

The procedural differences between judicial proceedings and contractual arbitration create a number of obstacles to judicial review of the legal merits of arbitration decisions:

First, the same procedures the Legislature imposed on courts to ensure fairness to the litigants also ensure the creation of a sound factual record. The absence of those rules in the arbitration setting hamstrings judicial review of the merits.

As Professor Cole explained, "it is unusual for parties to maintain a record of their arbitral hearing or for an arbitrator to write an opinion. Thus, when the parties request judicial review of the arbitral award, there is

little for a court to review." (See Cole at p. 1259, fn. 260.) While this does not pose a problem when a reviewing court examines an arbitration award "for procedural irregularities alone," the same cannot be said where a court is expected to review the underlying merits of the controversy. (*Ibid.*) Without a detailed factual record and decision, a reviewing court simply cannot review the merits of an arbitrator's decision.[11/]

Second, even if an arbitrator has recorded the proceedings and the reasons for his decision, judicial review of the merits still threatens a court's institutional integrity. This is so because a reviewing court cannot wear blinders to the "roughshod" regime that underlies the record it is reviewing; the court cannot ignore how the factual findings it is asked to review came into existence. By reviewing factual records and decisions rendered without basic procedural protections, courts compromise their institutional integrity by giving their imprimatur to such procedures.

Not only would the absence of judicial procedures and safeguards during arbitration reduce public confidence in judicial decisions stemming

---

[11/] "[The] 'errors of law' standard. . . . might not appear to threaten the court's integrity because courts review all kinds of decisions for legal errors, [but] it is nevertheless problematic because it asks the court to review the underlying award even in the absence of a record or written opinion from the proceedings before the arbitrator. A court's rubber-stamp of the underlying decision in the absence of a record when the parties' chosen standard anticipates a more meaningful review may undermine institutional integrity because it makes the court appear to be an unprincipled decision-maker." (Cole at p. 1259.)

from arbitration, but this undermining would occur on a routine basis. Indeed, if litigants could obtain judicial review of their arbitrator's decision, they would have no incentive to ever bring their cases originally in a trial court. Litigants would have their cake and eat it too—both the perceived economic advantages of arbitration and ability to tailor the rules of engagement with later judicial review (albeit predicated on a truncated and patently non-judicial record) acting as a perceived safeguard and stamp of legitimacy as to the merits or any reward. The result would be a flood of cases pouring from arbitration into the courts for "final" review. This would serve neither the interests of arbitration in assuring speedy and final resolution of disputes, nor the paramount interests of the judicial system in making sure that justice has been done (and, more importantly, that it appears to have been done).

3. St. Jude's arguments to the contrary have no merit.

After acknowledging concerns "that a precedential decision might rest on an inadequately developed record," St. Jude invites the Court to "implement[] rules that do not permit review in certain circumstances." (ASB 11.) St. Jude does not elaborate on what either those "rules" or those "certain circumstances" would be. Instead, St. Jude asks the Court to create from whole cloth a new regime for reviewing arbitration awards. Would this new regime involve some sort of discretionary review, akin to a writ of

certiorari, where a party to an arbitration would petition the appellate court for review? Would the arbitral party have to show that the record was sufficient to enable review? Would the party have to show the arbitrator utilized procedures ensuring basic fairness and an adequate opportunity to develop a factual record? St. Jude doesn't say. This Court should decline the invitation to sail into uncharted waters.

Next, St. Jude's answer to this Court's concern about the lack of control over the evidentiary record (i.e, the possibility that an evidentiary record might be based on hearsay, lay opinion or other incompetent evidence) is that courts frequently admit incompetent evidence. (ASB 12-13.) This is no consolation, especially in light of St. Jude's assertion that a reviewing court would have *no ability* to vacate or correct an award because it is based on incompetent evidence. (ASB 13.) If, in fact, a reviewing court would lack the power to vacate an arbitration decision where no admissible evidence supports it, this alone intolerably restricts the reviewing court's ability to review the merits of an arbitration award.

Nonetheless, St. Jude asserts that review of a limited factual record is appropriate in certain circumstances. (ASB 14-15.) But the sole case St. Jude cites for that proposition (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269) is inapposite. There, the Supreme Court held only that under governing statutory law, "issues involving the

reelection of probationary teachers [are not] subject to arbitration." (*Id.* at p. 277.) Accordingly, the arbitrator exceeded his powers by addressing such issues.

Thus, *Round Valley* stands only for the proposition that arbitrators exceed their powers when they adjudicate issues that are barred by statute from arbitration. The fact that *Round Valley* came to this conclusion on a limited factual record does not in any way suggest that review of the merits of an arbitrator's legal reasoning on a limited factual record would be appropriate. Indeed, it is a simple matter to discern whether an arbitrator decided an issue not submitted to arbitration. Such review *does not* require an arbitrator to delve deeply into either the record or the details of an arbitrator's legal reasoning. Not so for "errors of law" review.

Next, St. Jude disingenuously asserts that judicial review would not threaten the courts' institutional integrity even where an arbitration contract restricts a court from vacating an award because no cross-examination of witnesses was permitted. (ASB 20.) Parties to an arbitration cannot ask a court to review an award for "errors of law," yet bar a court from ensuring that the factual record upon which it is expected to render its decision is sound. A court impugns its institutional integrity if it ignores the obvious flaws and lax procedural protections underlying the factual record it is reviewing.

St. Jude concedes that the parties to an arbitration are permitted to specify whatever "idiosyncratic" procedures they wish, yet St. Jude suggests that a court should decide on a case-by-case basis whether departures from traditional judicial norms in procedure render a given case incapable of judicial review. (ASB 18-20.) This ad hoc decision-making is problematic because there is no guarantee that cases involving similar arbitration proceedings will be treated in a similar manner.

For example, one court may decide to review an arbitration award stemming from hearings conducted without witnesses being sworn to tell the truth, while another may decided that the absence of such an oath renders the case incapable of judicial review. Such inconsistent treatment will have an adverse affect on the courts' institutional integrity.

Finally, contrary to St. Jude's suggestion, a reviewing court's power to depublish cases is no panacea. (See ASB 12.) Even if a court's decision only affects the parties who participated in the arbitration, the damage to the court's institutional integrity is the same: The court is still giving its imprimatur to a decision and a regime devoid of basic protections and an adequate factual record for review.

B. The Legislature Did Not Intend Contractual Arbitration Proceedings, Shielded From The Public Eye And Exempt From Uniform Rules, To Be The Basis For Precedential Decisions Through Judicial Review.

As discussed in section I, *supra*, the Legislature did not intend contractual arbitration proceedings, which are exempt from uniform procedural rules, to be the basis for precedential decisions through judicial review. By declining to add "errors of law" as a permissible ground for reviewing arbitration awards, the Legislature spoke loudly and clearly. So have the courts.

Again and again, the courts have held that contractual arbitration is a separate universe of dispute resolution procedures, intended to ensure speed, efficiency and finality, not error-free legal reasoning or precedential decisions. The Supreme Court explained: "Parties who stipulate in an agreement that controversies that may arise out of it shall be settled by arbitration, may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable *and not subject to judicial review*." (*Moncharsh, supra*, 3 Cal.4th at p. 11, emphasis added, internal quotation marks omitted.)

In other words, the parties make a choice when they select arbitration over a judicial forum: "Parties to arbitration voluntarily trade the formal procedures and the opportunity for greater discovery and appellate review for 'the simplicity, informality, and expedition of arbitration.'" (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1080; see also *Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at p. 58 [94 S.Ct. at p. 1024] ["it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution"].)

No judicial review of the merits of an arbitration has been sanctioned by either the Legislature or the courts because "[t]he decision to arbitrate disputes is motivated in part by the desire to avoid the delay and cost of judicial trials and appeals. 'Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized.'" (*Advanced Micro Devices, Inc. v. Intel Cor*p., *supra*, 9 Cal.4th at p. 373.) Reviewing the merits of the arbitrator's decision would vastly increase the cost and time to the arbitral parties. In so doing, it would stymie the very goals of arbitration that the Legislature and the courts have sought to promote—namely, speed and finality.[12/]

[12/] See *Marsch v. Williams*, *supra*, 23 Cal.App.4th at p. 243 ["California has a well-established policy favoring arbitration as a speedy and relatively inexpensive means of settling disputes. To support this policy . . . it is essential arbitration judgments be both binding and final"];

Put simply, judicial review of the merits of arbitration awards is the antithesis of *Moncharsh*'s admonition that "[t]he arbitrator's decision should be the end, not the beginning, of the dispute." (*Moncharsh, supra*, 3 Cal.4th at p. 10.)

Moreover, private arbitration is shielded from the public eye. As a result, allowing arbitration proceedings to be the basis for precedential decisions through judicial review undermines one of the primary purposes of judging: To "satisfy the appearance of justice." (See *Heenan v. Sobati* (2002) 96 Cal.App.4th 995, 1002 [" Public judging operates in the public eye, with reported proceedings and under appellate review, to both dispense justice and satisfy the appearance of justice" (internal quotation marks omitted)]; *Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 105 ["In performing its judicial function, the court must avoid even the appearance of unfairness: 'The justice system not only must be fair to all litigants; it must also appear to be so'"]; *TJX Companies, Inc. v. Superior Court* (2001) 87 Cal.App.4th 747, 754 ["It is wise public policy to conduct judicial proceedings in the sunshine, unless there is a very good reason not to do so"].)

---

see *ibid.* ["To ensure that an arbitrator's decision is, indeed, the end of a dispute, arbitration judgments are subject to extremely narrow judicial review"].

Thus, the private nature of arbitration, like the absence of uniform procedural protections, weighs against using arbitration awards as the basis for precedential decision-making by courts.

C. Alleged Legal Error By An Arbitrator Cannot Be Raised For The First Time In The Reviewing Court.

Both the CAA and the case law interpreting that statutory scheme mandate that alleged error by an arbitrator cannot be raised for the first time in the reviewing court. To this end, the CAA provides that "[a] petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner." (Code Civ. Proc., § 1288.) Likewise, a court may not vacate an award unless (1) a petition or response requesting the award be vacated or corrected has been duly served, and (2) all petitioners and respondents are before the court or have been given proper notice. (Code Civ. Proc., § 1286.4.) Finally, the statutory scheme requires that upon a petition seeking confirmation, vacation or correction of an award, the court *must confirm* the award, *unless* it either vacates or corrects it. (Code Civ. Proc., § 1286.)

The courts have been uniform in their treatment of these statutory mandates; they have held that a litigant must strictly comply with the time

limits for raising error or else waive the right to challenge the arbitration award on the basis of such asserted error at a later date.

For example, in *Knass v. Blue Cross of California* (1991) 228 Cal.App.3d 390, the plaintiff *did not* petition the court to vacate the award within 100 days after it was served, but rather filed an appeal "contending the arbitrator's award must be vacated because it is based on an error of law appearing on the face of the award." (*Id.* at p. 392.) *Knass* concluded that plaintiff "waived his opportunity to challenge the award by allowing the 100-day period to expire. The fact the award was reduced to a judgment does not resurrect his opportunity to challenge it." (*Id.* at p. 394.) *Knass* explained its reasoning as follows:

> "In order to comply with the purpose of expeditious resolution of disputes through arbitration, time limits in which to challenge arbitration awards must be strictly enforced. Permitting a party to wait until after judgment to challenge an award would undermine the purpose of arbitration proceedings—to resolve disputes quickly. The requirement that a petitioner challenge an award within the 100-day limit 'places a burden upon those who would attack the award to act promptly or acquiesce in its enforcement." (*Id.* at p. 395, citations omitted.)

Likewise, in *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, the Court held that "[a] party who fails to timely file a petition to vacate under section 1286 may not thereafter attack that award by other means on grounds which would have supported an order to vacate." (*Id.* at p. 659.) There, the

defendant sought to avoid an arbitration award setting the amount of its loss from an earthquake. (*Id.* at p. 658.) Following the trial court's order confirming the award, the defendant filed an appeal challenging the award on the ground that the arbitrator should have disqualified himself.

The Court expressly rejected this attempt to circumvent the statutory scheme for challenging an arbitration award: "Our reading of the statutory scheme . . . compels the conclusion that a party to an arbitration may not circumvent the 100-day time requirement in which to seek the vacation of an award by attempting to raise his or her objections to the award in an appeal from the judgment entered following an order of confirmation." (*Id.* at p. 659; see also *id.* at p. 660 [defendant "cannot avoid the consequences of its failure to file a timely petition to vacate by appealing from the postconfirmation judgment"].)

The arbitration statute is clear: "A party to an arbitration proceeding must challenge an award under section 1288 by a petition to vacate or correct the award within 100 days of service of the award. An appeal of the judgment confirming the award may not be used to circumvent the prescribed time allowed to petition for vacation or correction of an award." (*Knass, supra*, 228 Cal.App.3d at pp. 395-396; see also *Gordon v. G.R.O.U.P., Inc.* (1996) 49 Cal.App.4th 998, 1010, citation omitted ["Although appellants may be correct on the law, their argument comes too

late. Statutory grounds for correction of an arbitrator's award cannot be asserted for the first time on appeal from the judgment confirming the award. Accordingly, we conclude that appellants waived any objection to the cost award"].)

D. The Absence Of Issue-Sharpening Procedures In The CAA Lessens Public Confidence In Judicial Decisions Stemming From Arbitration And Indicates The Legislature Did Not Intend Expansive Judicial Review.

This Court need not read tea leaves to determine whether the Legislature intended there to be judicial review of private arbitrations. As discussed in section I, *supra*, the Legislature narrowly circumscribed the situations where it sanctioned judicial review. "Errors of law" is not among the exclusive enumerated grounds the Legislature listed.

Moreover, as discussed in sections II.A and II.B, *supra*, the very nature of arbitration makes it a poor candidate for creating records conducive to effective review. The absence of issue-sharpening procedures is just one more reason why arbitration awards are not intended to form the basis of precedential decisions regarding the law.

Issue-sharpening procedures, such as demurrer and summary adjudication, help ensure efficient and effective review. (See *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073 [demurrers "are

designed to eliminate sham or facially meritless allegations"]; *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 344 ["The aim of the [summary adjudication] procedure is to discover whether the parties possess evidence requiring the weighing procedures of a trial"]; *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750 ["if a defendant believes that the plaintiff has not presented substantial evidence to establish a cause of action, the defendant may move for a nonsuit if the case has not yet been submitted to the jury, a directed verdict if the case is about to be submitted, or a judgment notwithstanding the verdict (jnov) following an unfavorable jury verdict"].)

Without such procedures, there is no assurance that a reviewing court is reviewing issues supported by credible evidence (or any evidence at all). This is especially true where an arbitrator declines to render a detailed award. "Errors of law" review thus may force a court to perform a detailed review of the factual record in order to determine whether issues should even have been decided by the arbitrator in favor of one party or the other. This process may be complicated by inadequate factual records and flexible procedures that characterize arbitration. (See pp. 16-20, *supra.*)

St. Jude's answer to the absence of issue-framing procedures is to suggest that courts can exercise discretion to decline to review arbitration

awards where the issues "are not properly framed for the reviewing court." (ASB 21.) Again, St. Jude suggests ad hoc decision-making, unguided by any principles that guarantee consistent treatment of arbitration cases. Such decision-making is a threat to the institutional integrity of the courts.

E. A Judicial Opinion Deciding Matters Of Law Stemming From An Arbitration Award Would Be Merely Advisory Since, If The Arbitration Is Vacated, The Court Loses Jurisdiction And Therefore Cannot Bind The Parties To The Result Required By Its Decision.

This Court has expressed concern that a judicial opinion deciding matters of law would be merely advisory since, if the arbitration is vacated, the court loses jurisdiction and cannot bind the parties to the result required by its decision. (Order at p. 2.) This is a very real problem given that the parties to an arbitration may stipulate amongst themselves that the reviewing court's decision will not bind them in future arbitration proceedings. Indeed, because arbitration is a creature of contract, there is nothing that would stop the parties and the arbitrator from agreeing to such an arrangement.

St. Jude asserts that a reviewing court would not be issuing an advisory opinion, since the court would be restricted to vacating or correcting an arbitration award. (ASB 22-23.) This is incorrect. In an

opinion vacating an arbitration award, a reviewing court would presumably articulate why it believed an arbitrator's reasoning was legally infirm. But such a legal opinion would not bind the parties in future arbitral proceedings, since the vacation of the arbitration award would render the previous arbitration a nullity. Without a "law of the case" doctrine, nothing would require a later arbitrator to adhere to the court's reasoning.

St. Jude acknowledges the limited control the courts exert over arbitrators (i.e., courts cannot sanction recalcitrant arbitrators). (ASB 16-17.) St. Jude argues, however, that the fact that "many arbitrators" are retired judges or members of the bar should give the court comfort because, after all, the arbitrator "can be expected to follow a reviewing court's ruling" in further arbitration proceedings. (ASB 18.) In other words, St. Jude concedes that according appropriate dignity to the reviewing court's rulings would be at the whim of the arbitrator. This is no comfort at all.

Additional concerns stem from the fact that, as in the vacatur of judgment context, the parties would have too much flexibility to decide how to use and whether to respect a judicial decision. (Cole at p. 1204 [discussing why courts do not allow parties to stipulate to vacatur of judgments as part of settlements].) For example, the parties could wait until a court rendered a decision vacating an award because of errors in law, and

then decide amongst themselves whether to treat that legal decision as binding in future arbitrations. In the alternative, the parties could wait until after a court rendered a legal decision confirming an award, and then stipulate to vacating the underlying arbitration award (i.e., as part of a settlement). In either case, the parties would possess the ability to undermine the court's authority. Such flexibility would damage society's respect for both "the decisions courts make and the courts themselves." (*Ibid.*)

CONCLUSION

Governing statutory and decisional law, as well as sound public policy mandates that courts cannot review the legal merits of arbitration decisions. Rather, arbitration is a separate system of dispute resolution—a contractual arrangement whereby litigants *opt out* of the judicial system. While the courts cannot interfere with litigants' rights to opt out, the courts also cannot step into the alternative world of dispute resolution without compromising their institutional integrity. This Court best effectuates its statutory and constitutional mandates by adhering to principles of stare decisis and declining to review the legal merits of arbitration awards.

DATED: December 16, 2004

Respectfully submitted,

K & R LAW GROUP LLP
Gary S. Pancer

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy Coates
Cynthia Tobisman

By: _____
Cynthia Tobisman

Attorneys for Defendant and Cross-Respondent,
PACIFICARE of California

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, I certify that the attached **SUPPLEMENTAL BRIEF OF DEFENDANT PACIFICCARE OF CALIFORNIA** is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 7,457 words.

DATED: December 16, 2004

Respectfully submitted,

K & R LAW GROUP LLP
Gary S. Pancer

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy Coates
Cynthia Tobisman

By: _____
Cynthia Tobisman
Attorneys for Defendant and Cross-Respondent,
PACIFICARE OF CALIFORNIA