# Break-Out Track C: Arbitration

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**2013 DEVELOPMENTS IN THE LAW AFFECTING ARBITRATION IN CALIFORNIA**
By James R. Madison

The flood of cases from the United States Supreme Court, the Ninth Circuit Court of Appeals and California appellate courts involving arbitration abated somewhat in 2013 from the high water mark in 2012, with only a total of 51 decisions as compared to 57. It may be that the snake has largely digested the pig, so to speak, arising from the effect of the Supreme Court's 2011 Concepcion decision, as the pace of decisions involving its impact slackened, particularly in the latter part of the year.

A lesson for arbitration clause drafters was taught by one of the two 2013 United States Supreme Court arbitrations: if you want to avoid the risk of class arbitration, say so expressly. See Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013). In Sutter, the Court affirmed an award in which the arbitrator interpreted an arbitration clause that was silent on the issue to permit class arbitration.

Class plaintiffs fared less well in the second Supreme Court decision in which the Court distinguished its 2000 decision recognizing that high costs might enable litigants to avoid arbitration of statutory claims. Justice Scalia wrote for a majority that the high cost of proving a claim does not extinguish the right to pursue it. See American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

At the California Supreme Court level, the court bowed to Concepcion by retreating from its earlier decision precluding waiver of a so-called Berman hearing before the Labor Commissioner on a wage claim and upheld, at least potentially, an agreement providing for the hearing of such claims in arbitration in the first instance. See Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109 (2013). In remanding the case to the trial court, however, the court invited further consideration of whether the arbitral forum would provide the same benefits as a Berman hearing, such that surrender of the right to a Berman hearing was not unconscionable.

As recognized in a number of 2013 decisions, two cases still pending in the California Supreme Court will affect the circumstances under which plaintiffs can avoid the effect of a class waiver in an arbitration agreement despite Concepcion. One of these is Sanchez v. Valencia Holding Co., LLC., S199119, which has been fully briefed and is awaiting oral argument. (The California Supreme Court does not schedule oral argument until four of the seven justices have reached tentative decisions). In Sanchez, the Court of Appeal for the Second Appellate District held in 201 Cal. App. 4th 74 (2012), that an automobile retail sales contract that is widely used in California was unconscionable independent of its class waiver. In 2013, the same Division of the same District of the Court of Appeal reached the same conclusion it had previously based on "a refined analysis" of the contract. See 216 Cal. App. 4th 1269 (no. 15 of the DCA cases below). Not all of the other courts to confront the same form of contract agreed. See nos. 2, 5 and 13 of the DCA cases. Review has been granted in all of these and in Goodridge v. KDF Automotive Group, Inc., 209 Cal. App. 4th 325 (2012), and Mayers v. Volt Mgmnt Corp., 203 Cal. App. 1194 (2012), but briefing has been stayed pending the decision in Sanchez.

The second pending California Supreme Court case involving Concepcion is Iskanian v. CLS Transportation of Los Angeles, S204032, which will decide whether a Private Attorney General Act (PAGA) claim can be maintained by a plaintiff despite a class waiver. Brown v. Superior Court, 216 Cal. App. 4th 1302 (6th Dist. June 4, 2013), decided in the affirmative. See no. 17 of the DCA cases. Review has been granted in Brown

and in two 2012 cases noted by the Brown court that had split on this issue. Briefing in all of these has been deferred pending Iskanian. In addition to the PAGA issue, Iskanian, which, like Sanchez, has been fully briefed, is slated to decide whether Gentry v. Superior Court, 42 Cal. 4th 443 (2007), was, like Discover Bank, overruled by Concepcion.

The California Supreme Court has three other arbitration cases pending before it. The most recent of these is Leos v. Darden Restaurants, 217 Cal. App. 4th 473 (2013), no. 16 in the DCA cases below and now S212511 in the Supreme Court. Briefing in Leos has been deferred pending Baltazar v. Forever 21, Inc., 212 Cal. App. 4th 221 (2012), which is under review in S208345. The third case is Richey v, Autonation, Inc., 210 Cal. App. 4th 1516 (2012), under review as S207536, in which the Court of Appeal vacated an award in favor of an employer because it was inconsistent with the court's view of the employee's statutory rights.

Another aspect of California arbitration jurisprudence fell victim to Concepcion in the Ninth Circuit case of Ferguson v Corinthian Colleges, Inc., 733 F.3d 928 (9th Cir. 2013), 9th Circuit no. 11 infra, in which a pair of California Supreme Court decisions excluding from arbitration efforts to obtain public injunctive relief were held to be preempted.

The same justice who wrote Corinthian Colleges also wrote the opinion in Chavarria v. Ralphs Grocery Co., 733 F.3d 916 (9th Cir. 2013), 9th Circuit no. 13, in which a novel arbitrator appointment process that was held to favor the employer combined with the employee's exposure to arbitrator charges acknowledged by the employer to be $7,000-$14,000 per day to make the arbitration agreement unconscionable.

Other lessons for drafters can be drawn from Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069 (9th Cir. 2013), 9th Circuit no. 8 (incorporation of UNCITRAL Rules sufficient to provide for arbitrator to decide arbitrability); In re Wal-Mart Wage and Hour Employment Practices Litigation, 9 th Cir No. 11-11718 (9th Cir. 2013), 9th Circuit no. 15 (right of review of award not waived by making arbitration "non-appealable"); and HM DG, Inc. v. Amini, 220 Cal. App. 4th 534 (2013), DCA no. 22 infra (CCP 1281.6 process for appointment of arbitrator saved agreement without arbitrator appointment provision from being unenforceable).

Other Ninth Circuit cases with lessons for both drafters and advocates involved unsuccessful efforts of non-signatories to compel arbitration. See Kramer v. Toyota Motor Corp., 705 F. 3d 1122 (9th Cir. 2013), 9th Circuit no. 1 infra; Rajagopalan v. Note World LLC, 718 F.3d 944 (9th Cir. 2013), 9th Circuit no. 5; and Murphy v. DirecTV, Inc., 724 F,3d 1218 (9th Cir 2013), 9th Circuit no. 9.

Similarly, skilled nursing facilities had difficulty enforcing arbitration agreements signed by someone other than the patient in Daniels v. Sunrise Senior Living, Inc., 212 Cal. App. 4th 674 (2013), DCA no. 1 infra; Goldman v. Sunbridge Healthcare, Inc., 220 Cal. App. 4th 1160 (2013), DCA no. 27; and Young v. Horizon West, Inc., 220 Cal. App. 4th 1122 (2013), DCA no. 28.

Two California Court of Appeal cases demonstrate how even unusual failures of disclosure by arbitrators can jeopardize awards. See Gray v. Chiu, 212 Cal. App. 4th 1355 (2013), DCA no. 3 infra, and Mt.Holyoke Homes v. Jeffer Mangels, et al., 219 Cal. App. 4th 1299 (2013), DCA no. 25. Ironically, the lawyer for one of the prevailing parties in Chiu was or should have been aware of the relationship the arbitrator did not disclose and presumably could have saved the day by making it himself.

And possibly the most fascinating case of the year with lessons for both advocates and arbitrators is the California Court of Appeal decision in Mave Enterprises, Inc. v. Travelers Indem. Co. of Connecticutt, 219 Cal. App. 4th 1408 (2013), DCA no. 26. This was a "night baseball" arbitration agreed to during jury selection in which the arbitrator evidenced in his award his dissatisfaction with the evidentiary presentations and the unhappy party tried, unsuccessfully so far, to forum shop for a favorable standard of review.

**United States Supreme Court**

1. Oxford Health Plans LLC v. Sutter, 133 Sup. Ct. 2064 (June 10, 2013). On certiorari to review a decision of the Third Circuit Court of Appeals that upheld an arbitrator's finding that an arbitration agreement permitted class arbitration, held, 9-0, affirmed. The arbitrator reasoned that the arbitration agreement was intended to put into arbitration the entire universe of what could be brought in court and that, as a class action could be brought in court, the parties intended to allow a class proceeding in arbitration. The arbitrator distinguished the situation from that in Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010),

in that the parties there stipulated they had not agreed to class arbitration, whereas here they were found to have agreed upon it. The award did not exceed the arbitrator's powers under 9 U.S.C. Section 10(a)(4), even if it was erroneous, in that the arbitrator ascertained the parties' intent from an interpretation of the agreement and did not apply his own notion of policy, as in Stolt-Nielsen. In note 2, Justice Kagan observed that the case might have been different if instead of committing the issue to the arbitrator, Oxford had sought a preliminary determination of arbitrability from a court. The Supreme Court has not yet decided whether the availability of class arbitration is a question of arbitrability. Justice Alito with Justice Thomas joining wrote a concurrence stating that, if the Court's review was de novo, the lack of agreement by absent class members to a class proceeding would have precluded class arbitration.

2. American Express Co. v. Italian Colors Restaurant, 133 Sup. Ct. 2304 (June 20, 2013). On certiorari to review a decision of the Second Court of Appeals that reversed the grant of a motion to compel individual arbitration of a putative class antitrust action because the cost of antitrust expertise greatly exceeded the maximum recovery and prevented vindication of antitrust rights, held, reversed, 5-3. Justice Sotomayer, who had participated in the Second Circuit decision, recused herself. The Sherman Act did not include a "contrary congressional mandate" forbidding enforcement of an arbitration agreement according to its terms, and the majority opinion by Justice Scalia limited the judge made "effective vindication" exception (i) to agreements forbidding assertion of statutory rights and "perhaps," per Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000), (ii) to instances in which high arbitration costs make arbitration "impracticable." The cost of proving a claim does not extinguish the right to pursue it. Reiterating what the majority thought was decided in Concepcion, Scalia writes in note 5 that the FAA's command to enforce arbitration agreements "trumps any interest in ensuring the prosecution of low value claims."

**Ninth Circuit Court of Appeals**

1. Kramer v. Toyota Motor Corp., 705 F.3d 1122 (9th Cir. Jan 30, 2013). On appeal from an order denying a motion to compel arbitration, held, affirmed. As a non-signatory, Toyota was not entitled to arbitration of the claims of plaintiffs pursuant to arbitration clauses in agreements between plaintiffs and dealers from which plaintiffs purchased Prius automobiles. Thus, Toyota was not able to benefit from the class waivers in the pertinent arbitration agreements. The contracts did not contain any "clear and unmistakable" provision for arbitrators to decide whether Toyota could enforce them. Moreover, Toyota could not claim that plaintiffs were equitably estopped from avoiding arbitration, because plaintiffs (a) did not rely on the purchase agreements for their claims against Toyota and (b) did not claim misconduct by Toyota "intertwined" with that of the signatory dealers.

2. In re Tristar Esperanza Properties, LLC, 2013 WL 870238, 488 Bank. Rep. 394 (9th Cir. Bankruptcy App. Panel March 8, 2013). An investor's withdrawal from a real property owning LLC triggered a "buy-back" clause in the operating agreement that governed the enterprise. A dispute over the payment due became the subject of an arbitration award against the enterprise that was confirmed as a judgment of the Orange County Superior Court. On appeal from a decision of the Bankruptcy Court that the judgment was subject to mandatory subordination to the claims of credits as "damages arising from the purchase or sale" of a security of the debtor within the meaning of Section 510(b) of the Bankruptcy Act, held, affirmed.

3. United Transp. Union v. BNSF Ry. Co. , 710 F.3d 915 (9th Cir. March 13, 2013). On appeal from dismissal of a petition for review under the Railway Labor Act of an arbitration decision by a Public Review Board upholding an employee discharge, held, reversed. Upon circulation by the neutral member of the Board of a draft award reinstating the employee, the Railway representative allegedly threatened the member with never receiving another appointment. The neutral then recused herself and issued an order dismissing the case without prejudice. A different neutral on a new board that upheld the discharge allegedly was told about the previous threat. The court ruled that the petition stated a case for review of the award on grounds of corruption, i.e., that the award was infected by the threat in the initial proceeding and remanded the case to allow the union an opportunity to prove its allegations.

4. Kilgore v. Keybank, N.A., 718 F.3d 1052 (9th Cir. April 11, 2013). On review of a panel decision upholding a denial of defendant's motion to compel arbitration, held en banc, Judge Pregerson dissenting, reversed and remanded with instructions to compel individual arbitration. Plaintiffs filed a putative class action claiming that Keybank violated the California Unfair Competition Law. They sought to enjoin

Keybank from enforcing notes evidencing loans made to students at a helicopter training school that failed. The notes contained an arbitration clause with a class waiver. With the exception of the class waiver, which was upheld pursuant to Concepcion, and a confidentiality requirement, which plaintiffs were by note 9 to argue against, the arbitration clause was free from procedural and substantive unconscionability. In Davis v. O'Melveny & Myers, 485 F.3d 1066 (9 th Cir. 2007), the court had followed the California Supreme Court decisions in Broughton v. Cigna Healthplans of California and Cruz v. PacifiCare Health Systems, Inc. in relying on a passage from Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991), to hold that statutory claims for an injunction to benefit the public created an "inherent conflict" with arbitration and, thus, were exempt from the FAA. However, the court avoided deciding whether Concepcion limited the reach of this exemption to federal statutes by concluding that the injunction sought would benefit only 120 students involved and not the public.

5. Rajagopalan v. Note World, LLC, 718 F.3d 844 (9th Cir. May 20, 2013). On appeal from denial of a motion to compel arbitration, held, denied. New World, which processed payments to and for a debt relief service provider ("DRSP"), but was not signatory to the arbitration agreement between plaintiff and the DRSP, sought to compel arbitration of a diversity class action. New World denied being an agent for the DRSP, but contended it was a third party beneficiary of the contract and that plaintiff was equitably estopped to deny arbitration. Under Washington law, New World did not qualify as a third party beneficiary, because there was no evidence the parties intended a third party beneficiary contract. Moreover, plaintiff was not estopped to deny arbitration to New World, because his claims did not arise out of or relate to the contract containing the arbitration clause.

6. American President Lines, Ltd. v. ILWU, 721 F.3d 1147 (9th Cir. July 12, 2013). On appeal from dismissal by the trial *sua sponte* of an employer's action to recover damages under Section 303 of the Labor Management Relations Act for unfair practices allegedly committed by the union in the course of a work preservation grievance arbitration, held, reversed. Nothing in Section 303 precludes "standing" to sue for damages for an alleged Section 8(b)(4) "hot cargo" violation inherent in an arbitration award without seeking to vacate the award.

7. Mortensen v. Brennan Communications, LLC, 722 F.3d 1151 (9th Cir. July 15, 2013). On appeal from denial of a motion to compel arbitration of a putative class action under an arbitration clause with a New York choice of law provision in a broadband internet service agreement, held, reversed. Somehow, despite Concepcion, the District Judge denied arbitration because Montana public policy requires that a contract of adhesion be within a party's "reasonable expectations" and, unless post-dispute consent is given to arbitration, an adhesive arbitration agreement amounts to an "unknowing waiver of the fundamental constitutional rights to trial by jury and access to courts." As recognized in note 14, the ruling was preempted by Concepcion because it outlawed a category of arbitration agreements. However, the Court of Appeal went further and said that Concepcion preempts any state contract defense, whether based on unconscionability or not, that has a "disproportionate effect on arbitration." Put another way, it said Concepcion construed the FAA to "give preference" to arbitration. Given that Montana's public policy against adhesive arbitration agreements was preempted, there was no conflict with New York's policy upholding them. Thus, the New York choice of law was valid.

Note: Although the court said in note 13 that it did not rely upon the conflation, the District Judge must have concluded that, being contrary to Montana public policy, the agreement was unconscionable. Otherwise, the pre-emptive effect of Doctor's Associates v. Casarotto, which was not even mentioned, seemingly would have been game, set, match.

8. Oracle America, Inc. v. Myriad Group A.G., 724 F.3d 1069 (9th Cir. July 26, 2013). On appeal from a partial denial of arbitration, held, reversed. Oracle filed suit complaining of breach of a license contract and copyright infringement. The court granted Myriad's motion to compel arbitration of the breach of contract suit, but denied arbitration of the intellectual property claims on the basis of an exception in the arbitration agreement. The Court of Appeal followed Second Circuit and District of Columbia Circuit decisions in holding that providing in the agreement for the UNCITRAL rules to govern the arbitration constituted "clear and unmistakable" evidence that the arbitrator, not the court, should decide arbitrability, i.e., whether the exception applied.

9. Murphy v. DirecTV, Inc., 724 F.3d 1218 (9th Cir. July 30, 2013). On appeal from an order compelling individual arbitration of a putative class action, held, affirmed as to the manufacturer Direct TV and reversed as to Best

Buy, the retailer involved. Direct TV's documentation included an arbitration clause with a class waiver which, under Concepcion, became enforceable after it was decided and the case was still pending in the District Court. Best Buy was not party to any arbitration agreement, and, as in Kramer, no. 1 above, it was not entitled to arbitration as a non-signatory. Plaintiffs did not rely on DirecTVs documentation for the claims against it, and the claims were not "intertwined" with or "inherently inseparable" from those against DirecTV. That is, Best Buy's potential liability was independent of that of DirecTV. Moreover, apart from retailers generally being regarded as principals and not agents of their suppliers, the agreement between Best Buy and DirecTV for the sale of the latter's products "expressly disavowed" an agency relationship. Finally, there was no evidence of any intent that Best Buy be a third party beneficiary of the DirecTV-consumer documentation.

10. Lagstein v. Certain Underwriters at Lloyd's of London, 725 F.3d 1050 (9th Cir. Aug. 5, 2013). On a previous appeal involving arbitrator disqualification, the court reversed a judgment in favor of Lloyd's vacating an award in an arbitration arising from denial of disability insurance benefits. Lagstein v. Certain Underwriters at Lloyd's of London, 607 F.3d 634 (9th Cir.), cert. denied, 131 Sup. Ct. 832 (2010). The award included $900,000 policy benefits, $1.5 million in emotional distress damages, $4 million in punitive damages and $350,000 in attorney's fees. Judgment confirming the award eventually was entered on September 23, 2011. On this appeal from a District Court order with respect to interest and attorney's fees, affirmed in part and reversed in part. The arbitrators included pre-award interest on the contract damages in their award. As a diversity case, entitlement to pre-judgment interest is based on state law---here that of Nevada, while post-judgment interest is based on federal law. Nevada law entitled Dr. Lagstein to post-award pre-judgment interest on the entire award. In addition, Dr. Lagstein is entitled to post-judgment interest on the entire amount of the judgment including pre-judgment interest. Finally, Dr. Lagstein is entitled to attorney's fees, as provided by Nevada law.

11. Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928 (9th Cir. Aug. 8, 2013). On appeal from the partial denial of a motion to compel individual arbitration of a putative class action by students at for-profit subsidiary colleges of defendant, held, reversed. Arbitration of a claim for injunctive relief had been denied on the basis of the Broughton-Cruz rule. Unlike Kilgore, no. 4 above, the injunctive relief sought in this case was for the benefit of the public. However, the court concluded that, as involving a particular type of claim, the effort to obtain injunctive relief was preempted by Concepcion. By way of dicta, the court also noted that, because of preemption, the "effective vindication" exception and the "inherent conflict" exception to the FAA, which "are two sides of the same coin," do not apply to state statutes, but only to federal statutes.

12. Richards v. Earnst & Young, LLP, 734 F.3d 831 (9th Cir. Aug. 21, 2013, amended, December 9, 2013) (per curiam). On appeal from the denial of a motion to compel arbitration of a putative wage and hour class action on the basis of Concepcion, held, reversed. Plaintiff was not prejudiced by any delay in making the motion. Discovery had not been used to gain any information that would not have been gained in arbitration, and expenses that resulted from filing in court instead of demanding arbitration were "self-inflicted."

13. Chavarria v. Ralphs Grocery Co., 733 F.3d 916 (9th Cir. Oct. 28, 2013). On appeal from an order denying individual arbitration of a putative employment class action, held, affirmed. The arbitration agreement was procedurally unconscionable, because it was presented on a "take it or leave it" basis. The procedural unconscionability was enhanced, because its terms were not given to plaintiff until three weeks after, by signing an application for employment, she had agreed to it. The terms of the agreement "shocked the conscience," so that it was also substantively unconscionable. The arbitrator selection process provided for each party to nominate three and for alternative strikes, with the party not demanding arbitration to strike first, until the last remaining would serve. In virtually all cases this would unfairly guarantee that one of Ralphs' nominees would be the arbitrator. The provision requiring the arbitrator to apportion his fees or hers equally up front is also unfair. Ralphs represented that these would be one-half of $7,000-$14,000 per day for the requisite retired state or federal judge. Concepcion did not preempt such unfair agreements.

Note: I sense there is room for me to reset my charges.

Note: Judge Clifton, who wrote the opinion, also wrote that in Corinthian Colleges, no. 11 above.

14. Smith v. Jem Group, Inc., 737 F.3d 636 (9th Cir. Dec. 12, 2013). On appeal from denial of a motion to compel arbitration of a complaint against a Washington law firm, held, affirmed. The district court properly

concluded that it, not the arbitrator, should decide the question of unconscionability, and the arbitration clause in the retainer agreement was unconscionable as a matter of Washington law. It was sufficient that the challenge to the arbitration agreement as distinct from the complaint as a whole was made for the first time in opposition to the motion to compel. It also was sufficient under Washington law to deny enforcement if a contract was procedurally unconscionable. This one was because the arbitration clause was buried on the fourth page of a four-page retainer agreement included as part of a 21-page contract between plaintiff and defendant debt relief service. Washington law was not pre-empted by Concepcion, both because it is not aimed at arbitration, i.e., it permits and does not tend to preclude arbitration, and also because it does not affect the arbitral process, e.g., class or not, with which Concepcion was concerned.

15. In re Wal-Mart Wage and Hour Employment Practices Litigation, 737 F.3d 1262 (9th Cir. Dec. 17, 2013). On appeal from confirmation of an arbitration award apportioning the fees of plaintiffs' counsel upon settlement of a class action, held, affirmed. The lawyer who moved successfully to confirm the award objected to jurisdiction to entertain the appeal because the arbitration agreement provided for "binding, non-appealable" arbitration. The court noted that some circuits hold such a phrase to waive only review of the merits of the arbitration, not the right to seek vacatur. The Second Circuit holds that it divests both the trial and appellate court of jurisdiction to review the arbitrator's decision in any way. Based both on the text of Section 10 and Congress attempt by Section 10 of the FAA to ensure a minimum level of due process, the court held that attempts to eliminate review pursuant to Section 10 are unenforceable just as attempts to expand review are. The court distinguished and by implication agreed with a 10th Circuit case approving a clause that waived appellate review of a trial court decision on vacatur.

**California Supreme Court**

1. City of Los Angeles v. Superior Court, 56 Cal. 4th 1086 (June 20, 2013). The Superior Court granted a union petition for mandate to require the City to arbitrate a grievance that the City's emergency ordinance mandating an employee furlough violated the City's Memorandums of Understanding (MOU) with the union. The Court of Appeal reversed. On review by the Supreme Court, held, 4-3, a chartered city may arbitrate collectively bargained wage and hour provisions without unlawfully delegating to an arbitrator its budgeting and salary-setting authority and the city was obligated to arbitrate the grievance in this case under a broad arbitration clause in the applicable MOU. The terms of the MOU preserved the City's right to relieve employees from work because of lack of funds, provided that the impact of the exercise of such right on wages, hours and working conditions was subject to being grieved and the ultimate grievance step was binding arbitration. By agreeing to the MOU the City exercised the discretion with respect to salary setting reserved to it in its City Charter.

2. Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109 (Oct. 17, 2013). On remand from the Supreme Court for further proceedings in light of Concepcion, held, 5-2, remanded to the trial court for further proceedings consistent with the principles set forth in the opinion. Contrary to the court's original decision at 51 Cal. 4th 659 (2011), under Concepcion, the FAA preempts categorically prohibiting waiver of a Berman hearing. An arbitral forum may provide the same benefits, so that surrendering them in favor of arbitration is not unconscionable. "There are potentially many ways to structure arbitration . . . so that it facilitates accessible, affordable resolution of wage disputes." Courts are not to require "an ideal arbitral scheme," but the costs and risks should not make resolution "inaccessible and unaffordable." The questions of whether the substantive terms and circumstances surrounding formation of the agreement make it "unreasonably favorable" to one party and thereby unconscionable remain. It is OK for states to facilitate the prosecution of low dollar value claims so long as they do not interfere with the fundamental attributes of arbitration. Deciding unconscionability by motion, as prescribed by CCP 1290.2 will not delay arbitration. Sonic can argue for its process on remand. The surrender of Berman protection may be considered, and the Labor Commissioner may intervene. In dissent, Justice Chin disagreed with "unreasonably one-sided" instead of "so one-sided as to shock the conscience." Justice Corrigan concurred on the understanding the two are equivalent.

Note: A very long opinion including a long passage addressing Justice Chin's dissent. I sense it is a reluctant retreat from *Sonic I* coupled with a strong brief in defense of using unconscionability to facilitate the prosecution of small claims. The court may ultimately be willing to farther than in Armendariz.

**California Court of Appeal**

1. Daniels v. Sunrise Senior Living, Inc., 212 Cal. App. 4th 674 (4th Dist. Jan. 4, 2013). On appeal from an order denying the motion of a residential care facility to compel arbitration of claims by the daughter of a deceased patient related to elder abuse and wrongful death, held, affirmed. Although the daughter was bound by the arbitration agreement she signed as representative of the mother to arbitrate the survivor claims, there was no evidence that she signed in her personal capacity. Thus, she was not bound to arbitrate her independent wrongful death claim. The court was unwilling to extend to a residential care facility for the elderly ("RFCE") decisions arising out of medical malpractice arbitration agreements pursuant to Code of Civil Procedure Section 1295. The arbitration agreement did not include the provisions intended to safeguard an informed decision, and the claim was not based on medical malpractice. Moreover, the trial court did not abuse its discretion in denying arbitration of the survivor claims alone pursuant to CCP Section 1281.2(c), because the possibility of inconsistent rulings involved a non-signatory third party, to wit, the daughter in her personal capacity.

2. Flores v. West Covina Auto Group, 212 Cal. App. 4th 895 (2nd Dist. Jan. 11, 2013) (review granted and briefing deferred in S208716). On appeal from an order compelling individual arbitration of individual and class claims arising from the purchase of a previously-owned vehicle, held, affirmed. An order granting a motion to compel arbitration ordinarily is not appealable, but this one under the "death knell" doctrine in that it effectively ended the class aspect of the case. Respondent was excused from moving sooner to compel arbitration, because, under Fisher v. DCH Temecula Imports, LLC, 187 Cal. App. 4th 601 (2010), a class waiver in a Consumer Legal Remedies Act case like this one only became effective after Concepcion. Procedural unconscionability was shown, but "at the low end of the spectrum," because the front side of a 2-sided contract called attention to the arbitration agreement on the back side, and the agreement was highlighted on the back. The clause enabling a party to have re-arbitration before a 3-member panel in the event of an award of zero or more than $100,000 did not favor the dealer. The clause providing for the dealer to front arbitration costs only up to $2,500, subject to the arbitrator's authority to order reimbursement, was also not substantively unconscionable. Nor was the clause providing, in effect, for AAA arbitration. Or the clause exempting self-help, i.e., repossession.

3. Gray v. Chiu, 212 Cal. App. 4th 1355 (2nd Dist. Jan. 22, 2013). On appeal from a judgment confirming an award in favor of respondents in a medical malpractice arbitration, held, reversed. After the arbitration had begun, the lead lawyer for respondents resigned as such to become an arbitrator and continued as counsel only for the respondent doctor. Before evidentiary hearings were held, the lawyer became affiliated with ADR Services and his picture had been posted in the hallway of the ADR Services office where the hearings were held. The neutral arbitrator, who was affiliated with ADR Services, never disclosed that the lawyer had become a fellow ADR panelist. Disclosure was required, both pursuant to CCP 1281.9 and also Ethics Standard 8 which, in a consumer arbitration, requires disclosure of any significant relationship between the provider organization and a lawyer in the arbitration. Claimant was not estopped to complain or waive his complaint by learning of the affiliation from the photos in the hallway. The ethics standards cannot be waived, and the deadline for disclosure was long before the hearings were held.

4. Ahdout v. Hekmatjah, 213 Cal. App. 4th 21 (2nd Dist. Jan. 25, 2013). On appeal from a judgment confirming an award in favor of respondents, held, reversed. Claimant was entitled to a trial de novo of a construction dispute based on his contention that, contrary to the "explicit legislative expression of public policy" in Business and Professions Code Section 7031, the respondent contractor did not hold the requisite license. Review per Loving & Evans v. Blick, 33 Cal. 603 (1949), was not available because, as recognized in Moncharsh, it required that the entire contract be illegal, whereas here the illegal construction contract was only part of the overall contract between the parties. However, on public policy grounds Moncharsh also allowed for review for arbitrators exceeding their powers when, as in this case, confirming an award would be inconsistent with the protection of statutory rights.

Note: Query whether the court should have considered the impact of Concepcion.

5. Natalini v. Import Motors, Inc., 213 Cal. App. 4th 587 (1st Dist. Jan 7, 2013) (review granted and briefing deferred in S209324). On appeal from an order denying a a dealer's motion to compel arbitration of the individual and class claims asserted by plaintiff car buyer, held, affirmed. The form of contract was identical to that in Flores, no. 2 above which is before

the California Supreme Court in Sanchez v. Valencia Holding Co., S199119. The court did not reach the issue of waiver, because it held that the arbitration clause was unconscionable. Procedural unconscionability was satisfied by evidence plaintiff was not allowed to negotiate (oppression) or to read the back of the contract (surprise). The re-arbitration and self-help provisions (that satisfied the court in Flores) showed that the clause was "systematically structured" to cover a buyer's claims while allowing the dealer to appeal or pursue self help. With three defects, to wit, re-arbitration because of size of award and injunction and self help exclusion, the agreement was "permeated with unconscionability." The court said it, therefore, need not address the cost allocation and arbitrator selection provisions.

6. Bigler v. The Harker School, 213 Cal. App. 4th 727 (6th Dist. Feb. 6, 2013). On appeal from an order denying arbitration of a student's claims that she was wrongfully accused of an honor code violation and demeaned in public in violation of her enrollment agreement, held, reversed. The evidence did not support either a finding of oppression or one of surprise, and not having given a copy of the applicable AAA rules to the parents was "of minor significance." Exclusion of tuition disputes actually benefited the parents more than the school, as tuition was paid in advance. The school acknowledged that a prevailing party attorney's fee clause was inconsistent with current AAA procedures and should be severed.

7. Acquire II, Ltd. v. Colton Real Estate Group, 213 Cal. App. 4th 959 (4th Dist. Feb. 11, 2013). On appeal from denial on the basis of CCP 1281.2(c) of a motion to compel arbitration of real estate investment disputes, held, reversed and remanded for further evidentiary consideration. Some groups of the 250 plaintiffs had signed arbitration agreements; others had not. The arbitration agreements provided for application of California arbitration law. The record did not show sufficient evidence to support the trial court's implied finding that each of the three conditions necessary to a 1281.2(c) denial, to wit, that defendants were involved in pending litigation with some plaintiffs who did not agree to arbitration, that the claims of at least some such third parties grew out of the same or related transactions as those of the parties who agreed to arbitration and that a common legal or factual issue created the possibility of conflicting outcomes.

7A. Compton v. Superior Court, 214 Cal. App. 4th 873 (2nd Dist. March 19, 2013). On petition for writ of mandate treated as appeal from an order granting a motion to compel arbitration of an employee's putative class action, held, 2-1, reversed. Concepcion excused the defendant's delay in moving to compel. However, the arbitration agreement was unconscionable independent of a class waiver. It was permeated with unconscionable substantive provisions in that, whereas the employee was compelled to arbitrate, the employer was free to seek injunctive relief; whereas the employee was faced with a foreshortened period of limitations, the employer had the benefit of the applicable full statutory periods; and the arbitrator had discretion to withhold an award of attorney's fees even when the law entitled the employee to them. Procedural unconscionability was satisfied by the agreement being adhesive, the employee being rushed to sign and the applicable rules not being provided.

8. Serpa v. California Surety Investigations, Inc., 215 Cal. App. 4th 695 (2nd Dist. March 21, 2013). On appeal from an order denying a motion to compel arbitration of a sexual harassment and wrongful termination case by a bail bond investigator, held, reversed. The agreement was not made illusory because it could be revised by the employer at any time without notice, and a provision for attempting to resolve disputes informally before resorting to arbitration was not substantively unconscionable. Being adhesive, but without oppression or surprise, the agreement had a low degree of procedural unconscionability. The law-implied covenant of good faith and fair dealing prevented the employer from revising the agreement as to a pending claim. Requiring efforts to resolve disputes informally was "both reasonable and laudable." And a provision for parties to bear their own attorney's fees was severed.

9. Harris v. Bingham McCutchen, 214 Cal. App. 4th 1399 (2nd Dist. March 29, 2013). On appeal from an order denying a motion to compel arbitration of a former employee's disability and wrongful termination claims, held, affirmed. The court upheld the provision in the arbitration agreement that it was to be governed by Massachusetts law. Massachusetts law precluded arbitration of discrimination claims without a "clear and unmistakable waiver of statutory antidiscrimination rights." That requirement is not pre-empted by the FAA per Concepcion, because it does not interfere with "fundamental attributes of arbitration." The court found support for its conclusion both in 14 Penn Plaza LLC and in Concepcion's footnote 6 in which Justice Scalia said states could require that class waivers in adhesive contracts be highlighted.

Note: One can sympathize with the result without agreeing with the logic.

10. Barseghian v. Kessler & Kessler, 215 Cal. App. 4th 446 (2nd Dist. April 15, 2013). Plaintiffs sued a law firm for malpractice and three other defendants who had been involved in the transaction from which the malpractice claim arose. The law firm's engagement agreement included an arbitration clause, and it moved to compel arbitration. A real estate purchase agreement with two of the other defendants also included an arbitration clause. A lease agreement with them did not, and there was no arbitration clause involving plaintiff and the third other defendant. On appeal from denial based on CCP 1281.2(c) of the law firm's motion to compel arbitration, held, affirmed. Boilerplate allegations in a complaint that the defendants are agents of each other are not for purposes of a motion to compel arbitration judicial admissions that the defendants are not unrelated third parties.

11. Sabey v. City of Pomona, 215 Cal. App. 4th 499 (2nd Dist. April 16, 2013). A partner in a law firm represented the City in an advisory arbitration when a police officer grieved his termination for misconduct. The arbitrator's decision reinstating the officer was subject to review by the City Council as the ultimate decision maker. On appeal from denial of a writ of mandate to disqualify another partner in the same firm from advising the City Council in its review, held, reversed. For one lawyer from a private law firm to act as advocate for a public agency and another to act as advisor to the decision maker that reviews the result achieved by the advocate violates due process. The fiduciary duty each partner in a law firm owes to another precludes a screening process that permits separate lawyers from a public agency to serve such functions.

12. Kurtin v. Elieff, 215 Cal. App. 4th 455 (4th Dist. April 16, 2013). To the extent arbitration is implicated by this complex appeal, which resulted in modifying and affirming a trial court order granting a motion for new trial, the court held that the award in an arbitration limited to resolving any ambiguities in a mediated settlement agreement was not res judicata. Thus, the plaintiff in the mediation was not prevented from seeking more in subsequent litigation than provided by the mediated settlement agreement, as amended by the arbitration award. The court held that settlement agreement limited the arbitrator's powers to inserting intended, but inadvertently omitted terms. Thus, instead of by barred by res judicata from seeking in subsequent litigation what could have been litigated in the arbitration, the plaintiff was free in the subsequent litigation to seek what the limitation on the arbitrator's power prevented him from seeking in the arbitration.

Note: See Summary of Developments in Mediation for effect of mediation privilege on subsequent litigation.

Note: The mediator and arbitrator was the well-known Tony Piazza.

13. Vasquez v. Greene Motors, Inc., 214 Cal. App. 4th 1172 (1st Dist. March 27, 2013) (review granted and briefing deferred in S210439).. On appeal from denial of a motion to compel arbitration, held, reversed. The arbitration clause was included in the same form of retail installment sales contract at issue in Flores, no. 2 above, and Natalini, no. 5. Although imposition of the clause created a minimal level of procedural unconscionability, there was no significant substantive unconscionability. The court discusses procedural unconscionability at length, including why adhesion is less significant in a commercial case than in employment. In addition, the court noted that no non-employment California case had held requiring a plaintiff to pay more than in court was substantively unconscionable and that plaintiff had not offered evidence of why the cost sharing arrangement was substantively unconscionable.

14. Ronay Family Limited Partnership v. Tweed, 216 Cal. App. 4th 830 (4th Dist. May 23, 2013). On appeal from denial of a motion to compel arbitration, held, reversed. Defendant registered representative of a defunct FINRA member firm was entitled to enforce an arbitration agreement both as a named party, as the signing member's agent and as an intended third party beneficiary of the agreement. FINRA Rule 12202, which bars arbitration of claims against a defunct member unless the claimant agrees post-dispute to arbitration, does not affect claims against a registered representative associated with a member. Given the inclusion of non-signatory defendants, the trial court was directed on remand to consider Plaintiff's alternative opposition based on CCP 1281.2(c).

15. Vargas v. SAI Monrovia B, Inc., 216 Cal. App. 4th 1269 (2nd Dist. June 4, 2013). On appeal in reliance on the "death knell" doctrine from an order striking plaintiff's class allegations and compelling individual arbitration of claims under the arbitration clause in an automobile sales contract identical to that in nos. 2, 5 and 13, held, reversed. The court had decided Sanchez v. Valencia Holding Co., LLC, 201 Cal. App. 4th 74 (2012), which

is under review to the Supreme Court in S199119. After considering other cases decided after its initial decision, including Goodridge v. KDF Automotive Group, Inc., 209 Cal. App. 4th 325 (2012) (review granted and briefing deferred in S206153), and nos 2, 3 and 5 above, but not Mayers v. Volt Management Corp., 203 Cal. App. 4 th 1194 (2012), review also granted and briefing deferred in S200709 , the court observed that it had "refined our analysis" and again concluded that arbitration is not required. Concepcion held only that a state may not rely on "categorical rules" to prohibit arbitration of "a particular type of action." It allows for procedural unconscionability based on oppression [adhesion] or surprise [hidden terms] in contract formation and substantive unconscionability based on "overly harsh or one-sided" terms. In the case of an adhesion contract, the attention to arbitration on the front side of the contract "was obscured by surrounding text." Moreover, the finance manager, who "controlled" the signing, did not turn the page over and reveal the arbitration clause. Thus, reading was excused. The contract format and the management of the signing resulted in a "high degree" of procedural unconscionability. Four provisions of the arbitration agreement are substantively unconscionable---(i) the right to appeal an award of more than $100,000, (ii) the right to appeal an injunction, (iii) the allocability of costs on appeal and (iv) the self help, i.e., repossession exclusion. The $100,000 appeal and injunctive award appeal triggers and the repossession exclusion benefit only the dealer. The matter of costs on appeal is contrary to Armendariz and conflicts with concept that the right to appeal a $0 award benefits the consumer. The dealer pay limit on the buyer's arbitration costs is OK, because the AAA consumer arbitration rules provide greater protection (at least apart from costs of any appeal). The combination of unconscionable provisions makes the contract "permeated" with unconscionability.

Note: The provision that awards between $0 and $100,000 are final, but outside that range are appealable is akin to the terms of baseball arbitration.

16. Leos v. Darden Restaurants, Inc. 217 Cal. App. 4th 473 (2nd Dist. June 4, 2013) (review granted and briefing deferred in S212511 pending Baltazar v. Forever 21, Inc., 212 Cal. App. 4 th 221 (2012), review granted in S208345 (whether FAA applied)). On appeal from denial of a motion to compel arbitration of statutory employment claims, held, reversed. Although the arbitration agreement was procedurally unconscionable, none of its terms was substantively unconscionable. Darden is a national chain. Strangely, the court said that, since plaintiffs' duties did not affect interstate commerce, the FAA did not apply. However, it also said that whether or not the FAA applied made no difference in its analysis. (This is correct, as unconscionability would be determined by reference to state law in any event). None of (i) the employer's right to modify the agreement, (ii) the arbitrator's power to manage discovery and hearing time, (iii) the employee being required to pay for a transcript if it wanted a court reporter, (iv) the availability of provisional relief in the courthouse as an optional alternative to the arbitration or (v), as applied to this individual case, the class waiver was substantively unconscionable.

17. Brown v. Superior Court,, 216 Cal. App. 4th 1302 (6th Dist. June 4, 2013) (review granted and briefing deferred in S211962). On appeal treated as a petition for a writ of mandate requiring the trial court to reverse its order directing individual arbitration, held, reversed in part. In delaying until Concepcion was decided before moving to compel individual arbitration of a putative class action, defendant did not waive its right to arbitration. However, Concepcion did not preempt plaintiffs' PAGA (Private Attorney General Act) claim. In asserting a PAGA claim, plaintiffs were acting as an alternative to the government itself, i.e., as a representative of the government and not on behalf of themselves. This is not inconsistent with requiring individual arbitration of plaintiffs' individual claims. As defendant did not agree to arbitration of any representative claim, the trial court order was modified to exclude the PAGA claims from arbitration and to stay the action as to them pending arbitration of the individual claims.

Note: The decision relied upon and followed Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489 (2011). It also noted that in the wake of Concepcion a class waiver was held in Iskanian v. CLS Transportation of Los Angeles, 205 Cal. App. 4th 949 (2012) (review granted in S204032) to apply to a PAGA claim and in Franco v. Arakelian Enterprises, 211 Cal. App. 4th (2012) (review granted in S207760) was held not to preclude a PAGA claim. Briefing was also deferred pending Iskanian in Reyes v. Liberman Broadcasting, 208 Cal. App. 4 th 1537 (2012) (review granted in S205907) (not a PAGA case, but Iskanian also involved whether Gentry v. Superior Court survived Concepcion).

18. Abers v. Rohrs, 217 Cal. App. 4th 1199 (4th Dist. June 13, 2013). On appeal from a judgment dismissing a petition to vacate an arbitration award adverse to

the owners of homes in a condominium development for failure to serve respondents within 100 days after service of the award, held, affirmed. The provisions of lease agreements upon which the claimants relied covered notices regarding the leases and not service of process. Refusing to treat the vacatur petition as filed in a pending case was not an abuse of discretion, because claimants acknowledged making a "deliberate, strategic" decision not to file in the pending case. Equity does not prohibit a party from demanding adherence to statutory requirements. And CCP 473 is not available to relieve claimants; the court loses jurisdiction when the deadline passes.

19. Avery v. Integrated Healthcare Holdings, 218 Cal. App. 4th 50 (4th Dist. June 27, 2013). On appeal from denial of a motion to compel individual arbitration of the claims asserted by plaintiffs in a putative class action, held, affirmed. The evidence supported the trial court's finding that plaintiffs had not signed arbitration agreements. The pivotal form of agreement was that in employee handbooks issued by a predecessor owner of the hospitals operated by Integrated, as its revised handbook including a form of arbitration agreement with a class waiver was issued after plaintiffs' claims had accrued. One plaintiff did not sign any document, and, while the other seven signed a "confusing patchwork of acknowledgements and other forms" agreeing to arbitration, none referred to the handbook and agreement on which Integrated relied in its motion.

20. Roberts v. Packard, Packard & Johnson, 217 Cal. App. 4th 822 (2nd Dist. July 3, 2013). On appeal from an order awarding fees to the former attorneys for plaintiffs because they prevailed on a motion to compel arbitration and the pertinent arbitration agreement provided for an award of fees to "the" prevailing party, held, reversed. The fee decision should be deferred until "the" party ultimately prevailing in the case has been determined, and only that party shall be entitled to an award of fees. A party that prevails at interim stages is not "the" prevailing party. Cases on which the law firm relied were distinguished as involving finality.

21. Wade v. Ports America Management Corp., 218 Cal. App. 4th 648 (2nd Dist. Aug. 2, 2013). An employee filed suit for wrongful termination in violation of public policy. The employer moved for summary judgment contending that an award in a grievance arbitration adverse to the employee constituted res judicata. On appeal from a judgment in favor of the employer, held, affirmed. Unlike FEHA claims, claims for termination in violation of public policy do not require an "express agreement" to be covered by a grievance arbitration. Moreover, the issues in the arbitration, as framed by the union's lawyer and as addressed in the award, included plaintiff's discrimination claim.

22. HM DG, Inc. v. Amini, 219 Cal. App. 4th 1100 (2nd Dist. Sept. 20, 2013). On appeal from an order denying a petition to compel arbitration of a construction dispute on the ground the arbitration agreement was "uncertain" in that it did not specify a provider or the method of selecting an arbitrator, held, reversed. Given CCP 1281.6, which provides for court appointment of an arbitrator, it is not necessary that an arbitration agreement do so. Because the trial court had not considered any other ground for denial of arbitration, the case was remanded to allow it do so.

23. Mendez v. Mid-Wilshire Health Care Center, 220 Cal. App. 4th 534 (2nd Dist. Sept. 23, 2013). On appeal from an order denying arbitration of a wrongful termination suit that included FEHA claims for age and disability discrimination, held, affirmed. The collectively bargained arbitration agreement made no mention of FEHA claims, let alone a waiver of the right to sue that was "particularly clear," as required by Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998), and Vasquez v. Superior Court, 80 Cal. App. 4th 430 (2000), or "explicitly clear," as required by 14 Penn Plaza, LLC v. Pyett, 556 U.S. 247 (2009).

24. Peng v. First Republic Bank, 219 Cal. App. 4th 462 (1st Dist. (Aug. 29, 2013). On appeal from an order denying arbitration of a wrongful termination suit on the ground that the arbitration agreement was unconscionable, held, reversed. The failure of the employer to attach or provide a copy of the applicable AAA Rules, which, as the court noted, are available on the internet, did not aid a finding of procedural unconscionability. The provision entitling the employer to modify the agreement did not support a finding of substantive unconscionability.

25. Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP, 219 Cal App. 4th 1299 (2nd Dist. Sept. 24, 2013). On appeal from denial of a motion to vacate an award in favor of defendants in a legal malpractice case, held, reversed. The arbitrator did not disclose that he had used a name partner in defendant law firm as a reference to gain listing of his resume with the National Academy of Distinguished Neutrals some 10 years before his appointment. The information was discovered by the moving party on the internet post-award. The court ruled that a reasonable person

aware of this fact could reasonably have entertained a doubt that the arbitrator would be neutral. According to the court, the arbitrator presumably believed the lawyer thought favorably of him, and a reasonable person might doubt whether the arbitrator's interest in maintaining this favorable view might color his judgment in a malpractice case against the lawyer's firm. There was a dispute over how available the information was on the internet, but the court rejected the argument that a party should be held to know "readily available" information, saying the disclosure obligation rests on the arbitrator.

Note: The CDRC submitted a letter as amicus curiae supporting review of the issue of whether parties to arbitration should be held to know what knowledgeable parties routinely learn from an internet search as part of their due diligence in selecting an arbitrator. However, the Supreme Court denied review.

26. Mave Enterprises, Inc. v. Travelers Indem. Co. of Connecticut, 219 Cal. App. 4th 1408 (2nd Dist Sept. 26, 2013). On appeal from an order denying a stay of post-award proceedings pending post-award proceedings in the U.S. District Court and from a judgment confirming the award, held, affirmed. After extensive litigation in a suit claiming bad faith by an insurer in adjusting a fire insurance claim, the parties stipulated to binding arbitration. After an award in favor of the insured for approximately $3.7 million, the insured filed a petition to confirm the award and the insurer filed a petition in the United States District Court to vacate, modify or correct the award, together with a motion to stay proceedings in the superior court. The superior court denied the motion and confirmed the award. The insured filed a motion in the federal court asking that it abstain, which it granted and dismissed the insurer's petition. The trial court did not abuse its discretion in denying the stay; it had acquired jurisdiction long before the federal court proceeding was filed and retained jurisdiction while the case was diverted to arbitration, and its ruling discouraged duplicate litigation. In the absence of any provision in stipulation for arbitration or in the choice of law clause in the policy for federal law or the FAA to be "the controlling law," it was proper to review the award under the California Arbitration Act instead of the FAA. Without any explicit limitation on the arbitrator's power, it was not beyond his power to include the punitive damages in calculating the Brandt fee or to award punitive damages 15 times the compensatory award. Arbitration was not "state action" so as to implicate the 14th Amendment. Thus, the multiplier was like any other claimed error of law.

Note: The stipulation for arbitration was reached during jury selection. The stipulation provided for "night baseball" arbitration. That is, the award was limited to a low of $500,000 and a high of $7.5 million without the arbitrator knowing the limits.

Note: The insurer obviously was forum shopping with respect to vacatur, as the standards for review of an award under the FAA are different in the Ninth Circuit from those under California law. The Ninth Circuit allows manifest disregard as code for excess of power; California does not. Curiously, the court cited neither the leading post-Hall Street Ninth Circuit manifest disregard case not the leading California non-manifest disregard case.

Note: Before granting the insured's motion to abstain, the District Court had issued a tentative order modifying the Brandt fee award by eliminating the factor based on the punitive damage recovery as in manifest disregard of the law.

Note: The insurer appealed to the Ninth Circuit from the District Court's dismissal, but, as of the Second District decision, the appeal had not been set for oral argument.

27. Goldman v. Sunbridge Healthcare, LLC, 220 Cal. App. 4th 1160 (3rd Dist. Sept. 27, 2013). On appeal from an order denying arbitration of an abusive care and wrongful death action, held, affirmed. The evidence sufficiently supported the trial court's findings that plaintiff did not have the authority to sign the relevant arbitration agreements on her late husband's behalf, and she did not sign them in her individual capacity. Although plaintiff held a Durable Power of Attorney signed by her husband, her appointment took effect only if he was unable to make health care decisions for himself and the evidence did not show this to be true when she was asked by the skilled nursing centers to sign and did. Nor did her status as spouse authorize her to sign on his behalf. There was no evidence she signed on her own behalf.

28. Young v. Horizon West, Inc., 220 Cal. App. 4th 1122 (6th Dist. Oct. 28, 2013). On appeal from an order denying arbitration of a elder abuse case against a skilled nursing facility, held, affirmed. The power of attorney in plaintiff's advanced health care directive in favor of her daughter was not triggered, because it required a determination by plaintiff's primary physician that she was unable to make her own health

care decisions and there was no evidence of any such determination. Moreover, plaintiff had not checked the box authorizing her agent to make decisions without the prior physician determination. In addition, the court disagreed that "health care decisions" included signing arbitration agreements. Finally, plaintiff was not equitably estopped to deny arbitration and her daughter was not ostensibly authorized to agree to arbitration.

29. Optimal Markets, Inc. v. Salant, 221 Cal. App. 4th 912 (6th Dist. Nov. 26, 2013). After confirmation of an arbitration award in favor of defendants, one of the successful defendants moved the court pursuant to CCP Section 128.7 for sanctions against plaintiff's attorneys. On appeal from an order denying the motion, held, affirmed. Plaintiff's attorneys, who were substituted in after suit had been stayed pending arbitration, could not be held accountable for any pleadings or arguments to the court before arbitration was ordered. The court said there is no authority for a court awarding sanctions against a lawyer for conduct before an arbitrator. The arbitrator's award had explained that attorney's fees were awarded to defendants in part as sanctions, but that the applicable JAMS arbitration rules authorized sancations against parties, but not lawyers.

30. Hong v. CJ CGV America Holdings, Inc., ___ Cal. App. 4th ___ (2nd Dist. B246945 Dec. 18, 2013). On appeal from an order denying arbitration of what had morphed into a derivative action, held, affirmed. The arbitration agreement was contained in a stock purchase agreement. The trial court was correct in deciding that a court, not the arbitrator, should decide whether defendants have waived the right to arbitrate by litigation conduct. After the suit had been filed and before moving to compel arbitration, defendants had demurred successfully to a first amended complaint and moved successfully to quash service on some. Plaintiffs had propounded extensive document and electronic information requests and interrogatories and noticed a deposition. For their part, defendants had moved to require plaintiffs to post a $50,000 bond to secure the costs of "this action" and had initiated a separate lawsuit against one of the three individual plaintiffs. The court rejected defendants' reliance upon Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), noting that that case involved, in effect, a statute of limitations defense to arbitration and not whether a party was obligated to arbitrate. It cited four Court of Appeals decisions that waiver by litigation conduct was for the court to decide and distinguished an 8th Circuit case to the contrary.

Note: The objections to arbitration other than waiver were addressed by the court in an unpublished segment of the opinion.

# *Faculty Biography: John Worden*

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ohn S. Worden has been with Schiff Hardin's San Francisco office (and its predecessor, Morgenstein & Jubelirer) since 1989 and has been a partner since 1996. From 1997 to 2000, Mr. Worden was San Francisco's managing partner. He practices throughout the United States and, in addition to substantial work in California and elsewhere, heads the firm's Nevada practice.

Mr. Worden is a trial lawyer. He has tried dozens of cases for plaintiffs and defendants, in state and federal courts, in front of judges, juries and binding arbitration panels. Most such cases are on the defense, but he has multiple seven- and eight-figure plaintiff verdicts. He has won 21 of the last 22 cases he has tried.

**Practice Areas**

- Litigation
- Reinsurance and Insurance
- Financial Markets and Products
- Construction
- Real Estate

**Industries**

- Construction
- Financial Institutions
- Real Estate
- Sports and Entertainment

**Awards and Honors**

- 1997 San Francisco Bar Association Barrister of the Year
- Northern California Super Lawyers – Insurance Coverage; Securities Litigation

**Education**

- Seattle University School of Law(J.D., magna cum laude, 1989) -- Editor, Seattle University Law Review
- Seattle University(B.A., with honors, honors program, 1986)