ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

REPORT

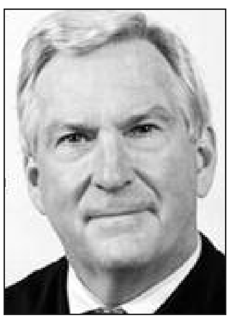
LOS ANGELES

WINTER 2017

CHARTING THE FUTURE OF CLASS ACTION WAIVERS IN ARBITRATION CLAUSES

"Elections Have Consequences."

President Barack Obama speaking to
House Minority Whip Eric Cantor, October 25, 2010



Hon. William F. Highberger

I. Introduction

Following the death of Justice Antonin Scalia, it appeared that settled expectations regarding enforcement of mandatory arbitration agreements with class-action waiver terms required reexamination. Since so many of the recent decisions by the United States Supreme Court invoking the Federal Arbitration Act (FAA) to enforce adhesion contracts preventing class action litigation were decided by 5-4 margins, most of which were authored for the

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— INSIDE —

UNFAIR COMPETITION AND THE DEFEND TRADE SECRETS ACT OF 2016

Amy T. Brantly

The Defend Trade Secrets Act (DTSA) was signed into law by President Obama on May 11, 2016. The DTSA creates a federal private right of action for misappropriation of trade secrets if the trade secret is related to a product or service used, or intended for use, in interstate or foreign commerce.[1] While there are many similarities between the DTSA and the California Uniform Trade Secrets Act (CUTSA), there are some marked differences of which practitioners should be aware. Among them is that California courts hold that the CUTSA preempts other business tort claims that are based on the same nucleus of facts,[2] while the DTSA expressly does not preempt other claims.[3] The ability to bring multiple tort claims in federal court based on the same underlying facts should be a consideration for attorneys representing employer plaintiffs.

Employers often allege a number of claims along with misappropriation of trade secrets. The typical scenario is that an employee or officer with access to a trade secret or confidential information leaves the employer and uses the trade secret or confidential information while working for a competing venture.

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[1] 18 U.S.C. § 1836(b)(1) (2016). A DTSA claim must be filed in federal court; there is no concurrent jurisdiction in the state courts. 18 U.S.C. § 1836(c) (2016).

[2] *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 958-59 (2009) (holding that breach of confidence, interference with contract and unfair competition claims were preempted by the CUTSA); *see also Farmers Ins. Exch. v. Steele Ins. Agency, Inc.*, 2013 U.S. Dist. LEXIS 104606, at *28 (E.D. Cal. July 25, 2013).

[3] 18 U.S.C. § 1838 (2016).

PRESIDENT'S REPORT

Nancy R. Thomas

As I sit at my desk and watch a storm that has lived up to its billing as the biggest storm in years, I can't help but think back to the beautiful clear skies and ocean views in Maui, where ABTL held its Annual Seminar. Over 400 lawyers and judges gathered at the Ritz-Carlton in Kapalua. The Los Angeles Chapter was the host of the 43rd Annual Seminar, and the top-notch programming was developed by our Annual Seminar Chair Valerie Goo and a committee of lawyers and judges from every ABTL Chapter.

This year's seminar topic was The Technology Enigma – A 21st Century Trial. We put on a mock trial of a trade secrets case, focusing on the computer forensics and other technical aspects of proving misappropriation of electronic data (as well as a few fun facts about the individual witnesses to keep the trial from being too dry!). The mock jury listened to evidence of Pasadena Partners' and Sheldon Cooper's alleged theft of Big Bank's trade secret customer list, aided and abetted by Sheldon's friend Amy Farrah Fowler.

When we weren't learning from the best trial lawyers in the state, we were hearing from Ashlie Beringer, Vice President and Deputy General Counsel at Facebook, and John Horn, host of *The Frame* radio show and podcast. And our program ended, as always, with break-out sessions led by state and federal judges. Whether engaging in the programming or enjoying Hawaii, the Annual Seminar provided a terrific opportunity to do what ABTL does best — promote a dialogue between the bench and the bar on business litigation issues.

An event like the Annual Seminar only looks effortless. In reality, the success of the program came about through the hard work and support of a small army. Thanks very much to:

- Valerie Goo and a hard-working Annual Seminar Committee, including LA Chapter Committee members Judge Dan Buckley, Allen Lanstra of Skadden, Arps, Michael Mallow of Sidley Austin, and Erin Ranahan of Winston & Strawn;

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PRESIDENT'S MESSAGE …continued from Page 2

- all of the panelists, LA-based presenters Judge Andre Birotte, Judge Kevin Brazile, Judge Dan Buckley, Judge Beverly Reid O'Connell, Kevin Boyle and Rahul Ravipudi of Panish Shea & Boyle, Sascha Henry of Sheppard Mullin, Don Howarth and Suzelle Smith of Howarth & Smith, and Rick Richmond of Jenner & Block;
- our welcome and keynote speakers and Judges Beverly Reid O'Connell and Samantha Jessner, who reached out to them on our behalf;
- the judges who led break-out sessions;
- Judge Richard Kramer (retired), who once again created a fun and fact-filled hypothetical for our mock trial; and
- all of our sponsors, some of whom were great sports in agreeing to serve as trial witnesses and without whom we could not put on the Annual Seminar.

Finally, major thanks to our Executive Director Linda Sampson, who has truly perfected the difficult job of making sure everything runs like clockwork.

Mark your calendars for the 44th Annual Seminar on October 5-8, 2017 at the Omni La Costa Resort and Spa in Carlsbad.

ABTL's 2017 membership drive is in full swing. I encourage you to become a member of the Los Angeles Chapter to support our stellar programming and public service activities, and to take full advantage of our networking opportunities. I look forward to seeing you at the Biltmore for one of our upcoming programs!

Nancy R. Thomas
Morrison & Foerster
ABTL President, 2016-2017

Want to Get Published?

Looking to Contribute An Article?

The ABTL Report is always looking for articles geared toward business trial lawyers.

If you are interested,
please contact either of our Co-Editors
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THE INSIGHT INTERVIEW

Hisao Kushi

The Insight Interview features interviews with leading jurists, lawyers and business executives, focusing on practical, real-world advice for lawyers in their first 10 years of practice.

This installment features Hisao Kushi, Co-Founder and General Counsel of Peloton Cycle, the cutting edge, at-home smooth and silent bike that streams live and on-demand classes on a dedicated HD monitor from world-class cycling instructors. The Peloton Bike has been named "the best cardio machine on the planet" by Men's Health, and has "become a cult favorite," according to the New York Times.

Steven Feldman

The company is in the midst of major growth and to date has raised more than $119 million in funding. Before co-founding Peloton Cycle, Mr. Kushi was the Chief Operating Officer of Evite, and served in various senior in-house positions at Liberty Media, IAC, and Ticketmaster.

Mr. Kushi was interviewed by Steven Feldman, a senior associate with Hueston Hennigan LLP in Los Angeles, CA.

For those who don't know much about Peloton, tell us a bit about the business.

In 2012, when we first began working on the idea – which was to capture the amazing live cycling class experience at home with a beautiful, smooth, and silent bike that had a dedicated HD monitor streaming classes from the world's best cycling instructors – we didn't even know if people were going to want this product. At the time, nothing like it existed in the marketplace. But the reaction has been amazing, and the growth of our company has been phenomenal. We could not have anticipated the strength of the community – people who purchase a Peloton bike not only find it engaging to use alone, but they've also started to reach out to others.

Our business is an incredibly complicated one. We do everything from designing and manufacturing the bike itself to designing cloud computing software that pushes cycling statistics back to users in real time so they can compare themselves to others. We also film and stream high definition video content in 10-12 cycling classes a day from our Peloton studio, run 20 retail showrooms across the country, and run a web interface for e-commerce and marketing.

With all of those various business lines, how do you handle the inevitable legal issues that arise?

Right now, even though we're high growth, we still are at an early stage of our business, and so we rely a lot on outside counsel to help us handle investment rounds, corporate securities matters, regulatory issues, and litigation. When I came aboard, I figured out where we needed outside legal expertise, and where we could rely on in-house experience. This is a balance, but in general what I've tended to do is bring in outside counsel where we need deep subject matter expertise in a discrete area. But as we expand, our in-house legal team will have the ability to handle the unpredictable variety of issues that would come across their desk.

Before Peloton, you were a litigation associate, Hollywood screenwriter, senior in-house lawyer at Ticketmaster, IAC, and Liberty Media, and the Chief Operating Officer of Evite. Can you tell us a bit about your career path?

It hasn't been a deliberate path, that's for sure.

Coming out of law school, like a lot of newly minted lawyers, you don't know what your practice of law will be. When I graduated in 1992, I joined a small firm in Boston doing litigation and realized fairly quickly it was not for me. I got married and my wife and I decided that if we were going to make a move to the West Coast – as we had dreamed of doing – that was the time. So we quit our jobs and drove out to Los Angeles to pursue sunshine, my love of movies, and my desire to be a screenwriter.

For a couple of years, I got some screenwriting work, but the income in that field is spotty. As they say, "You can't make a living, but you can make a killing." Ultimately, after our daughter was born in the late 1990s, I decided to take an in-house position at Universal where I supported their internet group. It was meant to be a day job supporting my writing, but ultimately I became interested in working in the internet business. From that point, I became much more absorbed in being an in-house

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The Insight Interview with Hisao Kushi …continued from Page 4

lawyer and fascinated by the work the companies I was working for were doing. I never went back to writing.

I feel incredibly lucky that I was able to fall into an in-house situation and apply my legal skills in a field that was new, immersing, and exciting, but also an environment that allowed me to have business impact.

And how did you end up co-founding Peloton?

During the course of my career with different companies, I've had the opportunity to meet a lot of great people. One of those people is John Foley, the founder of Peloton, with whom I worked for many years, and who became one of my closest friends. In late 2011, toward the end of his tenure as President of Barnesandnoble.com, he called me up with his idea for this business. He was in love with indoor cycling and group fitness companies like SoulCycle, and believed we could create a business that could bring the amazing group indoor cycling experience to people at home, since it is so difficult for busy people like us to find time to book and attend classes. My first reaction was that I didn't get it. My background was in the internet and tech – not in fitness or hardware. But after sitting on it for a day or two, I realized that the real core of the idea was creating amazing digital content for our users, and that is something I do get. The bike in some ways is the vehicle to get our users that content.

We filed the papers for Peloton in January 2012, and for the next couple of years, I continued to work at Liberty Media while still advising Peloton. Ultimately, in May 2015, I left Liberty and joined Peloton full time.

During your time in-house at both IAC and Liberty Media, you were able to get deeply involved in business issues. Many young lawyers who wish to go in-house look at startups and internet companies because they think they'll be able to work on both the business and legal side, as opposed to being pigeonholed on specific legal work in a larger company. What advice do you have for them?

Particularly in the age of Facebook and Snapchat, where you see these companies explode out of nowhere, young lawyers see real romance in working at those places, but that romance is really only half justified. If you are considering joining a young, less mature company as a lawyer, one of the things you ought to be aware of is the lack of infrastructure and legal support you will have. They are dynamic, exciting places to work, and you'll be closely engaged in lots of different issues and working alongside lots of interesting people, but they are generally not great training grounds for the practice of law. So, young lawyers should be mindful of the importance of first getting a great foundation. Oftentimes, this means working at a law firm where you learn how to think about issues deeply and address client concerns in discrete matters. That way, when you go in-house, you can carry a lot of that with you because you won't necessarily have access to outside counsel.

As someone who has spent many years in senior in-house positions, what advice would you give outside counsel, and particularly younger lawyers, about the best way to stand out with clients?

What I think is very important is taking the time at the start of an engagement to understand the client's business as a whole. One challenge I have is communicating to my outside counsel the breadth of the business and legal issues Peloton has across the board. I may be asking you about a discrete issue, but it has to be understood in the context of the broader company. If lawyers don't probe and ask the right questions, they may solve the discrete issue, but it may not be in the manner that is best for the whole company.

Let's dig down into that a bit. How specifically would you want an outside lawyer to go about understanding your business?

In the case of Peloton, I would want them to get a download from me about the history of the business and various business operations. Ideally, what I would want is for the lawyer to take the time to come out to one of our retail stores, actually look at the bike, get on the bike, see what the service is, and understand how to navigate it. Stop by the office in New York and take a tour of our fitness studios. Take the time to understand both what the company does and the personality of the company. You want to understand the risk tolerance, which can be different based on the company and the personality of the CEO, as well as the cash in the bank. Most legal issues are a balance of business opportunity and risk concerns; the advice you provide as outside counsel must be based on an understanding of those sensitivities. That's very hard unless you really learn how the business operates.

"FUTURE OF CLASS ACTION WAIVERS"… continued from Page 1

majority by Justice Scalia, the durability of this jurisprudence was then unknown. The election returns on November 8, 2016, are now likely to have a major impact on the future trajectory of the law in this area.

Three major impacts are likely. First, President Donald J. Trump's nominee to replace Justice Scalia is likely to be much more respectful of Justice Scalia's rulings and reasoning as compared to a nominee chosen by Trump's adversary, former Secretary of State Hillary Rodham Clinton. Second, the new administration will have the power to suspend proposed regulations that would prohibit mandatory arbitration clauses with class-action waivers in various contexts, including nursing home admission contracts and student-loan agreements. Third, the Republican-controlled Congress will be unlikely to enact any statutory reform to the FAA, and it may well withdraw powers that the Consumer Financial Protection Bureau (CFPB) is currently attempting to exercise to prohibit these kinds of adhesion contracts in many consumer credit transactions.

To the best of my knowledge, candidate Trump did not speak or tweet his views on mandatory arbitration clauses that force disgruntled customers or employees to pursue individual claims in arbitration without the leverage a class action can provide. Secretary Clinton, in May 2016, did publicly support the CFPB's proposed regulation to ban such clauses in consumer credit contracts. Trump as a defendant in business litigation recently experienced the consequences of not including an arbitration clause with a class action waiver in his form contracts: the Trump University litigation before District Judge Gonzalo Curiel in San Diego federal court was able to proceed as a certified class action precisely because Trump and his legal advisers had failed to include such a term.

As of 12 months ago and before Justice Scalia's death, the U.S. Supreme Court appeared to have accepted the outcome of its recent 5-4 FAA preemption decisions as valid stare decisis not open to reconsideration. Notably, the decision in *DirecTV, Inc. v. Imburgia* (2015) 136 S.Ct. 463, was authored by Justice Stephen Breyer and joined by Justice Elena Kagan. Although both had dissented from Justice Scalia's opinions in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, and *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304, they invoked stare decisis in reversing the California Court of Appeal in *Imburgia*.

The U.S. Supreme Court docket for the 2015 Term also included *Zaborowski v. MHN Government Services, Inc.* (9th Cir. 2014) 601 Fed.Appx. 461, cert. granted Oct. 1, 2015, No. 14-1458, 136 S.Ct. 27, cert. dism. Apr. 12, 2016, 136 S.Ct. 1539, a case which represented a frontal assault on the continuing viability of the now routinely cited and applied decision of the California Supreme Court in *Armendariz v. Foundation Health Pyschcare Services, Inc.* (2000) 24 Cal.4th 83. Only the happenstance of a settlement quite favorable to the employer after the certiorari petition had been granted removed that case from the U.S. Supreme Court docket.

Justice Scalia's unexpected death changed these settled expectations, and the prospect of a Democratic-controlled Senate created some theoretical possibilities for change to the existing legal landscape. But President Trump's unanticipated victory, combined with continuing Republican control of the Senate, have now brushed aside many of the hopes and dreams of the many critics of mandatory arbitration and class action waivers.[1]

One other "known unknown" is how the U.S. Supreme Court will resolve the emergent circuit split as to whether or not employee rights under Section 7 of the National Labor Relations Act (NLRA) include a right to engage in class action litigation in court and/or in arbitration that is not waivable as a matter of federal law, even in the face of the FAA. The last topic worthy of note is the practical impact of "delegation" clauses on the attractiveness of mandatory arbitration. Simply put, these provisions increase the risk to drafters of adhesion contracts—typically employers and retailers—since the key decisions, including whether or not a class will be allowed, are made by the arbitrator. The beneficial trade-off, from the point of view of the party imposing such terms, is that a quick exit from a traditional courtroom can be obtained with very little judicial input into the dispute.

II. U.S. Supreme Court Rulings, Past And Future

The FAA was passed in 1925 and signed by President Calvin Coolidge. While it was the subject of litigation over the decades, including repeated decisions by the U.S.

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[1] Recognizing that these issues appear routinely on the docket of many California judges, including my own docket, and recognizing that the exact terms of arbitration agreements and purported class action waivers and/or representative claim waivers come in a myriad of different formulations, none of the statements made in this educational article are intended to state a view on how I would rule in any given case. That necessarily depends on the arguments made, the factual circumstances under which any such agreement was formed, the exact nature of the legal question presented, and the state of the law when the question is decided.

"FUTURE OF CLASS ACTION WAIVERS"… continued from Page 6

Supreme Court between 1996 and 2008 striking down state statutes which purported to prohibit contracts mandating arbitration in various contexts, the legal community at large took special notice of the potential impact of FAA preemption when the Court issued its 5-4 opinion (by Justice Scalia) in 2011 in *AT&T Mobility LLC v. Concepcion*, striking down the California Supreme Court's ruling in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.[2]

The *Concepcion* ruling was notable because (a) state appellate court decisions adverse to enforcement of arbitration agreements were put at equal risk with state legislative enactments impeding enforcement of such agreements, and (b) Justice Scalia's opinion worked backwards from the basic premise that arbitration was inherently not a suitable forum for the large financial risks presented by class actions. A prior U.S. Supreme Court plurality opinion in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, had accepted the basic premise that an arbitrator would have the power to order that a case proceed in arbitration as a class action, and Justice Scalia had joined in Justice Breyer's plurality opinion so holding.

Faced with plaintiffs' arguments that individual arbitration defeated access to legal redress for many types of claims where the economics of class action litigation are needed to justify the front-end costs, the U.S. Supreme Court doubled down in another 5-4 decision in 2013 in *American Express Co. v. Italian Colors Restaurant*, which held that the enforceability of an arbitration clause containing a class action waiver turns on whether or not individual litigation of an individual business' federal antitrust claim was theoretically possible, not whether it made realistic economic sense. The U.S. Supreme Court also issued several summary reversals[3] from 2011 to the present in which state courts' refusal to enforce timely arbitration of claims consistent with adhesion contracts so providing was seen as an affront to FAA preemption.[4]

A. Recent Rulings

It was against this backdrop that the majority opinion a year ago in another California case was issued. A 6-3 majority[5] reversed the California Court of Appeal for its perceived failure to recognize the preemptive effect of the FAA in *DirecTV, Inc. v. Imburgia*. Justice Breyer made a clear statement that all lower courts were now duty-bound to follow *Concepcion*, *Italian Colors*, and the entirety of FAA preemption jurisprudence:

> No one denies that lower courts must follow this Court's holding in *Concepcion*. **The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation.** Lower court judges are certainly free to note their disagreement with a decision of this Court. But the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." [Citations.] **The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.** U.S. Const., Art. VI, cl. 2 ("[T]he Judges in every State shall be bound" by "the Laws of the United States").

(*Imburgia, supra*, 136 S.Ct. at p. 468, emphasis added.)

As noted previously, the California Supreme Court decision in *Armendariz v. Foundation Health Pyschcare Services, Inc.* appeared to be at risk of reversal after a certiorari petition was granted during the 2015 Term in *MHN Government Services, Inc. v. Zaborowski*. The dissent in the unpublished Ninth Circuit decision had laid out a road map for why *Armendariz* violated FAA preemption principles, particularly with its limits on how much "blue pencil" revision trial courts were permitted to save an arbitration agreement. The very fact that the U.S.

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[2] Since Associate Justice Clarence Thomas continues to hold to the view that the FAA does not apply to cases pending in state courts (see his recent dissent in *DirecTV, Inc. v. Imburgia, supra*, 136 S.Ct. at p. 471), the U.S. Supreme Court has almost always reached questions of FAA preemption of state law by granting certiorari in cases arising out of the federal courts.

[3] The U.S. Supreme Court routinely uses summary reversals to decide cases based only on the certiorari petition briefs and without further briefing or oral argument when it considers the lower court ruling to be so obviously in error that proceedings on the merits are unnecessary.

[4] *KPMG LLP v. Cocchi* (2011) 132 S.Ct. 23; *Marmet Health Care Center, Inc. v. Brown* (2012) 132 S.Ct. 1201; *Nitro-Lift Technologies, L.L.C. v. Howard* (2012) 133 S.Ct. 500.

[5] As noted above, Justice Thomas dissented because he uniquely holds that the FAA does not apply in state court.

"FUTURE OF CLASS ACTION WAIVERS"… continued from Page 7

Supreme Court had seen fit in *MHN* to review an opinion which was not citable precedent tended to demonstrate a very high likelihood that the high court would reverse the lower court decision, not affirm it. Counsel for the employer on inquiry from this author explained that the plaintiff's settlement demand had dropped to such an extent after certiorari was granted that the employer decided to settle the case in lieu of taking its chances with further litigation.

Simply put, as of the date of Justice Scalia's unexpected death, the Supreme Court had issued a fairly clear and robust set of decisions applying FAA preemption in the face of a multitude of state statutes and appellate court decisions which had tried to carve out viable exceptions to arbitration under the FAA's "savings clause."[6] That Court had also repeatedly held (e.g., in *Italian Colors* and *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665) that competing federal statutory priorities manifest in the Sherman Act and the Credit Repair Organizations Act were insufficient to overcome the policy preference in the FAA for enforcement of class action waivers in arbitration agreements.

B. Pending Cases

Even though the U.S. Supreme Court is now short a justice, it continues to have arbitration cases on its docket. One has been set for oral argument, and the previously noted circuit split regarding whether NLRA section 7 is an antidote to class action waivers in employment arbitration agreements is now before the court after it recently granted several pending certiorari petitions presenting that issue.

The pending case in which oral argument has been set is *Kindred Nursing Centers Limited Partnership v. Clark* (Ky. S.Ct. 2015) 478 S.W.2d 306, cert. granted Oct. 28, 2016, No. 16-32, 132 S.Ct. 368, a case involving the often thorny question of whether and how an arbitration agreement is formed. The specific issue is whether or not each of the two relatives who had written powers of attorney in place before they signed up their invalid relative for Kindred's nursing home care could thereby bind the deceased relative and his/her estate to a mandatory arbitration clause in the adhesion contract of admission for nursing home care. Contract formation disputes are now being presented routinely in such cases as opponents of class action waivers move away from the simpler categorical attacks relying on cases such as *Discover Bank* and *Gentry v. Superior Court* (2007) 42 Cal.4th 443, and instead turn to case-specific objections. The case comes directly from the Kentucky state court system, so it is reasonable to assume that Justice Thomas will again find the FAA inapplicable. Since it will likely be heard before a replacement for Justice Scalia is confirmed, the outcome of this case is far from clear.

Circuit splits present the classic situation in which a grant of certiorari seems preordained, and this has indeed come to pass in the cases presenting the NLRA section 7 issue. As noted previously, the issue presented is whether an employee's[7] right to engage in protected collective activity under the NLRA extends to the use of class action litigation procedures in the face of an arbitration agreement to the contrary.

The California Supreme Court itself confronted the issue when it decided *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348. Our Supreme Court ruled in line with various other courts which had rejected this argument. The National Labor Relations Board (NLRB) decided otherwise—holding that there was a viable section 7 unfair labor practice charge when an employee was denied use of the class action procedure to litigate disputes with employers—in *D.R. Horton, Inc.* (2012) 357 NLRB 2277, but the Fifth Circuit refused to enforce the decision (*D.R. Horton, Inc. v. NLRB* (5th Cir. 2013) 737 F.3d 344). The NLRB doubled down in *Murphy Oil USA, Inc.* (2014) 361 NLRB No. 72, using its opinion as a teaching guide to the Fifth Circuit on why it was wrong. This did not change the outcome, and the Fifth Circuit again denied enforcement. (*Murphy Oil USA, Inc. v. NLRB* (5th Cir. 2015) 808 F.3d 1013, cert. granted Jan. 13, 2017, No. 16-307.)

The same question has arisen in the context of motions and petitions to compel arbitration in cases such as *Iskanian* and a slew of similar published decisions in the federal district courts and courts of

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[6] The FAA's principal provision, 9 U.S.C. § 2, provides that a "written provision" in a contract providing for "settle[ment] by arbitration" of "a controversy . . . arising out of" that "contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The last clause in that section is generally referred to as the "savings clause."

[7] One must meet the NLRA statutory test of being an "employee" and not an "independent contractor" to obtain the benefit of this protection. This is a main point of factual controversy in cases arising out of the "gig economy" involving businesses such as Uber and Lyft.

[8] *See, e.g., Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050; *Sutherland v. Ernst & Young LLP* (2d Cir. 2013) 726 F.3d 290; *Chesapeake Energy Corp. v. NLRB* (5th Cir. 2016) 633 Fed.Appx. 613; *Citi Trends, Inc. v. NLRB* (5th Cir. Aug. 10, 2016, No. 15-60913) 2016 WL 4245458.

"FUTURE OF CLASS ACTION WAIVERS"... continued from Page 8

appeals. All such decisions aligned with the outcome in *Iskanian*[8] until the Seventh Circuit issued its decision on May 26, 2016 in *Lewis v. Epic Systems Corp.* (7th Cir. 2016) 823 F.3d 1147, cert. granted Jan. 13, 2017, No. 16-285. The Ninth Circuit ruled in accord with the Seventh Circuit more recently in *Morris v. Ernst & Young, LLP* (9th Cir. 2016) 834 F.3d 975, cert. granted Jan. 13, 2017, No. 16-300.[9] Given the existence of an undeniable circuit split on this issue, the U.S. Supreme Court recently granted certiorari in *Lewis*, *Morris*, and *Murphy Oil* to resolve the split.

As noted, the most recent U.S. Supreme Court rulings in this area have consistently upheld the FAA's pro-arbitration goals in the face of competing policy goals of other federal statutes. Whether the same outcome will result when the competing policy goals of the FAA and the NLRA must be balanced is presently unknowable.

III. California Supreme Court Rulings, Past And Future

The California Supreme Court has wrestled with the same issues as the U.S. Supreme Court but has started with a somewhat different jurisprudential viewpoint. It is undeniable that many of our Supreme Court's rulings have sought to protect employees and consumers from loss of access to the class action tool by invoking state-law exceptions premised on the FAA's "savings clause" for state-law legal principles of general applicability. However, those decisions have been repeatedly reversed by the U.S. Supreme Court as a matter of federal preemption, typically in a round-about fashion in which a federal court case applying California precedent is presented for merits review.

A. Recent Rulings

It took a while for the message to communicate, but by the time that our Supreme Court had issued its opinions in *Sanchez v. Valencia Holding Co.* (2015) 61 Cal.4th 899, and *Baltazar v. Forever 21* (2016) 62 Cal.4th 1237, it seemed fairly clear that class action waivers were withstanding the most obvious attacks lobbed in their direction by plaintiff/employee/consumer advocates. Traditionally viable attacks on the one-sidedness of adhesion contracts containing arbitration clauses obtained no traction in those two cases, suggesting that our Supreme Court was no longer interested in trying to thread the needle to produce some one-off, state-law ruling that might withstand FAA preemption attack. The California Supreme Court's recent decision in *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, did not involve the enforceability of an arbitration/class waiver clause as such, and will be discussed further below.

B. Pending Case

There is one arbitration case pending before the California Supreme Court which was recently argued and taken under submission. It involves the significant issue of whether or not a plaintiff seeking injunctive relief for the public benefit can, nevertheless, be forced to give up the judicial forum and take the claim to private, binding arbitration with no opportunity to pursue a class-wide remedy.

Many years before *Concepcion* was decided, our appellate courts had held that plaintiffs bringing claims seeking public injunctive relief—commonly plaintiffs suing under the Unfair Competition Law—could not be forced to abandon the judicial forum for arbitration. This principle was considered well-settled and was commonly referred to as the *Broughton-Cruz*[10] doctrine. The tension between this categorical rule and U.S. Supreme Court decisions which soundly rejected attempts to create categorical limitations on the effectiveness of arbitration agreements—whether such state-law limits were the fruits of legislation or of court rulings—could not escape notice forever. The case which poses this question is *McGill v. Citibank, N.A.* (2014) 232 Cal.App.4th 753, review granted Apr. 1, 2015, S224086. The Fourth District Court of Appeal had written *Broughton-Cruz*' obituary, but the state Supreme Court granted review so the death notice may be premature. Oral argument was heard on December 7, 2016, so a decision is due shortly, perhaps before the publication date of this article.

IV. Delegation Clauses

There is an inherent tension in the "who decides" issue—*i.e.*, whether the arbitrator or the court decides if a dispute is arbitrable—when a dispute subject to a binding

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[9] Notably, litigant Ernst & Young has received inconsistent rulings from the Second and Ninth Circuits regarding the enforceability of its standard form employment arbitration agreement.

[10] *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303.

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arbitration agreement arrives on a court docket. The going-in proposition is that everything is for the judge until such time as the court holds that there is an enforceable arbitration agreement. Arbitration clauses are almost always found in adhesion contracts drafted by the stronger party and not the fruit of any true negotiation, so the drafter can contemplate in advance whether or not some judicial "quality control" over the front-end of the process is desired. One way to avoid such judicial gatekeeping is to include language delegating the arbitrability determination—potentially including the class arbitrability determination—to the arbitrator. The U.S. Supreme Court wrestled with enforcement of such a delegation clause assigning the class arbitrability issue to the arbitrator in 2003 in *Green Tree Financial Corp. v. Bazzle*, and the Court could not even produce a majority opinion. More recently, in *Oxford Health Plans LLC v. Sutter* (2013) 133 S.Ct. 2064, the Court expressly noted that the question was unresolved and not before it because the parties had previously agreed to have the arbitrator decide the issue.

The "who decides" question comes in several flavors. Flavor One: If the arbitration clause is silent regarding the permissibility of class arbitration, does the court or the arbitrator decide the issue? Flavor Two: Is the class arbitrability issue such an important threshold question that it should be presumptively reserved for judicial determination? There is a split in federal court of appeals cases on the "who decides" class arbitrability question.[11] The California Supreme Court decided the question in *Sandquist v. Lebo Automotive* in favor of delegating the issue to the arbitrator where the contract is silent on the matter. This arguably creates more risk that an arbitrator may approve class arbitration, but drafters of arbitration clauses can, of course, draft around this.

The recent Ninth Circuit opinion in *Mohamed v. Uber Technologies, Inc.* (9th Cir. 2016) 836 F.3d 1102 provides a graphic example of how potent a broad delegation can be. In that case, District Judge Edward Chen had held that Uber's arbitration agreement with its non-employee drivers was unenforceable, and thereafter he had entertained extended argument as to whether Uber's attempt at a global class action settlement with the same drivers should be approved. That settlement agreement appeared to be on the ropes when the Ninth Circuit reversed Judge Chen's ruling refusing to enforce the arbitration agreement. The Ninth Circuit did not hold that the agreement was enforceable; it simply gave force and effect to the broad delegation clause in the arbitration agreement consigning that question (and everything else of consequence) to an arbitrator for decision. This would appear to moot the debate over the settlement agreement and leave Uber in a favorable position to argue that the arbitration agreement was both enforceable and also a matter to be litigated on an individual claim basis, which is anathema to the plaintiffs' class counsel, who would have to litigate the underlying merits many times over in separate proceedings.

V. Conclusion

Arbitration agreements have become so important to case valuation that they deserve independent analysis separate and apart from the legal and factual merits of the underlying dispute. While it appeared that an electoral victory for candidate Hillary Clinton would cause a re-evaluation of some of the key rulings written by the late Justice Scalia enforcing adhesion arbitration agreements, this appears to be much less likely under a Trump presidency with Republican control of Congress. The general trend of enforcement of such agreements appears likely to continue for the foreseeable future. Certain issues, like the delegation of the class arbitrability question to an arbitrator, may create cross-currents which make enforcement of existing form agreements less attractive to the party that imposed such terms. Counsel need to pay close attention to the evolution of case law, statutes and regulations in this area since the practical impact is so great.

Hon. William F. Highberger *is a Superior Court Judge sitting in the Complex Civil Division of the Los Angeles Superior Court.*

[11] Compare, *e.g., Dell Webb Communities, Inc. v. Carlson* (4th Cir. 2016) 817 F.3d 867 (court decides class arbitrability issue where arbitration clause is silent); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC* (3d Cir. 2016) 809 F.3d 746 (same); *Opalinski v. Robert Half International, Inc.* (3d Cir. 2014) 761 F.3d 326 (same); *Reed Elsevier, Inc. ex rel. LexisNexis Division v. Crockett* (6th Cir. 2013) 734 F.3d 594 (same), with *Robinson v. J&K Administrative Management Services, Inc.* (5th Cir. 2016) 817 F.3d 193 (arbitrator decides class arbitrability issue where arbitration clause is silent).

TAKING CARE OF (UNFINISHED) BUSINESS


Michael McNamara


Brian Adesman

Breakups are tough. Law firm breakups are no exception. When a partnership dissolves, law firm partners are free to join new firms during the winding-up process; however, when a partner brings unfinished client business to a new firm, the partner may owe his or her former firm a portion of any fees generated from this unfinished business. This is termed the "unfinished business" rule. In California, the "unfinished business" rule has been sparsely litigated, mainly in the context of contingency fee cases.[1] On September 14, 2016, the California Supreme Court granted a request from the Ninth Circuit Court of Appeals to determine whether California's "unfinished business" rule also applies to non-contingency fee matters.

To understand the significance of the California Supreme Court's impending decision, one must travel the winding procedural road that led us to this point.

I. Background

A. Jewel v. Boxer: The Genesis of the "Unfinished Business" Rule

The "unfinished business" rule was first applied to law firms in *Jewel v. Boxer*.[2] In *Jewel*, a four-partner law firm voluntarily dissolved into two separate two-partner law firms. Predictably, each partner took unfinished client business to his or her new firm. After dissolution, two partners filed a complaint against their former partners alleging a property interest in any fees generated by unfinished business pending at the time of dissolution. The *Jewel* court held, "in the absence of a partnership agreement, the Uniform Partnership Act requires that attorneys' fees received on cases in progress upon dissolution of a law partnership are to be shared by the former partners according to their right to fees in the former partnership, regardless of which former partner provides legal services in the case after the dissolution."[3] However, the *Jewel* court acknowledged that partnerships can (and should) stipulate how fees are to be allocated in the event of dissolution.[4]

B. Jewel's Fallout: The Brobeck Debacle

After *Jewel*, many law firms included "*Jewel* waivers" in their partnership agreements, stipulating how fees earned from ongoing business would be allocated in the event of dissolution. While *Jewel* waivers are readily enforceable when a law firm dissolves voluntarily, unique issues arise when a law firm becomes insolvent and dissolves prior to a bankruptcy.

In the case of *In re Brobeck, Phleger & Harrison LLP*, shortly before the firm dissolved, the partners amended the firm's partnership agreement to include a *Jewel* waiver.[5] When many of the partners joined new firms, the Brobeck firm was forced into involuntary bankruptcy. During the bankruptcy proceedings, creditors of the defunct Brobeck firm sought profits earned from unfinished business taken by former Brobeck partners to new law firms.

The bankruptcy court determined that Brobeck had a property interest in the partners' profits.[6] Further, the court determined that Brobeck's *Jewel* waiver transferred Brobeck's interest to the individual partners. However, the court set aside the *Jewel* waiver as a constructive fraudulent transfer because the *Jewel* waiver was added within a year of Brobeck declaring bankruptcy and did

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[1] Only one published California case has applied the "unfinished business" rule to matters handled on an hourly basis. *See Rothman v. Dolin*, 20 Cal. App. 4th 755, 757–59 (1993).

[2] 156 Cal. App. 3d 171 (1984).

[3] *Id*. at 174.

[4] *Id*. at 179–80 ("[P]artners are free to include in a written partnership agreement provisions for completion of unfinished business that ensure a degree of exactness and certainty unattainable by rules of general application.").

[5] *Greenspan v. Orrick, Herrington & Sutcliffe LLP* (*In re Brobeck, Phleger & Harrison LLP*), 408 B.R. 318, 326-28 (Bankr. N.D. Cal. 2009).

[6] In a subsequent case involving questions of New York law certified by the Second Circuit, the New York Court of Appeals held that "no law firm has a property interest in future hourly legal fees because they are too contingent in nature and speculative to create a present or future property interest." *Geron v. Seyfarth Shaw LLP* (*In re Thelen LLP) (Thelen)*, 24 N.Y.3d 16, 28 (2014) (internal quotation marks omitted).

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not transfer anything of value to the Brobeck partnership, essentially leaving Brobeck's creditors empty-handed. Thus, Brobeck's creditors were entitled to "claw back" the departing partners' profits earned from "unfinished business" completed at their new firms.

C. Heller: Turning the Rule Upside-Down

The 2009 *Brobeck* decision came at an unfortunate time for many law firms. The Great Recession of 2008 took no prisoners—law firms included. In 2008, when creditors of Heller Ehrman LLP declared Heller in default, the partners (actually shareholders of professional corporations which comprised the partnership) approved a dissolution plan which included a *Jewel* waiver.[7] Judge Dennis Montali—the same judge who presided over the Brobeck bankruptcy—presided over Heller's bankruptcy proceedings and set aside Heller's *Jewel* waiver as a constructive fraudulent transfer based in large part on his prior ruling in *Brobeck*.

When *Heller* was sent to the district court for a factual determination of damages, the district court reversed the bankruptcy court's ruling, holding that: (1) hourly fee matters pending when a law firm dissolves are not the property of that firm; and (2) Heller's bankruptcy trustee had no claim against third-party law firms that hired former Heller lawyers, representing former Heller clients, in hourly fee matters.[8] The district court made this determination by distinguishing and rejecting the applicability of *Jewel v. Boxer*.[9]

D. Heller: Appealed to the Ninth Circuit

The district court's ruling was soon appealed to the Ninth Circuit. Six weeks after the Ninth Circuit heard oral arguments in *Heller*, the court certified the following question to the California Supreme Court: "[u]nder California law, does a dissolved law firm have a property interest in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis?"[10]

II. Applying Jewel v. Boxer to Hourly Fees Is Poor Policy

The California Supreme Court's ruling on this issue will have significant policy implications for law firms, clients, and creditors. While granting creditors a property interest in unfinished contingency fee business has some policy rationale, the "unfinished business" rule, as it applies to hourly fees, would disadvantage clients, partners, and law firms.[11]

Most importantly, the "unfinished business" rule, if it applied to hourly fee matters, would demean the nature of the attorney-client relationship by treating the relationship like a commodity, when in fact the relationship is fiduciary, with attendant ethical and professional duties. Indeed, the rule would violate one of the most basic principles of legal practice, which recognizes that clients have an absolute right to terminate the lawyer-client relationship[12] and to choose who will be their attorney. If a client follows a departing attorney to a new firm, allowing a dissolved law firm to collect that client's hourly fees interferes with the client's right to choose counsel by forcing the client to choose between keeping a lawyer with no profit incentive to provide legal services and finding new legal representation altogether.

The rule also disadvantages partners leaving dissolved law firms because subsequent law firms would have little to no incentive to hire partners if those partners cannot generate profits for the successor firm.

Further, the "unfinished business" rule, as it applies to hourly fee matters, would significantly destabilize the already chaotic law firm environment. The rule

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[7] The firm agreed to waive "any rights and claims under the doctrine of [*Jewel*] to seek payment of legal fees generated after the departure date of any lawyer or group of lawyers with respect to noncontingency/non-success fee matters only." *Heller Ehrman LLP v. Arnold & Porter LLP (In re Heller Ehrman LLP)*, ADV No. 10-3203DM, 2011 WL 1539796, at *4 (Bankr. N.D. Cal. Apr. 22, 2011).

[8] *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*, 527 B.R. 24, 26 (N.D. Cal. 2014).

[9] *Id*. ("While this Court distinguishes *Jewel v. Boxer* on its facts, it is also of the opinion that the California Supreme Court would likely hold that hourly fee matters are not partnership property and therefore are not 'unfinished business' subject to any duty to account.").

[10] *Heller Ehrman LLP v. Davis Wright Tremaine LLP* (*In re Heller Ehrman LLP*), 830 F.3d 964, 966 (9th Cir. 2016).

[11] The American Bar Association, the Bar Association of San Francisco, the Los Angeles County Bar Association, and Morrison & Foerster LLP have all filed amicus briefs with the Ninth Circuit, asking that court to affirm the district court's ruling.

[12] *See* Model Rules of Prof'l Conduct r. 1.16(a)(3) (Am. Bar Ass'n 2002); *Fracasse v. Brent*, 6 Cal. 3d 784, 790 (1972).

"DEFEND TRADE SECRETS ACT"…continued from Page 1

This often results in claims for misappropriation of trade secrets, unfair competition, and breach of fiduciary duty. Generally, a former employee's use of his former employer's confidential information to compete with his former employer is regarded as unfair competition.[4] However, when the allegations of unfair competition are based on the same nucleus of facts as a CUTSA claim, the unfair competition claim is preempted.[5] Thus, a plaintiff bringing a trade secrets claim under California law, as well as other business torts based on the same nucleus of facts, risks dismissal of the related tort claims based on preemption.

Arguably, the DTSA changed the preemption landscape. The DTSA makes clear that it does not "preempt or displace any other remedies, whether civil or criminal . . . for the misappropriation of a trade secret."[6] This presumably means that a plaintiff bringing a federal trade secret claim can join an unfair competition claim under California Business and Professions Code section 17200 based on the underlying misappropriation without fear that the unfair competition claim or other business tort claims may be preempted. Since plaintiffs often fail to persuade courts that the misappropriated information is technically a trade secret, the ability to join other state-law theories of liability premised on theft of confidential information that may not rise to the level of a trade secret, is a powerful tool that may not be available in state court.

Thus, the DTSA would permit a plaintiff to bring both a federal trade secret misappropriation claim and a claim under the CUTSA. But joining the CUTSA claim could very well result in preemption of other state-law business tort claims, including an unfair competition claim. For this reason, a plaintiff should carefully weigh the benefits and risks of adding a CUTSA claim to a DTSA lawsuit.

There are other reasons that a plaintiff filing a DTSA claim in federal court may choose to leave out a trade secrets claim under California law. For example, California trade secret misappropriation claims are subject to California Code of Civil Procedure section 2019.210, which requires a plaintiff to identify the trade secret with reasonable particularity before discovery can commence. In practice, section 2019.210 is a tool defendants often use to delay responding to discovery and to increase costs by forcing plaintiffs to file contentious motions to compel. The DTSA, however, does not have a similar requirement, and plaintiffs may begin discovery consistent with Rule 26 of the Federal Rules of Civil Procedure. Although federal procedural rules apply in federal court, several federal courts have held that section 2019.210 of the California Code of Civil Procedure applies to a CUTSA claim brought in federal court.[7] This is another reason that a plaintiff may forego adding a CUTSA claim to its DTSA lawsuit.

Only time will tell how these issues are adjudicated by the federal courts, which may offer some degree of predictability regarding these issues. In the meantime, a plaintiff considering where to file trade secret misappropriation and related business tort claims should carefully consider the benefits and risks of adding a claim for violation of the CUTSA to a DTSA action in federal court.

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[4] *Allied N. Am. Ins. Brokerage Corp. v. Woodruff-Sawyer*, 2005 U.S. Dist. LEXIS 47388 at *37 (N.D. Cal. Feb. 22, 2005); *Courtesy Temp. Serv. v. Camacho*, 222 Cal. App. 3d 1278, 1292 (1990).

[5] *K.C. Multimedia*, 171 Cal. App. 4th at 958-59; *Farmers*, 2013 U.S. Dist. LEXIS 104606, at *28.

[6] 18 U.S.C. § 1838 (2016).

[7] *Compare SocialApps, LLC v. Zynga, Inc.*, 2012 U.S. Dist. LEXIS 82767, at *4-8 (N.D. Cal. June 14, 2012) (holding that section 2019.210 does apply), *Jobscience, Inc. v. CV Partners, Inc.*, 2014 U.S. Dist. LEXIS 26371, at *13-16 (N.D. Cal. Feb. 28, 2014) (same), and *Lilith Games (Shanghai) Co. Ltd. v. uCool, Inc.*, 2015 U.S. Dist. LEXIS 89365, at *5-8 (N.D. Cal. July 9, 2015) (same), with *Funcat Leisure Craft, Inc. v. Johnson Outdoors, Inc.,* 2007 U.S. Dist. LEXIS 8870, at *7-10 (E.D. Cal. Jan. 29, 2007) (holding that section 2019.210 does not apply), and *Hilderman v. Enea Teksci, Inc.*, 2010 U.S. Dist. LEXIS 1527, at *5-10 (S.D. Cal. Jan. 8, 2010) (same).

YLD UPDATE

Rachel Feldman

Ben Williams

ABTL's Young Lawyers Division is in the midst of another exciting and successful season. On September 28, 2016, the YLD hosted its annual Advisory Committee meeting, where the team discussed a number of ideas to capitalize on the group's energetic momentum. In addition to planning the usual (and popular) judicial mixers, brown-bag lunches, social events, and community service projects, YLD also formed an advisory subcommittee to explore a first-of-its-kind partnering relationship with the LA County Bar Association's Trial Advocacy Project (TAP). The details of the relationship are still being crystalized, but in general terms, LACBA and YLD are currently evaluating ways to bring customized, in-depth trial advocacy training—and actual trial experience—to YLD members who wish to participate. Rachel Feldman, co-chair of the YLD, said, "We're thrilled to be working with LACBA to explore ways to bring the TAP programming to our YLD members. We hear time and again just how highly young lawyers prize trial experience and advocacy training, and I'm excited by the opportunities the TAP program can offer our members." We expect to have more details, and a formal proposal for the ABTL Board, in the coming weeks.

The YLD also hosted its first-annual community impact event on Saturday, December 10, 2016. The well-attended effort, which was planned and coordinated by YLD members Marie Maurice and Jonathan Bakhsheshian, was a resounding success: Scores of YLD members, their families, and friends rolled up their sleeves to help fight hunger by volunteering at the Los Angeles Regional Food Bank. Volunteers helped sort, inspect, and package food items, crate the packages, and load them onto pallets for delivery to LA-area families in need. With determined spirits, servant hearts, and a little elbow grease, YLD members and other volunteers helped assemble several thousand food packages over the span of just a few hours. "It was an inspiring day. Coming together with other YLD members and their guests for such an important cause was truly rewarding—and a lot of fun, too," said YLD co-chair Ben Williams. "It was a fantastic team-building exercise, but more importantly than that, it was a great way to give back to the community."

The YLD has a great slate of events planned for the rest of the season, including an upcoming judicial brown-bag event hosted by the Hon. André Birotte, Jr. of the U.S. District Court for the Central District of California. "Brown bags are central to the YLD program and are always popular events," said Jeff Atteberry, YLD co-chair. "They provide an excellent opportunity for young lawyers to have meaningful conversations with members of the judiciary." Other YLD events, including the annual judicial mixer, are in the works and will be announced to YLD members as the details are finalized.

For any questions about the YLD, or if you have any ideas about events or programming you'd like to see from YLD, please contact:

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incentivizes partners with business to abandon law firms at the first sign of financial uncertainty because, if a partner leaves his or her firm before the firm becomes insolvent, the partner's hourly fees are not subject to the "unfinished business" rule.[13] Thus, applying the "unfinished business" rule to hourly fee matters may further erode the already fragile partnership fabric by causing partners with business to abandon ship, rather than to stay the course, during tough financial times.

It will be important to see if the California Supreme Court joins New York[14] in holding that the "unfinished business" rule does not apply to hourly fee matters or whether the Court will treat hourly fee matters like property, transferable without consideration of the client's best interests.

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[13] *Heller Ehrman LLP v. Jones Day* (*In re Heller Ehrman LLP*), ADV No. 10-3221DM, 2013 WL 951706, at *4 (Bankr. N.D. Cal. Mar. 11, 2013) ("[Partners] who left Heller prior to the dissolution, in the absence of a breach of duty, would not have to account for unfinished business taken to another firm.").

[14] *Thelen*, 24 N.Y.3d at 28.

The YLD's Community Service Event at the Los Angeles Regional Food Bank.

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