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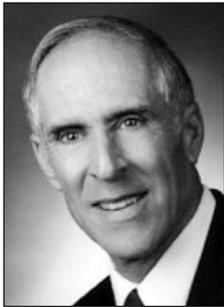
REPORT

LOS ANGELES

FALL 2015 / WINTER 2016

VOLUME XXXIV, NO. 4

PARTY-APPOINTED ARBITRATORS



Hon. Richard Mosk



Katherine McNutt

A tripartite arbitration panel is often composed of an arbitrator appointed by each party and a third neutral arbitrator. The neutral arbitrator typically is selected by the two party-appointed arbitrators, by the institution administering the arbitration, or in another manner specified by agreement of the parties. Richard Chernick recently discussed in this publication strategies for selecting party arbitrators.¹ This article will focus on the differing perceptions of the efficacy of party-appointed arbitrators.

One might wonder why have a party-appointed arbitrator when each party is represented by counsel? There would seem to be no need for an additional and expensive advocate on the panel. Moreover, it is said, even in international arbitrations, that the party-appointed

Continued on Page 7...

NINTH CIRCUIT POISED TO RULE ON SEVERAL ISSUES IN CONSUMER CLASS ACTION FALSE ADVERTISING CASES



Dale Giali



Rebecca Johns

Over the last six years, consumers have filed more than a thousand class actions against the food industry challenging labels as false or deceptive under state law. All manner of labeling statements have been challenged, from “all natural” to “0 grams trans fat,” from “healthy” to “no sugar added.”

California’s federal courts have been ‘ground zero’ for these cases, with the lion’s share filed in the Northern District, which, because of the volume of cases, has earned the moniker the “Food Court.” Six years into this wave of litigation, many important issues, arising in hundreds of cases, have reached the Ninth Circuit in several appeals that are currently pending, including issues relating to pleading attacks, summary judgment and class certification. Below we discuss seven such pending “food” appeals, which we

expect to be decided in the next three to eighteen months and to resolve many of these important issues—at least in the Ninth Circuit.¹

A. Motion to Dismiss Decisions

Kane v. Chobani, LLC (No. 14-15670, filed 3/28/2014): Plaintiffs allege, as to themselves and a nationwide consumer class, that defendant falsely names an ingredient in its Greek Yogurt products as “evaporated cane juice” and falsely labels its products as made from “only natural ingredients.” The district court found plaintiffs’ allegations as to themselves did not set forth plausible allegations of deception and, therefore, the named plaintiffs did not have standing to bring the case. On appeal, plaintiffs argue that the district court erred for

Continued on Page 6...

— INSIDE —

Ninth Circuit Poised to Rule on Several Issues in Consumer Class Action False Advertising Cases
by Dale Giali and Rebecca Johnsp. 1

Party-Appointed Arbitrators
by Hon. Richard Mosk and Katherine McNutt.....p. 1

President’s Messagep. 2

The Insight Interview.....p. 4

ABTL Young Lawyers Division Update
by Aaron Bloom, Rachel Feldman and Ben Williamsp. 8

The United States Supreme Court Addresses New Challenges to Class Actions and Arbitration
by Jessica M. Di Palma and David W. Moresheadp. 10

The Wages of the Sin of Hiding Evidence—A Cautionary Tale
by Kevin Boyle and Rahul Ravipudip. 11

California Supreme Court to Decide Borrowers’ Standing to Challenge Mortgage Loan Assignments
by Zareh A. Jalrossianp. 13

PRESIDENT'S REPORT



Bryan A. Merryman

The State of the ABTL

January is often the time of year when we reflect on the past year and consider our goals for the coming year. One example is the President's State of the Union speech to Congress. Here is the State of the ABTL's Los Angeles Chapter.

We are thriving! Our programming features leading jurists and attorneys talking about the issues of the day in a collegial forum or demonstrating the latest courtroom techniques; the Annual Seminar continues to be a highlight of the year; membership is at record levels; and we are finding new ways each year to contribute more to the business litigation legal community.

The ABTL's mission is to promote a dialogue between the California bench and bar on business litigation issues. How we accomplish that important mission takes many different forms. We are best known for our legal education programming. Most of our programs attempt to encourage discourse between the bench and the bar. For example, in December 2015, we hosted three of California's Supreme Court justices. Justice Carol Corrigan led a conversation with California's two newest Supreme Court justices, Justice Mariano-Florentino Cuéllar and Justice Leandra Kruger. In January 2016, Judge Philip Gutierrez moderated a lunch program featuring Chief Judge George King and Kiry Gray, the Clerk of the U.S. District Court for the Central District of California, as well as Presiding Judge Carolyn Kuhl and Sherri Carter, the Clerk of the L.A. Superior Court, discussing helpful tips and lessons for all practitioners. On February 9, 2016, Judge Suzanne Segal will moderate a discussion with four of our most recently appointed magistrate judges in the Central District – Judge Alexander MacKinnon, Judge Douglas McCormick, Judge Rozella Olivar, and Judge Karen Stevenson. The magistrate judges appointed in the Central District over the last couple of years are an extremely impressive group, and I am sure this program will be of great interest to our members. Attend the program and ask them a question.

In October, we can look forward to the Annual Seminar. This year, the ABTL will return to Maui. The conference will be at The Ritz Carlton, Kapalua, a new hotel for the ABTL. Make plans to

Continued on Page 3...

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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PRESIDENT'S MESSAGE ...continued from Page 2

spend a long weekend in Hawaii in October at a spectacular location and learn something valuable from the great programming featuring our leading practitioners and judges—when you are not on the golf course or enjoying a Mai Tai by the pool.

In addition to programming, this past year, as part of the ABTL's efforts to support the state's judiciary, two of our board members served on the Los Angeles Superior Court courts committee, and we worked with the Los Angeles County Bar Association and the Open Courts Coalition to support state court funding efforts. We also volunteered for mandatory settlement programs and assisted the Informed Voter Project supported by the National Association of Women Judges. In 2016, the ABTL will continue all of these efforts and look for new ways to communicate with and support our judiciary, especially the state courts that continue to serve us under severe budget constraints.

The ABTL also awards scholarships to a law student at each of the five local law schools. We will present the 2016 recipients with their scholarships at our February dinner program. In December, we raised a record amount of money for a local elementary school and non-profit that supports local students from lower income families. Thank you to Mary Haas, our board member who led this effort, and to our many ABTL members who contributed. Your generosity provided many of these children with the only gift they received during the holidays.

The Los Angeles chapter's membership numbers are at an all-time high. We have exceeded 1,500 members in recent years, demonstrating the organization's importance in the local legal community and the value of membership. The county's leading business litigation firms actively participate in the ABTL. We are proud that those firms are practicing at the highest levels on both the plaintiff and the defense side of the bar. We are honored to have many of the leaders of the local federal and state courts serving on our board and the attendance of many other judges at our programs, which allows for a true dialogue and communication between the bench and the bar.

In recent years, we have started making additional information available to our members on our website (www.abtl.org) and established a LinkedIn group page for members. We make available old ABTL programs for MCLE credit, published ABTL Reports, and information regarding upcoming programs and the Annual Seminar. This year, more real-time information is coming for our members on what is happening in our local courts, our latest programs, and increased information from other chapters that may be of interest.

We are even on Wikipedia now. This was a pet project of our past president, Dave Battaglia, and he succeeded in establishing an ABTL Wikipedia page. This year, we are going to expand the page for better branding and exposure. A client once said to me that if you are not on Wikipedia, you are not anyone. Well, I am still not on Wikipedia, but the ABTL is!

If you are a business trial lawyer and are not a member, I encourage you to join the ABTL and take advantage of what we offer – the best business litigation programming, the Annual Seminar, the ABTL Report, access to members-only information on the website and LinkedIn, and an easy way to meet the other business trial lawyers in LA and California. Join and actively participate in the dialogue between the bench and the bar.

Bryan A. Merryman

White & Case LLP

ABTL President, 2015-2016

THE INSIGHT INTERVIEW



Christopher Reynolds

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

This installment features Christopher Reynolds, Managing Officer, General Counsel and Chief Legal Officer for Toyota Motor Corporation. Mr. Reynolds was interviewed by Steven Feldman, a senior associate with Hueston Hennigan LLP in Los Angeles, CA.



Steven Feldman

When you were a student at Harvard Law School, what kind of career did you envision?

I came into law school thinking I would get a degree and then become an urban real estate developer who worked on rebuilding my hometown of Detroit. But then I took a federal litigation and trial practice course, which – along with some summer work experiences – changed my orientation.

After law school, you clerked for a federal appellate judge and then went to work as an associate at Hughes Hubbard in New York City. Tell me about your experience there.

After starting at the firm in 1987 on “Black Monday,” which you may recall was one of the largest one-day stock crashes in Wall Street history, I had a great experience, focusing on antitrust, product liability and class action defense work.

I was lucky that I got into court quite a bit as a junior associate. One of my first clients was the national airline of the Dominican Republic, and my work for the airline involved regularly going to Bronx civil and small claims courts to litigate claims brought against the airline for things like lost cargo-loads of furniture.

After spending a few years as an associate, you became an Assistant United States Attorney in the Southern District of New York. How did you decide to make that move?

My father, who was a retired New York City police officer, knew a former AUSA who told me that to advance in my career, I needed to leave the firm, take a financial hit, and go learn how to trust my own judgment and try my own cases at the U.S. Attorney’s Office. He said that if I prepared my application, he would recommend me. I ended up serving as an AUSA

for five years, handling a large number of trials and investigations.

Are there particular lessons you learned from being a prosecutor that you can share?

First, you have to trust your own judgment before you rely on anyone else’s. You need to trust you have enough skills to make important decisions, even if that decision is “I need someone else to help me make this decision.” Second, nothing beats face-to-face communication for talking over tough issues. And third, if you are confident enough in your own judgment, it is very difficult to get intimidated. There are many situations that occur, particularly in trial practice, where people purposely try to intimidate you, and you need to develop a level of resilience in response to adversity and crisis.

Given your preference for face-to-face communication, do you prefer that your outside counsel, including junior lawyers, avoid sending you emails?

For young lawyers who are trying to communicate with me, I would say, if you cannot have a face-to-face discussion, then do a phone call. It can simply be, “Hey, I know that you’ve asked me about this issue, here are my initial thoughts. I am going to give you more detail in an email, but I don’t want you to be surprised and I want to make sure I’m covering what you want me to cover.” In the context of that conversation, the outside lawyer will always learn something and I will feel that he or she is actually communicating with me rather than coming down from on high with tablets in hand. An email tends to have a distancing effect.

Continued on Page 5...

The Insight Interview with Chris Reynolds ...continued from Page 4

I think if you look at any successful lawyer, he or she will tell you that a key part of his or her success is the ability personally to relate to the client or others with whom the attorney is working.

When you left the U.S. Attorney's Office, you joined Morgan Lewis in New York as a labor and employment partner. Based on your experience as a law firm partner, what are some things you recommend associates do to stand out?

Express your interest in the work – by, for example, raising your hand to step forward on projects or by asking if there is a pleading or brief on which you can work. While it's easy to be a bit cynical about big firm work, the people who are successful partners are successful because they actually like what they do. Associates who demonstrate that they share this enthusiasm are folks with whom partners want to work.

What led you to leave Morgan Lewis in 2007 and join Toyota as deputy general counsel?

As an initial matter, Toyota was a client of mine, and I had loved working with the company. But I also looked ahead to what I thought would be my career as a law firm partner focused on labor and employment litigation, and thought going in-house at a company like Toyota would allow me to work on a wider variety of legal issues.

Still, I had tremendous hesitation about taking the position. I knew my compensation would be lower, that I had to move to Los Angeles, and it was not clear to me how a lawyer's performance would be evaluated at a company because in-house lawyers do not have revenue-generating roles.

Is there any "right time" for someone to leave a firm to go in-house?

You should leave when you decide being at a firm is not what you want to do any more. There's no reason – other than financial – why anybody should prolong a stay doing something they don't like, particularly at a law firm where the pressures increase as you become more senior.

Also, I don't see much of a link between how senior

you have to be when you leave a law firm, and whether you ultimately attain a senior in-house position. When you look at folks who are general counsels, many went in-house as mid-level associates and progressed through the company for 5-10 years before becoming general counsel. Most often, you get to become general counsel because you are viewed as comfortable and familiar with the business, as well as able to give the right kind of advice at the right time.

What do you know now, having served as a GC, that you wish you'd known while at a law firm?

It would have been helpful to understand how precious a client's time is. I always knew my time as outside counsel was precious – because I was billing it by the tenths of the hour – but I didn't quite realize the same thing about in-house attorneys. In many ways, the in-house counsel job is as tough, or tougher, than working as outside counsel, so you have to be ruthlessly efficient with their time.

The other thing I wish I knew is that clients are focused on solutions. We don't need long explanations of the underlying law. We expect you to work through that, and to keep our business objectives in mind while coming up with solutions.

Are there things you would tell young lawyers at law firms NOT to do?

Never think that emails and marketing strategies are substitutes for personal contact and relationships. Build relationships. You don't do that by sending a periodic email or putting someone on a marketing list. What you really want is the kind of relationship where you can pick up the phone and call someone in-house and say, "Hey, I know this issue is of interest to you because you and I have talked about this before, and if you have five minutes, I can quickly run it down for you."

Steven Feldman is a senior associate with Hueston Hennigan LLP in Los Angeles.

“CLASS ACTION FALSE ADVERTISING”...continued from Page 1

several reasons. First, plaintiffs argued that the district court was required to take the factual allegations in the complaint as true, but that the district court instead drew unwarranted inferences “to justify disbelief in Plaintiffs’ allegations that they were misled.” Plaintiffs argue that they adequately pleaded allegations of reliance and that reliance allegations are not subject to Federal Rule of Civil Procedure 9’s particularity requirement, and that the court erred in ruling otherwise. Plaintiffs also argue that as to their natural claims, the district court erred by ruling that plaintiffs failed to plead sufficient details of the manufacturing process that plaintiffs alleged were incompatible with a product labeled as “natural” and, in any event, that plaintiffs should have been provided an opportunity to add those details.²

Bishop v. 7-Eleven, Inc. (No. 14-15986, filed 5/19/2014): Plaintiff, on behalf of a nationwide class, challenges the use of the terms “0g trans fat” and “no cholesterol” on snack products. Plaintiff does not allege that those statements are false, but that they are not accompanied by a disclosure about the fat content of the product, which plaintiff alleges is required under the federal Food, Drug and Cosmetic Act (FDCA). The district court ruled that “Plaintiff has not pled an injury-in-fact and therefore has no standing to bring a claim,” and that the “lack of disclosure, on its own, is not enough to confer standing on Plaintiff to bring a claim.” On appeal, plaintiff argues that it was error for the district court to rule on a pleading attack that a plaintiff does not state a failure-to-disclose claim. Plaintiff argues that the district court was required to accept plaintiff’s reliance allegations as true and that Rule 9’s particularity requirements do not apply to reliance allegations.

B. Motion for Summary Judgment and Class Certification Decisions

Bruton v. Gerber Products Company (No. 15-15174, filed 1/30/2015): The district court denied certification of a nationwide consumer class and granted summary judgment to defendant in this case involving claims that numerous infant food products sold by Gerber contained improper “no sugar added” and nutrient content labeling (“good source,” etc.). In her opening brief to the Ninth Circuit, plaintiff focuses on the question of whether her claim under the “unlawful” prong of the UCL requires evidence that the challenged labeling statement was deceptive, or may (as she argues) proceed on a strict liability theory based on the FDCA’s labeling requirements. Her brief also argues that ascertainability is not a requirement for class certification (it is not mentioned in Rule 23) and that all that is necessary to meet Federal Rule of Civil Procedure 23 is a cogent definition of the class.

Major v. Ocean Spray Cranberries, Inc. (No. 15-15880, filed 4/30/2015): The district court granted summary judgment to defendant and denied plaintiff’s motion for class certification as moot in this case challenging labeling of defendant’s juice products—including natural and antioxidant labeling—on behalf of a putative nationwide consumer class. Plaintiff’s opening brief argues that the district court misapplied the summary-judgment burdens and that plaintiff submitted sufficient evidence to create a triable issue of fact. Plaintiff also argues that the district court erroneously looked at only one part of the FDA’s “no sugar added” labeling regulation (low-calorie), while ignoring the other part of the regulation (sugar content), and that the district court misinterpreted the “concentrated fruit juice” language in the regulation.

Jones v. ConAgra Foods (No. 14-16327, filed 7/14/2014): The district court denied class certification of separate classes for three distinct categories of products: canned tomato products (antioxidant labeling, “natural” and “no preservatives” labeling); Swiss Miss cocoa products (“natural source of antioxidants” labeling); and PAM cooking spray (“natural” labeling and failure to identify the propellant ingredients). The district court concluded that the proposed classes were not ascertainable, that the proposed classes did not meet the predominance requirement of Rule 23, and that plaintiffs’ damages models failed to meet the requirements of the Supreme Court’s *Comcast Corp. v. Behrend* decision. 133 S. Ct. 1426 (2013). The district court also found typicality problems as to the named plaintiff representing the proposed Swiss Miss class. The appellate briefing focuses heavily on the issue of ascertainability and whether the Ninth Circuit should adopt the Third Circuit’s *Carrera v. Bayer* line of cases, which require contemporaneous, objective evidence of class membership (e.g., a receipt for purchase of the challenged product). *See* 727 F.3d 300 (3d Cir. 2013); *see also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012).

Brazil v. Dole Packaged Foods (No. 14-17480, filed 12/17/2014): The district court decertified the class and granted summary judgment to defendant in this case involving packaged fruit products labeled “all natural fruit.” On appeal, plaintiffs focus on the aspect of the district court ruling that limited their damages recovery to the price premium, asserting that recovery should include various types of restitution and that class certification could not be denied based solely on a failure of damages calculations. They also argue that their “illegal product/strict liability” theory (i.e., that a technical violation of labeling law without deception or reliance is sufficient) was improperly rejected. Finally, they argue that sufficient evidence was presented to

Continued on Page 7...

“CLASS ACTION FALSE ADVERTISING”...continued from Page 6

prove that reasonable consumers would be misled by defendant’s “all natural fruit” label.

Briseño v. ConAgra Foods (No. 15-55727, filed 5/13/2015): This is an interlocutory appeal by defendant from an order granting class certification to plaintiffs in these consolidated cases alleging that defendant’s Wesson Oil products are not “all natural” because they are made from genetically modified (GMO) ingredients. The district court’s order approved several separate classes of consumers from individual states, while rejecting defendant’s detailed ascertainability argument and accepting plaintiffs’ new damages model, after having previously rejected plaintiffs’ earlier damages model. In its opening brief, defendant argued (1) that the class was not ascertainable and that more than a “definition” was required to meet ascertainability, (2) that individual issues predominated over common issues because there is no common understanding of the meaning of “natural” and there is no evidence that reasonable consumers thought “natural” labeling meant no GMO ingredients in Wesson oil products, (3) that individual damage calculation issues predominated given plaintiffs’ first-of-its-kind hybrid damages model using hedonic regression and conjoint analysis (hedonic regression attempts to determine “how much consumers pay for each feature of a product” while a conjoint analysis “conducts surveys of consumers’ present preferences” to determine whether the challenged labeling statement was material to the purchasing decision) and that this hybrid model violated the Supreme Court’s *Comcast* decision, and (4) that a class action was not a superior vehicle to resolve the dispute.

Briefing is complete in six of the above-listed cases.³ Oral argument has been noticed in only one of the appeals. In the not-too-distant future, the Ninth Circuit should provide lawyers and litigants answers to some of the many questions arising in this new and prolific area of the law.

Dale Giali is a partner in the firm of Mayer Brown.

Rebecca Johns is an associate in the firm of Mayer Brown.

¹ The seven appeals discussed here are not the first or only instances in which the Ninth Circuit has had an opportunity to address issues in food labeling false advertising class actions. See, e.g., *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th Cir. 2015); *Carrea v. Dreyer’s Grand Ice Cream*, 475 F. App’x 113 (9th Cir. 2012); *Williams v. Gerber*, 552 F.3d 934 (9th Cir. 2008); see also, e.g., *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753 (9th Cir. 2015) (cosmetics labeling). Moreover, appeals are currently proceeding in other food false advertising cases. See, *Rahman v. Mott’s LLP*, No. 15-15579 (9th Cir. filed 3/26/2015) (appeal from denial of class certification on liability issue); *Backus v. General Mills, Inc.*, No. 15-16658 (9th Cir. filed 8/19/2015) (appeal from entry of stay in trans fat case); *Kosta v. Del Monte Foods, Inc.*, No. 15-16974 (9th Cir. filed 10/2/2015) (appeal from denial of class certification).

² The authors are counsel of record for Chobani in the appeal.

³ These cases are *Kane v. Chobani, LLC*, *Jones v. ConAgra Foods, Inc.*, *Bishop v. 7-Eleven, Inc.*, *Bruton v. Gerber Products Company*, *Brazil v. Dole Packaged Foods*, and *Major v. Ocean Spray Cranberries, Inc.*

“PARTY-APPOINTED ARBITRATORS”... continued from Page 1

arbitrator is never really unbiased. Statistics show that in international investment arbitrations, a party-appointed arbitrator never dissents against the party that appointed him or her and almost never votes against the party that appointed him or her.² As one commentator said, “[I]s it not rather obvious that the insistence on a ‘right’ to name ‘one’s own’ arbitrator has more to do with the hope that the nominee will share one’s own prejudices rather than both sides’ values?”³ Two arbitrators predisposed to a result may well inhibit candid deliberations and cause an unjustified compromise award. Party-appointed arbitrators may become identified with sympathies toward a particular point of view or industry, and be perceived as looking for their next appointments.

On the other hand, the right of the parties to choose arbitrators is an attractive aspect of arbitration, as compared with litigation, for it gives the parties some control over the process and seemingly gives the arbitration legitimacy.⁴ According to one authority, the use of party-appointed arbitrators may prevent an irrational and clearly wrong, nonreviewable award and ensure that all arguments and perspectives of the parties are fully considered and that the process is fair.⁵ The principal rationale for using party-appointed arbitrators is that the parties do not trust that a single appointed presiding arbitrator will be capable of grasping all the essential arguments and issuing a reasoned opinion. Party-appointed arbitrators can be particularly useful in international arbitrations because they ensure that the customs, law, practices, and linguistics of a party are understood, considered, and not misapprehended.

California courts have “repeatedly upheld agreements for arbitration conducted by party-chosen nonneutral arbitrators; particularly when a neutral arbitrator is involved [citations]. These cases implicitly recognize it is not necessarily unfair or unconscionable to create an effectively neutral tribunal by building in presumably offsetting biases.”⁶ “[B]ias in a party arbitrator is expected and furnishes no ground for vacating an arbitration award, unless it amounts to ‘corruption.’”⁷

Most American statutes do not deal with party-appointed arbitrators. For example, California statutes regarding disqualification of arbitrators or arbitrator disclosure requirements apply to “neutral” arbitrators. Code of Civil Procedure section 1280, subdivision (d) defines a “neutral arbitrator” as one who is “(1) selected jointly by the parties or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.” Code of Civil Procedure section 1281.85, subdivision (a) directed the California Judicial Council to establish ethics standards for persons serving as neutral arbitrators under contractual arbitration agreements. The Judicial Council adopted the Ethics Standards for Neutral Arbitrators in Contractual Arbitration.⁸ But, those standards do not apply to “party arbitrators.”⁹ Even when state statutes

Continued on Page 9...

YLD UPDATE



Aaron Bloom



Rachel Feldman



Ben Williams

After a successful 2014-2015 season, the Young Lawyers Division of the ABTL is on track for another exciting and successful year. The Hon. Judith Ashmann-Gerst hosted a well-attended judicial brown-bag in November 2015 at Hogan Lovells LLP, with a focus on preserving the trial record for appeal. The young lawyers who attended described the event as tremendously useful and informative.

The YLD also hosted a happy hour at Pez Cantina in October 2015, bringing together many members of the YLD Advisory Committee for an opportunity to network and discuss events for the upcoming year. The young lawyers who attended stated that they appreciated the opportunity to meet in a casual setting with other young trial lawyers. "I think that YLD happy hours are a wonderful opportunity to develop a community of young trial lawyers in Los Angeles," said Aaron Bloom, co-chair of the YLD. "We

are looking forward to hosting additional happy hours in the coming year."

The YLD has a great slate of events planned for 2016. On January 27, 2016, the Hon. Andre Birotte, Jr. will be hosting a judicial brown-bag event at the U.S. District Court at 312 North Spring Street with a focus on oral advocacy. "Brown bags are a staple of the YLD program," said Rachel Feldman, co-chair of the YLD. "They allow conversations between distinguished members of the judiciary and young lawyers in an intimate setting, exactly what we aim to achieve."

The YLD is also hosting another happy hour on February 17, 2016, at the Border Grill. As the spring continues, the YLD plans to host a judicial mixer as well as multiple panels and additional brown bags.

"We are incredibly excited about our 2016," said Ben Williams, co-chair of the YLD. "We think that we have a terrific set of events planned that should provide superb opportunities for the young lawyers of the ABTL. There is more to come, so please stay tuned."

For any questions about the YLD, please feel free to reach out to Aaron, Rachel, or Ben.

Aaron Bloom is an associate at Gibson, Dunn & Crutcher LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.

Rachel Feldman is a partner at White & Case LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.

Ben Williams is an associate at Morrison & Foerster LLP in Los Angeles and Co-Chair of the Los Angeles ABTL YLD.

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Hon. Margaret M. Grignon (Ret.), mgrignon@grignonlawfirm.com

“PARTY-APPOINTED ARBITRATORS”... continued from Page 7

make no distinction between party-appointed and non-party-appointed arbitrators, courts may recognize the difference.¹⁰

In the United States, court interpretations of the role of party-appointed arbitrators differ widely. Some give great weight to party autonomy and recognize the partiality of party-appointed arbitrators.¹¹ Others take a more restrictive view.¹² One federal court, referring to the Federal Arbitration Act’s provision that empowers courts to vacate awards for “evident partiality,” suggested that test applies to every member of the panel.¹³ Thus, at least nationally, the judicial views of the proper role of party-appointed arbitrators are not consistent.

In 1977, an American Bar Association-American Arbitration Association committee promulgated a code of ethics (ethics code) that stated that only the “neutral” arbitrator had to maintain independence and impartiality and that the nonneutral arbitrators may be “predisposed” towards the parties that appointed them. That code provided a presumption that party-appointed arbitrators were nonneutral, unless the parties agreed to the contrary. The sponsors of the ethics code, however, stated their preference that all arbitrators be neutral and subject to the same ethical standards.

In 2004, the ethics code was revised and established “a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties’ agreement, the arbitration rules agreed to by the parties, or applicable laws provide otherwise.”¹⁴ The revised ethics code imposed the same ethical obligations on all arbitrators, including party-appointed arbitrators, unless the parties otherwise agreed. The American Arbitration Association also amended its commercial arbitration rules in 2004 to conform to this version of the ethics code.¹⁵ Similarly, all arbitrators in international arbitrations are either presumed or required to be unbiased, although a court has stated that in an international arbitration subject to United States law, “[g]enerally partisan arbitrators are permissible.”¹⁶

It has been said that although “[m]any clients assume that the arbitrator they name will favor their case, [and] be an advocate for them within the tribunal, [t]his assumption is seldom correct...particularly in arbitrations under rules requiring the party arbitrator to be as objective as the third arbitrator.”¹⁷ In one recent and highly publicized international arbitration, the party-appointed arbitrator selected by the respondent Russian Federation joined in the unanimous \$50 billion award against that respondent—the largest arbitration award to date.¹⁸

Others have characterized the idea that party-appointed arbitrators are independent as a “pretense,” and perceive European practitioners and arbitrators as clinging to the theory, if not the practice, of “demanding quasi-judicial ‘independence.’”¹⁹ They argue that this European view “increase[s] the risk of confusion and hesitation where not only the attorneys but the three arbitrators come from differing legal systems.”²⁰

Most authorities, however, agree that party-appointed arbitrators should be unbiased. As noted, some do not think there should be party-appointed arbitrators at all. Nevertheless, parties should check the applicable standards and laws in the relevant fora before contracting to arbitrate or participating in an arbitration. In the absence of a clear agreement, parties who decide to use party-appointed arbitrators may have different assumptions as to what such arbitrators will or can do. This includes limitations on what issues may be raised in preselection interviews, disclosures, relationships with the parties, ex parte communications, methods of compensation, challenges, and many other practices. As long as the law on the subject of party-appointed arbitrators remains confused and uncertain, full disclosure, agreement of the parties, and careful draftsmanship will be the prudent and best practices.

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¹ Chernick, *Selecting Party Arbitrators* (2014) XXXIV ABTL Report 1.

² Van den berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* 821.

³ Paulsson, *Must We Live with Unilaterals?* (2013) 1 ABA Section of International Law, International Arbitration Committee 1, 5.

⁴ Brower, *The (Abbreviated) Case for Party Appointments in International Arbitration* (2013) 1 ABA Section of International Law, International Arbitration Committee 10.

⁵ *Ibid.*; see also Park, *Arbitration of International Business Disputes* (2d ed. 2012) p. 39.

⁶ *Tate v. Saratoga Sav. & Loan Ass’n* (1989) 216 Cal.App.3d 843, 852, disapproved on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376-377.

⁷ *Id.* at p. 858; see also *Tipton v. Systron Donner Corp.* (1979) 99 Cal.App.3d 501, 506 [holding that party-appointed arbitrator’s relationship as attorney for party that appointed him was not grounds for vacating award absent a showing of corruption and prejudice.]

⁸ Cal. Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration; see Code Civ. Proc., §§ 1281.9(a)(2), 1281.91, 1286.2(3).

⁹ *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 945, fn. 4.

¹⁰ D. Branson, *American Party-Appointed Arbitrators—Not the Three Monkeys* (2004) 30 U. Dayton L.Rev. 1, 15, fn.3.

¹¹ See, e.g., *Astoria Medical Group v. Health Ins. Plan* (1962) 11 N.Y.2d 85, 133 [182 N.E.2d 85, 87].

¹² See *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.* (1925) 240 N.Y. 398, 404 [148 N.E. 562, 564]; *Barcon Associates, Inc. v. Tri-County Asphalt Corp.* (1981) 86 N.J. 179, 184 [430 A.2d 214, 219] [“parties may agree to any form of dispute resolution that they wish, but they may not seek the backing of the courts for private actions that, while substituting for the judicial function, are fraught with the appearance of bias”].

¹³ *Standard Tankers (Bahamas) Co. v. Motor Tank Vessel, Akti* (E.D.N.C. 1977) 438 F.Supp. 153, 159.

¹⁴ ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes, Note on Neutrality (Rev. 2004).

¹⁵ II Born, *International Commercial Arbitration* (2d ed. 2014) p. 1802.

¹⁶ *ATSA of California, Inc. v. Cont’l Ins. Co.* (9th Cir. 1985) 754 F.2d 1394, 1395 (modifying and quoting *ATSA of California, Inc. v. Cont’l Ins. Co.* (9th Cir. 1983) 702 F.2d 172, 175).

¹⁷ Geokjian, *ICC Arbitration From a Practitioner’s Perspective* (1980) 14 J. Int’l L. & Econ. 407, 410.

¹⁸ PCA Case Nos. AA 226, 227, 228 (July 18, 2014).

¹⁹ Higgins, et al., *Pitfalls in International Commercial Arbitration* (1980) 35 Bus. Law. 1035, 1043-1044.

²⁰ *Ibid.*

THE UNITED STATES SUPREME COURT ADDRESSES NEW CHALLENGES TO CLASS ACTIONS AND ARBITRATION



Jessica M. Di Palma

In October Term 2015, the United States Supreme Court will issue opinions in several cases addressing Federal Arbitration Act (FAA) preemption of state-law attempts to evade arbitration, as well as procedural aspects of class action litigation. Depending on how they are decided, each of these cases may have a significant impact on class action litigation and arbitration in the years to come. The following cases involve the most prominent issues in these areas before the Court this term:



David W. Moreshead

1) *Spokeo, Inc. v. Robins*—whether a plaintiff in a putative class action who alleges a willful violation of a federal statute yet suffers no concrete harm has Article III standing

In *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015), the United States Supreme Court will decide whether, by authorizing a private right of action based on violation of a federal statute, Congress may confer Article III standing on a plaintiff who suffers no concrete harm and who therefore could not otherwise invoke the jurisdiction of a federal court.

Thomas Robins sued Spokeo, Inc.—a website that provides users with information about other individuals, including contact data, occupation, economic health, and wealth level—for willful violations of the Fair Credit Reporting Act (FCRA). Robins, who was unemployed, alleged Spokeo’s website reported false information that his education and wealth level were better than they actually were, and that this harmed his employment prospects and caused him emotional distress. The district court dismissed the action, ruling Robins lacked standing because he failed to plead injury in fact traceable to Spokeo’s alleged statutory violations. The Ninth Circuit reversed and remanded, holding that Spokeo’s alleged willful violation of the FCRA was sufficient to establish Article III standing, even if Robins did not suffer actual injury.

Spokeo asked the Supreme Court to resolve whether Congress can confer Article III standing on plaintiffs, like Robins, whose claims would otherwise fall short because

they have not suffered any concrete harm. As companies such as eBay, Twitter, and Facebook argue in amicus briefs filed on behalf of Spokeo, a ruling for Robins may open the floodgates to plaintiffs bringing abusive class actions based only on alleged violations of the numerous federal statutes that provide for statutory damages, whether or not the plaintiffs suffered injury in fact. At oral argument in the Supreme Court, a majority of the Justices seemed sympathetic to this position, but it remains to be seen whether they will conclude that Article III standing is absent in this case.

2) *DirecTV, Inc. v. Imburgia*—whether state courts can ignore the preemptive effect of the Federal Arbitration Act in interpreting arbitration agreements governed by state law

In *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), the United States Supreme Court returned to a topic that has vexed it for quite some time now: California state courts’ recalcitrance in the face of the preemptive force of the FAA.

The arbitration clause in DirecTV’s customer agreement required any claim against DirecTV to be resolved in arbitration, unless “the law of [the customer’s] state” would find the provision unenforceable. Under the “*Discover Bank* rule,” California courts had held arbitration agreements unenforceable when they contained class action waivers, but the United States Supreme Court decided in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), that the FAA preempted *Discover Bank*.

DirecTV customers brought a putative class action in California state court challenging early cancellation fees DirecTV charged them. After *Concepcion* was decided, DirecTV moved to compel arbitration. The trial court denied DirecTV’s motion, and the Court of Appeal affirmed. The Court of Appeal explained that the DirecTV arbitration agreement carved out “a specific exception” to the preemptive scope of the FAA by referencing state law. Further, the court interpreted the agreement’s reference to state law to mean the parties intended to follow California law without considering the preemptive effect of the FAA. The court held that *Discover Bank*—despite having been overruled in *Concepcion*—was binding. Calling the Court of Appeal’s conclusion “nonsensical,” the Ninth Circuit subsequently disagreed with the Court of Appeal’s holding in a case interpreting the same clause of the same DirecTV customer agreement. *Murphy v. DirecTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013).

Continued on Page 14...

THE WAGES OF THE SIN OF HIDING EVIDENCE—A CAUTIONARY TALE



Kevin Boyle



Rahul Ravipudi

In virtually every case, each party is in possession of evidence that its lawyers wish did not exist. Probably every lawyer has at least once pondered how good life would be if that evidence magically disappeared. But being ethical officers of the court, we never actually take any steps to hide that evidence from the opposing party, right? In addition to the ethical considerations, hiding evidence carries profound ramifications, and the risks can never outweigh the potential benefits. Simply put, and as the following tale reminds us—nothing good can come of hiding evidence.

THE FACTS. In December 2010, a 15-year-old high school student was crossing a four-lane road with no traffic controls for miles in either direction and cars driving at freeway speeds—to get to his school bus stop—when a vehicle driven by an elderly woman struck and killed him.

The police officers who investigated the accident found that the student was legally crossing in an unmarked crosswalk and the driver had an unobstructed view. The driver told the police that she just never saw the young man.

According to the young man's mother, in 2009, there had been bus stops on both sides of that road. Students who lived south of the road, like her son, did not need to cross the road to get to and from a bus stop. However, according to the mother, the stop on the south side of the road was removed during her son's sophomore year, requiring students to cross the road to get to the school bus. According to the California Code of Regulations, a school should not configure its bus stops in a way that requires children to cross uncontrolled, high-speed roads to get to and from a school bus stop. (Cal. Code Regs., tit. 13, § 1238, subd. (b)(3).) If the stops were configured as the mother said, the bus stop was illegally designated and would be a dangerous condition of the school district's property.

THE DISCOVERY. A government claim was served in May of 2011, giving the district unqualified notice of the impending litigation, and creating a duty to preserve

discoverable evidence. The district rejected the claim. The mother filed a complaint against the district, alleging dangerous condition of public property.

Fifteen days after the filing of the lawsuit, written discovery was propounded on the district. The discovery sought all information relating to the designation of the bus stops. Responsive documents would include the bus schedules identifying the bus stops at the time of the incident and the year prior.

The district produced 11 pages of documents, none of which appeared to pre-date the incident. The district denied every fact relayed by the mother as to the bus stop designations and instead stated the opposite.

Its failure to produce any evidence proved beneficial to the district throughout the lawsuit. The district's defenses included: (1) the bus stop was not designated on a multi-lane highway, but was actually a block away on a two-lane road with stop signs at every corner; (2) another bus stop much closer to the young man's home did not require him to cross any streets; and (3) there was never a bus stop on the southwest corner of the road. These defenses were offered through verified discovery responses, declarations of district employees, and the deposition testimony of district employees. As a result of these defenses, a demurrer was sustained without leave to amend, but reversed on appeal and remanded to the trial court for further proceedings.

SUMMARY JUDGMENT AND SANCTION REQUESTS. On remand, the district moved for summary judgment. Counsel for the mother hired an investigator. The investigation revealed that shortly before the incident, another student's mother had communicated with the district and saved her emails. The emails from the district had been authored by the same district employees who had been deposed and exposed all of the district's defenses as false. Not surprisingly, the trial court denied summary judgment.

Plaintiff moved for terminating, issue and evidentiary sanctions based on the destruction of all relevant evidence. Defendants have a duty to "to preserve evidence for another's use in pending or future litigation" even if that evidence has not been specifically requested in discovery. (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (*Williams*)). California law not only prohibits the destruction of evidence specifically requested, but also contemplates the preservation of evidence that could be used in future litigation even when it was never previously requested through court-ordered discovery. (See *ibid.*; *Karz v. Karl* (1982) 137 Cal.App.3d

Continued on Page 12...

“WAGES OF SIN OF HIDING EVIDENCE”... continued from Page 11

637; *Valbona v. Springer* (1996) 43 Cal.App.4th 1525; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736.)

To obtain sanctions for discovery abuse a plaintiff need only make an initial prima facie showing that the defendant withheld, destroyed, or failed to present evidence that had a substantial probability of damaging the moving party’s ability to establish an essential element of his claim or defense. (See *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal. App. 4th 1336, 1346-1347; *Williams, supra*, 167 Cal.App.4th at p. 1227.)

In this case, the court ordered a hearing on the sanctions motion. During the hearing, the same district employees took the stand and began explaining how they had just found some documents, including a thumb drive with unknown contents, a file folder with undescribed materials, and 36 boxes of documents, all of which the court ordered produced. The following day, counsel for the district requested an in-camera review of an “attorney-client communication” folder. Portions of that folder revealed that within days of the accident, the district’s risk management and the same district employees had discussed the potential exposure relating to the bus stop designation. Also hidden in that “attorney-client communication” folder were the bus stop schedules, which confirmed all of the allegations in the complaint.

The Court imposed the following issue sanctions on the district for secreting and hiding the bus stop evidence in the hopes of avoiding liability for a dangerous condition:

- Prior to the 2010 school year, the district designated bus stops on both sides of the road so that students did not need to cross the road to get to a bus stop;
- The district eliminated any bus stop on the south side of the road at the start of the 2010 school year, which required all of the students who lived on the south side to cross the uncontrolled 5-lane highway to get to the designated stop;
- The district’s designated stop on the northeast corner of the road is located on a multi-lane highway in violation of the Code of Regulations;
- The district’s superintendent was not involved in the designation of the bus stops despite regulations mandating he designate the stops;
- The district did not obtain the required permission from the California Highway Patrol in designating the bus stop;
- The district’s designation of the bus stop created a dangerous condition of public property;

- The dangerous condition created by the district’s designation of the bus stop was a substantial factor in causing the student’s death;
- The dangerous condition created by the district’s designation of the bus stop created a reasonably foreseeable risk that this kind of incident would occur;
- The negligent conduct of district employees while acting in the course and scope of their employment created the dangerous condition;
- The district was on actual notice of the dangerous condition it created and had a long enough time to protect against it;
- It would not have cost any money for the district to cure the dangerous condition;
- Defendants admit they created a dangerous condition of public property that was the cause of the student’s death.

These issue sanctions established a dangerous condition of public property and that the district was a cause of the student’s death, but allowed the district to continue to argue comparative fault of the driver and the student.

THE VERDICT. The jury deliberated for one day and found the district to be 100% responsible. The jury awarded \$20.5 million in non-economic damages against the district.

After judgment was entered, the trial court ordered the district to submit a declaration outlining all the steps it would take to make sure that its employees did not conceal evidence in the future.

* * * *

Some—like the district—may argue that the issue sanctions were too high, drove the verdict amount, and created passion and prejudice on the part of the jury. Plaintiff would argue the issue sanctions saved the district from the devastating impeachment of its employees on the witness stand. But we can all agree that if the district had not suppressed the evidence, sanctions would have been avoided altogether. So, the lesson learned is to always explain to your clients the wide-ranging consequences of failing to preserve and produce relevant evidence.

Kevin Boyle and Rahul Ravipudi are partners at Panish, Shea & Boyle LLP, a plaintiffs trial law firm based in Los Angeles. Panish, Shea & Boyle LLP represented the plaintiff in the case discussed in this article.

CALIFORNIA SUPREME COURT TO DECIDE BORROWERS' STANDING TO CHALLENGE MORTGAGE LOAN ASSIGNMENTS



Zareh A. Jaltorossian

On December 2, 2015, the California Supreme Court heard oral argument in *Yvanova v. New Century Mortgage Corporation* (2014) 226 Cal.App.4th 495, review granted Aug. 27, 2014, S218973. *Yvanova* is one of several cases presenting the same question in which the Supreme Court has granted review: whether, in an action for wrongful foreclosure on a deed of trust securing a home loan, a

borrower has standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void. The Supreme Court's decision in *Yvanova* will have a significant impact on nonjudicial foreclosure litigation in California, so it is worth considering what issues it presents and how it got to the Supreme Court.

Yvanova is a wrongful foreclosure action involving a relatively novel theory of liability sometimes labeled "improper securitization." In a process called securitization, multiple loans (including both the promissory note and the mortgage/deed of trust) with similar characteristics are pooled, and then sold in the secondary market where mortgage loans and servicing rights are bought and sold among mortgage originators, securitizers, investors, and trusts. A Pooling and Servicing Agreement governs the relationship among the various parties in the securitization process. The end result of a securitization transaction, from the borrower's perspective, is that the rights to the loan are assigned to a financial institution other than the one that originally made the loan.

In recent years, increasing numbers of defaulting borrowers facing nonjudicial foreclosure have sued their lenders' assignees (and usually any other parties involved in the foreclosure) based on the claim that these parties lack the right to foreclose because of some problem with the loan's securitization, including purported failures to comply with the terms of the applicable pooling agreements. As one would expect, defendants respond to such claims by arguing that the borrowers, who are not parties to the securitization transaction, lack standing to sue based on irregularities in the securitization process.

"Improper securitization" is, of course, just one theory borrowers have utilized to challenge the rights of defendants to foreclose on a loan. Other common arguments designed to avoid foreclosure focus on whether the foreclosing party owns or possesses the promissory note.

Until 2013, California appellate courts were unanimous in rejecting such wrongful foreclosure claims. *Gomes v.*

Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149, from Division 1 of the Fourth District Court of Appeal, laid much of the analytical groundwork for rejecting such theories. *Gomes* was a wrongful foreclosure action that did not involve an improper securitization claim but rather a claim that the entity initiating the foreclosure did not own the promissory note and was not the note owner's authorized agent. Analyzing California's detailed and "exhaustive" nonjudicial foreclosure statutes, the court held that the statutory scheme simply did not permit a borrower to bring an action compelling a defendant to demonstrate its right to foreclose before effectuating the foreclosure. To force a foreclosing party to demonstrate its right to foreclose in court would subvert the entire point of nonjudicial foreclosures.

A year later, in *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, the Sixth District Court of Appeal addressed whether the foreclosing party must have actual possession of the promissory note. Following *Gomes*, the court held that no such requirement exists.

In *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, Division 3 of the Fourth District Court of Appeal applied this rationale to an improper securitization claim. In *Jenkins*, the plaintiff argued that her home loan was pooled with other loans in a securitized investment trust in a manner that violated the pooling agreement, thereby extinguishing any security interest in her home. The court rejected this claim. It observed that the only parties to a pooling agreement are the transferor of the promissory notes and the transferees of the notes, not the plaintiff who is not a party to the pooling agreement and who still remains obligated on the promissory note.

A month after *Jenkins*, however, the Fifth District Court of Appeal reached a contrary result, holding that a borrower had standing to challenge the defendant's right to foreclose based on alleged non-compliance with the pooling agreement. *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079. The court based this conclusion on the fact that the pooling agreement at issue was governed by New York law, specifically a statute under which the purported failure to place the loan in the trust prior to the pooling agreement's closing date made the assignment void. The plaintiff had alleged that the assignment took place after the closing date. The court held that the plaintiff's allegations, if proven, meant the assignment of the loan was void. The court thus allowed the plaintiff to proceed with the wrongful foreclosure action.

Soon after it came down, *Glaski* came under heavy criticism from a number of courts as inconsistent with California's nonjudicial foreclosure statutes. Courts also took issue with its reading of New York law. Other courts tried to avoid a direct conflict with *Glaski* by distinguishing it on the ground that *Glaski* was a post-foreclosure case—that is, an action challenging a foreclosure after the trustee's sale had

Continued on Page 15...

“CLASS ACTIONS AND ARBITRATION”... continued from Page 10

The United States Supreme Court reversed and held the arbitration clause enforceable. It recognized that, while contract interpretation is traditionally left to state law, the question here was not one of contract interpretation, but whether the California court’s holding was consistent with the FAA. The Court held that the state court did not interpret the arbitration clause the same way it would interpret non-arbitration contracts, thereby placing arbitration agreements on an unequal footing with other contracts in violation of the FAA. The Court’s decision indicates that it intends to ensure California courts consistently enforce arbitration agreements.

3) *Campbell-Ewald Co. v. Gomez*—whether a defendant’s offering a named plaintiff complete relief moots the plaintiff’s claims, including the possibility of proceeding as a class action

In *Campbell-Ewald Co. v. Gomez*, 135 S. Ct. 2311 (2015), the United States Supreme Court granted certiorari to address whether a defendant can “pick off” a putative class action’s named plaintiff by offering to provide him or her complete relief.

After plaintiff Jose Gomez sought to represent a class of plaintiffs alleging violations of the Telephone Consumer Protection Act, defendant Campbell-Ewald offered him all of the relief he sought in his complaint. *Gomez* let the offer lapse without accepting it, after which Campbell-Ewald moved to dismiss the case on the ground that its offer mooted Gomez’s individual and class claims. The district court denied this motion, although it later granted summary judgment to Campbell-Ewald on a different ground. On appeal, the Ninth Circuit agreed that Campbell-Ewald’s offer did not moot the case.

Not long ago, the Supreme Court decided in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), that an offer of complete relief mooted a collective action under the Fair Labor Standards Act (FLSA). Here, the Ninth Circuit distinguished *Genesis*, holding that its reasoning was limited to FLSA collective actions.

At oral argument in the Supreme Court, the Justices appeared troubled by the notion that Campbell-Ewald’s offer mooted the case, since that would allow Campbell-Ewald to avoid a court judgment holding it liable as Gomez was seeking. But a majority of the Justices seemed to acknowledge that allowing such a case to proceed after a plaintiff receives an offer of the complete relief he or she has requested would squander scarce judicial resources.

Thus, while it is unclear whether the Supreme Court will hold the case to be moot, it seems unlikely that the case will be allowed to proceed.

4) *Tyson Foods, Inc. v. Bouaphakeo*—whether a class action can be certified where the putative class includes members who have not suffered any injury in fact and where the common measure of liability and damages is based on a non-representative sample

In *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 381 (2015), the United States Supreme Court granted certiorari to decide two issues: (1) whether a class action can be certified where the “common evidence” of classwide liability and damages is an extrapolation of a non-representative sample of the class; and (2) whether a class can be certified if a substantial number of its members were not injured.

The district court in *Tyson Foods* certified a state-law class action under Federal Rule of Civil Procedure 23 and a collective action under the FLSA, alleging Tyson Foods had not paid hourly workers at its pork processing plant for all time spent donning and doffing protective gear required for work. At trial, plaintiffs sought to prove injury and damages using statistical evidence that averaged donning and doffing times, even though employees used different equipment and it was undisputed that hundreds of employees were not entitled to additional compensation. A jury found Tyson Foods liable, but awarded only about half of the damages suggested by plaintiffs’ experts. Tyson Foods appealed, arguing that the district court erred in certifying the Rule 23 class and FLSA collective action, plaintiffs improperly relied on a formula to prove liability, and plaintiffs presented insufficient evidence to prove damages class-wide. A split Eighth Circuit panel rejected these arguments and affirmed.

Although the Supreme Court granted certiorari to decide two issues with potentially broad application to Rule 23 class actions, at oral argument the Justices focused on the type of proof that can support a FLSA claim for overtime pay. Instead of grappling with the question of whether a class can be certified under Rule 23 based upon statistical evidence where a substantial number of class members suffered no injury, the Court seemed to narrow its inquiry to whether “representative proof” is sufficient under the FLSA to demonstrate that workers were not paid overtime wages where the employer failed to keep proper records of hours worked. It remains to be seen whether the Court’s opinion decides only this relatively narrow question of FLSA liability or whether it addresses the Rule 23 questions more broadly.

Continued on Page 15...

“MORTGAGE LOAN ASSIGNMENTS”... continued from Page 13

already taken place—and, as such, did not implicate the concerns *Gomes* raised about undermining the nonjudicial foreclosure process. In *Kan v. Guild Mortgage Company* (2014) 230 Cal.App.4th 736, for instance, Division Two of the Second District Court of Appeal rejected a wrongful foreclosure claim based on an improper securitization where no trustee’s sale had yet taken place. The court distinguished *Glaski* as a post-foreclosure case that did not apply to “preemptive” wrongful foreclosure claims. Despite distinguishing *Glaski* on its facts, however, *Kan* proceeded to register its disagreement with its approach, noting that “[t]he vast majority of courts analyzing the case . . . have found it unpersuasive.”

Court of Appeal decisions after *Kan* have kept up the critical barrage against *Glaski*. *Yvanova*, from Division One of the Second District Court of Appeal, was one such case. Like *Glaski*, *Yvanova* was a post-foreclosure suit based on alleged defects in the securitization of the plaintiff’s loan. Since the court could not simply sidestep *Glaski* as a post-foreclosure action, it squarely disagreed with it.

The Supreme Court granted review in *Yvanova*. The Court also granted review in several other cases disagreeing with *Glaski*. The Supreme Court is holding these decisions for disposition pending its consideration and disposition of *Yvanova*, the lead case.

The Supreme Court’s decision in *Yvanova* will resolve the conflict between *Glaski* and the other Court of Appeal cases on the question of whether a borrower may raise an improper securitization claim. More importantly, it could decisively impact a wide variety of wrongful foreclosure lawsuits. Although *Yvanova* involved an improper securitization theory, the issue under review has far broader implications than just the validity of improper securitization claims. The Supreme Court has stated the issue broadly—whether a borrower has standing to challenge an assignment based on defects allegedly rendering the assignment void, not just defects that arose in the securitization process.

Indeed, during oral argument in *Yvanova*, several of the justices posed questions and comments suggesting they are struggling with the breadth of any proposed rule regarding a borrower’s standing to challenge defects in the assignment of a note. The justices seemed concerned with the standing of borrowers to bring these types of suits in general, not just with the viability of improper securitization claims. The tenor of the oral argument was therefore consistent with the breadth of the question as the Court has framed it.

If the Court’s broad framing of the issue and the justices’ questions at oral argument prove reliable indicators, financial institutions and borrowers will be wrestling with *Yvanova*’s outcome in a variety of wrongful foreclosure cases for the foreseeable future.

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“CLASS ACTIONS AND ARBITRATION”... continued from Page 14

5) *MHN Government Services, Inc. v. Zaborowski*—whether California’s arbitration-specific severability rule is preempted by the FAA

The United States Supreme Court granted certiorari in *MHN Government Services, Inc. v. Zaborowski*, 136 S. Ct. 27 (2015), to address the viability of California’s arbitration-specific severability rule under the FAA. For contracts generally, California law requires courts to sever unconscionable provisions in order to make an agreement enforceable. But California has a different rule for arbitration agreements that allows courts to decline severance and simply refuse to enforce the agreement if it contains more than one unconscionable provision. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 124 (2000).

In this case, a split Ninth Circuit panel applied *Armendariz*’s arbitration-specific non-severability rule to uphold a district court’s refusal to enforce an arbitration agreement. The district court found several unconscionable provisions “so permeated [the agreement] with unconscionability that it [wa]s not severable,” despite the fact that the agreement explicitly included a severability clause. The dissent argued that refusing to sever the unconscionable provisions contradicts the FAA and *Concepcion*, noting that severing those provisions would not require the court to add any provisions or otherwise rewrite the agreement.

On January 7, the Supreme Court removed *MHN* from its oral argument calendar after the parties informed the Court that the case was in the process of settling. Though the Court will likely not be required to decide the merits of the case, the Supreme Court’s grant of certiorari in *MHN* indicates its continuing interest in whether *Armendariz*’s arbitration-specific non-severability rule is preempted by the FAA.

* * *

These cases show that the United States Supreme Court continues to closely monitor developments in the arbitration and class action arenas. The Court’s decisions in these cases may either continue the trends of allowing businesses to curtail class action litigation and direct more disputes to arbitration or they may put the brakes on these trends. We will know the answer by next June.

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