COMPELLING ARBITRATION: UNRESOLVED ISSUES

BEST PRACTICES DEC. 6, 2012

By Judge William F. Highberger

Trial courts continue to receive very inconsistent direction from the U.S. Supreme Court, the California appellate courts and the National Labor Relations Board regarding the proper interpretation and application of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to state trial court cases. Because the arbitration alternative has so much impact on case value and because it is also intimately tied up with whether or not a case can proceed on a class or "representative" basis, this is a highly important topic.

The Supremacy Clause

As discussed by the latest U.S. Supreme Court cases on the topic, with respect to many aspects of arbitration, the U.S. Constitution and laws adopted by Congress are supreme as to any inconsistent enactments by any of the several states. In *Marmet Health Care Center, Inc. v. Brown* (Feb. 21, 2012) 132 S.Ct. 1201, the Supreme Court rejected West Virginia's Supreme Court's reliance on "public policy" to prohibit mandatory arbitration of personal injury claims against nursing homes and to decide whether the arbitration clauses in its case were unenforceable under state common law principles that were not specific to arbitration and preempted by the FAA. The U.S. Supreme Court stated:

> State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et seq.*, with respect to all arbitration agreements covered by that statute. Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle. The state court held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes.
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> The decision of the state court found the FAA's coverage to be more limited than mandated by this Court's previous cases. The decision of the State Supreme Court of Appeals must be vacated. When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U. S. Const., Art. VI, cl. 2. . . . .
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> The state court considered whether the state public policy was pre-empted by the FAA. The state court found unpersuasive this Court's interpretation of the FAA, calling it "tendentious" . . ., and "created from whole cloth" . . . . It later concluded that "Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public" . . . . The court thus concluded that the FAA does not pre-empt the state public policy against predispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes.

The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.

Inconsistent Jurisprudence Interpreting The "Savings Clause"

In the last decade, a number of California appellate cases have found compulsory arbitration clauses "unconscionable" and thus unenforceable. The holdings, based on "unconscionability" or reliance on "general state law contract principles," have been the stated basis for non-enforcement of contracts otherwise covered by FAA, and have relied on the FAA's "savings" clause which allow courts to refuse to enforce arbitration contracts based "upon such grounds as exist at law or in equity for the revocation of any contract." (FAA, § 2.)

In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161, *overruled by AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, Justice Moreno wrote for the majority: "[S]uch class action or arbitration waivers are indisputably one-sided. . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable."

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 465, Justice Moreno wrote, "The principle that in the case of certain unwaivable statutory rights, class action waivers are forbidden when class actions would be the most effective practical means of vindicating those rights is an arbitration-neutral rule: it applies to class waivers in arbitration and nonarbitration provisions alike. [Citation.] 'The *Armendariz* requirements are . . . applications of general state law contract principles regarding the unwaivability of public rights to the unique context of arbitration, and accordingly are not preempted by the FAA.'" (Referring to *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.)

Finally, in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 688, *summarily vacated and remanded for further consideration* (Oct 31, 2011) 132 S.Ct. 496, Justice Moreno wrote, "The doctrine of unconscionability cannot be used, however, in a way that discriminates against arbitration agreements. *** [O]ur conclusion that Berman waivers are contrary to public policy and unconscionable does not discriminate against arbitration agreements.")

As noted below, the U.S. Supreme Court majority did not see it the same way, but the near-term result has been a muddle with inconsistent published decisions post-*Concepcion* on the continuing validity of *Gentry* and other issues.

And Back In Washington

Even as California courts set up roadblocks to mandatory arbitration and class action waivers accomplished via mandatory arbitration, the U.S. Supreme Court has routinely enforced mandatory arbitration clauses and overruled lower courts routinely to do so. The list of key U.S. Supreme Court cases over the past 20+ years attached hereto shows that court's consistent rulings in favor of enforcing binding arbitration clauses even when lower courts have found various reasons not to do so. In particular, although in 2003 the U.S. Supreme Court contemplated in an oddly decided 4-1-3-1 decision in *Green Tree Financial Crop. v. Bazzle* (2003) 539 U.S. 444, that class arbitration could be allowed under the FAA if the contract authorized such a proceeding, the majority in 2010 in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*

Corp. (2010) 130 S.Ct. 1758, came out soundly against implying any right to class arbitration under the FAA if a contract was silent on authorizing this. The majority decision recited at length all the due process horrors which attach to submitting high-stakes class action claims to arbitration subject to limited judicial review and with broad arbitrator discretion to ignore otherwise controlling law.

AT&T Mobility was decided only one year later and basically leveraged off *Stolt-Nielsen*'s holding that class arbitration was a bad idea. *AT&T Mobility* was also based on a somewhat unique record that created a very pro-consumer process for arbitration of individual claims. Only time will tell if a later U.S. Supreme Court majority limits the logic of that decision to its unique facts. The reasoning of *AT&T Mobility* soundly rejected reliance on the "savings" clause of the FAA to allow state-law based impediments to enforcement of arbitration.

As analyzed by Justice Scalia in *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (1998) 524 U.S. 214, 227–228:

> This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).
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> As we have said, a federal statute's saving clause "'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'"

In the short period since *AT&T Mobility* was decided 19 months ago, the U.S. Supreme Court has issued another decision after full briefing and argument overturning a decision protecting federal statutory claims from mandatory arbitration and at least four summary "G/V/R" orders (standing for **Granting** the cert. petition, **Vacating** the lower court decisions summarily without need for any further briefing or argument, and **Remanding** for further consideration by the lower court) rejecting decisions from California, Florida, West Virginia and Oklahoma which appeared to flout the highest court's reading of the FAA. (See list of decisions which follows this text.)

NLRB Takes A Different View Of Class Action Waivers

A very different view of the propriety of class-action waivers has recently come from the National Labor Relations Board. The Board issued *D.R. Horton, Inc.*, 357 NLRB No. 184, 192 LRRM (BNA) 1137, 2012 NLRB LEXIS 11, 2012 WL 36274, in a very odd procedural posture – with only two members acting for what should be a five-person body. The board found that enforcement of mandatory arbitration with a class action waiver violated non-union employees' Section 7 rights under the National Labor Relations Act, 29 U.S.C. § 157.

There is a question with respect to the precedential value of *D.R. Horton, Inc*, because in *New Process Steel v. NLRB* (2010) 130 S.Ct. 2635, the U.S. Supreme Court had held that a prior attempt to issue a Board decision with only two members acting was invalid for lack of the needed minimum quorum under 29 U.S.C. §§ 153(a) and (b).)

Moreover, since *D.R. Horton* is the result of the balancing of two different federal statutes, it does not encounter the kind of supremacy clause problems which apply to efforts to rely on state "public policy" or similar state law reasons to reject arbitration or class action waivers. But federal law questions are suitable issues for the U.S. Supreme Court to review, and the Supreme Court does not appear to have ever extended the NLRA to apply in such a context totally devoid of union involvement.

Further, NLRB decisions are not self-enforcing (29 U.S.C. §§ 160 (e) and (f)). D.R. Horton has filed a petition to vacate with the United States Court of Appeals for the Fifth Circuit. Whether the NLRB's ruling will stand remains open to question, both on its legal merits and the no-quorum issue. The NLRB decision itself is presumably no more than potentially persuasive, but not controlling, authority in state court since it is not from the U.S. Supreme Court on a federal law question.

While Back In California

The California Supreme Court is now tasked to revisit its holding in *Sonic-Calabasas A* (California Supreme Court docket S174475, now in amicus curiae phase of briefing) in response to the G/V/R order from the United States Supreme Court. The state high court has also granted review to consider the impact of the FAA on the enforceability of an arbitration agreement in *Sanchez v. Valencia Holding Co., LLC* (California Supreme Court docket S199119, fully briefed but not yet set for argument, previously reported at 201 Cal.App.4th 74), a case where the trial court and appellate court had each refused to enforce a contractual term for individual-only arbitration. The state Supreme Court also recently issued its opinion in *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC* (Aug. 16, 2012) 55 Cal.4th 223, where a 6-1 majority held that a binding arbitration clause was enforceable by the project developer against the purchasers' homeowners association ("HOA") even though that association did not exist when the CC&R's were drafted and recorded by the developer to bind its intended purchasers and their collective HOA. While the pre-emptive effect of the FAA as to "any statutory provision that specifically discriminates against arbitration" was noted by the majority (slip op. at 18 n. 8), the reasoning leading to the holding reached depended much more on the majority's interpretation of the Davis-Stirling Common Interest Development Act, Civil Code § 1350 et seq., particularly § 1375. The opinion sheds no light on how the justices will rule on the *Gentry* issue.

The Court of Appeal opinions continue to set up direct conflicts in their holdings. The Fourth Appellate District's recent decision in *Truly Nolen of America v. Superior Court* (Aug. 13, 2012) 208 Cal.App.4th 487, does an excellent job gathering the state and federal cases. Its own core holding is a fair reflection of the current state of play:

> Although *Concepcion*'s reasoning strongly suggest that *Gentry*'s holding is preempted by federal law, the United States Supreme Court did not directly rule on the class arbitration issue in the context of unwaivable statutory rights and the California Supreme Court has not yet revisited *Gentry*. Thus, we continue to be bound by *Gentry* under California's stare decisis principles.

The very recent decision of *Franco v. Arakelian Enterprises, Inc.* (Nov. 26, 2012) 2012 Cal. App. LEXIS 1207, does a good job of distinguishing *Concepcion* as a case involving a

"categorical" bar to arbitration as compared to the fact-bound analysis required by *Gentry* of whether or not the practical effect of mandating individual arbitration in a given specific factual situation would accomplish a de facto wavier on non-waivable statutory rights.

A recap of other published California appellate cases decided since *Concepcion* was issued and distinguishing or otherwise limiting *Concepcion* appears at the end of this paper, after the listing of the U.S. Supreme Court's own decisions in this field. *Iskanian v. CLS Transportation Los Angeles, LLC* (June 4, 2012) *originally reported at* 206 Cal.App.4th 949, *pet. rev. granted* (Sept. 19, 2012), set up an express conflict in the published authorities between its decision ordering individual-only arbitration of Private Attorney General Act ("PAGA") claim under Labor Code § 2698 and the contrary decisions in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, *rev. denied, cert. denied* (2012) 132 S.Ct. 1910, and *Reyes v. Macy's Inc.* (2011) 202 Cal.App.4th 1119, 1123-24. It is also notable that several recent appellate decisions have been able to avoid the *Gentry* question by finding a failure of proof in the record by the plaintiff of the *Gentry* factors opposing the motion to compel arbitration. There is now no published California state appellate case specifically rejecting *Brown*'s conclusion as to the arbitrability of individual PAGA claims, but the discord in the state of the law is evident both from the contrary results reached by many federal courts in published decisions and more generally by the continuing split in how much preemptive effect the state appellate decisions give to the FAA. See, e.g. *Caron v. Mercedes-Benz Financial Services USA LLC* (July 30, 2012) 208 Cal.App.4th 7 (FAA per *Concepcion* preempts California Consumer Legal Remedies Act's prohibition [Civil Code § 1751] on class action waiver). On a pure statistical count basis, the vast majority of the published 2012 appellate opinions either refuse to compel arbitration or affirm an order compelling arbitration based on a finding of a failure of proof by plaintiff in trying to show unconscionability.

Can You Give Me A Decision Tree To Use?: Yes

Arbitration agreements, with or without express class-action waivers, seem to come in an almost infinite variety of forms. Since *AT&T Mobility*'s threshold premise is that courts are to enforce the agreement made, each case needs to focus on the contract terms.

1. **Does the FAA apply, i.e. is there coverage?** The answer is almost always "yes" unless you have a worker exempted by the narrowly interpreted "employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" exception in FAA §1 (and they typically have a union and union contract protecting them).

2. **What does the alleged arbitration agreement say?** What claims are submitted? What alternative processes, if any, are overly barred? Who is the provider? What is said about finality? Any discussion of class or representative claims as allowed or prohibited? Are the rules of procedure designated?

3. **Who decides whether or not the arbitration agreement is unenforceable in the first instance?** Compare *Rent-A-Center, West, Inc. v. Jackson* (2010) 130 S.Ct. 2772 (arbitrator decides when contract was clear on this point) with *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771 (court decides absent "clear and unmistakable" evidence

of delegation to arbitrator).

4. **Is the arbitration agreement itself unenforceable on some "general state law contract principles" that are not specific to arbitration?** In theory you can have an enforceable arbitration agreement even if you would find the contract, as a whole, or key terms therein unenforceable (because the arbitrator can address the same question in due course). *Nitro-Lift Technologies, L.L.C. v. Howard* (Nov. 26, 2012) 81 U.S.L.W. 4011, *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-49, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 403-04.

   Cases like *AT&T Mobility, Marmet* and *Nitro-Lift* have not told us how to look beyond the arbitration agreement itself (and its practical impacts) to the contract as a whole to test an assertion that under "general state law contract principles" we are being asked to enforce an unconscionable contract. There are, of course, any number of reasons not dependent on "unconscionability" analysis why a contract, as a whole, may be unenforceable even if the arbitration clause survives analysis, but this is uncharted territory to the best of my analysis. Maybe the U.S. Supreme Court will interpret the FAA "savings" clause as only applicable to valid challenges under general state law principles to the arbitration clause itself (e.g. lack of capacity for a minor). If so, arguments about improper limitations on remedies and damages, improper limitations on the statute of limitations, unfair or oppressive commercial terms, and the like drop out of the unconscionability analysis, leaving many plaintiff's counsel with very little to argue.

   The first published California case to deal with this issue is *Phillips v. Sprint PCS* (Sept. 26, 2012) 209 Cal.App.4th 758, 774, where an order compelling arbitration was affirmed notwithstanding such challenges to the contract as a whole:

   > The challenged provisions limit the time period for bringing claims against Sprint and the amount and type of recoverable damages. The trial court found that "[p]laintiff's arguments are to the effect that these provisions render the contract itself – not just the arbitration clause – unconscionable. Consequently, these issues are for the arbitrator, not the court, to resolve." The trial court was correct.

5. **Is *AT&T Mobility* Limited To Its Unique Facts And "Categorical" State-Law Rules Barring Arbitration?** The form contract at issue there was unique and very pro-consumer. While other businesses may adopt its terms going forward, virtually every case we will see in the near term will have a less advantageous arbitration process in place. The recent decision in *Franco v. Arakelian Enterprises, Inc.* (Nov. 26, 2012) 2012 Cal. App. LEXIS 1207, notes correctly that the question on which certiorari was granted in *Concepcion* was expressly tied to the "categorical" nature of the *Discover Bank* rule. This leaves open the real possibility that arbitration will be overridden – either as a matter of federal law under the FAA or as a matter of "general state law contract principles" permitted by the "savings clause" of the FAA – when the record shows that referral to binding non-class arbitration is tantamount to waiver of non-waivable statutory rights. Fortunately, the U.S. Supreme Court has granted cert. on this exact issue in *In re American Express Merchants' Litigation* (2d Cir. Feb. 1, 2012) 667 F.3rd 204, *cert.*

granted (Nov. 9, 2012), so we should have some guidance on this question by late June 2013 when the current term ends.

6. **If the arbitration agreement is a slight bit "unconscionable," should you blue pencil it under *Armendariz* rather than denying it effect?** This too seems to be virgin territory in the argument of the effectiveness of class action waivers. (It also may not be relevant if acceptable attacks under the "savings" clause remain limited to the "separate" agreement to arbitrate tested in isolation.) Simply put, if a slight fix works to make the arbitration clause NOT unconscionable, does the author of the adhesion contract get this benefit (and with it the elimination of class action exposure) or not?

7. **The "Volt" Issue:** If some deviation from the default provisions of the FAA is contemplated, is it "antithetical" to the FAA under *Volt Information Sciences v. Board of Trustees* (1989) 489 U.S. 468: FAA tolerates the parties' free will choice to adopt state law in lieu of FAA rules if that is the contract they actually make and the terms they adopt do not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. The California Supreme Court cited *Volt* in both *Discover Bank* and *Sonic-Calabasas A* to justify its anti-arbitration holdings. We know by 20/20 hindsight that the U.S. Supreme Court did not see it the same way.

8. **To what extent may a trial court follow its reasonable conclusions about what the U.S. Supreme Court mandates by general statement in FAA cases as compared to more specific holdings by various California Courts of Appeal?** It is not easy to reconcile the general tenor of decisions in this field from the U.S. Supreme Court with most of the post-*Concepcion* decisions from the California intermediate appellate courts (with the notable exception of the recent, now depublished *Iskanian* decision). **Should a trial court just stay this part of its docket until the U.S. Supreme Court and the California Supreme Court rule on pending cases? I now recommend this, at least as to the current validity of *Gentry,* and probably also as to the long-term validity of *Brown* and *Reyes*.** Should a trial court rule one way and issue a decision which also says this outcome is mandated by state appellate authorities which appear inconsistent with recent U.S. Supreme Court decisions and invite appeal and/or writ practice?

9. **How to apply *D.R. Horton*? Or not?** Since the decision was rendered without the minimum necessary quorum (because the third member was recused), does it count for anything? By law, NLRB decisions are not self-enforcing or immediately effective, and the NLRB has to seek enforcement of its orders in a United States Court of Appeals. It is far from obvious that *D.R. Horton* will receive judicial approval in the federal courts, so how much deference should be given to it presently. It is presumably no more than persuasive authority since it is not from the U.S. Supreme Court on a federal law question.

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KEY U.S. SUPREME COURT ARBITRATION CASES

(= Cases most relevant to motions to compel arbitration in California state court)*

Pending before the U.S. Supreme Court:

**** In re American Express Merchants' Litigation*** (2d Cir. Feb. 1, 2012) 667 F.3rd 204, *cert. granted* (Nov. 9, 2012) (circuit court held merchant customers' Sherman Act antitrust case not suject to mandatory arbitration as individual claim as this would effectively waive claim due to cost of presenting individual case with expert witnesses)

Decided cases:

**** Nitro-Lift Technologies, L.L.C. v. Howard*** (November 26, 2012) 81 U.S.L.W. 4011, a Grant/vacate/remand order to Oklahoma Supreme Court:

> State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act [cite], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.
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> [I]t is for arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law.

**** Marmet Health Care Center, Inc. v. Brown*** (Feb. 21, 2012) 132 S.Ct. 1201 (per curiam with no dissent noted). Grant/vacate/remand order to West Virginia's highest court to reject reliance on "public policy" to prohibit mandatory arbitration of personal injury claims against nursing homes and to decide "whether, absent that general public policy, the arbitration clauses in Brown's case and Taylor's case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA."

CompuCredit Corp. v. Greenwood (Jan. 10, 2012) 132 S.Ct. 665 (8-1) Claims arising under the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 et seq., are subject to arbitration under Federal Arbitration Act ("FAA") pursuant to a valid arbitration agreement even though CROA speaks of "right to sue" for statutory violations.

KPMG LLP v. Cocchi (2011) 132 S.Ct. 23 (per curiam with no dissent noted). Grant/vacate/remand order to Florida appellate courts to consider further whether two of four claims (i.e. shareholder derivative-type claims) were subject to immediate arbitration even if two other claims which were "direct" claims and not derivative in nature were not subject to binding arbitration.

**** Sonic-Calabasas A, Inc. v. Moreno*** (2011) 132 S.Ct. 496 (no dissent recorded). Grant/vacate/remand order to California Supreme Court (opinion below at 51 Cal.4th 659) California Supreme Court's early 2011 decision refusing to compel contractual arbitration of "Berman hearings" before California Labor Commissioner vacated "for further consideration in light of *AT&T Mobility LLC v. Concepcion*."

**** AT&T Mobility LLC v. Concepcion*** (April 27, 2011) 131 S.Ct. 1740 (5-4, from 9th Circuit re California facts). *Discover Bank*'s unconscionability analysis overruled as contrary to Federal Arbitration Act ("FAA").

**** Rent-A-Center, West, Inc. v. Jackson*** (2010) 130 S.Ct. 2772 (5-4, from 9th Circuit re Nevada employee dispute) Under FAA, arbitrator, not court, to determine unconscionability attack on arbitration agreement where agreement expressly assigns that decision to arbitrator. General attack on contract's overall legality does not bar referral to arbitration: "Thus, a party's challenge to another provision of the contact, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. '[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'" *Id.* at 2778.

**** Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*** (2010) 130 S.Ct. 1758 (5-3, from 2nd Circuit). When arbitration agreement silent, class arbitration not allowed under FAA, and any award so providing exceeds arbitrator's authority and is unenforceable.

Hall Street Associates v. Mattel, Inc. (2008) 552 U.S. 576 (6-3, from 9th Circuit re Oregon facts). Parties may not contract for additional terms for vacating or modifying arbitration awards in federal court; FAA §§ 10 and 11 control. But parties "may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." *Id.* at 590.

**** Preston v. Ferrer*** (2008) 552 U.S. 346 (8-1, from 2nd DCA California). Purportedly mandatory provisions of California Talent Agencies Act (California Labor Code § 1700 *et seq.*) giving Labor Commissioner exclusive jurisdiction preempted by FAA.

**** Doctor's Associates, Inc. v. Casarotto*** (1996) 517 U.S. 681 (8-1, from Montana state courts). Montana statute providing arbitration agreement was unenforceable unless "typed in underlined capital letters on the first page of the contract" preempted by FAA: "Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. * * * It bears reiteration … that a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what … the state legislature cannot.'" *Id.* at 687.

**** Allied-Bruce Terminix Companies, Inc. v. Dobson*** (1995) 513 U.S. 265 (7-2, from Alabama state courts) State court judgment refusing to compel arbitration under FAA unless parties contemplated connection to interstate commerce overturned; FAA's coverage terms read "broadly, extending the Act's reach to the limits of Congress' Commerce Clause power."

* ***Volt Information Sciences, Inc. v. Board of Trustees [Stanford University]*** (1989) 489 U.S. 468 (6-2, from 6th DAC California). If parties contract for state law to apply, state court can apply C.C.P. §1281.2 to stay arbitration of certain claims while related claims involving parties not subject to mandatory arbitration are litigated; doing so does not offend FAA: "The question before us, therefore, is whether the application of … §1281.2(c) to stay arbitration under this

contract in interstate commerce, in according with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not." *Id.* at 477.

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RECENT POST-*CONCEPCION* CASES FROM CALIFORNIA AND ELSEWHERE
(listed by court)

Pending before the California Supreme Court:

Caron v. Mercedes-Benz Financial Services USA LLC (July 30, 2012) *originally published* at 208 Cal.App.4th 7 *rev. granted* (October 24, 2012) (FAA per *Concepcion* preempts California Consumer Legal Remedies Act's prohibition [Civil Code § 1751] on class action waiver)

Iskanian v. CLS Transportation Los Angeles, LLC (June 4, 2012) *originally published* at 206 Cal.App.4th 949, *rev. granted* (Sept. 19, 2012) (disagreeing with *Brown* and *Reyes v. Macy's* and holding *Gentry* invalidated by *Concepcion*)

Mayers v. Volt Management Corp. (Feb. 2, 2012) *originally published* at 203 Cal.App.4th 1194, *rev. granted* (June 13, 2012) (arbitration denied for failure to supply text of AAA arbitration rules)

Wisdom v. Accentcare, Inc. (Jan. 3, 2012) *originally published* at 202 Cal. App. 4th 591 *rev. granted* (March 28, 2012) (arbitration clause applicable to employee only unconscionable and not enforced)

Sanchez v. Valencia Holding Co. (2011) *originally reported* at 201 Cal.App.4th 74, *rev. granted* (March 21, 2012) (arbitration contract unconscionable where prohibition on class arbitration combined with "poison pill" negating arbitration clause if class waiver unenforceable)

Sonic-Calabasas A, Inc. v. Moreno (2011) 132 S.Ct. 496 (no dissent recorded). Grant/vacate/remand order to California Supreme Court (opinion below at 51 Cal.4th 659) California Supreme Court's early 2011 decision refusing to compel contractual arbitration of "Berman hearings" before California Labor Commissioner vacated "for further consideration in light of *AT&T Mobility LLC v. Concepcion*."

California Supreme Court:

Pinnacle Museum Tower Ass'n v. Pinnacle Market Development (US), LLC (Aug. 16, 2012) 55 Cal.4th 223 (CC&R's can create binding agreement to arbitrate construction defect disputes with developer with such contract obligation applicable to both individual condominium owners and their collective homeowners association)

California Courts of Appeal:

Franco v Arakelian Enterprises, Inc. (Nov. 26, 2012) 2012 Cal. App. LEXIS 1207 (*Gentry* is good law and was not overruled by *Stolt-Nielsen* and *Concepcion* because it does not establish a categorical rule against class action waivers but sets forth several factors to be applied to determine whether class action waiver precludes employees from vindicating rights)

Richey v. AutoNation, Inc. (Nov. 13, 2012) 2012 Cal. App. LEXIS 1177 (arbitration award vacated since arbitrator committed clear legal error in accepting honest belief defense since incompatible with California statutes, regulations, case law and important public policy. Unwaivable statutory rights under CFRA and FMLA)

Elijahjuan v. Superior Court (Oct. 17, 2012) 210 Cal.App.4th 15 (defendant cannot compel claim of plaintiff's Labor Code class action claim alleging misclassification as independent contractor by reliance on agreement calling for arbitration "if a dispute arises with regard to [contract's] application or interpretation")(Grimes, J. dissented, arguing that "[b]road arbitration clauses … are consistently interpreted as applying to extracontractual disputes between the contracting parties.")

Goodridge v. KDF Automotive Group, Inc. (Aug. 31, 2012) 209 Cal.App.4th 325 (arbitration of consumer class action claim against used car dealer denied as preprinted, adhesion contract's arbitration language on back side of form constituted unconscionable surprise since arbitration clause not initialed and customer did not sign or initial any part of back side of form)

Reyes v. Liberman Broadcasting, Inc. (Aug. 31, 2012) 208 Cal.App.4th 1537 (compelling arbitration without rejecting *Gentry* based on failure of proof in the record on appeal)

Phillips v. Sprint PCS (Sept. 26, 2012) 209 Cal.App. 758 (On post-*Concepcion* reconsideration of enforceability of arbitration agreement, arbitration compelled as plaintiff challenged contract as a whole for unconscionability but not arbitration clause specifically as unconscionable, following *Buckeye Check Cashing, Inc. v. Cardegna*)

Truly Nolen of America v. Superior Court (Aug. 13, 2012) 208 Cal.App.4th 487 (*Gentry* inconsistent with *Concepcion* but still must be followed as matter of stare decisis until state Supreme Court expressly overrules *Gentry*)

Sparks v. Vista Del Mar Child and Family Services (Aug. 20, 2012) 207 Cal.App.4th 1511 (arbitration of individual wrongful termination claim based on language in employee handbook denied notwithstanding employee's having signed agreement to abide by handbook's terms since receipt too vague and handbook included "no contract formed" language and contract illusory since employer reserved sole right to amend prospectively at its discretion)(Turner, J. dissented, finding receipt adequate to assent to contract and terms not unconscionable, whether or not plaintiff chose to read handbook)

Nelsen v. Legacy Partners Residential, Inc. (July 18, 2012) 207 Cal.App.4th 1115, *rev. denied* (Oct. 31, 2012) (compelling arbitration without rejecting *Gentry* based on failure of proof in the record on appeal)

Kinecta Alternative Financial Solutions, Inc. v. Superior Court (April 25, 2012) 205 Cal.App.4th 506, *rev. denied* (July 11, 2012) (following *Brown*'s holding but finding a failure of proof in the record on appeal)

Samaniego v Empire Today, LLC (April 5, 2012) 205 Cal.App.4th 1138 *rev. denied* (July 11, 2012) (FAA did not preempt California unconscionability doctrine and the trial court was not required to server unconscionable provisions of arbitration provision and enforce the rest)

Ajamian v. CantorCO2e, L.P. (Feb. 16, 2012) 203 Cal.App.4th 771 (CEO's claim not subject to mandatory arbitration as limits on damages and other terms unconscionable)

Reyes v. Macy's, Inc. (2011) 202 Cal. App. 4th 1119 (PAGA claim not susceptible of individual arbitration)

Roberts v. El Cajon Motors, Inc. (2011) 200 Cal.App.4th 832 (denial of arbitration upheld based on waiver for five-months delay during which "pick off" settlements of individual claims of putative class members were being obtained)

Brown v. Ralphs Grocery Co. (2011) 197 Cal.App.4th 489, *rev. denied, cert. denied* (2012) 132 S.Ct. 1910 (PAGA claims not arbitrable)

Zullo v. Superior Court (2011) 197 Cal.App.4th 477 (arbitration denied based on unconscionability with one-sided burdens on employee claimant)

U.S. Courts of Appeals:

Coneff v. AT&T Corp. (2012) 673 F.3d 1155 (enforcing individual only arbitration based on FAA preemption notwithstanding contrary provision in Washington state law)

Kilgore v. KeyBank, N.A. (9th Cir. 2012) *original panel opinion at* 673 F.3d 947, *rehrg. en banc granted* (Sept. 21, 2012) (panel opinion had enforced individual-only arbitration for consumer claims for injunctive and other relief pled as class action under Unfair Competition Law, rejecting prior California state cases which held contrary to California public policy to do so)

U.S. District Courts:

Morvant v. P.F. Chang's China Bistro, Inc. (N.D.Cal. 2012) 2012 U.S.Dist.LEXIS 63985, 2012 WL 1604851 (*Concepcion* overrules *Gentry*)

Jasso v. Money Mart Express, Inc. (N.D.Cal. 2012) __ F.Supp.2d __, 2012 U.S.Dist.LEXIS 52538, 2012 WL 1309171 (*Concepcion* overrules *Gentry*)

Blau v. AT&T Mobility (N.D.Cal. Jan. 3, 2012) 2012 U.S. Dist. LEXIS 21458, 2012 WL 10546 (compelling arbitration of UCL and CLRA claims)

Meyer v. T-Mobile USA Inc. (N.D.Cal. 2011) 836 F.Sup.2d 994 (disagreeing with *In re DirecTV* and compelling arbitration of UCL and CLRA claims)

Valle v. Lowe's HIW, Inc. (N.D.Cal. 2011) 2011 U.S.Dist.LEXIS 93639, 2011 WL 3667441 (*Concepcion* overrules *Gentry*)

Murphy v. DirecTV, Inc. (C.D.Cal. 2011) 2011 U.S. Dist. LEXIS 87625, 2011 WL 3319574 (*Concepcion* overrules *Gentry*)

Lewis v. UBS Financial Services, Inc. (N.D.Cal. 2011) 818 F.Supp.2d 1161 (*Concepcion* overrules *Gentry*)

Grabowski v. C.H. Robinson Co. (S.D.Cal. 2011) 817 F.Supp.2d 1159 (disagreeing with *Brown*)

Plows v. Rockwell Collins, Inc. (C.D.Cal. 2011) 812 F.Supp.2d 1063 (following *Brown v. Ralphs Grocery* to uphold *Gentry*)

In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litigation (C.D.Cal. 2011) 810 F. Supp. 2d 1060 (private attorney general claims under UCL and CLRA not subject

to arbitration as brought to enforce public right although other claims are ordered into arbitration)

[Updated Dec. 5, 2012 for LASC Best Practices]