

**FOCUS ON ARBITRATION:
THE CONTINUING TUG OF WAR
BETWEEN THE U.S. AND
CALIFORNIA SUPREME COURTS OVER
ARBITRATION LAW**

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), set significant restrictions on state laws limiting the enforceability of arbitration agreements governed by the Federal Arbitration Act (FAA). The California Supreme Court has now issued its first decision addressing the impact of these cases on California arbitration law: *Sonic-Calabasas A, Inc. v. Moreno*, 2013 WL 5645378 (Cal. Oct. 17, 2013). But far from settling the extent to which *Concepcion* and *Italian Colors* sweep away pre-*Concepcion* limits on arbitration, *Sonic-Calabasas* further muddies the waters.



Felix Shafir

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**FOCUS ON INTELLECTUAL PROPERTY
LITIGATION: DAMAGES IN
“IDEA SUBMISSION” CASES**



Jay M. Spillane

Among my clients are writers who developed an idea for a show or movie -- anything from an outline or treatment to a full script – presented that idea to a studio or producer, and then afterwards believed the idea was used in a finished product without the author’s permission. Although California courts have clearly determined such plaintiffs have potential claims, the amount or type of damages they can

recover remains unsettled.

These cases rarely present a viable claim of copyright infringement. A copyright claim should involve significant copying of expression, not merely alleged copying of ideas, themes or plot.

Additionally, few prospective plaintiffs want to proceed with a copyright claim when they hear that, if they lose, a judgment could be entered against them for the other sides’ attorneys’ fees.

If the client pitched their ideas to a person who produced a work allegedly embodying those ideas, the client may have a so-called “idea submission” or “Desny” case, meaning a potential claim for breach of express or implied contract or breach of confidence.

In *Desny v. Wilder*, 46 Cal.2d 715 (1956), the plaintiff called the office of film producer Billy Wilder to communicate an idea for a film based upon the story of a person who became trapped and perished in a cave. He reached Wilder’s secretary. The plaintiff wanted to submit a 65-page script, but the secretary said Wilder would not read anything of such length and took down the story idea by shorthand. She said she would present the idea to Wilder; the plaintiff said he wanted payment if the idea was used. Later Wilder produced a film that the plaintiff claimed was based upon the idea submitted to Wilder’s secretary. The California Supreme Court reversed an order granting summary judgment for Wilder, finding that the evidence of an agreement to pay for use of the idea synopsis created triable issues concerning the formation and breach of a contract.

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PRESIDENT'S MESSAGE



Beautiful blue skies, breezy 80-degree Southern California coastal weather, open bar and lively conversation—with over 400 members and guests in attendance—was a picture perfect setting for celebrating the ABTL's 40th birthday.

With such tempting surroundings, it was only the stellar MCLE programming that kept the conference rooms at capacity. The Chief Judge of the Ninth Circuit Court of Appeals, the Honorable Alex Kozinski, delivered a lively, humorous and informative keynote address. We

heard compelling presentations from top trial lawyers from across the state.

A communications expert to politicians and celebrities, Richard Greene, taught us valuable tools for effective communication. Well-known television writer, Jonathan Shapiro ("The Practice," "Boston Legal"), and Emmy-award-winning actor, Michael Badalucco (Jimmy from "The Practice") gave us a new perspective about how to tell a compelling story to the trier of fact.

The quality of the programming was only rivaled by the camaraderie among the attendees. In short, the weekend at the Ritz Carlton in Laguna Niguel was perfect. Mark your calendars for the ABTL's 41st Annual Seminar on October 14 to 19, 2014 at the JW Marriott Ihilani in Oahu, Hawaii. You don't want to miss it!

You also will not want to miss our upcoming dinner and lunch programs. At our December 3, 2013 dinner program, you'll hear from the lawyers who obtained a historic \$169,000,000 jury verdict for the FDIC in the Indymac matter—the first jury verdict arising from the financial crisis. At our January 21, 2014 lunch program, you will hear about the inner-workings of the federal and state court-sponsored settlement programs and how they can benefit your clients. At our February 18, 2014 dinner program, Dean Erwin Chemerinsky and Professor John Eastman will debate cutting-edge constitutional issues with the Honorable Jacqueline Nguyen of the Ninth Circuit Court of Appeals serving as the moderator. And at our March 11, 2014 lunch program, you will learn about the new trend of litigation financing from some of the foremost experts in the field.

I am very pleased to report that the ABTL is well poised for another successful 40 years. The Los Angeles Chapter of the ABTL, in particular, has record membership and has never been stronger. As we approach the end of 2013, we encourage you to do the following: renew your ABTL membership for 2014 or become a new member; write for the ABTL Report; attend our dinner and lunch programs; and participate in our community service initiatives. You can learn about all of this and more by visiting our website at www.abtl.org. The ABTL fosters an important dialogue between the bench and both sides of the business bar—plaintiff and defense. We look forward to your participation.

Sincerely yours,

*J. Warren Rissier
ABTL President 2013-2014, Los Angeles Chapter*

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Arbitration Law...continued from Page 1

The U.S. Supreme Court has long held that the FAA mandates enforcement of agreements to arbitrate statutory claims. Congress can override this FAA mandate but, where the FAA and *state* law conflict, the FAA preempts state law.

Decades ago, in dictum, the U.S. Supreme Court expressed a willingness to invalidate agreements to arbitrate *federal* statutory claims where the agreements “‘operat[e] ... as a prospective waiver of a party’s *right to pursue* statutory remedies.’” *Italian Colors Restaurant*, 133 S. Ct. at 2310. This concept came to be known as the “vindication” principle—the idea being that courts might not compel arbitration if federal statutory rights could not be vindicated through arbitration. *Id.* Although the Court has since occasionally discussed this vindication principle, it has never struck down an arbitration agreement for failing to vindicate *federal* statutory rights.

The California Supreme Court has, in contrast, relied on a version of the vindication principle to deny arbitration in cases raising *state* statutory claims. For example, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), applied the vindication principle to hold that, as a matter of California public policy, mandatory agreements to arbitrate unwaivable state statutory claims can be invalidated where the agreed-upon arbitration procedures failed to approximate certain court procedures that the state Supreme Court believed were essential in enabling an employee to vindicate his or her statutory claims.

The California Supreme Court decided that the FAA’s saving clause, which permits courts to invalidate arbitration agreements based on “‘generally applicable contract defenses,’” saved this state public policy defense from FAA preemption because this defense against enforcing arbitration agreements as written was based on California’s rule against exculpatory contracts that undermine plaintiffs’ vindication of their unwaivable rights. *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1079-80 (2003).

But *Concepcion* subsequently rejected the assertion that “California’s policy against exculpation”—i.e., California’s version of the vindication principle—could override the FAA’s principal objective of enforcing arbitration agreements according to their terms. *See Concepcion*, 131 S. Ct. at 1746-53. *Concepcion* determined that where courts hold arbitration procedures to be “unconscionable or unenforceable as against public policy” based on their “public-policy disapproval of exculpatory agreements,” such state law defenses “[i]n practice . . . have a disproportionate

impact on arbitration agreements” even though they “presumably apply” to all contracts. *Id.* at 1747. *Concepcion* therefore held that the FAA preempts state law standards—including unconscionability defenses—invalidating agreed-upon arbitration procedures based on a state policy against exculpatory contracts. *Id.* at 1747-48.

Italian Colors further limited the vindication principle’s scope, holding that, to the extent this principle exists at all, it is limited to prospective waivers of a party’s right to pursue federal statutory remedies, and it may also bar filing and administrative fees that are so high as to make access to the arbitral forum impracticable in cases involving federal statutory claims. *Italian Colors Restaurant*, 133 S. Ct. at 2309-12.

In *Sonic-Calabasas*, the California Supreme Court has now acknowledged that pre-*Concepcion* limits it placed on the enforcement of arbitration agreements cannot be squared with *Concepcion* and *Italian Colors*. But *Sonic-Calabasas*’ precise holding is unclear.

On one hand, *Sonic-Calabasas* held that the FAA, as construed by *Concepcion*, preempts the state Supreme Court’s prior public policy rule categorically prohibiting an arbitration agreement from moving wage-related disputes into the arbitral forum in a way that bypasses an otherwise available informal administrative hearing before the Labor Commissioner. This ruling is consistent with the view that the public policy defense applied in cases like *Armendariz* is no longer good law after *Concepcion*.

On the other hand, *Sonic-Calabasas* left open the possibility that an arbitration agreement’s administrative hearing waiver may be deemed unconscionable *on a case-by-case basis*. The court persisted in applying the vindication principle as a foundation for that part of the analysis. According to Justice Liu’s majority opinion, neither *Concepcion* nor *Italian Colors* prohibits a court from considering, as one factor in an unconscionability analysis, whether the arbitration agreement results in the employee entirely surrendering procedural protections associated with the administrative process, such that the agreement fails to provide the employee with an “accessible and affordable” forum for resolving wage disputes. This application of the vindication principle in the form of an unconscionability analysis might suggest that, in the state Supreme Court’s view, *Armendariz*’s public policy defense—which is equally grounded in the vindication principle—survives *Concepcion* and *Italian Colors*.

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ABTL YOUNG LAWYERS DIVISION PANEL: DON'T TURN INTO A PUMPKIN: HOW TO MARKET YOURSELF AS A YOUNG LAWYER



Emily A. Jarvis

The ABTL Young Lawyers Division (YLD) Committee provides programming and events relevant to lawyers who have been practicing ten years or less. On October 29, 2013, the Committee organized a panel of distinguished attorneys and marketing professionals for the festively titled program: Don't Turn Into A Pumpkin: How to Market Yourself as a Young Lawyer.

Bingham McCutchen LLP graciously hosted the program at the firm's offices in downtown Los Angeles. Moderated by J. Warren Rissier, a Partner at Bingham McCutchen LLP, the program featured panelists David Houston, Editor of the Daily Journal; Nancy G. Newman, a Marketing Consultant at Robins, Kaplan, Miller & Ciresi L.L.P.; James R. Kalyvas, a Partner at Foley & Lardner LLP; and Jeffrey A. Konicius, a Partner at Kiesel Law LLP.

The panelists provided practical tips on what young lawyers should do to market themselves internally and externally. David Houston provided valuable insider advice about the types of articles and columns that the Daily Journal seeks to publish and discussed the particular attorney marketing efforts that have resonated with him. Nancy Newman gave practical advice about the things that young lawyers can do to market themselves, including organizing contacts, engaging in meaningful business card exchanges, and developing effective elevator speeches as conversation starters, rather than conversation downers. James R. Kalyvas discussed developing practice-area expertise and ways to effectively (and genuinely) seek business opportunities from contacts. And Jeffrey A. Konicius discussed viewing marketing as an opportunity to help others, as opposed to seeking out others for help, as well as ways to successfully develop and utilize referral networks. Above all, the panelists emphasized the theme that marketing efforts should be viewed as a sprint, not a marathon. Nonetheless, implementing some key components in your practice as a young lawyer will set the stage for effective business development as a senior associate or partner.

The event was well attended and the attendees enjoyed time networking with colleagues from both the Plaintiff and Defense bars. The YLD Committee thanks all who attended the event and

especially the panelists for their unique, valuable, and sincere advice.

The YLD Committee's next event will be a brown bag lunch with Justice Judith Ashmann-Gerst and Judge Arthur Alarcon in late November 2013, titled: Appellate Tips for Trial Lawyers: How to Protect the Record. Stay tuned for more details on this event and upcoming YLD events in the New Year.

Emily A. Jarvis is an associate at Robins, Kaplan, Miller & Ciresi L.L.P. and an ABTL YLD Committee Member.

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At any rate, it remains to be seen whether *Sonic-Calabasas*' unconscionability standard will survive future U.S. Supreme Court scrutiny. Justice Chin's dissenting opinion in *Sonic-Calabasas* took issue with the majority's unconscionability standard requiring that arbitration agreements guarantee procedural protections that would be available to vindicate claims prosecuted outside of arbitration. The dissent emphasized that *Italian Colors* held that the vindication principle does not require an arbitration agreement to provide an arbitral forum that affords the same procedures available outside of arbitration. Indeed, Justice Kagan's dissenting opinion in *Italian Colors* confirmed that the vindication principle is inapplicable to state statutory claims.

Moreover, the *Sonic-Calabasas* majority acknowledged that its unconscionability standard addresses issues unique to arbitration. But, as Justice Chin pointed out in his dissent, *Concepcion* reaffirmed that courts cannot rely on the uniqueness of an arbitration agreement as a basis for finding the agreement unconscionable.

Time will tell whether, given its interest in eliminating judicially-created barriers to arbitration, the U.S. Supreme Court may one day strike down *Sonic-Calabasas*' unconscionability standard pursuant to the FAA.

Felix Shafir is a partner at the civil appellate law firm of Horvitz & Levy LLP.

Idea Submission Cases...continued from Page 1

The elements of an express or implied contract claim involving ideas are well defined under California law. “[F]or [a Desny] implied-in-fact contract one must show: that he or she prepared the work; that he or she disclosed the work to the offeree for sale; under all circumstances attending disclosure it can be concluded that the offeree voluntarily accepted the disclosure knowing the conditions on which it was tendered (i.e., the offeree must have the opportunity to reject the attempted disclosure if the conditions were unacceptable); and the reasonable value of the work.” *Faris v. Enberg*, 97 Cal. App.3d 309, 318, 158 Cal. Rptr. 704, 709 (1979). It is error to require the plaintiff to show that disclosure of the idea was “clearly conditioned” on payment. *Gunther-Wahl Productions, Inc. v. Mattel, Inc.*, 104 Cal.App.4th 27, 35-39, 128 Cal.Rptr. 50, 57-59 (2002). Rather, the expectation of payment for use of the disclosed idea may come from industry custom. *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 977-78 (9th Cir. 2011).

An “idea submission” case may also sound in breach of confidence. “An actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror’s permission.” *Faris*, 97 Cal. App. 3d at 323, 158 Cal. Rptr. at 712.

While the elements needed to prove liability for a breach of contract or confidence claim have been well developed, the standards governing an award of potential damages are not as clear.

A plaintiff on a contract claim may seek damages sufficient to compensate for the harm caused by the breach. CACI No. 350. This would usually not be more than could have been obtained had the contract been performed (the “benefit of the bargain”). Cal. Civ. Code § 3358. Defendants will therefore argue that even if liability is shown, damages would be limited to the fee the plaintiff would have earned to license the idea. If the plaintiff has no substantial history of earnings from licensing stories or screenplays, such a fee would not likely be very large, perhaps limited to “scale” (minimum payments set forth in a collective bargaining agreement) if the plaintiff is a guild signatory.

The plaintiff, on the other hand, will likely feel that if s/he proves liability, the defendant should not get away with first stealing the idea and then paying only the license fee that would have been negotiated had the defendant sought permission for its use. This feeling will be stronger if the defendant is alleged to have used the idea to earn significant sums through misappropriation of the plaintiff’s idea. However, no California court has expressly held that either disgorgement of profits or attorneys’ fees – remedies both potentially available under copyright law – are available for breach of contract or confidence.

The attorney struggling with how to frame damages in a

Desny case would do well to consider whether cash or non-cash compensation other than an up-front license fee could be proven as an element of the agreement. For example, if the plaintiff proves she was promised not only payment for her idea but “story by” or production credit in the resulting work, her agent or an expert could testify to the potential value of that credit in the marketplace and seek recovery under a “benefit of the bargain” theory. Or, if an opportunity to work on or otherwise participate in the production, or a share of profits can be shown to be elements of the express or implied bargain, sums for loss of opportunities or profits could be claimed. See *Trademark Properties Inc. v. A&E Television Networks*, 422 Fed.Appx. 199 (4th Cir. 2011) (award of profits for use of idea upheld as jury could have accepted evidence that a split of revenues was intended); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001) (upholding jury verdict for plaintiff based on use of idea for ad campaign involving proposal to earn percentage of advertising budget, sales and licensed products).

Just as the element of a promise to pay for use of an idea may be inferred from the circumstances or industry custom, custom may also provide a basis for inferring an agreed method of compensation. For example, in *Stanley v. CBS, Inc.*, 35 Cal.2d 653, 667 (1950), involving an implied agreement to pay for use of an idea in a radio show, the damage award was supported by evidence of a custom to pay a percentage of production costs based upon the number of weeks a show was on the air. *Donahue v. United Artists Corp.*, 2 Cal.App.3d 794 (1969) involved submission of story outlines for a television show involving scuba diving, allegedly used in the show “Sea Hunt.” The jury’s award of \$200,000 in damages was upheld on appeal as supported both by a co-owner’s opinion of the market value of the idea at the time of submission, and by testimony supporting the existence of a custom of paying a per-episode royalty for show concepts. The trial judge denied a motion for new trial on damages on the theory that the jury could reasonably have awarded a fee of \$2.00 for each of 100,000 airings of the show.

There exists some support for an outlier theory that disgorgement can be an element of a contract or confidence action based on a Desny theory. In *Landsberg v. Scrabble Crossword Game Players, Inc.*, 802 F.2d 1193 (9th Cir. 1986), the plaintiff sued for breach of an implied-in-fact contract to compensate him for use of his ideas in a strategy book for the Scrabble board game. The district court awarded all of the defendant’s profits plus pre-judgment interest. The Ninth Circuit rejected the argument that disgorgement of profits was an improper remedy, finding that the contract required not only compensation for use of the idea but also permission to use the idea, and that because the defendant had no right to use the idea it had no right to keep the profits. To rule otherwise, the court reasoned, would be to sanction theft of the idea and limitation of plaintiff’s compensation to a license fee in a forced exchange. 802 F.3d at 1198. See also *Reeves v. Alyeska Pipeline Service Co.*, 56 P.3d 660 (Alaska 2002) (for

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FOCUS ON THE CALIFORNIA SUPREME COURT: SUMMARY OF PENDING CALIFORNIA SUPREME COURT CASES



David M. Axelrad

Following is a summary of cases pending before the California Supreme Court that should be of particular interest to the ABTL membership.

CLASS CERTIFICATION

Do variations in how workers do their job preclude class certification?

Ayala v. Antelope Valley Newspapers, Inc., 210 Cal. App. 4th 77 (2012), *review granted*, S206874 (Jan. 30, 2013)

In this appeal from the denial of class certification, the putative class consists of newspaper carriers for the Antelope Valley Press (AVP) who, though described as independent contractors, were allegedly so controlled in their performance as to be employees entitled to sue for AVP's failure to comply with California labor laws. The trial court found there were many variations in how the carriers performed their jobs, and that common issues did not predominate for purposes of class certification. The Court of Appeal, however, concluded that these variations do not preclude class certification. The Supreme Court will consider the class certification issue and the relevance of *Martinez v. Combs*, 49 Cal. 4th 35 (2010) and IWC Wage Orders to defining the employment relationship for purposes of unpaid wage claims.

PROTECTED SPEECH

Does Civil Code section 2527 compel speech in violation of the California Constitution?

Beeman v. Anthem Prescription Mgmt., LLC, 682 F.3d 779 (9th Cir. 2012), *amended and superseded by* 689 F.3d 1002 (9th Cir. 2012), *review granted* (S203124, Cal. June 7, 2012)

California Civil Code section 2527 requires prescription drug claims processors to provide their clients with a report on the fees charged by California pharmacies for dispensing pharmaceutical services to private consumers. Plaintiffs, the owners of five California pharmacies, filed a federal

class action suit against drug claims processors for violation of section 2527. The defendants moved for judgment on the pleadings, alleging that section 2527 compels speech in violation of the California Constitution. Although three California Court of Appeal decisions and two trial court decisions found the statute to be unconstitutional, the Ninth Circuit was not persuaded that the California Supreme Court would follow those decisions, and therefore requested that the California Supreme Court decide whether Civil Code section 2527 compels speech in violation of article I, section 2, of the California Constitution.

ATTORNEY FEES

What law governs a contractual attorney fee claim brought in state and federal court on a federal copyright claim?

Kandy Kiss of Cal., Inc. v. Tex-Ellent, Inc., 209 Cal. App. 4th 604 (2012), *review granted*, 291 P.3d 326 (S206354, Cal. Jan. 16, 2013)

Kandy Kiss sued Paramount, a fabric wholesaler, in state court, alleging breach of warranty because a third party owned the copyright to the paisley design of the fabric Kandy Kiss wanted to purchase through Paramount. Paramount successfully moved to dismiss on grounds that Kandy Kiss's action arose under the Federal Copyright Act and could only be brought in federal court. Kandy Kiss then refiled its breach of warranty action in federal court, but the federal court granted Paramount's motion for summary judgment and dismissed the action. Paramount moved for attorney fees in state court as prevailing party under a contractual attorney fee provision. The state trial court awarded attorney fees while the federal district court denied Paramount's request for fees on grounds that Kandy Kiss's federal suit was not an action on a contract containing a fee provision.

Noting a split of authority on the issue, the Court of Appeal, following decisions in *Profit Concepts Management, Inc. v. Griffith*, 162 Cal. App. 4th 950 (2008), and *PNEC Corp. v. Meyer*, 190 Cal. App. 4th 66 (2010), held that because Kandy Kiss chose to sue Paramount in state court, and Paramount achieved complete success by obtaining a final dismissal of Kandy Kiss's claims in that court, Paramount is entitled to an award of contractual attorney fees as the prevailing party under Civil Code section 1717. The Supreme Court agreed to review this "prevailing party" attorney fee issue.

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PATENT INFRINGEMENT

Is a “pay for delay” contractual provision a defense to an antitrust action under the Cartwright Act?

In re Cipro Cases I & II, 200 Cal. App. 4th 442 (2012), review granted, 269 P.3d 653 (S198616, Cal. Feb. 15, 2012)

In 1991, Barr Pharmaceuticals challenged the validity of Bayer’s patent on the antibiotic Cipro. Bayer sued Barr for patent infringement. Bayer settled with Barr and other manufacturers, and agreed to pay the manufacturers for their agreement to accept the validity of Bayer’s patent and defer manufacturing a generic version of the drug while Bayer’s patent was in effect.

Purchasers of Cipro then filed antitrust actions in federal court alleging that the Cipro settlement agreements violated federal antitrust laws. Both the Federal Circuit and Second Circuit approved the agreements.

Plaintiff purchasers then sued in California state court alleging that the Cipro settlement agreements violated the Cartwright Act. Both the trial court and the Court of Appeal upheld the “pay for delay” provision in the settlement agreements.

The Supreme Court’s decision will likely examine the impact of the U.S. Supreme Court decision in *FTC v. Actavis*, 133 S. Ct. 2223 (2013), which held that “reverse payment” settlements, similar to “pay for delay” settlements, can violate federal antitrust laws.

FEDERAL PREEMPTION

Is an unfair competition action on behalf of truck drivers premised on violations of California labor law preempted by the Federal Aviation Administration Authorization Act?

People ex rel. Harris v. Pac Anchor Transp., Inc., 195 Cal. App. 4th 765 (2011), review granted, S194388 (Aug. 10, 2011)

Alfredo Barajas leases trucks and drivers to Pac Anchor. Because the drivers are classified as independent contractors, Barajas and Pac Anchor do not observe the state labor law requirements that apply to employees, such as providing workers’ compensation insurance, paying unemployment insurance, reimbursing business expenses, etc.

The State of California brought an action against Barajas and Pac Anchor for violating state unfair competition law by misclassifying the truck drivers as independent contractors. The trial court found the State’s action was preempted by the Federal Aviation Administration Authorization Act, 49 U.S.C.

§ 14501 (FAAAA). The Court of Appeal reversed, holding that the State’s unfair competition action is unrelated to the motor carrier prices, routes, and services covered by the FAAAA.

In reviewing the Court of Appeal’s decision, the California Supreme Court may examine the effect of *American Trucking Ass’ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013) and *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013), both of which address the preemptive scope of the FAAAA.

WRONGFUL TERMINATION/ARBITRATION

Is an employer’s “honest belief” a valid defense to a wrongful termination action? Can an arbitration award be vacated for legal error implicating important state statutory rights?

Richey v. Autonation, Inc., 210 Cal. App. 4th 1516 (2012), review granted, 294 P.3d 74 (S207536, Cal. Feb. 13, 2013)

Avery Richey was terminated from his position as an auto dealership sales manager because his employer believed Richey was misusing his family leave to work part-time at a restaurant. Richey sued the dealership for violating his rights under the state family leave act. Richey’s claim was submitted to arbitration pursuant to a mandatory arbitration provision in his employment agreement. The arbitrator denied Richey’s claim based on the employer’s honest belief that Richey was discharged for misusing his family leave. The Court of Appeal reversed, holding that the honest belief defense is contrary to California law and that the arbitrator’s award should be vacated because the arbitrator exceeded his powers in applying the honest belief defense. The Supreme Court will examine the validity of the “honest belief” defense and the scope of judicial review of arbitration awards that violate or implicate important state statutory rights.

PREMISES LIABILITY

Does a commercial property owner have a duty to make available to its invitees a defibrillator to treat sudden heart attacks?

Verdugo v. Target Corp., 704 F.3d 1044 (9th Cir. 2012), review granted (S207313, Cal. Dec. 12, 2012)

While Mary Ann Verdugo was shopping at Target, she suffered a sudden cardiac arrest and collapsed. By the time paramedics arrived, Verdugo was dead. Target sells automatic external defibrillators (AEDs), which enable untrained persons to administer an immediate electric shock

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that can restart an arrested heart. However, Target did not have an AED in the store where Verdugo was shopping.

Verdugo's heirs filed a wrongful death suit in state court, which Target removed to federal court. The district court granted a motion to dismiss on grounds that Target had no duty to have an AED available on its store premises.

The Ninth Circuit certified to the California Supreme Court the question whether "the common law duty of a commercial property owner to provide emergency first aid to invitees require[s] the availability of an Automatic External Defibrillator . . . for cases of sudden cardiac arrest[.]"

PRODUCTS LIABILITY

Should California adopt the sophisticated purchaser doctrine in products liability failure to warn cases?

Webb v. Special Elec. Co., 214 Cal. App. 4th 595 (2013), *review granted*, 301 P.3d 1176 (S209927, Cal. June 12, 2013)

William Webb contracted mesothelioma. While working for a pipe company, Webb routinely handled an asbestos product manufactured by Johns-Manville using a type of asbestos supplied by Special Electric.

Webb sued Special Electric for negligence and strict liability, alleging that Special Electric had failed to warn him of the risk of injury and disease from the handling of asbestos. The trial court granted Special Electric's motion for nonsuit/directed verdict/JNOV on grounds that the warnings Special Electric gave Johns-Manville satisfied any duty to warn Special Electric might have and that would be unreasonable to obligate Special Electric to ensure that Johns-Manville gave warnings to the users of its products concerning the asbestos product supplied by Special Electric.

The Court of Appeal reversed, finding that Special Electric had a duty to warn the end users of Johns-Manville's product. At issue in the Supreme Court will be whether, because Johns-Manville was a sophisticated purchaser of Special Electric's asbestos product, Special Electric had any duty to warn Johns-Manville or the ultimate users of Johns-Manville's product.

ARBITRATION

Is it unconscionable for an arbitration clause to permit either party to seek provisional remedies in court while the arbitration is pending?

Baltazar v. Forever 21, Inc., 212 Cal. App. 4th 221

(2012), *review granted*, 296 P.3d 974 (S208345, Cal. Mar. 20, 2013)

Plaintiff sued her employer and fellow employees for discrimination and harassment based upon race and sex. When defendants moved to compel arbitration pursuant to an arbitration agreement, plaintiff argued the agreement was unconscionable. The trial court agreed, but the Court of Appeal reversed. The arbitration clause in the plaintiff's employment agreement stated, in accordance with the California Arbitration Act, that either party to an arbitration could go to court to seek provisional remedies such as temporary restraining orders or preliminary injunctions. Plaintiff argued this provision was unduly one-sided in favor of the employer and therefore unconscionable, but the Court of Appeal disagreed and held that a neutral clause of this sort did not favor one side or the other, that the employer was not more likely than the employee to seek injunctive remedies, and that in any case the clause simply incorporated state law that would govern even in the absence of the clause. The Supreme Court will review the unconscionability issue.

ARBITRATION

Are arbitral appeal and self-help remedies provisions in an arbitration clause unduly one-sided and therefore unconscionable?

Sanchez v. Valencia Holding Co., 201 Cal. App. 4th 74 (2011), *review granted*, 272 P.3d 976 (S199119, Cal. Mar. 21, 2012)

A buyer sued a car dealer for violation of various state consumer laws in connection with the sale of a used Mercedes and sought to certify a class action. The dealer moved to compel arbitration pursuant to an arbitration provision in the sales contract, which contained a class action waiver. The trial court refused to enforce the class action waiver, and the Court of Appeal affirmed on different grounds. The arbitration clause in the contract contained an arbitral appeal provision for damage awards of \$0 or more than \$100,000 or for awards of injunctive relief (with the appealing party required to advance arbitral appeal costs), as well as an exclusion of self-help remedies from arbitration, and a class action waiver. The Court of Appeal ultimately held that the arbitration clause was unconscionable because the arbitral appeal provision (including its cost advancement provision) and self-help remedies exclusion were unduly one-sided in favor of the car dealer. The court also held that

Continued on Page 9...

Pending Supreme Court Cases...continued from Page 8

the U.S. Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) did not change this result because *Concepcion* was limited to FAA preemption of specific unconscionability rules barring class action waivers, and the unconscionability principles applied in this case were general and not specifically aimed at disfavoring arbitration. The Supreme Court granted review in *Sanchez* to determine the scope and operation of unconscionability principles in the wake of *Concepcion*, as well as whether the arbitration clause in this case was unconscionable.

ARBITRATION**Is a wage and hour class action waiver enforceable under *Concepcion* even if individual arbitration cannot effectively vindicate class members' statutory employment rights?**

Iskanian v. CLS Transp. L.A., LLC, 206 Cal. App. 4th 949 (2012), review granted, 286 P.3d 147 (S204032, Cal. Sept. 19, 2012)

Plaintiff sued his employer for various wage and hour violations, and sought to certify a class action. The employer moved to compel arbitration pursuant to an arbitration agreement that included a class action waiver. Following the U.S. Supreme Court decision in *Concepcion*, 131 S. Ct. 1740 (2011), the trial court enforced the class action waiver and ordered the case to arbitration. The Court of Appeal affirmed, holding that the Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007) (class action waiver unenforceable if individual arbitration could not as effectively vindicate employee's unwaivable statutory rights) was preempted by the Federal Arbitration Act (FAA) under *Concepcion*. The Court of Appeal also determined that federal labor law does not prohibit the enforcement of an arbitration agreement's class action waiver under the FAA. Additionally, the appellate court held that, pursuant to *Concepcion*, the FAA requires courts to enforce an arbitration agreement provision barring employees from pursuing a representative (rather than an individual) claim for wage-related penalties under the Private Attorneys General Act.

The California Supreme Court has granted review to consider the impact of *Concepcion* in this case.

David M. Axelrad is a partner at the civil appellate law firm of *Horvitz & Levy LLP* and Editor of the *ABTL Report*.

Idea Submission Cases...continued from Page 5

breach of an implied contract not to use an idea for a visitors' center, "[u]nder Landsberg the proper measure of Reeves's compensatory damages is the profit that Alyeska actually realized by exploiting Reeves's idea. We thus conclude that the trial court properly rejected Alyeska's attempt to limit Reeves's damages to the fair value of his services).

Landsberg has neither been adopted nor rejected by the California courts. I believe that it could be difficult to convince a trial judge to approve a jury instruction based upon Landsberg given the well-accepted maxim that a plaintiff cannot recover in excess of the benefit of the intended bargain. If such an instruction was given and a sizable verdict rendered, a sharp battle on appeal would surely ensue.

A better approach to enhancement of a potential damage award than the risky course of arguing disgorgement, and one less susceptible to reversal on appeal, would be to urge that the amount of the intended or fair compensation for use of an idea could take into account the degree of financial success enjoyed by the recipient as a result of use of the idea. A damage award could then be based upon the "value of the use [of the plaintiff's idea] to the defendant." For example, what if a top film producer, who earns millions per film, was struggling to find the idea that would launch a desired feature film project. An uncredited writer supplies that idea, which is used without permission; the film is a hit. Would the plaintiff's damages be limited by evidence of market license fees paid to inexperienced writers for film stories? Or, could it be argued that the film producer should pay a just portion of his millions in earnings for use of the idea without permission? In this scenario, I believe that a judge would give a jury instruction authorizing damages for the value of the idea "to the defendant" and wide latitude to argue the latter theory of damages to the jury.

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. * * * 'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights."

Donahue v. United Artists Corp., supra, 2 Cal.App.3d at 804.

I believe that any practitioner considering a Desny claim would do well to consider at the outset not only liability, but how to fashion jury instructions that will be supportive of the plaintiffs' theory of damages, approved by the trial court and upheld on appeal, especially given the relatively sparse guidance in this area.

Jay M. Spillane is a business trial lawyer with *Spillane Trial Group PLC*.

ASSOCIATION OF BUSINESS TRIAL LAWYERS



January 21, 2014

Lunch and Program

Getting to Yes: Strategies and Resources for Settlement in Federal and State Court

Hon. Jay C. Gandhi

United States District Court



Hon. Helen I. Bendix

Los Angeles Superior Court



Michelle A. Reinglass

ADR Office of Michelle A. Reinglass



Robert S. Span

Steinbrecher & Span LLP

Moderator

Millennium Biltmore Hotel

506 S. Grand Avenue, Los Angeles

Lunch Served: 12:00 p.m.; Program 12:30 p.m. — 1:30 p.m.

Cost: 2014 ABTL Members **\$85**, Non-Members **\$100**, Active Judiciary: **Complimentary**

Tables of 10 Members Cost: **\$800** Tables of 10 Non-Members Cost: **\$900**

1.0 hour of MCLE credit will be offered.

Trial attorney group turns 40

The Association of Business Trial Lawyers, founded in LA, filled a legal niche.

By Kylie Reynolds
Daily Journal Staff Writer

Forty years ago, business trial lawyers in Los Angeles lacked the same opportunities as other specialists to interact and exchange ideas about the bar. Unlike personal injury or defense attorneys, at the time they were without a professional group that catered to their specific interests.

So in 1973, a cadre of business litigators led by Allan Browne, founding partner of Browne George Ross LLP, formed the Association of Business Trial Lawyers.

"It started from the premise that there were some gaps that needed to be filled, and it has continued to serve that role," said Karen Kaplowitz, who was president of the Los Angeles chapter in 1996.

The founders were young - most were in their 30s, said Bingham McCutchen LLP partner Marshall B. Grossman, one of the association's founders. Lacking a central office, the members organized using the "stationery and the postage and the elbow grease" provided by Browne's and Grossman's offices.

"We started with nothing - we had no funds, we had no experience," Grossman said. "We had no right to succeed, but we did."

In four decades, what started in Los Angeles has expanded to include five chapters across the state - Los Angeles, Northern California, Orange County, San Diego and San Joaquin Valley - and now boasts nearly 5,000 members.

"We were able to meld a true open bar association dedicated to litigation and cooperation between the bench and the bar in advancing the professional needs of each group," Grossman said. "That's the reason for its founding and its initial and continued success."

The group includes both plaintiff- and defense-side business litigators, as well as judges. Many of the association's members and leaders agreed that its greatest impact over the years has been connecting the bench with both sides of the state's business bar.

"We think that's really valuable ... to have a way to readily exchange ideas between the bench and both sides of the bar about



Alexander Drecun / Special to the Daily Journal

Marshall Grossman and J. Warren Rissier of the Association of Business Trial Lawyers, which just celebrated its 40th anniversary.

issues of import to a significant group that the California courts serve, which is the business litigators," said Bingham partner J. Warren Rissier, this year's Los Angeles chapter president.

At a 40th anniversary event held during the association's annual seminar earlier this month, association founders discussed the original goals of the association. Among them were providing continuing legal education and fostering "social fellowship" among its members, Rissier said, adding "I think we've stayed pretty true to those goals that were set forth since 1973."

Balance is also a top priority. From its membership to the leaders at its helm, the group has worked to avoid becoming dominated by defense attorneys, said Alan Schulman, the association's first plaintiffs'-attorney president. Schulman, now a University of San Diego School of Law professor, headed the San Diego chapter in 2001.

"I felt there was a genuine effort being made to make sure the organization was balanced with plaintiffs, defendants and judges, so it was truly representative of the litigation bar," he said.

A balance between both sides of the bar is attractive to judges, because they can talk to attorneys without concern that they might appear to be taking sides, said Richard Seabolt, the Northern California chapter president and a Duane Morris LLP partner. Informal events such as dinners and debates give members a chance

to foster relationships with both attorneys and judges, groups that don't often have contact outside of the courtroom.

ABTL's expansion throughout the state began in the early 1990s, allowing members to connect with an even larger group of their peers, said Kaplowitz, who was part of a team that drove the expansion.

"You can see that the outreach by ABTL Los Angeles to the rest of the state reflected the growing importance of the legal communities in other parts of the state," she said. "We were part of a growing trend towards the nationalization and the internationalization of law firms."

The Northern California chapter has since surpassed Los Angeles in head count, eventually reaching an all-time high of about 2,000 members, Seabolt said.

Going forward, Rissier said, the association is making investments to prepare it for another 40 years. It has, for example, ramped up its Internet and social media presence and is focusing on increasing diversity. The group, which has had fewer female presidents or minority attorneys in its membership, is working to address these shortfalls, Kaplowitz said.

It's also devoting more resources on younger lawyers, encouraging them to take on leadership roles and offering free first-time memberships to attorneys who have practiced for three years or fewer.

"We think when young lawyers are introduced to the ABTL," Rissier said, "we'll have members for life."

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REPORT

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