ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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Q&A with the Hon. William W. Bedsworth

By Ben P. Ammerman

[*Editorial Note: Justice Bedsworth has served as Associate Justice for the California Court of Appeal, 4th District, Div. 3 since 1997. After graduating from Boalt Hall in 1971, he joined the Orange County District Attorney's Office, during which he was elected twice to the Board of Directors of the Orange County Bar Association. He was elected to an open seat on the Orange County Superior Court in 1986 where he served until his appointment to the appellate court. Outside of his judicial career, Justice Bedsworth may be best known for his nationally-syndicated monthly humor column, "A Criminal Waste of Space," which appears locally in the Orange County Lawyer. Of interest to hockey fans, he recently retired from a 15 -year career as a National Hockey League goal judge.*]

Q: If you had one lesson or anecdote that you would share with young attorneys, what would that be?

A: This is a long answer using two stories. I was asked to be second chair on a murder case with Bob

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The Art of 998 Offers to Compromise

By Evan Rothman and Shannon C. Lamb

Every business litigator will inevitably grapple with offers to compromise pursuant to Code of Civil Procedure section 998 (hereinafter "Section 998"). Section 998 encourages settlement of litigated matters by providing a financial disincentive to reject a reasonable pre-trial offer. It provides a rubric for settlement offers that may significantly impact litigation -- whether or not the offer is ultimately accepted

Section 998 employs a "carrot and stick" approach whereby the legislature has incentivized parties to settle cases early on while penalizing parties who fail to accept reasonable settlement offers. The statute provides that "[t]he costs allowed under Section [] 1032 shall be withheld or augmented as provided in this section." This "cost shifting" can be a powerful tool in leveraging a case and can, if done correctly, allow a party to recoup the lion's share of its costs, including expert witness fees and, in certain circumstances, attorneys' fees.

It seems, however, that many attorneys have only a general understanding of statutory offers to compromise, which can prevent even experienced business litigators from taking full advantage of this highly effective litigation tool. This article discusses several aspects of Section 998 offers that have recently been litigated, and that can allow business litigators to use Sec-

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Message from the President:
By Melissa R. McCormick

This second half of 2012 promises to be terrific for ABTL-OC.

On June 6, ABTL-OC kicked off the summer with its 13th Annual Wine Tasting Fundraiser benefiting the Public Law Center. Eli M. Rosenbaum, the Director of Human Rights Enforcement Strategy and Policy for the Human Rights and Special Prosecutions Section of the U.S. Department of Justice provided "An Inside Look at the World's Most Aggressive and Effective Nazi-hunting Operation." Thomas Blatt, a survivor of the legendary 1943 Sobibor uprising and a testifying witness at the trials of Karl Frenzel and John Demjanjuk, joined Mr. Rosenbaum and spoke to a riveted audience about his courageous escape from Sobibor and trial testimony. It was a program that will long be remembered by all attendees.

The 2012 Summer Olympics in London, England kick-off on July 27 and run through August 12, 2012. To continue the Olympic spirit, ABTL-OC's September 12 program will address Olympics, Sports, and the Law, and provide an inside look at legal issues and groundbreaking cases involving elite athletes. This timely presentation will feature three of world's leading practitioners in the area of sports law:

Richard W. Pound: Mr. Pound is a former Olympic swimmer and former Vice-President of the International Olympic Committee. Mr. Pound has been named to Time Magazine's 100 most influential people in the world for his relentless efforts to rid sports of performance-enhancing drugs. In 2008, Mr. Pound was awarded the Laureus "Spirit of Sport" Prize for his work as head of the World Anti-Doping Agency. Mr. Pound is the former Chancellor of McGill University and is a Counsel in the Montreal office of Stikeman Elliott.

Howard L. Jacobs: Mr. Jacobs is one of the

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Keeping Internal Investigations Internal

By Kenneth M. Miller

A. THE COMPANY'S STRONG INTEREST IN COOPERATION

A company-sponsored investigation into facially supportable allegations of its own wrongdoing is generally in *the company's* interest. Such investigations are typically conducted by outside counsel. When the investigation uncovers evidence of potential criminal wrongdoing, the company is faced with the decision of whether to disclose this evidence to law enforcement, particularly the US Department of Justice (including the Department of Justice, the US Attorneys Office and the Federal Bureau of Investigation). This article discusses some basic concepts behind internal investigations of a company's own alleged misconduct, and then discusses hurdles to keeping the product of the investigation, including attorney work product and attorney-client communications, from being disclosed, especially to former employees identified as wrongdoers in the investigation.

Federal prosecutors reward companies that disclose their own wrongdoing. Here, "reward" is a relative term: it means less punishment. If the government never finds out about the wrongful conduct, then the government's reward is probably more punishment than the company would have received without disclosing its own misconduct.

Nonetheless, companies *do* have great incentive to seek such rewards. Companies can be convicted for the illegal acts of their directors, officers, employees, and agents where the conduct was within the scope of their duties and they were motivated (at least in part) to benefit the company. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006). That is a low bar because the company can be held criminally responsible for the acts of almost any employee. And a criminal conviction can have a huge impact on a company. For example, "Big Five" accounting firm Arthur Anderson was convicted of obstruction of justice. By

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Pre-Dispute Arbitration Agreements After Concepcion

By Michael A. Hood

I. INTRODUCTION

Businesses in California have been hit on all quarters by a spate of class actions, with consumer class actions challenging their business decisions from the outside, and wage and hour class actions attacking their employment practices from the inside. These class actions have significantly increased the costs of doing business in California, and have spawned a number of attempts by employers to reduce or limit their involvement in such suits. As occurred in an effort to eliminate the possibility of adverse jury verdicts in wrongful termination and similar suits 20 years ago after the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U. S. 20 (1991), many employers have attempted to address the class action problem by imposing arbitration agreements on consumers and employees both, and including in mandatory arbitration agreements express waivers of the consumer's or employee's right to pursue class actions. Prior to last year, such efforts met with limited success, as many state courts and legislatures, including in California, imposed restrictions on a business's ability to compel customers and employees to waive their rights to bring class actions.

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court changed the legal landscape regarding the enforceability of arbitration agreements with class action waivers. The Supreme Court held that the Federal Arbitration Act, 9 U.S.C. Sections 1, et seq. ("FAA"), preempts a California law that limited the enforceability of class-action waivers in such agreements. In the balance of this article, I will address the implications of the *Concepcion* decision for employers and others seeking to avoid class actions through arbitration agreements in which the right to engage in class or other representative actions is waived.

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Young Lawyer Division Update: ABTL Young Lawyers Enjoy the Good Times at the April Social Mixer
By Michael A. Penn

On April 18, Young Lawyer Division members gathered for a social networking mixer at Chapter One in Santa Ana. Attendees enjoyed hosted appetizers and live entertainment at this trendy downtown hot spot. The restaurant was an OC Weekly Best of 2011 winner with their seasonal farm-to-table menu items and hand crafted beverage selections.

The Division held their kickoff event in January of this year at the Pelican Hills Resort & Spa in Newport Beach. That free event was coordinated by Shiry Tannenbaum of Connor Fletcher & Williams. Members enjoyed hosted cocktails, hors d'oeuvres, and live entertainment while overlooking the beautiful hotel grounds and Pacific Ocean.

All ABTL members in their first 10 years of practice are invited to participate in YLD events. The Division plans to hold an educational seminar and voir dire workshop in the Fall. YLD social mixers are generally set to occur two weeks after the regularly scheduled ABTL dinner programs. We look forward to seeing you at the next YLD event.

♦*Michael A. Penn is an attorney at Aitken*Aitken*Cohn and the ABTL Young Lawyer Division Chair.*

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Chadick, who is/was a legendary homicide prosecutor in Orange County. Bob and I worked half a dozen Saturdays in a row getting ready for this big homicide case. And at the end of each Saturday Bob would say, "OK I'll see you next Saturday." After about 6 of those I felt like I had done everything that could be done. I couldn't figure out what we were going to do on another Saturday. Finally I said: "Wait a minute, another Saturday? I think we have this pretty much nailed down, don't we?" He said, "You need to hear about Roscoe Tanner."

Roscoe Tanner was a professional tennis player famous for his big left-handed serve. He did not have a complete game but he had this overwhelming serve. One day, a sports reporter came down from his hotel room and saw Tanner practicing his serve. The reporter watched for a while and returned to his room for breakfast. After breakfast, the reporter looked out from his room and saw Tanner still practicing his serve. After a few hours, the reporter walked down to Tanner, stopped his practice and said: "Tanner, I don't mean to insult you, but shouldn't you be practicing other parts of your game? There are a lot of people who would say that your serve is the best there is, why are you practicing it?" Tanner looked at the reporter and said, "The serve is the only part of the game that I control. Once I hit my serve, my opponent dictates what I have to do. He can make me go left, he can make me go right, he can make me move back. But he can't do anything about my serve. That is entirely under my control."

After telling me that story, Chadick looked at me and said: "Once you go into court, you lose control. You could get a bad judge, you can get a bad ruling, your witness can screw something up, the other side can do something really brilliant or really underhanded and you have to react. But your preparation is entirely within your control. No one can do anything to interfere with your preparation." He looked at me and smiled. "You're used to being one of the best lawyers in the room. I'm never the best lawyer in the room. But I'm always the best prepared lawyer in the room." I watched him try that case and no matter what happened, he was prepared. I learned

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from him and Roscoe Tanner that no amount of brilliance or intelligence can make up for preparation. You don't have to be the best lawyer in the room if you are the best prepared lawyer in the room.

Specific to young lawyers, my tip is to take your time. You have plenty of it. You will have a career for 40 or 50 years. You don't have to figure out in the first five where you want to be or what you want to do or how it should be done. For the first 5 years, just learn your craft, learn your trade and eventually you will figure out where you belong. Then you will have 35, 40, 45 years to do it.

Q: Before we started this interview, you mentioned that you completed your undergraduate degree in three years so that you could get to law school. On that note, it sounds like you had a desire to be a lawyer at a young age. What stirred that interest?

A: In third grade, I wrote a paper about becoming a Marine like my dad and then becoming a professional baseball player. My teacher wrote on my paper that I didn't have enough time for both. It didn't make much sense to me at the time, but now I understand. I was a smart kid who wasn't good at math and science. In those days, that meant you would be a lawyer, which sounded good to me. Not only were there no lawyers in my family, but no one had graduated from college. Once I decided that I was going to go to law school, I was in a hurry to get there. Combining summer school units and the extra units I received in the honors program, I realized I could graduate in three years. It meant giving up baseball, but I was in a hurry. I don't know why. I went to Boalt Hall, where I fell in love with criminal procedure. I knew that I wanted to practice criminal law.

Q: Why did you start writing the [*nationally-syndicated*] column: "A Criminal Waste of Space?"

A: I write because that's a part of my personality. I need to have fun. I need to laugh and joke. I spent my entire adult life in jobs where you don't get to laugh and joke. Prosecutor? Not a funny job. Trial Court Judge? Not a funny job. Court of Appeal, every day I worry, make somebody unhappy, and often impoverished. Often it means they're going to be incarcerated for many more years. Nobody wants to read -- your five million dollar judgment has been reversed, but did you hear the one about the nun, the parrot and the sailor? There's no outlet for humor there. And I think it's wrong to be humorous in published opinions. There are things every now and again that you just can't ignore. But on a daily basis you can't do that. So I write the column to get it out of my system.

It started when I was sitting in calendar call one day and a guy came in from Los Angeles and said he wanted to schedule an oral traverse of the search warrant. It meant that he wanted a 1538.5 motion, but in L.A. at that time they apparently referred to them as traverses which is technically correct. And I turned to the guy next to me, and I said, "Oral traverse? Isn't that the evangelist?" He said, "No, no, no. An oral traverse is something your dentist does to you. I mean they charge you a thousand bucks for it man." And we started fooling around with it. And then the next thing I knew, I was putting together what I ended up calling the California Criminal Law Specialist Screen Door Repairman's Examination. And I sent it off to the State Bar Journal. After about three months, the Journal wrote back saying that they did not typically publish humor, but that the reviewers all got such a big kick out of the column that they agreed to run it in the next issue. The editor of the Orange County Lawyer then asked me to write a humor column for them. Thirty-five years later, I am still writing.

Q: Is there a trend that you see in the practice of law that disturbs you as an experienced practitioner sitting on the bench?

A: I recently wrote an opinion about civility that has gotten a lot of attention. That's the thing that disturbs me. I could tell you a lot of things I have seen now in forty years of practice. On a lighter note, I guess you could say that it disturbs me that the lawyers are getting better and better, which makes my job harder every month. Lawyers are crafting complex and brilliant arguments that are much better than when I started out. I don't mind the fact that every generation is a little smarter than the one that went before it. But it is tough having it demonstrated to me on a regular

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basis by young lawyers that file briefs that just make my head spin.

But uncivility truly does disturb me. Many lawyers out there seem to feel that they should practice law like a hired gun. They appear to feel that if a client pays their fee, the attorney should argue anything and do whatever it takes to win. But that's not our job. The lawyer who practices like a hired gun is eventually going to run into the problem that all hired guns have; eventually they run into someone who is faster, tougher and meaner than they are. The people that I have found are happiest in this profession are the ones that I admire and respect for their honesty, forthrightness and courage. And none of that has anything to do with winning at all costs. I know some lawyers that I think the world of, especially in the criminal defense bar, who have spent their whole life losing. But they did so honorably and with integrity. They have my complete admiration and happy lives, mostly.

The ABTL thanks Justice Bedsworth for his time.

♦*Ben Ammerman is a litigation associate at Newmeyer & Dillion LLP*

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tion 998 offers more effectively.

Procedural Requirements

The procedural requirements of an offer to compromise pursuant to section 998 can be tricky and, for brevity, they will not be dealt with in detail here. Put simply, a Section 998 offer must be: (1) in writing; (2) must state the terms and conditions of the proposed judgment or award; and, (3) must contain a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. The procedural requirements of offers to compromise are further complicated when multiple plaintiffs and/or defendants are involved as the offer must be capable of apportionment.

Reasonable and Good Faith Requirement

An offer to compromise must be "made in good faith and be realistically reasonable under the circumstances of the particular case, and carry with it some reasonable prospect of acceptance." *Westamerica Bank v. MBG Industries, Inc*., 158 Cal. App. 4th 109, 129-30 (2007) (internal quotations and citations omitted). This raises an interesting consideration when making a section 998 offer: What should one offer, and should it include or exclude costs?

Whether or not an offer is reasonable depends on the information available to the parties when the offer was served. *Id.* at 130. "The reasonableness of a [party]'s section 998 settlement offer is evaluated in light of what the offeree knows or does not know at the time the offer is made." *Adams v. Ford Motor Co.*, 199 Cal. App. 4th 1475, 1485 (2011). Where the party making a Section 998 offer obtains a judgment more favorable than its offer, "the judgment constitutes prima facie evidence showing the offer was reasonable . . . ." *Santantonio v. Westingouse Broadcasting Co.*, 190 Cal. App. 3d 704, 710-11 (1987). The burden then shifts to the offeree to show that such an offer was unreasonable when made. This can be a difficult burden to meet, especially where the offeror sought damages far in excess of the judgment received. For example, in *Santantonio, supra*, it was held that a defendant's $100,000 section 998 offer was

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reasonable, even though the plaintiff sought damages in excess of $900,000 because the defendant had substantial evidence that undermined plaintiff's claim of which plaintiff was aware, and plaintiff nevertheless chose to proceed to trial. Where such evidence does not exist, however, courts have not been so generous. See, e.g., *Pineda v. Los Angeles Turf Club, Inc*., 112 Cal. App. 3d 53 (1980) (invalidating a $2,500 998 offer where plaintiff sought $10,000,000 in damages).

The Court of Appeal recently expounded upon the reasonableness requirement in *Adams v. Ford Motor Co., supra.* In *Adams*, the widow and children of Mr. Adams sued multiple defendants alleging that the defendants' actions and products resulted in Mr. Adams' exposure to asbestos causing mesothelioma and ultimately Mr. Adams' death. Plaintiffs sought more than $1,000,000 in damages. Four years into the litigation, plaintiffs had settled or dismissed their claims against all defendants except Ford. Plaintiffs' settlements ranged from $2,000 to $50,000 per defendant. Ford made a timely offer to compromise of $10,000 together with a mutual waiver of costs, which plaintiffs allowed to expire. After trial, the jury returned a verdict in favor of Ford finding that "it did not manufacture, sell or distribute the brakes that [plaintiffs] claimed had caused the decedent's illness." *Id.* at 1479. Ford filed a memorandum of costs seeking $185,741.82, which included $167,570 of expert witness fees. Plaintiffs filed a motion to tax costs arguing that, among other things, Ford's section 998 offer was a "token offer," made in bad faith with no reasonable expectation that plaintiffs would accept it.

The trial court ruled in favor of Ford. On appeal, the Court of Appeal affirmed stating that, "[o]n [the] one hand, a party having no expectation that his offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees," while on the other hand "section 998 punishes a party who refuses a reasonable settlement offer, and subsequently fails to receive a more favorable judgment." *Id.* at 1483 (citations and quotations omitted). The court found that Ford's offer was, under the circumstances, reasonable. In so ruling, the Court of Appeal made clear that a determination of whether an offer to compromise is reasonable is in the sound discretion of the trial court. *Id.* at 1484. The court also noted that Ford's offer to waive costs "substantially increased the settlement's potential value in the event that plaintiffs failed to secure a more favorable judgment against Ford." *Id.* at 1485. As such, business litigators should consider offering a mutual waiver of costs in a case where such costs are likely to be substantial.

Does a Second 998 Offer Extinguish the First Offer?

The court in *Martinez v. Brownco Const. Co.*, 203 Cal. App. 4th 507 (2012) resolved the question of whether a second 998 offer extinguishes the first offer, thereby limiting the offeror defendant's recoverable costs. The import of this question is significant as the fees incurred between such offers can be substantial.

The *Martinez* plaintiff recovered more than both of her Section 998 offers and, therefore, she sought to recover all costs, including expert witness fees, incurred from the time of the first offer. Defendant contended that plaintiff's second offer effectively terminated her first offer and, therefore, under contract principles plaintiff's second offer "superseded the first offer for purposes of cost shifting" preventing her from recovering fees incurred between 998 offers. *Martinez*, 203 Cal. App. 4th at 520.

The Court of Appeal in *Martinez* held that "nothing in contract law requires that [plaintiff/offeror] be divested of the entitlement [to all expert witness fees] simply because she made a later offer." *Id.* at 522. The court made clear that section 998 offers are governed by contract law principles only where "such principles neither conflict with the statute nor defeat its purpose." *Id.* at 521. It held that plaintiff's first offer lapsed pursuant to section 998 and that such a lapse "has no enduring contractual effect" and, therefore, a later offer "cannot 'extinguish' a lapsed offer." *Id.* "The sole significance of the first offer was that pursuant to section 998 it entitled [plaintiff] to cost shifting if [defendant] failed to obtain a more favorable judgment …. Here, [plaintiff] made two reasonable offers. To deny her the benefit of making the first offer simply because she made a later offer would actually discourage her making a later offer, and thus discourage settlement." *Id.* at 522.

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The Court of Appeal, in an attempt to create a bright line rule, stated that "[w]here a party makes two section 998 offers to compromise more than 30 days apart, the purpose of section 998 is adequately served by the statute's existing language, which entitles an offeror to cost shifting from the date of the earliest reasonable offer." *Id.* at 523. Anticipating that such a rule may result in the use of successive offers to reap the benefits of cost-shifting, the court noted that "[i]f any mischief or confusion results from later offers, or any gamesmanship arises, the court can address such concerns when it awards costs." *Id.* This should serve as a warning to litigators not to abuse 998 offers to compromise.

Gamesmanship and Leverage

Section 998 offers are ripe for gamesmanship. A clever attorney may use such an offer to increase a party's likelihood of recouping costs. However, one cannot make a low-ball section 998 offer while withholding evidence that shows the weakness of the other party's case, then expect to reap the benefit of section 998's cost shifting when a more favorable result is achieved at trial. See *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co*., 73 Cal. App. 4th 324, 333 (1999). Making an offer that an offeror knows or reasonably should know will be unacceptable will usually not result in cost-shifting of postoffer costs, especially if the offeror makes such an offer before revealing evidence that will reduce an offeree's chances of success at trial. A litigator should give careful consideration to the timing of a 998 offer, and it is usually a good practice to make an offer prior to incurring expert witness fees, which may be recoverable if the offer is rejected. Because the reasonableness of an offer to compromise is in the sound discretion of the court, such tactics may result in the court refusing to shift costs to allow the offeror to recover costs and, in some circumstances, attorneys' fees.

Recovery of Attorneys' Fees

If authorized by Section 1033.5, a party may recover attorneys' fees as costs of suit. Litigators must be especially wary when a case involves a statute that contains a unilateral "one-way" costs and/or attorneys' fees provision. Although many contracts contain "unilateral" attorneys' fees provisions, Civil Code section 1717 mandates that "the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorneys' fees in addition to other costs." Statutes, including the Cartwright Act (Bus. and Prof. Code § 16700 et seq.), Unruh Civil Rights Act (Civ. Code § 51 et seq.), Fair Employment and Housing Act (Government Code § 12900 et seq.) and in some circumstances the Unfair Competition Law (Bus. and Prof. Code § 17200 et seq.), however, contain provisions which expressly allow for recovery of attorneys' fees only by successful plaintiffs. These statutes limit recovery of costs and/or attorneys' fees incurred in defending the case "even if the work performed arguably provided some benefit to other aspects of the case." *Carver v. Chevron U.S.A., Inc*., 119 Cal. App. 4th 498, 506 (2004). These "unilateral" statutes are explicit about limiting recovery of attorneys' fees to plaintiffs and prevent a defendant who achieves a greater judgment than his 998 offer from recovering his postoffer costs, others are not.

The Song-Beverly Consumer Warranty Act (Civ. Code § 1790 et seq.), for example, provides that "[i]f the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time spent . . . ." Civ. Code § 1794. In *Murillo v. Fleetwood Enterprises, Inc*., 17 Cal 4th 985 (1998), the California Supreme Court found that because CCP § 1032 grants a prevailing party the right to recover costs "except where otherwise expressly provided by statute" and because Section 1794 is silent regarding prevailing sellers, a prevailing seller under the Song-Beverly Act may recover costs. Interpreting *Murillo*, the Court of Appeal recently held that "costs awardable under sections 1032 and 998 cannot be precluded by implication" and, therefore, a defendant who made a 998 offer that was greater than the award obtained by the plaintiff is entitled to its postoffer costs under other statutes that are not explicitly unilateral as well. *Bates v. Presbyterian Intercommunity Hospital, Inc*., --- Cal. Rptr. 3d --- (2012) (discussing 998 offers in a case involving elder abuse under Welfare and Institutions Code § 15657).

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Conclusion

Section 998 offers can be a useful and powerful tool in business litigation. A well thought out offer can significantly reduce a client's potential liability and can even help a savvy litigator snatch a small victory from the jaws of defeat.

♦*Evan Rothman is an associate and Shannon C. Lamb is a partner at Stephens Friedland LLP, a boutique business litigation firm in Newport Beach.*

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leading sports lawyers in the United States. Mr. Jacobs is an athlete's lawyer with a practice that focuses on the representation of athletes. Mr. Jacobs has represented professional athletes, Olympic athletes, and amateur athletes in disputes involving doping, endorsements, team selection issues and other matters. Mr. Jacobs' clients have included Floyd Landis, Tim Montgomery, Marion Jones and Tyler Hamilton. Mr. Jacobs is a former professional triathlete and former college athlete.

Jeffrey G. Benz: Mr. Benz is an arbitrator for the Court of Arbitration for Sport. Mr. Benz is the former General Counsel of the United States Olympic Committee and the AVP Pro Beach Volleyball Tour.

ABTL-OC is looking forward to this program exploring the intersection of sports and the law.

ABTL's 39th Annual Seminar will also take place in September; specifically, September 19-23, 2012, at the Grand Hyatt Kauai Resort & Spa. California's Chief Justice Tani Cantil-Sakauye will deliver the keynote address on Saturday, September 22. I hope that many ABTL-OC attorneys will plan to attend.

Thank you for your continued support of ABTL-OC. I look forward to seeing you at our 2012 events. Go USA!

♦*Melissa R. McCormick is a partner at Irell & Manella.*

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the time that conviction was overturned by the U.S. Supreme Court, the once mighty firm was no longer a viable business.

So there is a balancing that goes into the decision whether to self report. But once the decision to disclose is made, it is generally based on the idea that the company has criminal exposure and it wants to limit that exposure. By disclosing and resolving such issues, the company may obtain an express declination to prosecute, a deferred prosecution, or a significantly reduced penalty. For example, being permitted to plead guilty to a misdemeanor that does not require intentional conduct or otherwise preclude the company from doing business with the federal government can be the difference between life and death for a company.

Many companies, on the advice of their lawyers, sponsor internal investigations of alleged wrongdoing by their employees. But the companies and their lawyers should know that unlike a lot of traditional advice lawyers give, cooperation raises challenges to preservation of the attorney-client privilege and work product protection.

B. THE "INTERNAL" INVESTIGATION MAY NOT REMAIN CONFIDENTIAL

Once an internal investigation reveals potential criminal liability, counsel will often advise the disclosure of evidentiary material to the government, while maintaining work product and the attorney-client privilege over material they created. The US Department of Justice used to demand companies waive such privileges in order to obtain credit for their cooperation, but after a sustained uproar by the corporate criminal defense bar, the DOJ backed off. Now companies can obtain full cooperation credit while maintaining their privileges, provided they disclose the underlying, relevant facts to the government.

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1. When A Company Investigates With An Eye Towards Cooperation, Is the Product of its Investigation Even Confidential?

In order for the attorney-client privilege to apply, the communication sought to be protected must, among other things, be made in confidence. *United States v. Bergonzi*, 216 F.R.D. 487, 493 (N.D. Cal. 2003) (citing *In re Grand Jury Invest*., 974 F.2d 1068, 1071 (9th Cir. 1992)). Communications between a client and attorney made for the purpose of relaying information to a third party may never have been intended to be confidential. *Id.* at 493 (citing *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1204-05 (C.D. Cal. 1999)). For example, in *Bergonzi*, defendants were former corporate executives who sought production of the company's internal investigation report and underlying materials prepared by outside counsel (the "Report and Back-up Material"), including interview memoranda. *Id*. at 490. The defendants argued that the attorney-client privilege did not apply to the Report and Back-up Material because they were prepared for the government to obtain leniency and not to assist in providing legal advice, and the company waived any claim of privilege by voluntarily producing the materials to the government. *Id*. at 492.

The district court noted that it was undisputed that counsel was retained to gather relevant facts and to develop an effective legal strategy. But counsel agreed to turn the Report and Back-up Materials over to government investigators (pursuant to confidentiality agreements) before they were created. *Id*. at 493. The confidentiality agreements stated that the documents were created to provide "legal advice," were protected work product and protected by the attorney-client privilege, and that the company did not intend to waive protection "from further disclosure." *Id.* But they also made clear that the subpoenaed Report and Back-up Material would be disclosed to the government. *Id*. The confidentiality agreements also gave the government discretion to "determine that disclosure is otherwise required by federal law or in furtherance of [either entities'] discharge of its duties and responsibilities," and the company "consented to the disclosure of the documents to a federal grand jury as the [USAO] deem[ed] appropriate, and in any criminal prosecution that [resulted] from the [USAO's] investigation." *Id*. at 494.

Accordingly, the district court rejected the company's argument that it intended the Report and Back-up Material at issue to remain confidential. *Id*. at 493-94. "It is difficult for the Court to imagine how the communication between the company and [counsel] were confidential communications between attorney and client when [counsel] prepared the Report and Back-up Material after the company agreed to disclose the same to the Government." *Id*. at 494 n.7. "Such a disclosure conflicts with the underlying rationale behind the privilege, namely that the privilege encourages frank discussions between an attorney and his client." *Id*. Likewise, any work product protection was waived when the materials were disclosed to the government. *Id.* at 498.

Not all courts view the issue as that black and white. Some courts have applied a "selective waiver" doctrine; that is, a corporation can waive the privilege as to some adversaries (like the government), but still assert it as to others. *See generally Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1978) (en banc). However, most courts have rejected the selective waiver doctrine. *See, e.g. In re Pacific Pictures Corp.*, 2012 WL 1293534 at *4, __ F.3d. __ (9th Cir. 2012) (rejecting reasoning of *Diversified* and the selective waiver doctrine).

2. The Protected Status of Work Product Is Precarious When the Internal Investigation Leads to Criminal Charges

To the extent the investigation is "work product," at least one court has held that work product protection does not even apply. In *United States v. Graham*, 555 F. Supp. 2d 1046, 1051 (N.D. Cal. 2008), the district court rejected the United States Anti-Doping Agency's claim that its attorneys' interview notes and memoranda could be withheld from the defendant on work product grounds because the agency was not a party to the criminal case.

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Even where non-opinion work product is protected, it can usually be overcome upon a showing of substantial need and the inability to obtain equivalent information without undue hardship. *See Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981). Former employees will likely be able to show a "substantial need" for the interview memoranda of persons who will testify against them. "By their very nature, these statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time." *Cuthbertson*, 630 F.2d at 148. So work product protection may be overcome. (This raises a potential major difference between state and federal law. The U.S. Supreme Court has held that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399. Conversely, California Appellate Courts have held that "statements or reports that merely reflect what an intended witness said [to an attorney] during an interview are not work product." *Roland v. Superior Court*, 124 Cal.App.4th 154, 158 (3rd Dist. 2004).)

In fact, even opinion (or "core") work product—the investigating attorney's thoughts and impressions—may be fair game "when mental impressions are *at issue* and the need for the material is compelling," *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (emphasis added). Where defendants claim they were unfairly targeted in a company's internal investigation, the "competency" of the investigation may be at issue. Because the Supreme Court has recognized the value to the defense of an attack upon the competency of a criminal investigation, *see Kyles v. Whitley*, 514 U.S. 419, 446 (1995), the attorney's opinions and strategy may also be discoverable.

C. EVEN IF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES APPLY, THEY MAY BE OVERCOME IN CRIMINAL PROCEEDINGS AGAINST THE FORMER EMPLOYEE

1. The Confrontation Clause Trumps Privilege

A criminal defendant has the constitutional right to obtain witness statements that are necessary to the effective cross examination of the government's witnesses. In *Murdoch v. Castro*, 609 F.3d 983 (9th Cir. 2010) (en banc), the prosecution's key witness had previously written a letter to his attorney explaining that Murdoch did not commit the crime and that the witness had only accused Murdoch because of police coercion. *Id.* at 987. Murdoch's counsel requested the letter but the trial court held that it was protected by the attorney-client privilege and could not be used to cross-examine the cooperator. *Id.* The issue on *habeas* was whether "clearly established Supreme Court precedent" required that the attorney-client privilege yield to a defendant's confrontation clause rights. *Id.* at 995. The Ninth Circuit held that because a state court *could* draw a "principled distinction" between the facts of that case and Supreme Court precedent, the law was not "clearly established" and Murdoch was denied *habeas* relief**.**

Judge Kozinski argued in dissent that the Sixth Amendment right to confrontation is clearly established. *Id*. at 1002 (J. Kozinski, dissenting) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965) and *Crawford v. Washington*, 541 U.S. 36 (2004)). When an accomplice testifies against a defendant, he "must either be subject to rigorous cross-examination or stand mute before the jury." *Id*. at 1003 (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)). "[F]orcing a witness to confront and explain his prior statements that contradict his testimony is the gold standard for effective cross-examination." *Id.* (citing *Harris v. New York*, 401 U.S. 222, 223-26 (1971)). A criminal defendant cannot be denied the right to this rigorous cross-examination. *Id.* (citing *Crawford*, 541 U.S. at 61 and *Harris*, 401 U.S. at 225-26). "The bottom line is clearly established by a long line of Supreme Court cases: A witness may not testify against a defendant in a criminal trial if that witness cannot be cross-

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examined effectively." *Id.* at 1004 (Kozinski, J., dissenting)*; see also United States v. W.R. Grace*, 439 F.Supp.2d 1125, 1143-45 (D. Mont. 2006) (attorney-client privilege and work product protection must yield when their invocation "is inconsistent with a criminal defendant's Sixth Amendment rights."). But whether or not Judge Kozinski's view that this law is "clearly established" prevails, he makes a strong case that that is what the law requires. Accordingly, criminal defendants will have a strong argument that they have the constitutional right to obtain witness statements, even those obtained by counsel through an internal investigation, that are necessary to the effective cross examination of witnesses who testify against them.

2. Defendants' Right to Present a Defense Trumps Privilege

A criminal defendants' right to present a defense (in addition to the Sixth Amendment right to confront) may overcome a claim of privilege. "The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations, internal quotations omitted). This right includes "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). See also *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (holding that the Sixth Amendment protects "the right to present the defendant's version of the facts as well as the prosecution's"). Defendants are entitled to privileged, exculpatory evidence when their need outweighs "the policy behind the rule requiring that the evidence by excluded." *United States v. W.R. Grace*, 439 F.Supp. 1125, 1137-38 (D. Mont. 2006).

In summary, there are a lot of persuasive reasons to conduct thorough internal investigations and share the results with the government in appropriate circumstances. But companies and counsel should not assume that the product of their investigation will remain confidential.

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II. CLASS-ACTION WAIVERS AFTER *CONCEPCION*

A. *Concepcion* Class Action Waivers Are Enforceable.

The Supreme Court has long held that the FAA's key objective is to ensure the enforcement of arbitration agreements "according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). Despite this mandate, courts (especially in California) have found arbitration agreements unenforceable by invoking Section 2 of the Act, 9 U.S.C. Section 2, which preserves "generally applicable contract defenses." For example, the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160-61 (2005), held that a class-action waiver in a consumer contract (whether part of an arbitration agreement or otherwise) was unenforceable if it was part of an "adhesive" contract, and the dispute involved predictably small damages.

Gentry v. Superior Court, 42 Cal. 4th 443 (2007), applied the Discover Bank rule to an arbitration agreement in the employment context. Gentry held that class-action waivers are unenforceable if (1) individual awards tend to be modest for the claim in question; (2) suing poses a risk of retaliation; (3) claimants may not bring individual claims because they are unaware that their legal rights have been violated; and (4) it is cost-effective for defendants to pay judgments in discrete cases while continuing to violate the law. *Id*. at 459-62.

Concepcion held, however, that the Discover Bank rule interfered with, and therefore was preempted by, the FAA. Section 2 did not preserve state law rules that "'stand as an obstacle'" to enforcing arbitration agreements "according to their terms." 131 S. Ct. at 1753 (citation omitted). Cases like *Discover Bank*, which require the availability of class arbitration, violate the FAA because bilateral arbitration is fundamentally different from class arbitration. Class arbitration results in heightened formality, additional costs, procedural complexity, extra risks to defendants, and a slower pace of dispute resolution. *Id*. at 1751-52.

After *Concepcion*, several courts have held that the FAA preempts state rules similar to that announced in

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Discover Bank. See *Litman v. Cellco P'ship*, 2011 U.S. App. LEXIS 17649, at *16-17 (3d Cir. Aug. 24, 2011) (under *Concepcion*, the FAA preempted a New Jersey rule invalidating adhesive consumer contracts with class waivers); *King v. Advance Am.*, 2011 U.S. Dist. LEXIS 98630, at *16 (E.D. Pa. Aug. 31, 2011) (same; a similar Pennsylvania rule for consumer contracts with class waivers); *Clerk v. Cash Cent. of Utah, LLC*, 2011 U.S. Dist. LEXIS 95494, at *10 (E.D. Pa. Aug. 24, 2011) (same); *Alfeche v. Cash Am. Int'l, Inc.*, 2011 U.S. Dist. LEXIS 90085, at *17 (E.D. Pa. Aug. 12, 2011) (same); *Cruz v. Cingular Wireless, LLC*, ___ F.3d ___, 2011 WL 3505016, at *6 (11th Cir. Aug. 11, 2011) ("[T]o the extent that Florida law would . . . invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA's objective of enforcing arbitration agreements according to their terms, and is preempted."); Webster *v. Freedom Debt Relief, LLC*, 2011 U.S. Dist. LEXIS 85843, at *20 (N.D. Ohio July 13, 2011) ("In the wake of *Concepcion*, any public policy in favor of class action for consumers in the [Ohio Consumer Sales Practices Act] is clearly super[s]eded by the FAA as it is an obstacle to the accomplishment of the purposes and objectives of Congress."); *Green v. SuperShuttle Int'l, Inc.*, 2011 U.S. App. LEXIS 18483, at *7-8 (8th Cir. Sept. 6, 2011) (*Concepcion* foreclosed plaintiff's argument that Minnesota law rendered a class waiver unenforceable).

Concepcion was a consumer class action, but it appeared to invalidate all state laws that interfered with the enforcement of arbitration agreements. Almost all courts, for example, have found California's Gentry rule preempted. See *Valle v. Lowe's HIW, Inc.*, 2011 U.S. Dist. LEXIS 93639, at *17 (N.D. Cal. Aug. 22, 2011) ("[I]n light of *Concepcion*, Gentry is no longer good law . . . ."); *Murphy v. DirecTV, Inc.*, 2011 U.S. Dist. LEXIS 87625, at *11 (C.D. Cal. Aug. 2, 2011) ("[I]t is clear to the Court that *Concepcion* overrules *Gentry* . . . ."); *Morse*, 2011 U.S. Dist. LEXIS 82029, at *9 n.1 ("*Concepcion* rejected the reasoning and precedent behind Gentry . . . ."). *But see Plows v. Rockwell Collins, Inc.*, 2011 U.S. Dist. LEXIS 88781, at *14-15 (C.D. Cal. Aug. 9, 2011) (holding that *Gentry* survived *Concepcion*).

At least one court held that *Concepcion* means that the FAA preempted California's prohibition against arbitrating injunctive claims under the Consumer Legal Remedies Act and California Unfair Competition Law. *Arellano v. T-Mobile USA, Inc.*, 2011 U.S. Dist. LEXIS 52142, at *3-4 (N.D. Cal. May 16, 2011).

Concepcion did not address whether employees could waive the right to bring representative actions under the California Private Attorneys General Act, Cal. Lab. Code Sections 2698, *et seq.* ("PAGA"), which permits employees to bring representative actions on behalf of current and former co-workers to recover from their employers penalties that the California Labor Commissioner chooses not to seek for violations of the California Labor Code. One appellate court and three district courts have found that, after *Concepcion*, representative PAGA waivers are enforceable. *See Iskanian v. CLS Transportation*, __ Cal. App. 4th ___ (B 235158 June 4, 2012), at *13-16 (holding that FAA preempts state law as to arbitration of PAGA and unfair competition claims); Quevedo *v. Macy's, Inc.*, 2011 U.S. Dist. LEXIS 83046, at *49-50 (C.D. Cal. June 16, 2011) (enforcing arbitration agreement; "[R]equiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA."); *Nelson v. AT&T Mobility LLC*, 2011 U.S. Dist. LEXIS 92290, at *10-12 (N.D. Cal. Aug. 18, 2011) (rejecting plaintiffs' attempt to rely on cases suggesting that PAGA claims are not individually arbitrable; "*Concepcion* compel[s] enforcement of arbitration agreements even where the agreements bar[] an employee from bringing a representative PAGA claim."); *Valle v. Lowe's HIW, Inc.*, 2011 U.S. Dist. LEXIS 93639, at *13-15 (N.D. Cal. Aug. 22, 2011) (holding an arbitration agreement enforceable despite the "possibility that an arbitrator may interpret the agreement to bar Plaintiffs from representing others in bringing a PAGA claim," the plaintiffs could still bring more -limited PAGA claims, "on behalf of themselves and the state of California"). However, two courts have found that agreements purporting to waive representative PAGA claims could not be enforced. *See Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 500-03 (2011), criticized in *Iskanian*, supra, at *13-15; *Plows*, 2011 U.S. Dist. LEXIS 88781, at *13-15.

The validity of PAGA waivers is vitally important to California employers. If these waivers are unenforceable, plaintiffs easily can circumvent *Concepcion* by recharacterizing their claims as PAGA claims. In *Brown*, for example, the court remanded and instructed

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the trial court to determine whether the PAGA waiver could be severed from the arbitration agreement. 197 Cal. App. 4th at 503-04. PAGA cases are particularly dangerous for employers because plaintiffs bringing them (a) are not required to comply with class action requirements in order to bring representative actions under PAGA, *Arias v. Superior Court*, 46 Cal. 4th 969, 980-87 (2009), and (b) may be able to recover not only statutory penalties but also lost wages as a remedy for violations, *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112, 1144-46 (2012).

B. *Concepcion's* Effect On Cases Under Federal Employment Statutes.

Concepcion did not address what effect, if any, the FAA has on class claims brought under federal statutes. The results so far are mixed.

In *Chen-Oster v. Goldman, Sachs & Co*., 2011 U.S. Dist. LEXIS 73200, at *17-18 (S.D.N.Y. July 7, 2011), the court considered *Concepcion's* effect on claims under Title VII. The court held that a class-action waiver was unenforceable in that case because it interfered with (what the court described as) "a substantive federal statutory right" to assert a pattern-or-practice theory. *Id*. at *3-4. The court noted that the FAA's pro-arbitration objectives are not "paramount" where "rights created by a competing federal statute are infringed by an agreement to arbitrate." *Id*. at *10.

It is anticipated that there will be much litigation over whether *Concepcion* applies to collective actions brought under the Fair Labor Standards Act. Many courts previously have held that the FLSA does not confer a non-waivable substantive right to bring class claims. See, e.g., *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) ("[W]e reject the . . . claim that [plaintiffs'] inability to proceed collectively deprives them of substantive rights available under the FLSA."); *Adkins v. Labor Ready, Inc*., 303 F.3d 496, 503 (4th Cir. 2002) (enforcing individual arbitration agreement because the FLSA confers no "nonwaivable right to a class action"); *Horenstein v. Mortg. Mkt., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001) (absence of the right to bring a collective action does not render the arbitration agreement unenforceable because plaintiffs "retain all substantive rights" under the FLSA).

The Supreme Court has granted certiorari in *Greenwood v. CompuCredit Corp*., 615 F.3d 1204 (9th Cir. 2010), cert. granted, 131 S. Ct. 2874 (May 2, 2011) (No. 10-948). The Ninth Circuit had held in that case that an arbitration agreement could not be enforced because the plaintiffs' rights to sue in court could not be waived under the Credit Repair Organizations Act, 15 U.S.C. § 1679 et seq. Plaintiffs will contend that a favorable decision in that case portends a similar result under the FLSA and other federal statutes.

Employers should expect a related, and narrower, argument as well: that arbitration's costs prohibit employees from vindicating their federal rights, unless they are permitted to bring a class or collective action. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (arbitration costs could preclude the plaintiff "from effectively vindicating her federal statutory rights in the arbitral forum;" here, however, plaintiffs' contention to that effect was unsupported). Employers therefore should take care not to allocate costs unreasonably or to tamper with a federal statute's remedial scheme. Employers also should contend that a statutory prevailing party attorney's fee provision is an adequate "substitute . . . [for] the small litigant, for the class action device." *Mathews v. Book-of-the-Month Club, Inc*., 62 F.R.D. 479, 479-80 (N.D. Cal. 1974); see also *Concepcion*, 131 S. Ct. at 1753 (noting the AT&T Mobility agreement's fee subsidy).

III. *CONCEPCION*'S EFFECT ON STATE UNCONSCIONABILITY DOCTRINES

It remains unclear what impact *Concepcion* will have on state unconscionability laws. For example, courts so far have continued to apply the rules announced in California's seminal case on the enforceability of arbitration agreements, *Armendariz v. Foundation Health Psychcare Services, Inc*., 24 Cal. 4th 83 (2000). *Armendariz* announced a set of rules that the California Supreme Court deemed essential for mandatory predispute arbitration agreements to be enforceable, including a neutral arbitrator; a written arbitration award subject to limited judicial review; payment by the employer of all costs unique to arbitration; adequate discovery; full statutory remedies; and no other substantively unconscionable provisions. *Id*. at 102-21. A strong argument can be made that at least *some* of these "rules" do not survive *Concepcion*, because

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they are not rules of general contract law; they are fashioned solely and expressly to regulate arbitration contracts, as *Armendariz* itself acknowledged. 24 Cal. 4th at 103 n.8 (announcing rules that apply "in the particular context of mandatory employment arbitration agreements") & 119 (justifying the proscription of arbitration -specific rules because "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context").

Yet to date most courts have continued to measure arbitration agreements against the Armendariz requirements. *See Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Group*, 197 Cal. App. 4th 1146, 1158 (2011) (applying *Armendariz*, described as a "[g]eneral state law doctrine pertaining to unconscionability [that] is preserved"); *Kanbar v. O'Melveny & Myers*, 2011 U.S. Dist. LEXIS 79447, at *15-21 (N.D. Cal. July 21, 2011) (applying *Armendariz*; even after *Concepcion*, "arbitration agreements are still subject to [California's] unconscionability analysis"); *Saincome v. Truly Nolen of Am., Inc*., 2011 U.S. Dist. LEXIS 85880, at *9-10 (S.D. Cal. Aug. 3, 2011) (same).

Other states also have continued to apply their pre-*Concepcion* unconscionability rules. *See Bernal v. Burnett*, 2011 U.S. Dist. LEXIS 59829, at *13-22 (D. Colo. June 6, 2011) (applying to an arbitration agreement the unconscionability factors in *Davis v. M.L.G. Corp*., 712 P.2d 985, 991 (Colo. 1986); there is no "reason why the *Davis* factors are not still good law" after *Concepcion*); *Daugherty v. Encana Oil & Gas (USA), Inc*., 2011 U.S. Dist. LEXIS 76802, at *25 (D. Colo. July 15, 2011) (same); *Webster*, 2011 U.S. Dist. LEXIS 85843, at *24-47 (applying Pennsylvania and Colorado unconscionability laws and finding an arbitrator-selection clause unenforceable); *Tierra Right of Way Servs. v. Abengoa Solar Inc*., 2011 U.S. Dist. LEXIS 61876, at *22 (D. Ariz. June 9, 2011) (applying New York and Arizona unconscionability laws and finding arbitration agreement enforceable); *RCR Plumbing & Mech., Inc. v. ACE Am. Ins. Co*., 2011 U.S. Dist. LEXIS 62689, at *24-27 (C.D. Cal. June 3, 2011) (applying Pennsylvania unconscionability law and finding arbitration agreement enforceable); *Pilitz v. Bluegreen Corp.*, 2011 U.S. Dist. LEXIS 86042, at *18 (M.D. Fla. Aug. 3, 2011) (applying Florida unconscionability law and finding arbitration agreement enforceable).

IV. DRAFTING TIPS

After *Concepcion*, employers without predispute arbitration agreements should consider adopting them. Even with the open questions identified above, there are significant benefits to limiting exposure to costly class actions. The critical threshold issue is whether to include an express class-action waiver or to remain silent on the issue of class arbitration. Section A below discusses that issue. But there are other issues to consider as well, as discussed in Section B.

A. Should An Arbitration Agreement Include An Express Class Waiver?

Before reflexively redrafting arbitration agreements to include express class-action waivers, employers should consider some risks.

1. *Concepcion* may not be the last word.

First, *Concepcion* may not last forever. Congress could amend the FAA. Or the composition of the Supreme Court could change, and *Concepcion* could be overruled. Minnesota Senator Al Franken has already introduced an FAA amendment (the so-called "Arbitration Fairness Act," S. 877) to prohibit mandatory predispute arbitration in civil rights, consumer, and employment disputes. Though this amendment probably is unlikely to pass the Republican-led House of Representatives this session, the political winds can change. If they do, companies that contract for express class waivers could be creating a generation of arbitration agreements at risk of being held defective when the law changes.

Second, even now, it is unclear whether the *Concepcion* rule applies in state courts. Justice Thomas was the critical (and "reluctant") fifth vote in *Concepcion*. He has repeatedly stated his belief that the FAA does not apply in state court. Compare *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (the FAA applies in state courts) with, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting) (arguing to the contrary). Though Justice Thomas' position on the FAA never has been adopted, *Concepcion* could have been decided differently if it arose in state court, because then Justice Thomas might have joined the four *Concepcion* dissenters to make their opinion the plurality. It is an open question whether Justice Thomas will apply his own prior

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views, or defer to the stare decisis effect of cases like Southland, when the Court considers a case like *Concepcion* arising from state court.

Justice Thomas may have to answer the question soon. Before *Concepcion*, the Kentucky Supreme Court held that a class waiver in a consumer contract was unconscionable and unenforceable. *Schnuerle v. Insight Communs*. Co., L.P., 2010 Ky. LEXIS 288, at *3-4 (Ky. Dec. 16, 2010). While the defendant's petition for rehearing was pending, the Supreme Court decided *Concepcion*, which the defendants brought to the court's attention. The plaintiffs argued that *Concepcion* did not apply because the case originated in state court and Justice Thomas was the decisive fifth vote. The Kentucky court is rehearing the case now, and its decision could reach the U.S. Supreme Court.

Third, the National Labor Relations Board recently found that requiring employees to sign express class waivers as a condition of employment violates employees' rights to engage in concerted activity under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 159(a)(1). *D.R. Horton Inc.*, 357 NLRB No. 184 (2012). The validity of that decision is currently under attack on a number of fronts, and thus far the California courts of appeal have refused to follow it. *Iskanian v. CLS Transportation, supra*, at *12 (expressly refusing to follow *D.R. Horton* in compelling arbitration of class claims).

In short, any employer that forces its employees to sign an arbitration agreement containing an express class action waiver faces potential public policy wrongful termination litigation from any employee or prospective employee who declines to sign the agreement and either loses his job or an employment opportunity as a result. See Sonic-*Calabasas A, Inc. v. Frank Moreno*, 51 Cal. 4th 659, 687 (2011)(holding that arbitration agreements that purport to require employees to waive their rights to bring administrative actions before the California Labor Commissioner violate public policy).

2. Is silence golden?

Arbitration agreements silent on the issue of class actions may insulate employers from class litigation without the foregoing risks of express waivers. Recently, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758 (2010), the Supreme Court held that mere "silence" on the issue of class arbitration could not be read to authorize it. The Court held that an arbitration panel exceeded its powers by finding that a silent arbitration agreement permitted class arbitration. 130 S. Ct. at 1767-68. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id*. at 1775 (emphasis in original). "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id*. at 1776.

However, there remains a risk that a court could interpret a silent agreement to permit class arbitration. In *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), the court of appeal reversed a district court's decision to vacate an arbitration award. It held that the arbitrator did not exceed her authority by finding that a "silent" arbitration agreement encompassed class claims. *Id*. at *40. According to the court, Stolt-Nielsen did not "hold that an arbitration agreement must expressly state that the parties agree to class arbitration." *Id*. at *19-20. In dissent, Judge Winter argued that Stolt-Nielsen foreclosed a finding of an "implied" agreement to class arbitration. *Id*. at *46. He noted that Stolt-Nielsen "held that 'imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is [in]consistent with the Federal Arbitration Act.'" *Id*. (citations omitted). However, Judge Winter's views did not prevail, and the Second Circuit denied the *Jock* defendant's petition for en banc rehearing.

Other courts have addressed whether silent agreements permit class arbitration, with differing results. *Compare Smith & Wollensky Rest. Grp., Inc. v. Passow*, 2011 U.S. Dist. LEXIS 4495, at *3-4 (D. Mass. Jan. 18, 2011) (pre-*Concepcion* case holding a class arbitration permitted; the agreement contained broad language covering "any claim that, in the absence of [the] Agreement, would be resolved in a court of law under applicable state and federal law") and Hayes *v. Service-Master Global Holdings, Inc.*, 2011 U.S. Dist. LEXIS 66439, at *12-13 (N.D. Cal. June 22, 2011) (class arbitration may be permitted; interpretation of arbitration agreements "is generally a matter of state law," which "permits a decisionmaker to look beyond the four corners of the contract where appropriate") with Underwood *v. Palms Place, LLC*, 2011 U.S. Dist. LEXIS

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50581, at *11-13 (D. Nev. May 9, 2011) (class arbitration not permitted; the arbitrator properly found that "'[s]ilence on an issue in contract precludes adding the issue to the contract by implication'") (citation omitted); *Goodale v. George S. May Int'l Co*., 2011 U.S. Dist. LEXIS 37111, at *7-8 (N.D. Ill. July 14, 2010) (class arbitration not permitted; under Stolt-Nielsen, "where an agreement to arbitrate is silent, an arbitrator may not infer [the] parties[*'*] intent to submit to class arbitration"); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011) ("In accordance with Stolt-Nielsen, class arbitration may not be imposed on parties whose arbitration agreements are silent on the permissibility of class proceedings."), In re *Cal. Title Ins. Antitrust Litig.*, 2011 U.S. Dist. LEXIS 71621, at *12-13 (N.D. Cal. June 27, 2011) (under *Stolt-Nielsen*, class arbitration was not available "in the absence of [a] class-wide arbitration provision") and *Wilcox v. Taco Bell of Am., Inc*., 2011 U.S. Dist. LEXIS 90720, at *11-12 (M.D. Fla. Aug. 15, 2011) (under *Stolt-Nielsen*, "an implicit agreement authorizing class arbitration may not be inferred solely from the existence of an arbitration agreement").

A related issue is: Who decides? Court or arbitrator? *Jock* emphasized that "the primary thrust of [its] decision [was] whether the district court applied the appropriate level of deference when reviewing the arbitration award." 2011 U.S. App. LEXIS 13633, at *31. In light of the highly deferential standard afforded arbitral decisions, the employer's interests are best protected if a court, not an arbitrator, decides whether class arbitration is authorized. Arbitrators have a financial incentive to interpret agreements to authorize larger, more complex, and more expensive arbitrations such as class actions. *Jock* (if it survives) suggests that it will be difficult to overturn an arbitrator's adverse decision once it is made.

In 2000, a plurality of the Supreme Court held that arbitrators were to decide whether agreements permitted class arbitration. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003). However, *Stolt-Nielsen* questioned this holding:

> . . *Bazzle* did not yield a majority decision [on this issue] . . . .
>
> Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case . . . . For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. . . . In fact, however, only the plurality decided that question.

130 S. Ct. at 1772. *Stolt-Nielsen* did not expressly overturn *Bazzle*. *See id*. However, after noting that it could either "direct a rehearing by the arbitrators" or decide the question itself, the Court saw "no need to direct a rehearing by the arbitrators" because there could "be only one possible outcome on the facts before [it]." *Id*. at 1770.

Stolt-Nielsen could be read to eclipse *Bazzle*. *Goodale* adopted this view. 2011 U.S. Dist. Lexis 37111, at *6. Citing *Stolt-Nielsen*, the court refused to submit the question of class arbitration to the arbitrator because "Supreme Court precedent . . . squarely foreclose[d] the possibility that the class claims [were] arbitrable." *Id*.

However, most courts — so far — have held that arbitrators should decide the issue. See *Vilches v. Travelers Cos*., 2011 U.S. App. LEXIS 2551, at *11 (3d Cir. Feb. 9, 2011) (unpublished pre-*Concepcion* case reversing the district court's finding that an agreement did not permit class arbitration; the arbitrator must decide "whether a contract with an arbitration clause forbids class arbitration"); *Hayes*, 2011 U.S. Dist. LEXIS 66439, at *10-11 (N.D. Cal. June 22, 2011) (the issue of class arbitration was for the arbitrator to decide because it did not bear on the enforceability of the agreement); *Guida v. Home Sav. of Am., Inc*., 2011 U.S. Dist. LEXIS 69159, at *2 (E.D.N.Y. June 28, 2011) (compelling arbitration but reserving the class arbitration issue for the arbitrator); *Angermann v. General Steel Domestic Sales, LLC*, 2010 U.S. Dist. LEXIS 123145, at *6 (D. Colo. Nov. 8, 2010) (same).

Employers who wish to remain silent on the issue of "class actions" may improve their chances by including subtle provisions in arbitration agreements inconsistent with class arbitration. These include:

- *Use of a localized venue provision.* A provision designating that the arbitration will occur "in or near the city in which [the employee] was last employed by Company" shows that the company did not intend to subject itself to statewide or national class arbitration.

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- *Incorporating the AAA/JAMS rules "and no other rules."* This provision prevents the plaintiff from arguing that the employer agreed to the JAMS "Class Action Rules" or the AAA "Supplementary Rules for Class Arbitration," which provide the procedures for class arbitrations.

- *Adding a "no other party" provision*. The FAA permits parties "to limit with whom [they] will arbitrate." *Concepcion*, 131 S. Ct. at 1749. By specifying that the agreement is between the company, the named employee "and no other party," the agreement shows that class actions are not envisioned — without using the term "class action."

B. Avoid Unenforceable Arbitration Provisions.

Employers in drafting new agreements (and in litigating under old ones) should consider whether *Concepcion* preempts prior state unconscionability rules. Many of these rules may be abrogated by *Concepcion*'s mandate that agreements be enforced "according to their terms," but employers may conclude that it is safest to comply with them to avoid the risk of unenforceability. Here are a few examples:

- *Substantive carve-outs*. Some courts hold unenforceable, on grounds of lack of mutuality, provisions allowing resort to certain forms of relief in court (i.e., temporary restraining orders to prevent intellectual-property violations). See *Stirlen v. Supercuts, Inc*., 51 Cal. App. 4th 1519, 1540-41 (1997); *Trivedi v. Curexo Tech. Corp*., 189 Cal. App. 4th 387, 397 (2010). *Concepcion*, however, said that under the FAA, "parties may agree to limit the issues subject to arbitration." 131 S. Ct. at 1748. Do cases such as *Stirlen* and *Trivedi* survive?

- *Discovery limitations*. Provisions that limit parties to "minimal" discovery in arbitration have been deemed unconscionable. See *Armendariz*, 24 Cal. 4th at 102; *Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 716-17 (2004). *Concepcion*, however, labeled discovery limitations a virtue and not a vice. 131 S. Ct. at 1752-53 ("Parties could agree to arbitrate pursuant to . . . a discovery process rivaling that in litigation. . . . But [t]hat . . . may not be required by state law.") (first emphasis in original, second added).

- *Remedies limitations.* Provisions that purport to limit available remedies generally are not permitted. *Paladino v. Avnet Computer Techs*., 134 F.3d 1054, 1059-60 (11th Cir. 1998) (provision limiting arbitrator's authority to award damages for "breach of contract only" rendered agreement unenforceable); see also *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1077 (9th Cir. 2007) (provision shortening the statute of limitations to one year was substantively unconscionable).

- *Arbitration rules incorporated by reference.* Many arbitration agreements incorporate by reference certain ADR rules (i.e., the American Arbitration Association National Rules). Failing to provide a copy of these rules to employees has been held to support a finding of procedural unconscionability. See *Trivedi*, 189 Cal. App. 4th at 393. The reasoning of such cases is dubious, but employers can avoid this pitfall by attaching a copy of the arbitration rules or including a link to the website and adding a provision stating that the company will provide a copy of the rules upon request.

- *Confidentiality provisions.* Some courts have found confidentiality provisions to be unconscionable. See e.g., Ting v. AT&T, 319 F.3d 1126, 1151-52 (9th Cir. 2003). *Concepcion* may have abrogated cases like Ting; the Supreme Court noted that, under the FAA, parties can agree that "proceedings be kept confidential." 131 S. Ct. at 1749.

IV. CONCLUSION

Concepcion offers employers opportunities to foreclose or limit the availability of class actions. How best to exploit *Concepcion* is not obvious, and thoughtful employers will want to consider how best to do it — mindful of the risks of overreaching.

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