2016 ADR Cases of Interest

A. Mediation

1. *Amis v. Greenberg Traurig* (2015) 235 Cal. App. 4th 331 (2nd Dist.)

2. *Haskins v. Employers Ins. of Wausau* 2015 WL 369983 (N.D.Cal.)

3. *Silicon Storage Technology, Inc. v. National Union Fire Ins. Co., Etc.* 2015 WL 4347711 (N.D.Cal.)

4. *Doublevision Entertainment, LLC v. Navigators Specialty Ins. Co.* 2015 WL 370111 (N.D.Cal.)

B. Contract Arbitration

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2. *Meyer v. Stoscher* (2015) 2015 WL 4910155 (6th Dist.)

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5. *DirecTV v. Imburgia* (2015) 136 S.Ct. 463

6. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, cert. denied, 135 S.Ct. 1155 (Jan. 20, 2015)

7. *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425

8. *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal. 4th 899

9. *Montano v. Wet Seal Retail, Inc.* (2015) 232 Cal. App. 4th 1214 (2nd Dist.)

10. *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal. App. 4th 1109 (4th Dist.)

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16. *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal. 4th 899

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20. *Trabert v. Consumer Portfolio Services, Inc.* (2015) 234 Cal. App. 4th 1154 (4th Dist.)

21. *Serafin v. Balco Properties, Ltd.* (2015) 235 Cal. App. 4th 165 (1st Dist.)

22. *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal. App. 4th 227 (1st Dist.)

23. *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal. App. 4th 619 (1st Dist.)

24. *Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal. App. 4th 1233 (2nd Dist.)

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30. *Scripps Health v. Blue Cross and Blue Shield of Kansas, Inc.* (9th Cir. 2015) 577 Fed. Appx. 672

31. *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal. App. 4th 79 (1st Dist.)

32. *Singerlewak LLP v. Gantman* (2015) 241 Cal. App. 4th 610 (2nd Dist.)

33. *Sheppard Mullin Richter & Hampton LLP v. J-M Manufacturing Co., Inc.* (2016) 2016 WL 364742 (2nd Dist.)

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34. Stretching the Limits of *Functus Officio*. *In re Tailwind Sports, Inc., et al. v. SCA Promotions* (JAMS 2005 and 2015), and award confirmation proceedings in *SCA Promotions v. Armstrong*, U.S. District Court of Dallas County, Texas, Case No. DC-15-01764

35. Waiver of Right to Arbitration Through Litigation Conduct

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Orgel v. Pacpizza, LLC (2015) 237 Cal. App. 4th 342 (1st Dist.)

C. Settlement

1. *McKenzie v. Ford Motor Co.* (2015) 238 Cal. App. 4th 695 (4th Dist.)

2. *Leeman v. Adams Extract & Spice, LLC* (2015) 236 Cal. App. 4th 1367 (1st Dist.)

A. Mediation

1. *Amis v. Greenberg Traurig, LLP* (2015) 235 Cal. App. 4th 331 (2nd Dist.)

Legal malpractice plaintiff cannot circumvent mediation confidentiality by advancing inferences about his former attorney's supposed acts or omissions during an underlying mediation. "To permit such an inference would allow Amis to attempt to accomplish indirectly what the statutes prohibit him from doing directly – namely, proving [the firm] advised him to execute the settlement agreement during the mediation." Further, it "would turn mediation confidentiality into a sword by which Amis could claim he received negligent legal advice during mediation, while precluding [the firm] from rebutting the inference by explaining the context and content of the advice that was actually given." Relying on *Cassel*, the court of appeal noted that the California Supreme Court "has broadly applied the mediation confidentiality statutes and all but categorically prohibited judicially crafted exceptions, even in situations where justice seems to call for a different result."

2. *Haskins v. Employers Ins. of Wausau* 2015 WL 369983 (N.D. Cal.) *Not Reported*

Plaintiffs' mediation brief was subject to discovery because it was prepared by or on behalf of fewer than all of the mediation participants and plaintiffs (through their counsel) expressly agreed in writing to its disclosure via a letter written to counsel for plaintiffs' insurer, thus satisfying the express waiver requirements of Evidence Code §1122(a)(2).

3. *Silicon Storage Technology, Inc. v. National Union Fire Ins. Co., Etc.* 2015 WL 4347711 (N.D.Cal.) *Not Reported*

The court declined to extend what it termed the "*Milhouse* rule" to allow a defendant to discover and compel disclosure of *other* parties' mediation statements.

Note: In *Milhouse v. Travelers Commercial Ins. Co.*, 982 F.Supp. 2d 1088 (C.D.Cal. 2013), Judge Carney allowed testimony of plaintiffs' settlement demands and the insurance company's offers at mediation because to deem such evidence inadmissible in the trial of an insurance bad faith case would violate the due process rights of the defendant insurer to provide a defense to its alleged liability for bad faith and punitive damages. "To exclude this crucial evidence would have been to deny Travelers of its due process right to present a defense." Id. at 1108. *Milhouse* is on appeal to the Ninth Circuit (Case No. 13-57029), where it has been fully briefed.

4. *Doublevision Entertainment, LLC v. Navigators Specialty Ins. Co.* 2015 WL 370111 (N.D. Cal.) *Not Reported*

California's mediation confidentiality protections applied in granting protective order for some – but not all – communications had during, before and after a mediation held in a related state court action. Pre-mediation: Only two of five emails were protected because the other emails did not discuss mediation strategy and were not prepared for the upcoming mediation. To qualify for protection, the words "prepared for use in mediation" need to be stated or the substance has to refer to mediation strategy. Post-mediation: Memorandum was protected because it recounted statements made during mediation. "The end of the mediation did not strip the privilege that attached to statements and communications made during the mediation." Emails were not protected because they were sent after the end of the 10-day mediation period, did not recount anything from the earlier mediation, and could not be prepared for the purpose of or pursuant to a mediation because no subsequent mediation was scheduled or ever occurred.

B. Contract Arbitration

Arbitrator Disqualification / Required Disclosures / Evident Partiality

1. *In re Sussex* (9th Cir. 2015) 778 F.3d 1092

District court reversed for stepping in midstream and removing arbitrator before entry of an award because it did not apply the correct legal standard when it found that the arbitrator's contingent, attenuated and merely potential financial relationships would give rise to a reasonable impression of partiality towards one of the litigants. With regard to the district court's mid-stream intervention, the Ninth Circuit rejected the district court's equitable concern that delays and expenses would result if the arbitration was allowed to proceed to an award, which the district court believed would then be vacated. The Ninth Circuit held that delay and expense for assessing the arbitrator's "evident partiality." The Ninth Circuit held that the potential for delay and expense was "manifestly inadequate" to justify midstream intervention because cost and delay do not constitute severe irreparable injury or manifest injustice.

2. *Meyer v. Stoscher* (2015) 2015 WL 4910155 (6th Dist.) *Not Reported*

Defendant appealed from a judgment entered after the trial court confirmed an arbitration award entered in favor of his two siblings. The three siblings were all beneficiaries of a trust established by their parents, now deceased. Defendant is the successor trustee of his parents. After a dispute arose concerning trustee and caregiver fees, the parties signed an arbitration agreement and participated in arbitration. The selected arbitrator had been the trust and estate attorney for the parties' parents – facts disclosed by the arbitrator and that were otherwise known by the parties. Vacatur was denied because, based on the arbitrator's disclosures and the information the defendant otherwise knew, defendant had sufficient information and could not wait and see if he was pleased or displeased with the award before raising the issue of the completeness of the arbitrator's disclosures. Affirmed on appeal.

3. *Morris v. O'Neill* (2015) 2015 WL 3849706 (2nd Dist.) *Not Reported*

Plaintiff's contention that the arbitrator had an undisclosed professional relationship with CNA or had engaged in discussions with CNA regarding prospective employment as a dispute resolution neutral was based on plaintiff's unsworn speculation regarding the CNA icon or logo on a LinkedIn page and was an inadequate basis upon which to vacate the arbitration award.

4. *Nieves v. Travelers Casualty Ins. Co. of America* (2015) 2015 WL 4484176 (C.D.Cal.) – *Not Reported*

Plaintiffs filed suit in state court and defendant insurer removed the action to federal court. The district court then ordered the parties to arbitrate their dispute, as provided for in the arbitration clause of the relevant insurance policy. A disagreement arose between the parties about the neutrality requirements for party-appointed arbitrators. The arbitration clause provided for each party to appoint an arbitrator and for those two neutrals to appoint the third neutral. Plaintiffs designated their party arbitrator but refused to direct / allow her to agree to a third arbitrator because, they alleged, the defendant insurer's party arbitrator was partial. Defendant petitioned the court to order plaintiffs to direct their party-selected arbitrator to meet and confer and decide on a third arbitrator. Plaintiffs opposed the motion on the grounds that all three arbitrators were required to be neutral. The court disagreed with plaintiffs.

As a matter of Federal, the court held that "evident partiality" for a party-appointed arbitrator must be limited to conduct in transgression of contractual limitations (i.e., evident partiality or corruption), and because the arbitration had not been completed, it was premature to raise a challenge to the arbitrator's

partiality at this stage. The court further noted that the parties' arbitration clause provided for two party-appointed arbitrators and did not specify that they must be impartial. Accordingly, the court ruled that it could not require a higher level of impartiality from a party-appointed arbitrator than what the parties contracted for and agreed to in their arbitration agreement.

As a matter of California law, the court held that the California ethics standards and disclosure requirements do not apply to party-arbitrators. Citing *Jevne v. Superior Court,* 34 Cal. 4th 935, 945, n.4 (2005); *Mahnke v. Superior Court*, 180 Cal. App. 4th 565, 574-575 (2009) (bias in a party-arbitrator is expected and furnishes no ground for vacating an arbitration award unless it amounts to corruption).

Class Arbitration and the Status of Waivers and Contract Silence

5. *DirecTV v. Imburgia* (2015) 136 S.Ct. 463

Justices of the U.S. Supreme Court had scorching criticism for a California court's refusal to enforce an arbitration agreement. In this case, two customers who objected to the company's early termination fees sought to represent a class of people in the same situation by filing a class action lawsuit in 2008. After *Concepcion* (in which the Supreme Court allowed class action waivers to be enforced),[1] DirecTV asked a state court judge to dismiss the lawsuit and require arbitration. The case turned on an odd provision in the company's contract that forbid class arbitration, but made the entire arbitration provision unenforceable if "the law of your state" barred class arbitration waivers. Applying to the law as it existed at the time the lawsuit was filed, the request for arbitration was denied and the matter was allowed to proceed in court as a class action. Justice Breyer, writing for the majority, said that the state court failed to take into account the Court's 2011 decision in *Concepcion*, which allowed companies to avoid class actions by insisting on individual arbitrations. He went on to say that the right way to read the contract was to assume that it referred to *valid* California laws and not to ones displaced by the 2011 decision.

[1] Reminder: In *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148 the California Supreme Court held that when a class action waiver is included in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, such waivers are unconscionable as a matter of law, making the arbitration agreement unenforceable. The "Discover Bank Rule" was overruled by the U.S. Supreme Court in its 2011 *Concepcion* decision. The Supreme Court stated that because the rule stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (citation), California's *Discover Bank* rule is preempted by the FAA." 131 S.Ct. 1753.

6. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, cert. denied, 135 S.Ct. 1155 (Jan. 20, 2015)

The California Supreme Court held that after the U.S. Supreme Court's ruling in *Concepcion*, class action waivers are generally valid and enforceable – even in employment contracts. However, with regard to PAGA claim waivers, the Court held that such waivers are not enforceable because a PAGA claim lies outside the FAA's coverage. The Court explained that a PAGA claim is not a dispute between an employer and employee arising out of their contractual relationship but, rather, is a dispute between an employer and the State concerning alleged violations of the Labor Code. The employer filed a petition for writ of certiorari with the U.S. Supreme Court. That petition was denied on January 20, 2015,* thereby leaving intact the California high court's decision requiring that representative actions brought under PAGA proceed on a representative basis in some forum – whether it be in court or an arbitration.

On remand from the California Supreme Court, Judge Robert L. Hess ruled on November 25, 2015 (L.A. Superior Court Case No. BC35621) that the individual claims subject to arbitration must be resolved before the trial court would address the PAGA claims.

**Note: The U.S. Supreme Court has denied employers' petitions for review of the Iskanian rule twice. First in Iskanian* and second in *Bridgestone Retail Operations LLC v. Brown et al. (cert. denied June 1, 2015). Thus the U.S. Supreme Court's review of Sakkab may not be forthcoming – meaning that employers will no longer be able to rely on PAGA waiver provisions to eliminate the threat of representative PAGA actions and the dual pendency of individual claims in arbitration and representative PAGA claims in court litigation.*

7. *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425

The Ninth Circuit ruled that PAGA claims cannot be waived in employment arbitration agreements, following the rule announced by the California Supreme Court in *Iskanian*. With this 2-1 ruling, the Ninth Circuit majority found that the *Iskanian* rule barring PAGA waivers is not preempted by the FAA. The majority rejected the preemption argument, holding that "[f]ollowing the logic of *Concepcion* … the *Iskanian* rule is a 'generally applicable' contract defense that may be preserved by [the FAA's] savings clause" because "the *Iskanian* Rule does not conflict with the FAA's purposes." The court found here that the waived PAGA claims did not mandate procedures that interfere with arbitration, as the class action claims in *Concepcion* did.

While PAGA waiver provisions could not be enforced in California state courts, it remained unclear as to their viability in federal courts. Before the Ninth Circuit decision in *Sakkab*, at the federal trial court level, the *Iskanian* ruling had been generally rejected based upon the rationale that, under *Concepcion,* the FAA preempted the holding in *Iskanian*. See e.g., *Lucero v. Sears Holdings Mgmt. Corp.*, No. 3:14-cv-01620 (S.D.Cal., Dec. 2, 2014); *Mill v. Kmart Corp.*, No. 14-cv-02749 (N.D.Cal., Nov. 26, 2014); *Langston et al. v. 20/20 Cos. Inc. et al.,* No. 5:14-cv-02749 (C.D.Cal., Oct. 17, 2014) and *Ortiz v. Hobby Lobby Stores Inc.*, No. 2:13-cv-01619 (E.D.Cal., Oct. 1, 2014).

8. *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal. 4th 899

Car buyer brought class action against dealer alleging violations of the CLRA and other consumer protection laws. Dealer filed a motion to compel arbitration pursuant to a provision in the sales contract that also included a class action waiver. The trial court denied the motion to compel arbitration, holding that the class waiver was unenforceable because the CLRA expressly provides for class action litigation and forbids class action waivers. After the trial court's decision, the U.S. Supreme Court held in *Concepcion* that the FAA preempts state laws that prohibit class action waivers in consumer arbitration agreements. The U.S. Supreme Court left open the possibility that general contract defenses, such as unconscionability, might provide grounds to invalidate arbitration agreements in state courts. On appeal, the court of appeal in *Sanchez* declined to consider whether the class waiver at issue was enforceable, and instead affirmed the trial court's decision on different grounds: namely, that the arbitration clause was procedurally and substantively unconscionable. The California Supreme Court reversed the court of appeal. While the Court recognized that the CLRA provided an unwaivable right to file a class action, the Court held that the anti-waiver provision was unenforceable under the U.S. Supreme Court's decision in *Concepcion*. Even though *Concepcion* requires enforcement of the class waiver, the Court held that it does not limit the unconscionability rules applicable to other provisions of the arbitration agreement." The unconscionability portion of the decision is discussed in Paragraph 15, below.

9. *Montano v. Wet Seal Retail, Inc.* (2015) 232 Cal. App. 4th 1214 (2nd Dist.)

This is another employer-employee dispute in which the employer moved to compel arbitration. The trial court denied the employer's motion and, at the same hearing, granted a motion compelling discovery responses against the employer defendant. The defendant appealed the trial court's ruling denying its motion to compel arbitration and also argued that the motion to compel discovery should have been stayed under CCP § 1281.4, which requires a case to be stayed while a motion to compel arbitration is "undetermined." The Court of Appeal affirmed the trial court's denial of the employer's motion to compel because the purported waiver of

the right to bring representative action under PAGA rendered arbitration agreement unenforceable. The appellate court also rejected the holding stated in *Smith v. Superior Court* (1962) 202 Cal. App. 2d 128 that a motion to compel arbitration is "undetermined" for the purposes of Section 1281.4 while a denial of the motion is on appeal. Instead, the motion to compel was decided when the trial court denied it, and there was no obligation to stay the case after that point.

10. *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal. App. 4th 1109 (4th Dist.)

In *Iskanian*, the California Supreme Court held that, while class action waivers in arbitration agreements are generally enforceable, waivers of representative actions under PAGA generally are not. The *Iskanian* Court invalidated the PAGA claim waiver, but did not decide whether the PAGA claim should be resolved in arbitration or in court. In this case, the trial court ruled that a similar PAGA claim waiver was unenforceable, but issued an order compelling arbitration of all claims – including the PAGA claim. The Court of Appeal reversed, holding that the PAGA waiver rendered the entire arbitration agreement unenforceable due to the existence of a non-severability provision that immediately followed the class action and representative action waiver provisions. The court stated that "Notwithstanding any other clause in this Agreement, the proceeding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought as a class, collective or representative action." The court held that the non-severability provision essentially turned the arbitration agreement into an all-or-nothing proposition: If the class or representative action waivers are not enforceable, the entire agreement to arbitrate is unenforceable, and all dispute must be resolved in court.

11. *Williams v. Superior Court* (2015) 237 Cal. App. 4th 642 (2nd Dist.)

Employee brought a single-count representative action under PAGA alleging that his employer (Pinkerton Governmental Services) had failed to provide required rest breaks. The employer moved to enforce the employee's waiver of his right to assert a representative PAGA claim or, in the alternative, to require arbitration of the individual claim and to stay adjudication of the representative claim. The trial court the employer's waiver request, but entered an order requiring arbitration of the individual claim and staying adjudication of the PAGA claim. On appeal, the Court of Appeal agreed with the trial court that under *Iskanian*, the waiver of a right to assert a representative PAGA claim is unenforceable in any forum. However, the appellate court concluded that the employee's single cause of action under PAGA could not be split into an arbitrable "individual" claim and a nonarbitrable "representative" claim. Writ of mandate issued.

12. *Franco v. Arakelian Enterprises, Inc.* (2015) 2015 WL 798692 (2nd Dist.) *Not Reported*

After issuing its decision in *Iskanian*, the California Supreme Court ordered the Court of Appeal to vacate its earlier 2012 ruling. Pursuant to the California high court's order, the Second District Court of Appeal reversed and remanded to the trial court with instructions to grant the employer's petition to compel arbitration of the employee's individual claims. The Second District also ruled that while the PAGA claims were not subject to arbitration, they must be stayed until the individual claims were resolved in arbitration and to stay litigation of the because the issues subject to litigation under PAGA might overlap those that were subject to arbitration.

Arbitrability / Who Decides the Issue

13. *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125

Former bank executive brought suit against the bank for alleged wrongful termination and breach of contract. The bank moved to compel arbitration under the arbitration clause contained in the executive's employment agreement and to strike/dismiss the complaint. The executive opposed the motion and claimed that the arbitration clause in question was unconscionable and thus unenforceable. The bank responded that because the arbitration agreement incorporated the AAA rules, there was clear and unmistakable evidence that the parties intended to have the arbitrator decide the unconscionability issue. The district court agreed with the bank and dismissed the action in favor of arbitration. The executive appealed and the Ninth Circuit affirmed, finding that the incorporation of the AAA rules into the arbitration agreement constituted clear and unmistakable evidence of the parties' intent to delegate arbitrability questions to the arbitrator.

14. *Brinkley v. Monterey Financial Services, Inc.* (2015) 242 Cal. App. 4th 314 (4th Dist.)

Customer brought putative class action against financial services company asserting causes of action for invasion of privacy, unlawful recording of telephone calls and unfair business practices. The trial court granted the financial services company's motion seeking an order to compel arbitration of the individual claims and to dismiss the class claims. As discussed in Paragraph 24, below, the appellate court affirmed the trial court with regard to its order compelling arbitration, but it reversed the trial court's dismissal of the class claims. The arbitration agreement in question was silent on the subject of whether class or representative claims were subject to arbitration. As discussed in prior programs, the "gateway" issue of whether a claim is subject to arbitration – i.e., whether it is arbitrable - is generally

a matter to be decided by the courts unless there is a clear and unmistakable delegation of that issue to the arbitrator. As we have seen in prior cases, where an arbitration agreement incorporates a provider's rules by reference and those rules provide for the arbitration to decide arbitrability – i.e., his/her jurisdiction – such terms qualify as a clear and unmistakable delegation of the issue. In this case, the appellate court determined that the decision of whether or not plaintiff's putative class claims were subject to arbitration was a decision for the arbitrator because the agreement in question incorporated the AAA rules, which included the Supplementary Class Arbitration Rules, which state that the arbitrator is to determine, as a threshold matter, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.

15. *Universal Protection Service, L.P. v. Superior Court* (2015) 2015 WL 851090 (4th Dist.) *Not Reported*

Agreement between employer and employee unambiguously stated that disputes "shall be resolved" by arbitration conducted in accordance with the AAA Employment Rules, which rules expressly prescribe that an arbitrator's power includes "the power to rule on his or her own jurisdiction." More specifically, the appellate court noted that an agreement to arbitrate in accordance with the AAA Employment Rules "necessarily includes an agreement to the AAA Supplementary Rules for Class Arbitrations," which expressly state that the arbitrator "shall engage in 'construction' of the arbitration clause as to whether it permits the arbitration to proceed on behalf of or against a class." The appellate court concluded that the parties' agreement to arbitrate their disputes under a specifically designated set of rules, which in turn provided that the arbitrator shall decide arbitrability of class and/or representative arbitration, was clear and unmistakable evidence of their intent to delegate the determination of arbitrability to the arbitrator.

Enforceability and Challenges to Enforcement

16. *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal. 4th 899

Car buyer brought class action against dealer alleging violations of the CLRA and other consumer protection laws. Dealer filed a motion to compel arbitration pursuant to a provision in the sales contract that also included a class action waiver. The trial court denied the motion to compel arbitration, holding that the class waiver was unenforceable because the CLRA expressly provides for class action litigation and forbids class action waivers. After the trial court's decision, the U.S. Supreme Court held in *Concepcion* that the FAA preempts state laws that prohibit class action waivers in consumer arbitration agreements. The U.S. Supreme Court left open the possibility that general contract defenses, such as

unconscionability, might provide grounds to invalidate arbitration agreements in state courts. On appeal, the court of appeal in *Sanchez* declined to consider whether the class waiver at issue was enforceable, and instead affirmed the trial court's decision on different grounds: namely, that the arbitration clause was procedurally and substantively unconscionable. The California Supreme Court reversed the court of appeal, and acknowledged that "*Concepcion* requires enforcement of the class waiver, but does not limit the unconscionability rules applicable to other provisions of the arbitration agreement."

In this decision, the California Supreme Court confirmed that the central idea behind the unconscionability doctrine is not to invalidate contracts simply because they turn out to be "bad bargains," but rather is to deal with terms that are "unreasonably favorable" to a more powerful party. It was undisputed on appeal that the sales contract was to some degree procedurally unconscionable because it was a contract of adhesion. With regard to the special provisions providing for appeal to a three-arbitrator panel if the award was $0 or in excess of $100,000 or included injunctive relief was not, on its face, unreasonably one-sided or substantively unconscionable. Likewise, the provision requiring the appealing party to be responsible for payment of the filing fee and other costs was not unconscionable absent a showing that the cost of appellate arbitration filing fees was unaffordable. Similarly, the Court held that the class waiver and the provisions allowing for the retention of self-help remedies (such as repossession) were not unconscionable. The significant language form the decision was the Court's finding that these provisions were "reasonably balanced" and "commercially justified."

17. *Cruise v. Kroger Co.* (2015) 233 Cal. App. 4th 390 (2nd Dist.)

Employment application signed and submitted by employee contained an arbitration clause which stated that the company had a dispute resolution program in place that required final and binding arbitration of any and all disputes arising from the prospective employee's employment with the company. The employer's arbitration policy did not specify the procedures for the arbitration. When the employer moved to compel arbitration of the claims the employee asserted in his lawsuit, the employee claimed that the arbitration agreement was unconscionable, and thus unenforceable, because the employer's policy was silent as to the procedures. The trial court denied the employer's motion to compel based, in part, on defendant employer's failure to establish the precise terms of the arbitration policy. The Court of Appeal reverse, holding that the parties had unquestionably agreed to arbitration per the employment application signed by the employee. The defendant employer's inability to establish the terms of the arbitration policy only meant that the default procedures in the California Arbitration Act applied. Because those procedures were established by law, they could not be deemed unconscionable.

18. *Cobb v. Ironwood Country Club* (2015) 233 Cal. App. 4th 960 (4th Dist.)

Current and former country club members brought suit against the club seeking declaratory relief with respect to the club's obligation to repay land purchase assessment to each member. When plaintiffs filed their complaint, the club's bylaws contained no arbitration provision. Thereafter, the board adopted amendments to the bylaws that included a requirement that any claim or grievance of or by a member be submitted to arbitration. The club then filed a motion to compel arbitration based upon the amended bylaws. While the club's bylaws constitute a contract between the club and each of its members, the unqualified right to modify or terminate the contract must be tempered by the implied covenant of good faith and fair dealing, which the trial court found was violated by the post-litigation amendment. The trial court also found that while public policy favors arbitration, it does not favor giving effect to retroactive amendments. Affirmed. The Court of Appeal explained that the implied covenant of good faith and fair dealing bars a party from "making any unilateral changes to an arbitration agreement that apply retroactively to 'accrued or known' claims."

19. *Marenco v. DirecTV LLC* (2015) 233 Cal. App. 4th 1409 (2nd Dist.)

The issue presented was whether a non-signatory defendant may enforce an arbitration agreement between a signatory plaintiff and a corporation that was acquired by the non-signatory defendant. No prior California cases on point. This case established a new exception to the rule that arbitration agreements do not bind non-signatories. DirecTV was allowed to compel arbitration based on an arbitration clause contained in an employment agreement entered into between the employee and the company that DirecTV later acquired. The court held that as the employer's successor-in-interest, DirecTV had standing to enforce the arbitration agreement contained in the employment agreement. Because the employee had continued his employment with his employer's successor, the court found that that continued employment provided implied consent to maintaining the existing terms of employment, including the arbitration agreement.

20. *Trabert v. Consumer Portfolio Services, Inc.* (2015) 234 Cal. App. 4th 1154 (4th Dist.)

At issue in this case was a consumer's claims that repossession and default notices used by the creditor-assignee of his purchase contract were defective under consumer protection statutes. Previously, the trial court refused to enforce the arbitration agreement, but the appellate court remanded for a determination as to whether the unconscionable provisions could be severed. The offending provisions provided an exception to the binding and final nature of the arbitration award by providing for appealability of certain types of awards (e.g., an award in excess of $100,000). On remand, the trial court concluded that the offending provisions could

not be severed without augmenting the agreement. A second appeal was taken and in this decision, the appellate court reversed, finding that the offending "appeal" provision could be excised and the balance of the arbitration agreement enforced.

21. *Serafin v. Balco Properties, Ltd.* (2015) 235 Cal. App. 4th 165 (1st Dist.)

In this case, the plaintiff employee alleged that she had not consented to an arbitration policy because she had merely acknowledged that she "read and understand[s]" the mandatory arbitration policy. The Court of Appeal disagreed, noting that the mandatory arbitration policy was set forth in a short, easy-to-read document, which was clearly labeled "MANDATORY ARBITRATION POLICY," and a human resources representative was present to explain the terms of the policy that the plaintiff employee then signed. The court held that these facts did not suggest that the parties "intended the employee would be required to sign a separate and distinct document before an arbitration agreement would exist." The appellate court also held that the mandatory arbitration policy was not illusory merely because the employer retained the right to modify its personnel policies, because that right is subject to the implied covenant of good faith and fair dealing. The court further held that it was immaterial that the employer had not executed a writing indicating that it agreed to be bound by the mandatory arbitration policy because the employer's conduct (including printing the arbitration policy on its letterhead), and its use of arbitration to assert its own claim against the employee, evidenced the employer's intent to be bound. Finally, the appellate court held that the provision in the arbitration agreement calling for each party to bear their own fees was unconscionable, but severable.

22. *Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal. App. 4th 227 (1st Dist.)

Former employees brought a putative class for alleged wage and hour violations. In response to the employer's motion to compel, the trial court ordered arbitration of all claims except plaintiff's PAGA claims, but later reconsidered its order and denied the motion, concluding that the arbitration agreement was illusory and thus unconscionable. The trial court found that various provisions of the arbitration clause invoked Texas law and, as such, stripped plaintiff of his statutory protections under California law on multiple levels. The court of appeal agreed and affirmed, finding that forcing plaintiff to arbitrate under Texas law not only destroyed the foundation for his affirmative claims, but eliminated his ability to argue unconscionability using California public policy as the measuring stick for enforceability and the contract defenses asserted with respect thereto.

23. *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal. App. 4th 619 (1st Dist.)

Former employee brought suit for wrongful termination. The trial court denied the employer's motion to compel arbitration, finding that the arbitration agreement was cloaked with a high degree of unconscionability. Among the objectionable terms were the one-sided provisions granting only the employer the right to recover attorney's fees and requiring only the employee to arbitrate all claims, while allowing the employer to seeking judicial intervention if the employee violated her anticompetitive covenants or confidentiality obligations. The appellate court affirmed, finding that the arbitration agreement at issue was permeated by unconscionability and was thus not severable from its unconscionable parts. In this regard the appellate court noted that if an arbitration agreement contains more than one unlawful provision, such multiple defects indicate a systematic effort to impose arbitration not simply as an alternative to litigation, but as an inferior forum that works to the stronger party's advantage.

24. *Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal. App. 4th 1233 (2nd Dist.)

Motor carrier company brought suit against truck drivers and the Labor Commissioner to stay administrative proceedings being conducted with respect to claims filed by the truck drivers for the purpose of determining whether the claimants were employees (rather than independent contractors) and, if so, whether any unpaid wages were owed. The trial court denied the company's motion to compel and request for stay, finding that the individual respondents were exempt from the FAA and that the wage claims were not within the scope of the arbitration clause contained in the independent contractor agreements. The company appealed and the appellate court reversed, finding that the drivers were independent contractors (rather than employees), that the drivers' wage claims were covered by the arbitration provision included in the independent contractor agreements, and that the arbitration provisions were not procedurally unconscionable. On this latter point, the court noted that both procedural and substantive unconscionability must be shown and that the party asserting the defense of unconscionability bears the burden of proof on the issue. Here, the Labor Commissioner did not submit any evidence pertaining to the circumstances surround formation or execution of the agreements and the terms of the agreements alone did not demonstrate that the agreements were adhesive. "With no showing of procedural unconscionability, the subject agreements cannot be deemed unenforceable due to unconscionability."

25. *Brinkley v. Monterey Financial Services, Inc.* (2015) 242 Cal. App. 4th 314 (4th Dist.)

Customer brought putative class action against financial services company asserting causes of action for invasion of privacy, unlawful recording of telephone calls and unfair business practices. The trial court granted the financial services company's motion seeking an order to compel arbitration of the individual claims and to dismiss the class claims. On appeal, the appellate court found that while the fee and cost shifting provision in the contract was substantively unconscionable, the provisions plaintiff had challenged were not. The court determined that the unconscionable terms were severable, so the trial court's order requiring arbitration was affirmed because the arbitration agreement was enforceable. The appellate court held that the trial court erred in dismissing the putative class claims, rather than ordering the entire matter to arbitration and allowing the arbitrator to decide whether the parties' arbitration agreement permitted class claims. See Paragraph 13, above, for discussion regarding the "who decides" issue.

26. *Ramos v. Westlake Services LLC* (2015) 242 Cal. App. 4th 674 (1st Dist.)

In this case, the buyer of an automobile whose primary language was Spanish signed both an English and Spanish version of the sales contract. The English version contained an arbitration clause. The Spanish version purported to be a translation of the English version, but did not include an arbitration clause. When a dispute later arose between the buyer and the dealer, the buyer brought suit in state court. The dealer filed a motion seeking to compel arbitration based upon the arbitration clause contained in the English version of the sale contract. Motion denied. On appeal, the appellate court affirmed, holding that the arbitration agreement appearing only in the English version of the contract was void and unenforceable for fraud in execution.

27. *Jenks v. DLA Piper Rudnick Gray Cary US LLP* (2015) 243 Cal. App. 4th 1 (1st Dist.)

Attorney brought action against merged law firm, alleging that the merged firm had violated terms of his termination agreement by preventing him from receiving certain disability benefits. The merged law firm petitioned to compel arbitration based on the offer letter agreement between the attorney and his original law firm. The trial court granted the law firm's motion to compel and later confirmed the award. The attorney appealed, challenging the trial court's ruling that sent the matter to arbitration in the first place. The appellate court affirmed, holding that the merged law firm, as successor-in-interest to the attorney's original law firm, had standing to enforce the arbitration clause in the attorney's employment agreement. The fact that the merged law firm was not a signatory to

the offer letter agreement – standing alone – was not sufficient grounds to deny the motion to compel arbitration. As a matter of law, the merged law firm was the successor-in-interest of the original law firm and, moreover, had agreed to be bound by the terms and conditions of the offer letter agreement.

28. *Avelar v. Seven Fifty-Four, Inc.* (2015) 2015 WL 326719 (4th Dist.)

Trial court found that arbitration agreement forced upon employee was both procedurally and substantively unconscionable, and refused to order the employee to arbitration. The Court of Appeal reversed, disagreeing that the arbitration agreement was substantively unconscionable except with regard to the provision that parties would bear their own costs and attorney's fees. As to that provision, the appellate court noted that certain of the employee's claims carried statutory requirements for awarding fees to a successful plaintiff and that at least one of those statutes provided that the fee provision was unwaivable. The court found that severance of the offending provision was possible and appropriate and thus determined that the employee was obligated to arbitrate his claims.

Vacatur / Challenges to the Arbitration Award

29. *Richey v. AutoNation, Inc.* (2015) 60 Cal. 4th 909

This is an interesting case from both an arbitration and employment law perspective, and both need to be discussed in order to understand the Supreme Court's reasoning in rejecting the petitioning plaintiff's vacatur request.

Richey was an at-will employee of a Toyota dealership owned by AutoNation, a consortium of automobile dealerships. The dealership's stated policy said that outside work while an employee was on medical leave was prohibited. There was also a general understanding at the dealership that outside employment of any kind, including self-employment while on approved leave, was against company policy and that others had been fired for violating this rule.

Richey was employed by the dealership in 2004. In October 2007, Richey began work on plans to open a local seafood restaurant – i.e., to engaged in self-employment concurrent with his job at the dealership. He bought equipment and leased a site for the restaurant, which opened in February 2008. Richey was open and notorious about his side-business and marketed his restaurant while at work at the dealership. Richey's supervisors expressed concerns about the restaurant distracting him from his job responsibilities and met with him in February 2008 to discuss performance and attendance issues. In March 2008, Richey injured his back while moving furniture at home. He then presented the dealership with a doctor's note stating that Richey was medically unable to work. Richey then filed for medical

leave under the CFRA and FMLA. That leave was granted and then extended on multiple occasions.

In April 2008, Richey's supervisor sent him a letter advising him that employees were not allowed to pursue outside employment while on leave. In response to information that Richey was working in his restaurant, the company dispatched an employee to observe the restaurant, where he saw Richey working the front counter and doing various types of physical labor. Armed with this information, the dealership terminated Richey on May 1, 2008 – 27 days before his approved medical leave was set to expire. In its termination letter, the dealership stated that Richey was being dismissed for engaging in outside employment while on a leave of absence, in violation of company policy.

Richey then sued the dealership for wrongful termination, racial discrimination, retaliation for taking approved medical leave and for failure to reinstate following CFRA leave. The dealership moved to compel arbitration based upon an agreement Richey signed at the time of his employment requiring that any employment disputes be settled by arbitration. That motion was granted and the matter then proceeded to arbitration before a retired judge who conducted an 11-day evidentiary hearing. The arbitrator ruled in favor of the dealership. With regard to Richey's claims under the CFRA and FMLA, the arbitrator framed the legal issue as "whether the law provides a protective shell over [plaintiff] that bars his termination until he is cleared to return to work … or does the law allow an employer to let an employee go, while on approved leave, for other non-discriminatory reasons." The arbitrator found that although the employee manual was "poorly written," there was a general understanding that outside employment was against company policy and that others had been terminated for violating this rule. The arbitrator concluded that "case law" allowed the dealership to terminate Richey if it had an "honest belief" that he was abusing his medical leave.

Richey sought to vacate the award on the ground that the arbitrator had exceeded his powers when he accepted defendant's "honest belief" defense. The trial court confirmed the award over Richey's objection, finding that the fact that the arbitrator may have applied the wrong legal standard did not constitute grounds to vacate the award. The court of appeal reversed the trial court's judgment, concluding that the arbitrator had violated plaintiff's right to reinstatement under the CFRA when he applied the "honest belief" defense to plaintiff's claim. Defendant's petition for review was granted and the California Supreme Court reversed the court of appeal, thus reinstating the trial court's judgment for defendant based upon the arbitrator's award.

Without deciding the issue, the Supreme Court noted that while the "honest belief" equitable defense may not have been available with respect to Richey's alleged right to reinstatement under the CFRA, the Court held that even if the arbitrator erred, and even if such an error would serve as a basis for vacating an arbitration award, Richey had not shown that the error was prejudicial. 60 Cal. 4th at 920. Moreover, the Court found it significant that the arbitrator's award had indicated that Richey "blatantly ignored his superiors' clear instructions not to work at the restaurant while in CFRA leave" and that to ignore this fact and to hold that the dealership could not have fired plaintiff under any circumstance for violating company policy while on leave "would ignore the rule that plaintiff had 'no greater right to reinstatement or to other benefits and conditions of employment than if [he] had been continuously employed' during the statutory leave period." The Court found that the arbitrator had found that Richey's firing was based on a clear violation of company policy and that was "a legally sound basis for upholding the arbitrator's award," and that the arbitrator would likely have made that finding regardless of the evidence or findings as to the "honest belief" defense. "Thus, even if the arbitrator was mistaken in relying on the honest belief defense, plaintiff was not prejudiced thereby and the arbitrator's award in defendants' favor will stand." Id. at 921.

30. *Scripps Health v. Blue Cross and Blue Shield of Kansas, Inc.* (9th Cir. 2015) 577 Fed. Appx. 672

This case does not provide much in the way of analysis or factual context, but has been included in the materials because it contains a good summary recitation of the general guidelines and case precedent concerning vacatur under Section 10(a)(4) of the FAA.

This case arose out of a dispute over payment for hospital services provided to a Kansas Blue Cross member treated at a Scripps hospital in California. Scripps sued Blue Cross for breach of contract and other claims in district court. Blue Cross moved to dismiss both claims or, in the alternative, to compel arbitration. The motion to dismiss was denied. The motion to compel arbitration of the breach of contract claim and to stay the remaining claims was granted. After arbitration, the arbitrator's final award stated that Blue Cross had breached an express and implied contract between it and Scripps, that Blue Cross owed Scripps damages based on that breach, and that Blue Cross owed Scripps interest on those damages. Blue Cross then moved to vacate the award. The district court confirmed the award and denied vacatur. The Ninth Circuit affirmed. In so ruling, the Ninth Circuit held as follows:

- A district court's decision to vacate or confirm an arbitration award is subject to *de novo* review. *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007)

- A party seeking relief under Section 10(a)(4) – arbitrator exceeded his/her power – bears a heavy burden. *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S.Ct. 2064, 2068 (2013).

- An arbitrator's interpretation of the scope of his/her powers is entitled to the same level of deference as his/her determination of the merits. *Schoenduve Corp. v. Lucent Techs., Inc.*, 442 F.3d 727, 733 (9th Cir. 2006)

- An arbitrator exceeds his/her powers not when he/she merely interprets or applies the governing law incorrectly, but when the award is completely irrational or exhibits a manifest disregard of the law. *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012).

- To vacate an arbitration award based on manifest disregard of the law, it must be clear from the record that the arbitrator recognized the applicable law and then ignored it. Id. at 665. The arbitration must do more than simply interpret or apply the law incorrectly. Id.

31. *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal. App. 4th 79 (1st Dist.)

Plaintiffs, former employees of Pacific Bell, took early retirement, with the option to take a pension or a lump sum payment. All chose the lump sum, persuaded to do so by Kearney, with whom each plaintiff had significant interaction, having first learned of her from presentations made at the Pacific Bell premises. All became clients of Kearney, in connection with which they signed some documents, by which Kearney came to manage and invest their retirement proceeds, in some cases for years. Dissatisfied, plaintiffs sued Kearney and AIG Financial Advisors, the successor to the company where Kearney originally worked. AIGFA filed a petition to compel arbitration, supported in part by a declaration of Kearney. Without holding an evidentiary hearing, the trial court granted the petition. That arbitration occurred, with the arbitrators ultimately issuing an award rejecting plaintiffs' claims. After judgment was entered on the award, plaintiffs appealed. The court of appeal reversed and remanded for an evidentiary hearing. In this regard, the appellate court held that the trial court abused its discretion under CCP § 1290.2 by not holding an evidentiary hearing because there was a significant factual dispute regarding the content of the purported arbitration agreements that the investors had signed.

32. *Singerlewak LLP v. Gantman* (2015) 241 Cal. App. 4th 610 (2nd Dist.)

Accounting firm operated as a partnership entity. That entity was governed by a written partnership agreement, which included provisions dealing with the "liquidation amount" to be paid to a withdrawing. Those terms included provision for offset for fees earned if a partner withdrew and then provided accounting services to any then current clients of the accounting firm. If the offset reduction exceed the liquidation amount, then the agreement provided for the withdrawing partner to pay that amount to the firm within 60 days of that determination.

Defendant withdrew from the partnership and continued to provide accounting services to clients of the firm (at his new establishment). The accounting firm determined that the fees defendant earned from those services exceeded the liquidation amount and made demand for payment. Defendant refused, and the parties submitted the matter to arbitration, as required under the partnership agreement. In the arbitration, defendant argued that the above-described provisions of the partnership agreement amounted to an unenforceable non-compete agreement because it contained no geographic limitations. The arbitrator ruled against the withdrawing partner and in favor of the accounting firm. When the accounting firm sought to confirm the award, defendant objected and sought vacatur on the grounds that the arbitrator had exceeded his powers by enforcing the non-compete provisions of the partnership agreement. The accounting firm appealed.

On appeal, the Second District reversed the trial court, relying on age-old authorities to the effect that an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to one of the parties. Award confirmed.

33. *Sheppard Mullin Richter & Hampton LLP v. J-M Manufacturing Co., Inc.* (2016) 2016 WL 364742 (2nd Dist.)

The "Reader's Digest" summary of this case is that where a contract relationship is governed by the laws of California and a party to that contract challenges the entire contract as illegal or in violation of public policy, the question of enforceability is for the court – not the arbitrators – to decide because (1) the FAA and the contrary U.S. Supreme Court precedent do not apply, and (2) the trial court's error in not deciding the matter opens the door to de novo review and decision on the merits by the appellate court. Stated alternatively, when appellate courts do not like an outcome, they will find a way to undo it, and that is exactly what the Second District did in this case.

J-M Manufacturing Co. (J-M) was a litigation client of Sheppard Mullin (SMRH) until SMRH was disqualified because, without obtaining informed consent from either client, SMRH represented J-M in defending litigation in which the South Tahoe Public Utility District (Utility District) was a plaintiff and concurrently represented the Utility District in other matters. After the disqualification, SMRH sued J-M for $1.3 million for services rendered and J-M cross-complained for fraudulent inducement, breach of fiduciary duty and breach of contract. SMRH then moved to compel arbitration pursuant to the arbitration provision contained in the litigation engagement agreement. J-M opposed arbitration partly on the basis that the entire agreement containing the arbitration provision was illegal and void as a matter of public policy because SMRH's undisclosed and unwaived conflict of interest violated Rule 3-310(C)(3) of the Rules of Professional Conduct. The trial court granted SMRH's motion to compel, reasoning that the gravamen of J-M's "illegality" claim was fraudulent inducement – that J-M knew what it was signing, but was allegedly induced to such consent by fraudulent means. The trial court thus determined that this contract defense should be presented to and decided by the arbitrator.[2]

The matter proceeded to arbitration before a panel of three arbitrators, where the panel ruled in favor of SMRH and awarded the firm approximately $1.3 million in unpaid fees plus interest. When SMRH petitioned to confirm the award, J-M sought vacatur, arguing that the arbitrators had exceeded their powers by effectively enforcing a contract that was illegal and void. Over J-M's objection, the trial court confirmed the award and specifically found that a violation of Rule 3-310 did not render the entire retainer agreement illegal, void or unenforceable. It reasoned that whether an attorney should be entitled to attorney fees despite the existence of an ethical violation was at the heart of the equitable determination made by the arbitrators, and that the court could not disrupt the legal and factual findings of the arbitrators in this regard.

[2] Under the FAA, the trial court's ruling was absolutely correct, and the Second District so noted the same thing. *6. The FAA provides that covered arbitration agreements shall be enforced except "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. When parties commit to arbitrate contractual disputes, it is a mainstay of the FAA's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration provision itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). For these purposes, an arbitration provision is severable from the remainder of the contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).]

On appeal by J-M, the Second District reversed and remanded – not with instructions to the trial court to hear and determine J-M's illegality challenge to the enforceability of the retainer agreement and SMRH's entitlement to fees on some other ground (e.g., quantum meruit) - but with instructions to determine that SMRH "is not entitled to its fees for the work it did for J-M while there was an actual conflict with South Tahoe" per the appellate court's reasoning and analysis *16. The Second District further ordered the trial court to conduct proceedings to determine the amount of fees that SMRH "must reimburse to J-M" consistent with the appellate court's stated reasoning and analysis. *17. In a lengthy and strongly worded opinion, the court basically ruled that SMRH's engagement agreement with J-M was illegal and thus unenforceable as a matter of law and public policy because of the firm's prior / concurrent representation of the South Tahoe Utility District. In this regard, the court found that it "strains credulity" for SMRH's to suggest that the "boilerplate waiver provision" contained in the retainer agreement constituted informed written consent of the firm's actual conflicts to J-M "when, in fact, [SMRH] was silent about any conflict."

With regard to its expanded review of the arbitration award confirmed by the trial court, the Second District held that the limited review standard recognized by the California Supreme Court in *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1 was not controlling because it addressed judicial review in the context of when a party has alleged that only a portion of an otherwise enforceable contract is illegal, rather than the contract as a whole. The appellate court then reached back to a 1949 case in which a trial court was reversed for confirming an arbitration award in favor of unlicensed contractors. *Loving & Evans v. Blick* (1949) 33 Cal. 2d 603. In that case, the Supreme Court held that "the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award." Relying on its earlier decision *Lindenstadt v. Staff Builders, Inc.* (1997) 55 Cal. App. 4th 882, 892, fn. 2, the Second District held that on appeal from an order confirming an arbitration award, it reviewed the trial court's order (not the arbitration award) under a de novo review standard and that such review is "the standard of review that governs a trial court's review of an arbitrator's decision where one of the parties claims that the entire contract or transaction underlying the award is illegal." *6.[3]

[3] *Note: This part of the decision is a bit confusing, since the opening part of the decision made it sound like the basis for reversal was that the court – not the arbitrator – should have decided the illegality / enforceability issue and, thus, the arbitrators exceeded their power by deciding the issue. This decision would have resulted in remand back to the trial court to hear and decide the matter, but as discussed above, the Second District wanted to decide the illegality / enforceability issue. This case was only just decided on January 29, 2016. We'll have to stay tuned to see if J-M petitions the California Supreme Court for review and if that review is granted.*

Miscellaneous

34. Stretching the Limits of *Functus Officio*. *In re Tailwind Sports, Inc. et al. v. SCA Promotions* (JAMS 2005 and 2015), and award confirmation proceedings in *SCA Promotions v. Armstrong,* the District Court of Dallas County, Texas, Case No. DC-15-01764

On February 4, 2015, an arbitration panel ordered Lance Armstrong to pay $10 million in sanctions to his former promotions company, SCA Promotions, Inc. According to the arbitrators' written ruling, the sanctions award punishes Armstrong for engaging in "an unparalleled pageant of international perjury, fraud and conspiracy" that covered up his use of performance-enhancing drugs. The award was made public when SCA filed a motion in a Dallas state district court seeking to have the award confirmed as a judgment against Armstrong.

The arbitration panel issued the award after holding a multi-day evidentiary hearing during which Armstrong himself testified. During the hearing, the arbitrators considered whether Armstrong should be punished for his wrongful conduct in connection with his original dispute with SCA that was the subject of a JAMS arbitration. That dispute, which took place in 2005, involved whether SCA owed Armstrong bonus payments after he had won a series of Tour de France races. Armstrong swore under oath on numerous occasions in that proceeding that he had never used performance-enhancing drugs during his career. Given that sworn testimony, SCA settled the matter for $7.5 million in 2006. Armstrong later confessed in 2013 that he had cheated during every Tour de France race that he had won. He also acknowledged that he had committed perjury during the arbitration of his dispute with SCA. As a result, SCA petitioned the arbitration panel to re-open the arbitration proceeding to consider and rule upon its request for sanctions against Armstrong. based on his prior wrongful conduct. The original panel granted SCA's request and, after an evidentiary hearing, awarded SCA $10 million in sanctions.

What is curious about this case, from an arbitration law standpoint, is that SCA was allowed to "re-open" the arbitration that had been concluded many years earlier. The general rule is that arbitrators lose jurisdiction once they issue the final award – *functus officio* doctrine. Other than the short period within which parties may request that arbitrators correct a clerical or computational error under the arbitral rules (AAA gives 20 days; JAMS gives only 7), the arbitrators turn into pumpkins for all practical purposes after the final award is issued. The arbitral rules do not have any equivalent to Rule 60, which in federal courts allows a judge to re-do a judgment or order based on newly discovered evidence, fraud, or mistake. However, even Rule 60 sets a deadline of one year after the judgment is entered to request that the judgment be vacated.

The doctrine of *functus officio* was avoided in this case dispute because the settlement of the earlier dispute included an express term which stated that the same panel of three arbitrators who heard the 2005 evidence "shall have exclusive jurisdiction over the parties" with respect to any "any dispute or controversy [between the parties] arising under or in connection with" the settlement agreement. In ruling on the jurisdiction issue raised in the re-convened proceedings, the panel found that the provisions of the settlement agreement gave it "the exclusive authority to interpret and define its own jurisdiction," which the panel found was "entitled to appropriate deference," citing *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013). While recognizing that arbitration tribunals "are not common law courts of general jurisdiction" and that they had "no roving commission to determine or vindicate public policy," the panel nevertheless determined that "arbitration Tribunals must have the authority to regulate, control and, if necessary, sanction parties for conduct in connection with the proceedings before them."

35. Waiver of Right to Arbitration Through Litigation Conduct.

Bower v. Inter-Con Security Systems, Inc. (2015) 232 Cal. App. 4th 1035 (1st Dist.)

Bower was hired by Inter-Con in 2007 and executed an arbitration agreement, covering claims for compensation and wages. In 2008, Bower executed a second arbitration agreement that added clauses prohibiting claims on behalf of a class or in a representative capacity and covering claims for breaks and rest periods. After his 2011 termination, Bower filed a putative class action, claiming failure to: provide meal and rest periods, pay wages, provide accurate itemized wage statements, pay wages upon termination, with claims under the Unfair Competition Act and the Private Attorneys General Act. Instead of moving to compel arbitration, Inter-Con answered, asserting, as an affirmative defense, that Bower's claims were subject to arbitration. Inter-Con responded to discovery, but objected based on the arbitration agreement, and agreed to provide responses only to Bower in his individual capacity. Inter-Con did respond to an interrogatory concerning the number of class members employed during the class period and propounded its own discovery. Bower moved for leave to file an amended complaint to allege a broader class and additional theories and to compel further discovery responses. Inter-Con *then* moved to compel arbitration. The trial court denied that motion, holding that "Defendant waived the right to arbitrate by propounding and responding to class discovery." The Court of Appeal affirmed, concluding that there was substantial evidence to support the trial court's finding of waiver where the employer signaled its willingness to litigate class claims by propounding class wide discovery and by attempting to settle the case on a class wide basis.

Oregel v. Pacpizza, LLC (2015) 237 Cal. App. 4th 342 (1st Dist.)

Employee brought a putative class action lawsuit against his employer alleging that the employer had failed to reimburse him and like-situated employees for necessary expenses. Following extensive class discovery, the employee filed a motion for class certification, and the employer responded by filing a motion to compel arbitration. The trial court denied the employer's motion to compel arbitration and certified the class. With regard to the denial of arbitration, the trial judge observed that defendant employer was the first one he had had in his court "that posted jury fees and then came in and said 'I want arbitration.'" The trial judge went on to say that such conduct by the defendant employer "sends a message to your opponent that, despite the fact that you've got an arbitration clause, you see the case as staying in the courts," prompting the opposition to go out and do the work associated with such a proceeding (i.e., the extensive class discovery). On appeal, the First District Court of Appeal affirmed, finding that the defendant employer had waived its right to arbitration through its litigation conduct and also holding that it would not have been futile for the defendant employer to have sought enforcement of the arbitration agreement at an earlier point in time.

C. Settlement

1. *McKenzie v. Ford Motor Co.* (2015) 238 Cal. App. 4th 695 (4th Dist.)

In a lemon law case, the plaintiff rejected the defendant's initial 998 offer that contained onerous non-monetary conditions. Months later, the plaintiff accepted a second offer for the same monetary amount, but without the onerous, non-monetary terms. Both settlement offers allowed the plaintiff to file a motion to recover attorney's fees. The trial court denied the plaintiff's fee request incurred after the initial 998 offer, and the Court of Appeal reversed. The court held that the offer was rendered invalid by the non-monetary terms, which included: 1. an extraordinarily broad release, which applied to claims and persons outside of the litigation, 2. a confidentiality provision that was expressly prohibited by California's lemon law statute, and 3. an opt-out provision that allowed the defendant to reject the settlement based on the condition of the plaintiff's car upon its return. The Court of Appeal rejected the defendant's argument that because the terms were unlawful and unenforceable, they were therefore immaterial, and should have been disregarded in considering the validity of the 998 offer. Instead, the court held that the plaintiff's rejection of the first offer was reasonable, and the trial court erred by denying the plaintiff's fees incurred after that offer.

2. *Leeman v. Adams Extract & Spice, LLC* (2015) 236 Cal. App. 4th 1367 (1st Dist.)

The parties reached a settlement of an action under Proposition 65, which included a stipulated award of attorney's fees. The parties moved to have a judgment approved pursuant to Health & Safety Code § 25249.7, and entered as a judgment under CCP § 664.6. The trial court reduced the attorney's fees award by 50%, and denied a subsequent motion by both plaintiff and defendant to increase the attorney's fees award to the original amount agreed upon by the parties. The Court of Appeal reversed, holding that CCP § 664.6 only gives the trial court authority to either enter or refuse to enter judgment based on the settlement agreement. It does not give the trial court authority to alter the terms of the agreement.