ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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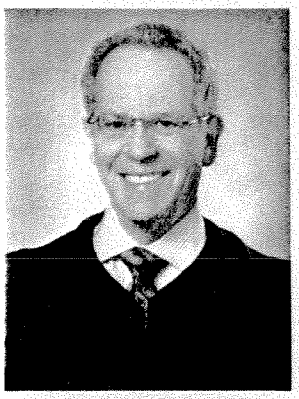
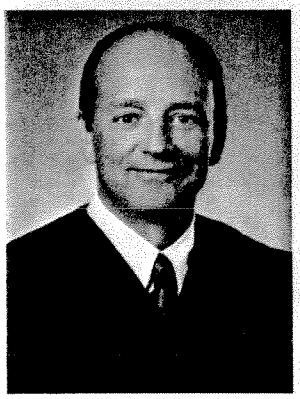
Brown Bag Lunch: The Impact of Budget Cuts on San Diego's Independent Calendar Departments



Judge Ronald S. Prager



Judge Jeffrey B. Barton

By: Ben West

The Litigation Section of the State Bar of California and the Association of Business Trial Lawyers of San Diego presented a bench/bar brown bag luncheon on July 24, 2013. San Diego Superior Court judges Jeffrey B. Barton and Ronald S. Prager discussed the impacts the judicial budget cutbacks have had and will have on the Independent Calendar Departments. Here are some of the highlights from their presentation.

Budget Cuts

San Diego lawyers are familiar with the state's budget crisis and its impact on the superior court system. The San Diego Superior Court is experiencing the biggest financial crisis in its history. In 2008, the court's budget was $203 million. The court's budget was reduced to $157 million in 2013, a nearly 25 percent reduction from 2008 to the present. However, the court will receive $3.5 million from the $63 million Governor Brown restored to the courts in the 2013-2014 state budget.

(see "Budget Cuts" on page 9)

Protecting Your Clients From Alter Ego Liability Makes Good Business Sense

David M. Greeley

By David M. Greeley

Imagine this scenario. A long-time client calls you and tells you that she is closing one of her company's three stores and reminds you that, thanks to your advice, she set up separate entities for each store location, and thanks to your negotiating skills, the lease, which has three years left on it, is not personally guaranteed. She wants you to inform the landlord not to bother with suing the tenant, since that entity has no assets. The client thinks "This is a separate entity; I am safe." But it occurs to you that you set up those entities three years ago and have had very little contact with the client since that time. While a separate entity generally insulates the owners or related entities from liability, there are exceptions. One notable exception is the "alter ego" doctrine, which provides that in limited circumstances, a creditor may treat the debt of the entity as the debt of an individual or related entity. In other words, the very reason a client generally goes through the trouble and expense of retaining an attorney to set up a fictional en-

(see "David M. Greeley" on page 12)

Inside

U.S. Supreme Court Continues To Expand FAA Preemption

By Thomas Kaufman and Shannon Petersen

In its 5-3 decision of June 20, 2013, the United States Supreme Court issued another pro-arbitration decision in *American Express Co. v. Italian Colors*.[1] The opinion by Justice Scalia continues to build on similar recent authority enforcing the terms of arbitration agreements under the Federal Arbitration Act ("FAA") even when they include class action waivers.

In *Stolt-Neilsen* (2010), the Court held that where an agreement was silent on the availability of class arbitration, only individual arbitration was allowed.[2] In *Concepcion* (2011), the Court held that the FAA preempted California Supreme Court law that made it difficult, if not impossible, to enforce a class action waiver.[3] In *Greenwood* (2012), the Court held that the FAA preempted any implied right to bring a federal claim in court.[4] Now, in *American Express*, the Court holds that the FAA preempts any claim that a class action is necessary to effectively vindicate a statutory right. According to the Court, a party cannot avoid a class action waiver in an arbitration agreement by showing that the cost of proving an individual claim will exceed any possible individual recovery.

This action arose from an antitrust claim brought by merchants against American Express. The second circuit invalidated the class action waiver contained in the arbitration agreement on the grounds that: (1) the FAA had no preemptive effect on the federal anti-trust law at issue; (2) previous U.S. Supreme Court authority invalidated arbitration terms that effectively precluded the enforcement of a federal claim; and (3) enforcement of the class action waiver effectively precluded the enforcement of the federal anti-trust law at issue because pursuing an individual claim was not economically rational.

In his majority opinion, Justice Scalia rejected each of these points. First, Justice Scalia wrote that the FAA can and does preempt other federal statutes, unless those federal statutes expressly state that a plaintiff has a right to sue in court or a right to bring a class action. The majority rejected any claim that a right to a class action could be implied in the federal anti-trust law. Justice Scalia pointed out that the anti-trust provisions at issue actually pre-dated the enactment of the federal class action statute, Rule 23 of the Federal Rules of Civil Procedure. According to the majority, the mere fact that class actions could aid in the enforcement of the anti-trust law was insufficient to trump the FAA, which enforces arbitration agreements according to their terms.

The majority also rejected the notion that class action waivers must be set aside if they interfere with the enforcement of federal rights. Justice Scalia described earlier Supreme Court authority in support of this proposition as *dicta*, which was only intended to apply if an arbitration agreement precluded a particular federal claim. It did not apply to procedural limits on how the claim might be brought—such as an agreement that a particular claim will be brought only as an individual claim in arbitration and not as a class action. As it did in *Concepcion*, the Court again rejected any implied federal right to a class action when the conditions of Rule 23 are met.

According to the Court, an arbitration agreement cannot forbid the assertion of a federal statutory right. However, courts cannot refuse to enforce a class action waiver merely because it would be economically impractical to pursue an individual federal claim.

In the face of such authority, plaintiffs' class action counsel are left only with the argument that an arbitration agreement is unenforceable as unconscionable. In making this argument, however, plaintiffs can-

(see "New and Noteworthy" on page 8)

not argue that class action waivers are unconscionable because plaintiffs have an implied statutory right to a class action or because a plaintiff can only vindicate his or her statutory rights through a class action. Plaintiffs must instead show that other terms of arbitration are so one-sided as to shock the conscience. The *American Express* case also recognizes that courts may properly refuse to enforce arbitration agreements when the filing and administrative fees are so high as to make arbitration impractical.

The California Supreme Court is expected to address many of these same issues in *Sanchez v. Valencia Holding Company*, likely rendering a decision late in 2013 or early in 2014. Meanwhile, the consumer class action bar is also urging legislative and regulatory reform to limit the impact of this line of recent U.S. Supreme Court authority. For example, the federal Consumer Financial Protection Bureau, authorized by federal law, is currently considering regulations to limit the use of arbitration agreements and class action waivers in consumer financial contracts. Federal law already prohibits the use of arbitration agreements in mortgage contracts.

(ENDNOTES)

1 Slip Opinion No. 12-133. Justice Sotomayor recused herself.

2 *Stolt-Nielsen, SA v. AnimalFeeds International*, 559 U.S. 662 (2010).

3 *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 563 U.S. ____ (2011).

4 *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 565 U.S. ____ (2012).

Mr. Petersen is a business litigation partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP in San Diego, where he specializes in consumer class action defense.

Mr. Kaufman is a labor and employment partner with the law firm of Sheppard, Mullin, Richter & Hampton LLP in Century City, where he specializes in wage and hour class action defense.

No Exemption for Managers Who Simultaneously Perform Exempt and Non-Exempt Tasks Where Primary Purpose of Task Is Not Related to Supervision or Operations of a Department

By Lois Kosch

An assistant manager of a grocery store brought suit alleging she was not properly classified as exempt because she regularly spent more than fifty percent of her work hours doing nonexempt tasks such as assisting with checkout and stocking shelves. An advisory jury returned a verdict for the employee and the employer appealed. On appeal, the employer argued that the trial court should have instructed the jury that the assistant manager should be considered to be engaged in exempt work so long he/she was simultaneously managing the store's operations. The court of appeal rejected this argument and held that the proper question was as the trial court stated: whether the reason or purpose for undertaking the task was to assist with supervising employees or contributed to the smooth functioning of the department for which the manager was responsible. Since the trial court instructed the jury to determine from an objective perspective the assistant manager's purpose in engaging in the nonexempt tasks, the court of appeal held there was no error and upheld the jury's finding that the employee was primarily engaged in nonexempt duties.

Heyen v. Safeway Inc. (2013) 216 Cal. App.4th 795