How to Win in Arbitration

KATHRYN BURKETT DICKSON
HON. ELAINE GORDON
SHANNON LISS-RIORDAN
PAUL LUKAS

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LOS ANGELES

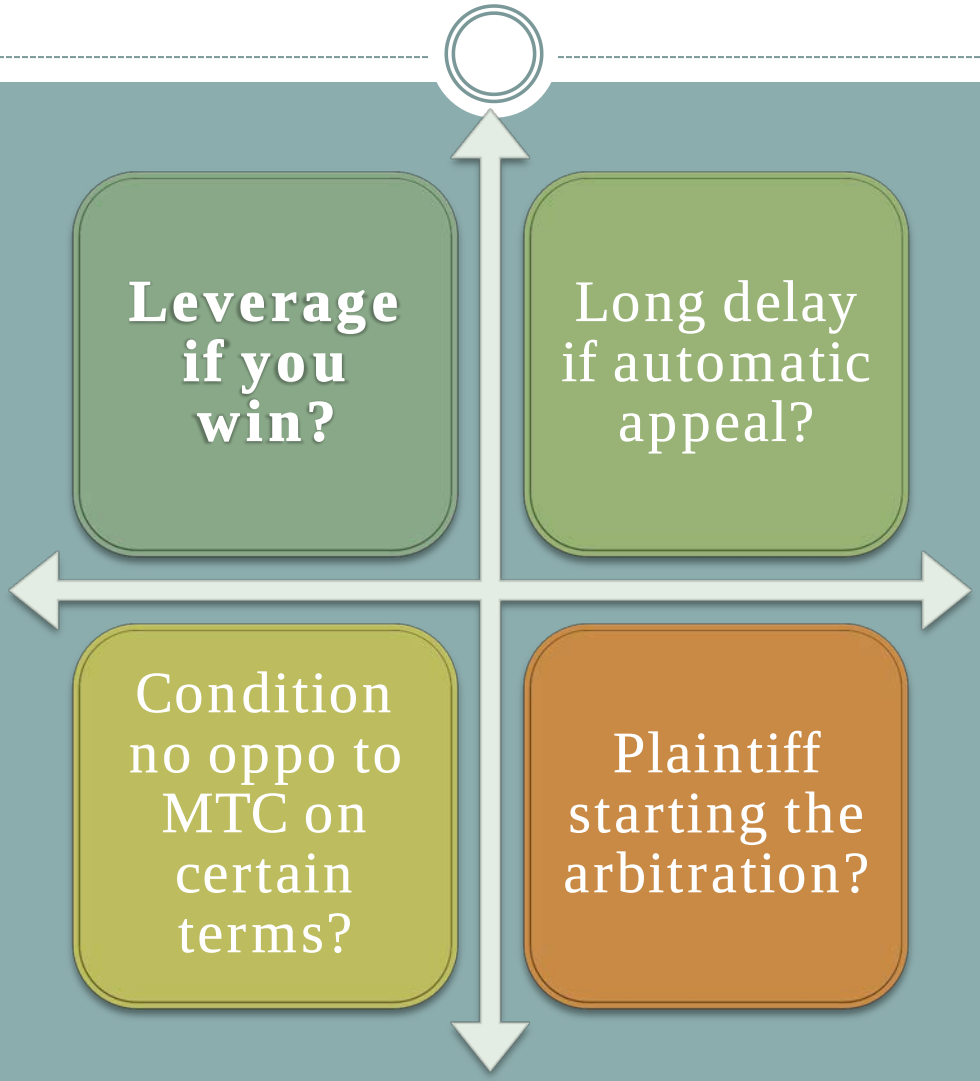
This Presentation

- To oppose arbitration or not
- Starting the arbitration and selecting the arbitrator
- Discovery and preparing for the plenary hearing
- Proving your case effectively
- Interim and final awards
- Post award issues

Pros and cons of arbitration

Pros	Cons
• Some say on decisionmaker • Easier resolution of discovery disputes • Fewer MSJs • Relaxed evidence rules • Faster decision • Lack of appeal	• No jury • Repeat player problem • Limited discovery • No appeal if erroneous ruling

To oppose arbitration or not



Which arbitration provider and arbitrator

What does the arbitration provision say? (But . . . you can always agree otherwise)

Pick the arbitrator first or the provider first?

Try to agree . . . exchange lists

- Research the possible candidates – do your "Googling" early
- Use listservs and databases – NELA and affiliates
- Use the available data (e.g., JAMS and AAA)

The "strike" process

Disqualifying appointed arbitrators

Agree on the rules you will apply – LEARN THE RULES

Discovery and Preparing for the Plenary Hearing

Preliminary Conference

- *See* attached Preliminary Conference Order No. 1
- If not automatically set, ask for a preliminary conference call
- Issues to address:
  - Length of plenary hearing (and whether "timed")
  - Dates of plenary hearing (insist on consecutive)
  - Pre-trial schedule
  - Electronic filing (e.g., Caseanywhere or electronic service)
  - Consistent and consecutive numbering of exhibits throughout discovery
  - Procedure for MSJ motions, if allowed

Preliminary Conference - Discovery

- Discuss scope of discovery and initial disclosures (consider using the discovery protocols)
- Explain the depositions you will need
- Discuss how discovery disputes will be handled (e.g., short letter briefs, followed by phone conference)
- If limits are imposed, propose suggested alternatives
  - For example, if there are many witnesses, ask for the number of hours you would get in federal court
  - Offer to make depos convenient – go where witnesses located
  - Explain reasons add'l discovery is necessary – e.g., damages
- Discuss experts and the scope and timing of expert discovery (e.g., written reports or not)

Conducting discovery and pre-trial preparation

- Keep discovery targeted
- Gear everything to what the arbitrator will need to decide in your favor
  - Review and use jury instructions as a guide
  - Prepare a “proof grid”
  - Clear questions and answers
  - Get the damages information you need
- Videotape the depositions
- Use focused experts
- Prepare with the same intensity you would for trial

The Plenary Hearings

Make it persuasive and focused

- Trial briefs
- Give an opening statement – use PowerPoint or graphics – make it lively and interesting
- Keep exams tight – make points – build the case brick by brick
- Use video from depositions
- Give an entertaining and powerful closing argument
- Ask if the arbitrator has specific questions or issues for the final brief
- Submit a post-trial brief – write it to help the arbitrator prepare the award in your favor

Interim and final awards

Interim award on the merits after hearing – includes liability and damages and possible punitives finding

Further hearings or written submissions on the amount of punitive damages, attorneys' fees, and injunctive relief

Final Award

Post-award matters

- Correcting an award
- Pre and post-award interest
- Motion or petition to confirm the award in court
- Motion to vacate the award
- Limited grounds for appeal

JAMS ARBITRATION NUMBER 1200045317

Ruhe, Michael & Catala, Vicente,

Claimant,

And

Masimo Corporation,

Respondent.

PRELIMINARY CONFERENCE ORDER NO. 1

(November 14, 2011)

(*Counsel are asked to take a few moments to carefully review the following order*)

An initial telephone Preliminary Conference in this new arbitration is scheduled for Thursday, November 17, 2011 at 3 PM Pacific Time. This order **requires counsel to confer and provide by e-mail a short joint written report at least 24 hours in advance of the Conference**. The required contents of the joint report are detailed below. In addition, information is provided below concerning guidelines for hearing length and target dates, electronic filing, exhibit preparation, discovery scope and discovery disputes, summary disposition motions, document retention, contact information, and bifurcation of fee and cost hearings.

The aim of this order is to establish from the outset of this proceeding a framework for a well-managed, efficient arbitration process in which the time, effort and expense are proportioned to the stakes in the controversy.

Attached with this order is an agenda for the Final Pretrial Conference which contains additional information. This order is standardized. Some of the information below may not apply in every case.

Pre-Preliminary Conference Joint Report. The joint report will contain the following:

--Estimated length of plenary arbitration hearing;

--Dates when counsel wish to conduct the hearing;

--Whether the parties wish to proceed under the JAMS Expedited Procedures (Comprehensive Rules, 16.1, 16.2) [the JAMS Rules are available at www.jamsADR.com];

--A pretrial schedule which includes the following:

--Deadline for Rule 17 exchanges;

--Additional discovery, to the extent permitted;

--Summary disposition motions, if any, including preapproval filings described further below ;

--Mediation deadline;

--Final pretrial conference (usually by telephone).

Discovery, motions, and mediation should be completed before hearing fees are due and non refundable (unless cancelled days can be rebooked--see below.) In this case fees will be due __ days before the hearing commences.

Further information about these topics is provided below.

Electronic Filing. The arbitrator requests that all submissions to him be made in *electronic form only*. The initial pleadings and arbitration agreement, and all subsequent briefs, communications, exhibit lists, witness lists, and other submissions (except trial exhibits) should be e-mailed to the arbitrator at the addresses provided below. Trial exhibits will be submitted on a thumb drive or DVD, consistent with the instructions provided below.

The arbitrator will create an e-mail service list for the case and attempt to provide counsel with courtesy copies of all orders and other pre-award communications (awards will be issued by the Case Manager.)

Contact Information. The Case Manager is Christy Arceo, who may be contacted at 213 253 9721, or carceo@jamsadr.com. The Case Coordinator, Andrea Perini, also can assist you: 213 253 9783, aperini@jamsadr.com. Both are in the Los Angeles Resolution Center, 707 Wilshire Blvd, 46th Floor, Los Angeles CA 90071. The fax number there is 213 620 0100.

Counsel are identified, with contact information, in the service list attached with this order. The parties are identified by name in the caption above.

The arbitrator may be contacted as follows: email (preferred): rneal@jamsadr.com; rneal 47@gmail.com; fax 626 577 2835; personal delivery: 1410 Hillcrest Avenue, Pasadena 91106

Exhibits. Counsel should agree at the outset of the case on a numbering system which assigns a single number to each document for purposes of discovery and trial. For trial the arbitrator expects that exhibits will be submitted on a thumb drive or DVD, with each exhibit as a separate PDF file. The parties should use the following convention to label each exhibit: "Ex. ##-- Abbrevtd name doc.—date." This will assure that documents will sort in numerical sequence in the computer file, and allow the file directory to serve as an electronic exhibit list. Internal pagination should suffice to identify each page of every document-- Bates numbers are adequate for this. There should be a means to display the exhibits on screen at the hearing. In the alternative counsel can use binders for themselves and the witness.

Guidelines for Scheduling.

Length of Hearing. The parties will be required to provide before trial witness lists summarizing the substance of each witness's testimony and the estimated time required for examination. In estimating the length of trial counsel should strive (understanding they are in early stages of case preparation) to preliminarily identify the witnesses needed and the estimated time to present them. The main cause of overlong hearings is the presentation of repetitive testimony by successive witnesses on non-crucial issues. Testimony of a single witness is sufficient to establish a fact, and testimony from multiple witnesses on non-controversial facts is not productive. Similarly, attention should focus on the key documents in the case. It is seldom productive or necessary to introduce every memorandum note and e-mail generated in discovery.

Target Dates for Hearings. Counsel should attempt to identify workable, realistic dates for the hearing, acceptable on their own calendars and those of their clients and witnesses. Hearing dates are firm. Continuances for convenience are discouraged, and continuances will be granted only for good cause.

Cancellation Fees. Counsel are reminded that arbitration fees are required to be deposited in advance of the hearing, on a schedule which will be confirmed in correspondence from JAMS, and that if the hearing is cancelled or continued after the deadline specified in that letter, the sum on deposit is deemed a cancellation fee, payable to JAMS, subject to a credit for hearing days which JAMS is able to rebook (see arbitrator's fee schedule.)

Discovery.

Scope Of Discovery. The key discovery mechanism in arbitration is the initial exchange of information. For example, JAMS Comprehensive Rule 17 (b) requires an early, good-faith voluntary informal exchange of all non-privileged documents and other information *relevant to the dispute or claim* immediately after commencement of the arbitration. The exchanges are to include all relevant non privileged documents, including those the party relies on in support of its positions, and the names of the individuals it may call as witnesses.

Some discovery is allowed in addition to the initial informal exchanges, but (unless the arbitration agreement adopts civil litigation discovery procedures) arbitration discovery is much more limited in scope than civil litigation discovery. Interrogatories and requests for admissions are not authorized by the JAMS Comprehensive Rules. Further, each side is allowed only a single deposition as a matter of right, with discretion granted the arbitrator to allow additional depositions based on a showing of reasonable need. In addition, the JAMS Recommended Arbitration Discovery Protocols encourage the arbitrator to require that discovery be proportional to the stakes; that document requests avoid broad phraseology ("all documents that directly or indirectly relate to etc."), and be limited to documents directly relevant to significant issues in the case; and that document requests be limited in time frame, subject matter, and persons/entities they inquire about.

Discovery Disputes. If discovery disputes arise, counsel shall expeditiously attempt to resolve them through a genuine meet and confer process (not just an exchange of position letters.) Either side may request that the arbitrator participate in the meet and confer session, to the end of swiftly and efficiently resolving the dispute with a minimum of formal motion practice.

For discovery disputes which must be ruled on by the arbitrator, counsel should prepare a joint statement setting out the disputed items and each side's position as to each item, with the objective of providing in a single document all the information the arbitrator will require to decide the dispute. Counsel should agree on a schedule for preparation of their respective portions of the joint statement. Hearings should be scheduled through the Case Manager or Coordinator, and may be by phone or in person. The arbitrator usually is ready to address disputes within no more than 2-3 days after submission of the joint statement.

Discovery disputes should be surfaced and addressed promptly so as not to disturb the hearing schedule established herein.

Summary Disposition. JAMS Comprehensive Rule 18 authorizes the arbitrator to permit a summary disposition motion. This is the arbitral equivalent of summary judgment, but it is not the same.

In the first place, the arbitrator has discretion whether to allow the motion to be brought. To properly exercise his discretion as to whether to permit a summary disposition motion, the arbitrator requires as follows: A party desiring to make a summary disposition motion shall advise of its wish to do so in a letter brief, not exceeding three pages in length, which summarizes the grounds for the motion. A party opposing the bringing of the motion shall have seven days to file a responding letter brief explaining why the motion should not be permitted. The arbitrator will then advise as soon as possible whether the motion will be allowed to proceed.

The following attributes of summary disposition in arbitration should be considered in the parties' decision whether to bring motions:

In California civil litigation, under CCP 437c, once moving party has shown prima facie the absence of material fact issues for trial, a burden arises upon the opposing party to come forward with specific facts to demonstrate the need for trial. The opposing party "may not *rely* on the mere allegations or denials of its pleadings but *must ... set* forth specific facts showing that a triable issue of material fact exists " (437c(p).) Neither this burden- creating mechanism, nor the other machinery of civil litigation summary judgment (for example, separate statements of undisputed facts), apply in arbitration ("rules of civil procedure typically do not apply in arbitration proceedings". *Schlesinger v. Rosenfeld, Meyer & Sussman* (1995) 40 Cal. App. 4th 1096, 1108.")

In arbitration it will normally suffice to defeat summary disposition that the opposing party makes a good faith showing that it can and will bring forth evidence *at the plenary hearing* that creates a material issue of fact.

Caution in exercising the discretionary power to entertain and grant summary disposition in arbitration is warranted for at least two important reasons. First, determinations in arbitration are final and binding, whereas in civil litigation

summary judgments receive de novo review by a three judge panel. Correct summary decisions are therefore particularly crucial in arbitration. Second, grants of summary disposition raise a risk of successful challenge to an arbitration award, on the ground that the arbitrator refused to hear material evidence. This is one of the narrow statutory grounds for challenging a binding award (e.g. CCP 1286.2(a)(5).

Document Retention. The arbitrator has no equivalent of a court clerk. JAMS does not routinely retain most arbitration materials. The arbitrator generally disposes of motion papers and other materials promptly following the events they relate to. If for any reason counsel wish the arbitrator to retain documents, they should call this specifically to his attention.

Fee And Cost Claims/Bifurcation/Close Of Hearing. The arbitrator will normally decide claims for attorneys' fees or costs following the merits hearings, on briefs and declarations, without further in-person hearings, on a schedule set at or after conclusion of the in-person hearings. Other suitable issues also may be bifurcated. The hearing will not be formally 'closed' until final briefs and evidence have been submitted.

Dated: November 14, 2011

By: Richard C Neal

Hon. Richard C. Neal (Ret.)

Arbitrator

AGENDA FOR FINAL PRETRIAL CONFERENCE

1) **Scheduling Issues**
   a) Trial schedule
      i) Normal hearing day: 9:30 am-5:30 pm, one hour for lunch
      ii) Flexibility to accommodate witnesses, counsel, i.e., start early, shorten lunch, work late
      iii) Any known conflicts? Other hearings, etc.
2) **Time Division/Time Keeping**
   a) Assures completion of hearing in time reserved
   b) Parties must agree
   c) Method: spreadsheet, assumes minimum of 6 hours 15 minutes (375 minutes) of proceedings per day, deducts from total hearing time (days x 375).
3) **Reporter**
   a) Either party wish one?
   b) Arrangements to share cost?
   c) Dailies?
4) **Electronic filing**
   a) Arbitrator gets all submissions in electronic form only: witness and exhibit lists, briefs and exhibits
   b) E mail witness and exhibit lists and briefs to <rneal@jamsadr.com> and <rneal47@gmail.com>
   c) Bring arbitrator's exhibits to hearing on thumb drive or DVD (instructions for preparation below)
5) **Exhibits**
   a) Each exhibit should be a separate .pdf file on thumb drive or DVD
   b) Please use following convention to label each exhibit: "Ex. ###--Abbrvtd Name Doc--date"
      i) Use of same convention by both sides assures exhibits will be in numerical sequence in arbitrator's file
      ii) File directory serves as electronic exhibit list
   c) Joint exhibit list and thumb drive preferred
   d) One exhibit only for each exhibit both sides identify
   e) Numbering: Joint exhibits, 1-__; Claimant exhibits, 100-___; Respondent exhibits, 200-___
   f) Internal pagination sufficient to identify every page of a document (Bates Nos. throughout?)
   g) Means to display on screen at hearing, or,
   h) Binders for counsel's own use, witness, other side

i) Expectation: minimize new exhibits at hearing, except impeachment; show new ones to opposing counsel night before

6) **Witnesses**
   a) Witness lists include short description of each witness's anticipated testimony, and time estimate
   b) Witnesses not identified shall not be allowed to testify absent showing of good cause
   c) Witnesses usually will testify only once--not in each side's case in chief--exception with arbitrator permission for party witnesses who will attend hearing
   d) Identify to adversary next trial day's witnesses by 6 pm (or other time mutually agreed on by counsel)
   e) Good trial practice: witness waiting at all times
   f) Witnesses by deposition
      i) Not necessary to consume hearing time except for key testimony
      ii) Non key testimony: provide arbitrator with .pdf or .txt file, and/or video clips; arbitrator will read off line

7) **Pretrial Briefs**
   a) Schedule
   b) Page limits

8) **Motions in limine**
   a) Raise key evidentiary points in pretrial briefs
   b) No need for separate motions

9) **Opening Statements**
   a) Encouraged
   b) Graphics, Demonstratives, Spreadsheets, Matrixes, Etc, welcome
   c) Time limits

10) **Witness examination**
   a) Background information (high school, college, employment history) normally should be very brief
   b) Expert witnesses: consider using CV for background
   c) Unnecessary for multiple witnesses to testify re non-key points--'cumulative' objections will be sustained
   d) Avoid reading documents to witnesses ("Did I read that right?" "Do you see that?") or having the witness "read the document into the record"
      i) Ev Code 1523--(a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.
   e) Judge Irving Younger's Ten Commandments of Cross Examination (Commandments 1, 2, 4, 5, 6, 9, 10, good for direct too)

1. Be brief.
2. Short questions, plain words.
3. Always ask leading questions.
4. Don't ask a question to which you do not know the answer.
5. Listen to the witness' answers.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat his direct testimony.
8. Don't permit the witness to explain his answers.
9. Don't ask the "one question too many."
10. Save the ultimate point of your cross for summation.

11) Objections

a) Strict conformity to evidence law not required, except as to privilege
b) Judgment in objecting--save objections for that which truly matters
c) Evidence objections are rarely a basis for successful appeal in court; and there's no appeal in binding arbitration
d) Specific objections:
   i) Lack of foundation, vagueness, speculation, "misstates testimony", "assumes facts", "incomplete hypothetical"--routinely overruled
   ii) Relevance--likely overruled unless probative value marginal--arbitrator will give proper weight
   iii) Hearsay, authenticity--likely overruled--arbitrator will give proper weight
   iv) Argumentative--sustained
   v) Cumulative--sustain after a point

12) Closing Arguments/Post Trial Briefs

a) Discuss at close of main hearing
b) Favored process:
   i) Written questions from arbitrator shortly after main hearing ends
   ii) Followed by closing briefs
   iii) Followed by oral argument

13) Bifurcation

a) Fee and cost applications usually bifurcated and heard on paper submissions, without argument
b) Evidentiary hearing doesn't close until last brief on fees and costs or other bifurcated issue is received. Time to render award runs from date hearing closes.

14) Logistics

a) Liaison, Karla Adams, 213 253 9786
b) Set up

c) 'War rooms'
d) Meals
e) Client services at JAMS
   i) computers,
   ii) internet,
   iii) printing,
   iv) copying,
   v) Wireless for your laptop

15) Other Issues??

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Arbitration's All Important Preliminary Conference

By
Judge Elaine Gordon, (ret.)

Arbitrations are all about advance planning. Once you select your Arbitrator, you need to plan for such matters as discovery, witnesses, and hearing length before the initial Preliminary Conference, which comes hot on the heels of Arbitrator selection.

Unlike traditional litigation, where early in the process, you are not always locked into choices about how you will conduct every aspect of your case, arbitrations call for an immense amount of strategic planning before you file or defend your claim. The goal in arbitration is a fair and expeditious proceeding. With this in mind, the Preliminary Conference will be used to plan for and ensure the goal of a fair and expeditious hearing is met.

The College of Commercial Arbitrators, in its Protocols, calls the Preliminary Conference a "critical phase of arbitration." Whether held in person or by telephone conference call, the Preliminary Conference sets, not just the schedule for the arbitration, but its tone. Just as important, it is your only chance to make a great first impression.

In the world of arbitration, efficiency, collegiality, professional cooperation and the agreement of counsel are encouraged. If you and your opposing counsel do not incorporate these values and conduct in the Preliminary Conference, the Arbitrator will set the example for you. It is imperative to be prepared to help the Arbitrator move through issues and scheduling quickly and completely.

Once appointed, the Arbitrator may send you an agenda for the conference. You will find examples of such agendas in the conference materials. While the agenda may set out the issues to be discussed during the conference, it is critical to familiarize yourself with the procedural and substantive law and arbitration rules that govern your proceeding. This information may or may not be contained in the arbitration clause which governs the dispute. Anything not explicitly set forth is likely to be an issue for discussion during the Preliminary Conference.

Don't be surprised by the Arbitrator's invitation to have your clients participate in the Preliminary Conference. The presence of clients usually results in the design of a more expeditious process, so Arbitrators favor their attendance.

Well before the Preliminary Conference, it helps to determine if you and opposing counsel have any disagreements about the agenda items. Most seasoned arbitration lawyers confer with each other, and often submit a joint proposal for all the issues listed in the agenda. If you and opposing counsel can manage such a thorough agreement, or even a partial agreement, you will make a great impression on the Arbitrator.

In addition to a sample agenda that you might receive from the Arbitrator, the CCA Protocols and the rules of arbitration governing bodies outline the items which will be discussed during the Preliminary Conference. Expect that the Arbitrator will address these types of issues, because it is the Arbitrator's job to make sure that the arbitration runs smoothly and that everyone knows what is expected of them.

One of the great benefits of arbitration is the ability to design your litigation. This benefit also carries a burden, because it takes preparation to produce an economical and efficient design. The Preliminary Conference is the forum for formalizing the design. Your job as counsel is to plan and prepare in advance of the Preliminary Conference. In addition to finalizing your hearing dates and discovery plan, you should also consider the following potential issues which are likely to be brought up:

- Under what circumstances did the dispute arise and what arbitration agreement and clause governs the proceedings.
- Jurisdiction and arbitrability.
- What is the controlling law?
- Have all claims, damages, defenses and counterclaims been set forth clearly?
- Are any other parties necessary to the proceedings?
- Do you need a non-disclosure or confidentiality agreement?
- Who are the potential witnesses? Will you need subpoenas to secure their presence?
- Do you need expert witnesses? How soon can you identify them and get a report?
- Upon what documents will you be relying? What documents do you need to have produced?
- Do you need to discover ESI? Be prepared to discuss why it is necessary and how costs can be limited.
- Do you need depositions? Depositions are usually held at the discretion of the Arbitrator and you should be prepared to discuss how to limit them, or use them to limit the hearing time. The Arbitrator will expect discovery to be modest, efficient and practical.
- Consider how you and opposing counsel will deal with discovery or procedural problems. Will you meet and confer before the Arbitrator is told of the problem? Will you use letters or formal motions to contact the Arbitrator if your discussions fail to resolve the problem?
- Should the arbitration be done in stages? Are there issues, which, if decided early, would increase the likelihood of the parties reaching settlement?
- Do you wish to build an opportunity for mediation into your schedule?
- How soon can you be ready for the hearing on the merits?
- How long will the hearing take? How many hours do you need to present your case?
- What will be the location and date of the hearing on the merits?
- When will your calendar allow for consecutive dates for the hearing?
- Are you will to have time limits agreed to or imposed on the hearing time?

- Will the hearing be recorded? Will the parties share the cost?
- Can witnesses testify in alternative ways such as by video conference, or phone? Can direct examination be replaced by sworn witness statements?
- When will you pre-mark and exchange exhibits prior to the hearing.
- Does the Arbitrator want a hearing notebook containing the exhibits, a flash drive, or other aid?
- Do you want to write a pre-hearing brief or make an opening statement?
- Is the case worth the investment in post hearing briefs?
- Will there be dispositive motions which, if filed, would eliminate the claim or a substantial amount of the proof needed at the hearing?
- What form of award is required?

The breadth of the issues that arise at a Preliminary Conference underscore the importance of advance planning which can lead to a fair, efficient and economical arbitration. The Arbitrator approaches the Preliminary Conference with great seriousness of purpose. It is both welcome and impressive when counsel follow the same approach.

Listening Between the Lines:
Emotion Based Valuation Factors

By Judge Elaine Gordon (Retired)

Before a mediation, or any settlement discussion, lawyers determine a case's value. Counsel conduct a cool assessment of strengths and weaknesses. Legal argument, essential facts and witnesses are reviewed. The case is compared to outcomes in the trials and settlements of similar cases. The assessment is logical and rational, even when a jury's emotional reaction is discussed. But all too often value determinations omit the assessment of factors which may be less rational but are often more important in successfully settling a case: the emotions, interests and goals of the parties.

Why is it so difficult for lawyers to embrace these important components of value? The late Roger Fisher, co-author of Getting to Yes, and a leader in the world of interest based negotiation and mediation, devoted an entire book to the importance of this subject. In Beyond Reason, he wrote that, “as lawyers, we favor reason over emotion in legal disputes. We are frustrated when people don’t face facts and behave unreasonably. So it’s often a lawyer's job to discover and acknowledge the emotional or core concerns of a dispute and help the participants move from negative feelings, which block settlement, to positive emotions which will permit it.” Knowing these core concerns may well make it easier for you to establish the settlement value of your case, both before and during a mediation. In addition, it will enhance the attorney-client relationship.

From a plaintiff's perspective, some of the factors which help establish value are the following:

The time value of money: Do you know your client's personal situation, plans, goals and pressures?

Risk tolerance/emotional fragility: Do you and your client share the same tolerance for risk? Is the mediation going to be their best day? After all, they don't call it trial for no reason.

The value of moving on: How anxious is your client to put the dispute behind him or her. Clients often do not volunteer this information for fear of disappointing their lawyer. Or maybe someone else is the driving force behind the litigation.

The need for validation, vengeance or vindication: You need to know, as early as possible, whether or not there is any amount of money that will ever satisfy your client.

Timing and leverage: Does your client understand that a quick, non-litigated settlement may extract the most value for your case.

Possibility of loss: Can you client foresee this possibility of losing the case? Can your client tolerate it?

Party interests and emotion can play a central role in valuing your case. Often these factors will define the scope, direction and outcome of a conflict as much as legal positions or underlying interests. Lurking beneath the surface of most legal disputes, especially in employment cases, is an unresolved emotional component or underlying interest that needs to be unearthed and addressed. If a lawyer has the skill set to listen, discover and acknowledge these components, the chance for a successful settlement and a more satisfied client is enhanced.

Just as we determine valuation based on facts, we must determine the significant value placed on a party's attitude, pride, future concerns and ability to save face.

Many non-legal, non-factual value changers can be learned during meetings with your client. Often they will not be learned by asking direct questions. Rather they will be learned by "listening between the lines", that is, listening for underlying interests and emotional needs that may drive your settlement figure up or down. Curiosity about your client and your client's life, not just their case, is the key to learning what you need to know.

To do his or her job well, an employment lawyer must listen to and acknowledge frustration, anger and pain. The best lawyers know how to listen without criticism and suspend judgment. Lawyers cannot assist

clients in settlement without first meeting them where they are emotionally. When meeting with your client, empathetic conversation can help you determine hidden value factors. At first, the conversations may be casual. This is an opportunity for the lawyer to show empathy and gain a client's trust. Increasingly these conversations will become more candid and revealing the more you continue to show empathy.

So how does a lawyer show empathy? This practice is more art than science. When "listening between the lines," a lawyer must listen carefully to what a client says and, just as crucial, listen for what is not said. Stephen R. Covey, author of the series, 7 Habits, wrote "in empathic listening, you listen with your ears, but also more importantly, you listen with your eyes and with your heart. You listen for feeling, you listen for meaning, and you listen for behavior. You sense, you intuit, you feel… you deal with the reality in another person's head and heart."

With some callousness, lawyers often talk about a litigant's need to vent. But telling one's story is a necessary step toward settlement. In order to develop a settlement range in a case, lawyers need clients to talk about their emotional needs. Lawyers are often way ahead of their clients in predicting the value of a case. They need to give their clients time to emotionally catch up in order to improve the chance of a successful settlement.

Just as you need to know about your client in order to properly value the case, learning about the opposing party is also essential. Some of an opponent's core concerns may be learned from your client, but lawyers will also need to apply their listening skills at depositions, and in conversations with opposing counsel. Mediations provide a great opportunity to ascertain or adjust value if you listen very carefully to the mediator. Often a mediator's input is based on the opposing party's core concerns and may signal or lead you to understand their underlying interests. In all three of these scenarios, listen between the lines for hints of your opponent's needs.

In the case of the mediator, remember that only the mediator knows everyone's concerns. Pay close attention to the questions a mediator asks, or better yet ask questions of the mediator. The mediator may have insights, not based on confidential information, which may help in your determination of value. Some of the defendant's concerns might be

publicity, company reputation, internal politics, fear of precedent, or anger toward plaintiff's counsel. An adjuster is always concerned about losing status by asking his or her company to reconsider a higher settlement figure. This information is vital in determining value and helps your negotiating strategy as well.

Upon reflection most lawyers will be able to come up with an example of how emotional and underlying interests led to an adjustment of value in the settlement of a case. Everyone has represented clients who are willing to settle for less than their lawyer thinks a case is worth because they cannot tolerate risk, or because the money offered is enough to accomplish the goals they have set in their personal life. In a sexual harassment case I mediated, the value of a case increased when the defendant's lawyer casually told plaintiff's counsel that the alleged harasser was the brother of the company's angel investor and chairman of the board.

As trials continue to disappear, lawyers will, by necessity, depend more and more on their negotiation skills. In addition, lawyers will have to modify their relationships with their clients, as they seek to listen to and understand them. Only after clients have revealed their underlying emotions and interests, will lawyers have all the information needed to complement their legal analysis in case valuation. And as mediations become the new trial, lawyers will become more adept at mining the opposition and the mediator for information that will produce value adjustments in real time during settlement negotiations and mediations. In the end, a lawyer's sensitivity, curiosity and empathy, and the ability to listen between the lines, will lead to better results and improved client satisfaction.

Shannon Liss-Riordan
Adelaide Pagano
Lichten & Liss-Riordan, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
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ARBITRATION ISSUES AND STRATEGIES FOR PLAINTIFFS' CLASS ACTION LAWYERS

In recent years, companies have increasingly used adhesive arbitration agreements to attempt to shield themselves from class litigation. Since the Supreme Court's decisions in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), and American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013), avenues to challenging arbitration clauses containing class action waivers have narrowed.[1] However, after these decisions, although plaintiffs' lawyers have had difficulty challenging arbitration agreements on the sole basis that they contain class action waivers, new strategies have emerged that plaintiffs' lawyers should be aware of when confronting arbitration clauses. This paper outlines some of the current issues in arbitration facing plaintiffs' lawyers today and creative approaches that the plaintiffs' bar is using to continue vindicating the rights of employees.[2]

A. Arbitration Agreements That Do Not Expressly Specify Whether Class-Wide Arbitration is Permitted.

After Concepcion and Italian Colors, many commentators predicted that class action waivers would appear in every arbitration agreement and would stymie all efforts to seek class-wide relief for workers. However, even after these decisions, many companies have still not included class action waivers in their arbitration clauses and instead use clauses that simply do not contain language one way or the other with respect to the availability of class-wide

[1] Prior to Concepcion and American Express, some states had banned class action waivers altogether. See, e.g., Feeney v. Dell Inc., 454 Mass. 192 (2009); Muhammad v. County Bank of Rehoboth Beach, 912 A.2d 88, 101 (N.J. 2006); Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005).

[2] Notably, neither Concepcion nor American Express were employment cases, and the Supreme Court has not directly addressed whether these principles should apply in the employment context. Thus, although lower courts have applied these decisions in the employment context, the argument remains open at the Supreme Court that these decisions should not be expanded to the employment context. See further discussion below in Section B, along with discussion of the argument, adopted by a growing number of courts, that such waivers violate the National Labor Relations Act.

arbitration. As discussed below, when there is no language expressly precluding class arbitration, the door is still open to class-wide proceedings.

In Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010), the Supreme Court appeared to narrow the possibility of utilizing class-wide in such circumstances. There, the Court considered a situation in which an arbitration agreement that said nothing about class arbitration was interpreted to allow for class-wide procedures, notwithstanding the fact that "the parties concurred that they had reached 'no agreement' on that issue." 559 U.S. at 684. The Court reversed the arbitration panel's decision, concluding that "[a]n implicit agreement to authorize class-action arbitration, . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." Id. at 685. The Court held that the arbitration panel had improperly injected its policy views regarding class actions, rather than interpreting the contract itself.

Following Stolt-Nielsen, many assumed that if an arbitration agreement does not expressly state that the parties may arbitrate on a class basis, then class arbitrations are not authorized. However, to the surprise of the defense bar, plaintiffs have had great success even after Stolt-Nielsen in arguing that class-wide arbitration is permissible in circumstances where the arbitration agreement does not expressly preclude class-wide arbitration. In the absence of a class action waiver, many arbitrators have ruled that broad language subjecting "any dispute or claim" to arbitration is meant to encompass FLSA collective actions or other class action claims.[3]

[3] See e.g., Frisari v. Dish Network LLC, AAA 18-160-001431-12, 2013 WL 4494927 (May 30, 2013) (Dreier Arb.) (finding parties' arbitration agreement allowed for class-wide arbitration even though it made no express mention of class-wide procedures); Laughlin, 74 160 Y 00068 12, 2012 WL 6801324, *4 (Sept. 7, 2012) (Lamothe, Arb.), aff'd Laughlin v. VMWare, Inc., 2012 WL 6652487, *5 (N.D. Cal. Dec. 20, 2012) (finding parties' arbitration agreement allowed for class-wide arbitration even though it made no express mention of class-wide procedures); Herrington et al. v. Waterstone Mortgage Corp., Case No. 51 160 00393 12, (July 11, 2012) (Pratt, Arb.) (interpreting arbitration agreement with no express mention of class-wide procedures to permit FLSA class claims); Popovich v. Rame, LLC, Case No. 11-cv-00680 (LBS) (March 7, 2012) (Weinstock, Arb.) (same); Passow v. Smith & W ollensky Restaurant Group, Inc., AAA 11 160 00357 08 (July 28, 2010) (Van Gestel, Arb.), aff'd, Smith & Wollensky Restaurant Group, Inc. v. Passow, 2011 WL 148302, *1 (D. Mass. Jan. 18, 2011) (same); Sutter v. Oxford Health Plans LLC, No. CIV. 05-2198 GEB, 2011 WL 734933, at *1 (D.N.J. Feb. 22, 2011) (same); Colquhuon v. Chemed Corp., AAA 11 160 001581 10 (May 6, 2011) (Rasfield, Arb.) (same); SW LA Hospital Assocs. v. Corvel Corp., AAA 11 193 02760 06 (Sept. 3, 2010) (same); Sutter v. Oxford Health Plans, Inc., AAA 18 193 20593 02 (Jul. 6, 2010) (Barrett, Arb), aff'd, Benson v. CSACredit Solutions of America, Inc., AAA 11 160 02281 08 (Jul. 6, 2010) (Meyerson, Arb.) (same) (App. 263); Knudsen v. North Motors, Inc., AAA 11 155 02699 09 (May 18, 2010) (Daerr-Bannon, Arb.) (same).

Since Stolt-Nielsen, not only have many arbitrators held that class actions can be pursued in arbitration, but courts across the country have upheld them. Indeed, the Supreme Court itself upheld an arbitrator's ruling that an arbitration agreement allowed for class-wide arbitration, where the arbitrator relied on the party's contractual language rather than "impos[ing] its own conception of sound policy." Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2070 (2013). The Supreme Court noted that the arbitrator had "focused on the arbitration clause's text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration" and "concluded, based on that textual exegesis, that the clause 'on its face ... expresses the parties' intent that class action arbitration can be maintained.'" Id. at 2069. The key for plaintiffs' lawyers in making the argument in favor of class arbitration is to rely on the text of the agreement itself, such as its broad applicability to many types of claims (which can be construed to include class and collective actions) and the absence of any language barring class claims (while including language excluding other types of claims).[4]

After Oxford Health, the plaintiffs' bar largely assumed that the Supreme Court had approved arbitrators permitting class-wide arbitration to proceed, where the agreement does not

[4] Another key point is that plaintiffs' lawyers should never refer to these agreements as being "silent" with respect to arbitration. The Supreme Court held in Stolt-Nielsen that a "silent" agreement was one in which the parties "had reached no agreement on th[e] issue" of class arbitration and thus such an agreement must be interpreted to preclude it. Stolt-Nielsen, 559 U.S. at 684. Indeed, the Court reached the decision it did in that case based on the plaintiffs having conceded in that case that the arbitration agreement was "silent" regarding whether it would allow for class actions. Instead, in referring to these agreements, plaintiffs' lawyers should be careful to refer to them simply as agreements that "do not expressly state" whether class actions are allowed. They can then argue, under principles of contract interpretation, why the agreement nevertheless allows for a class proceeding. See Westcott v. ServiceMaster Global Holdings, Inc., 2011 WL 2565621, *3 (N.D. Cal. June 29, 2011) ("[I]n Stolt–Nielson, the Supreme Court was using the word 'silent' in the sense that they had not reached any agreement, not in the literal sense that there were no words in the contract discussing class arbitration one way or the other"). For example, arbitrators have reasoned that an agreement that neglects to mention class claims but which purports to broadly apply to "any claim," including any claim for "wages, compensation and benefits," may be deemed to encompass class claims. See e.g., Passow v. Smith & W ollensky Restaurant Group, Inc., AAA 11 160 00357 08, at *9-10 (July 28, 2010) (Van Gestel, Arb.), aff'd, Smith & Wollensky Restaurant Group, Inc. v. Passow, 2011 WL 148302 (D. Mass. Jan. 18, 2011). In Smith & Wollensky, the arbitrator reasoned that because both state and federal wage laws permit employees to pursue claims on a class or collective basis, if the agreement meant to preclude them, the burden was on the drafter to insert language to that effect in the agreement. The fact that the agreement covered "wage and hour claims like those in play here [which] are frequently pursued as class or collective actions" meant that the parties must have intended class-wide arbitration to be permissible. Id. Thus, in order to avoid unintentionally conceding that the parties "reached no agreement on th[e] issue" of class-wide arbitration, it is best to refer to arbitration agreements as not expressly specifying whether class-wide arbitration is permitted, rather than calling them "silent" on this issue.

expressly specify one way or another whether class proceedings are allowed. However, one of the latest tactics employed by the defense bar has been to argue that arbitrators cannot be trusted to make such important decisions (even though it is almost always the defendant who compels that the dispute be heard by an arbitrator in the first place!) Thus, one of the newest highly contested issues in this arena is who should be the one to make the determination as to whether an arbitration agreement permits class-wide arbitration: the arbitrator or the court. The answer to this question was left open by the Supreme Court in a footnote in Oxford Health.[5]

In the last several years, since Stolt-Nielsen, various federal Circuit Courts of Appeals have at least implicitly held that the availability of class-wide or consolidated arbitration is a matter for the arbitrator to decide, by affirming arbitration awards in which the arbitrator had determined the question of whether class-wide procedures were available.[6] In addition, numerous district courts have held that the question is fundamentally procedural, rather than a "gateway" question of arbitrability, because it does not go to whether the parties have a valid agreement to arbitrate in the first instance, but rather simply concerns what procedures should be utilized in arbitration.[7]

However, two Circuit Courts of Appeals, the Third and Sixth Circuits, have directly addressed the issue and have decided that whether an arbitration agreement allows for class proceedings is a gateway question of arbitrability presumptively for the courts to decide. See Opalinski v. Robert Half Int'l, Inc., 761 F.3d 326, 335-36 (3d Cir. 2014) (holding that "the

[5] In Oxford Health, 133 S. Ct. at 2068 n. 2, the Court noted that it was not deciding whether "the availability of class arbitration is a so-called 'question of arbitrability' . . . presumptively for courts to decide." The Court held that it would not address this issue because "the 'who decides' issue had been waived" by the defendant. Id.

[6] See S. Commc'ns Servs., Inc., 720 F.3d 1352 (11th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014); DIRECTV, LLC, 546 F. App'x at 839 (11th Cir. 2013); Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012); Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. 2011); Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635 (7th Cir. 2011).

[7] See, e.g., Rossi v. SCI Funeral Servs. of New York, Inc., 2016 WL 524253, at *8 (E.D.N.Y. Jan. 28, 2016); Harrison v. Legal Helpers Debt Resolution, LLC, 2014 WL 4185814, at *5 (D. Minn. Aug. 22, 2014); In re A2P SMS Antitrust Litig., 2014 WL 2445756 (S.D.N.Y. May 29, 2014); Lee v. JPMorgan Chase & Co., 982 F. Supp. 2d 1109 (C.D. Cal. 2013); Kovachev v. Pizza Hut, Inc., 2013 WL 4401373 (N.D. Ill. Aug. 15, 2013); Cramer v. Bank of America, N.A., 2013 WL 2384313, *3–4 (N.D.Ill. May 30, 2013); Price v. NCR Corp., 908 F. Supp. 2d 935, 945 (N.D. Ill. 2012); Okechukwu v. DEM Enterprises, Inc., 2012 WL 4470537, *2–3 (N.D.Cal. Sept.27, 2012); Hesse v. Sprint Spectrum L.P., 2012 WL 529419, *3-4 (W.D. Wash. Feb. 17, 2012); Fisher v. General Steel Domestic Sales, LLC, 2010 WL 3791181, *2–3 (D.Colo. Sept.22, 2010).

availability of class arbitration is a 'question of arbitrability' for a court to decide unless the parties unmistakably provide otherwise"); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013) ("the question whether an arbitration agreement permits classwide arbitration is a gateway matter, which is reserved 'for judicial determination unless the parties clearly and unmistakably provide otherwise'").[8] The Supreme Court denied certiorari in Opalinski v. Robert Half in March 2015, meaning that the current split among the Circuits is likely to continue until the Court addresses this issue.

Meanwhile, defendants are attempting to use the present state of uncertainty to their advantage. What will typically happen is that a defendant will move to compel arbitration to get a case out of court, but then if an arbitrator rules that class arbitration is permissible, the same defendant will run back to court, claiming that the availability of class-wide relief is a gateway issue that the arbitrator should never have decided in the first place. This is exactly what happened in Opalinski v. Robert Half, where the defendant is now simply getting a second bite at the apple (and the parties are currently briefing for the court the same issue the arbitrator already decided, whether the arbitration clause allows for class proceedings). Allowing defendants to re-run the issue in court wastes the time and resources of plaintiffs and delays relief for workers. In some cases, courts have found that a defendant forfeits his right to argue the "who decides" question by compelling arbitration and committing the issue to the arbitrator in the first place. See S. Commc'ns Servs., Inc., 720 F.3d at 1359 (noting that "SouthernLINC gave the question of whether the contract allowed for class arbitration to the arbitrator through its choice of rules and by failing to dispute the arbitrator's jurisdiction to decide this threshold issue" such that the Court would not address the "who decides" question); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013) (where parties had "agreed that the arbitrator should determine whether its contract . . . authorized class procedures," the 'who decides' issue had been waived"). However, a few courts have held that where the defendant tried to compel *individual* arbitration, the defendant preserved the "who decides" question for further review on appeal. See Opalinski, 761 F.3d at 330 (finding defendant did not waive its right to make the 'who decides' argument because it had argued from the start that only the named plaintiffs' individual arbitrations should

[8] The Third Circuit had previously held in Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221 (3d Cir. 2012), and Vilches v. The Travelers Companies, Inc., 413 F. App'x 487 (3d Cir. 2011), that the availability of class-wide arbitration "is a question of interpretation and procedure for the arbitrator," and not a question of arbitrability for the court. Quilloin, 673 F.3d at 232. However, in Opalinski, the Third Circuit reversed course, dismissing Quilloin as dicta (and Vilches as an unpublished decision), and following the reasoning of the Sixth Circuit in Reed Elsevier instead.

be compelled). Ultimately, until this issue is decided by the Supreme Court the question of who decides the availability of class-wide arbitration will continue to be contentious.[9]

When faced with an arbitration clause that does not expressly state whether class arbitration is permitted, it is not always certain, however, which forum is preferable for plaintiffs: arbitration or court. In a case such as Opalinski, where the arbitrator ruled that the clause permits class arbitration, the plaintiffs naturally preferred arbitration at that point, while the defendants sought to have this decision made by the court (again, despite having moved to compel arbitration in the first place). In other situations, a court may be more hospitable to class proceedings than an arbitrator. For plaintiffs' lawyers, it is important to note that one forum or the other is not necessarily preferable, and thus plaintiffs' lawyers, like defendants' lawyers, will choose their preferred forum, given the circumstances. Although historically, plaintiffs' lawyers have generally attempted to avoid arbitration when bringing class actions, many arbitrators have certified classes in arbitration, and many plaintiffs have achieved great success in arbitration. Some commentators have noted advantages to class arbitration from a plaintiffs' perspective, in that some arbitrators may be more likely to permit class-wide arbitration than courts because they do not have the same incentives as courts to clear their dockets and instead have institutional incentives to hear larger (and more expensive) disputes. In addition, because arbitrators' decisions are harder to overturn than court decisions on class certification (indeed, arbitration awards are supposed to be impervious to judicial review, except in exceptional circumstances), it could be advantageous to plaintiffs to keep class cases in arbitration. However, do not expect that this (theoretical) lack of judicial review will allow class arbitration proceedings to move more quickly than court proceedings. Despite the extremely limited scope of review of arbitration decisions, defendants who want to prolong a dispute will inevitably move to vacate arbitrators' decisions at every step along the way. It is important for plaintiffs' lawyers to remind courts, in reviewing such decisions, that the purpose of arbitration is to provide a more quick and efficient forum for dispute resolution than court. Clearly, when defendants bounce cases back and forth between arbitration and court, they are simply

[9] A number of courts have held that, where an arbitration agreement references the AAA rules, the parties have evinced their intent to let the arbitrator decide the availability of class-wide arbitration procedures (because the AAA rules expressly provide that the arbitrator will determine the question). See, e.g., Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed.Cir.2006) (agreement "which incorporates the AAA . . . clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator"); Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332–33 (11th Cir. 2005) (same); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005) (same); Silec Cable S.A.S. v. Alcoa Fjardaal, SF, 2012 WL 5906535, *18 (W.D. Pa. Nov. 26, 2012); Way Servs., Inc. v. Adecco N. Am., LLC, 2007 WL 1775393, *4 (E.D. Pa. June 18, 2007). Thus, when faced with the "who decides" battle, plaintiffs' lawyers can argue that arbitration agreements that incorporate the AAA rules allow arbitrators to address whether class-wide arbitration will be permitted.

attempting to prolong the proceedings and get a second chance every time they are not happy with a ruling. However, plaintiffs who hang in there, and are not cowed by the delays, have achieved great successes in arbitration.

B. The National Labor Relations Board's Holding In *D.R. Horton* That an Arbitration Agreement Prevents Vindication of Section 7 Rights.

Another possible avenue for Plaintiffs lawyers seeking to defeat an arbitration agreement containing a class action waiver is the argument that the waiver restricts workers' rights under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, and is therefore invalid. Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. §158(a)(1). Section 7 of the NLRA protects the rights of workers to improve the terms and conditions of their employment through concerted activity, which includes "resort to administrative and judicial forums." Eastex Inc. v. NLRB, 437 U.S. 556, 566 (1978). Thus, "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 under the National Labor Relations Act." Brady v. NFL, 644 F.3d 661 (8th Cir. 2011).[10] The National Labor Relations Board has consistently held that a civil action filed by or on behalf of a group of employees (including a class action lawsuit) constitutes protected concerted activity under §7.

The NLRB has repeatedly concluded that class action waivers in arbitration agreements violate the NLRA because they restrict this important ability of workers to band together and engage in concerted activity to improve their working conditions. See In Re D. R. Horton, Inc., 357 NLRB No. 184 (Jan. 3, 2012); Murphy Oil USA, Inc., 361 NLRB No. 72 (Oct. 28, 2014). A steady trickle of courts has followed the NRLB's conclusion that enforcement of class action and collective action waivers violate the NLRA. See, e.g., Totten v. Kellog Brown & Root, LLC, 2016 WL 316019, *12-14 (C.D. Cal. Jan. 22, 2016); Lewis v. Epic Sys. Corp., 2015 WL 5330300, at *2 (W.D. Wis. Sept. 11, 2015); Grant v. Convergys Corp., 2013 WL 781898, *5 (E.D. Mo. Mar. 1, 2013), reconsideration denied, motion to certify appeal granted, 2013 WL 1342985 (E.D. Mo. Apr. 3, 2013), appeal dismissed (Jan. 17, 2014); Herrington v. Waterstone

[10] See, e.g., Harco Trucking, LLC, 344 NLRB 478, 481 (2005) (class action filed by one employee was considered concerted activity); Madri Restaurant, 331 NLRB 269, 275 (2000) ("the filing of a civil action by employees is protected activity unless done with malice or in bad faith"); Street Hotel Assoc., 321 NLRB 624, 633-636 (2000) (collective action was concerted activity); In re 127 Restaurant Corp., 331 NLRB 269, 275-76 (1996) (joint action filed by 17 employees was concerted activity); United Parcel Service, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982) (class-action lawsuit filed by one employee alleging that employer failed to provide rest periods required by state statute was found to be protected concerted activity); Spandsco Oil & Royalty Co., 42 NLRB 942, 948-949 (1942) (finding the filing of a Fair Labor Standards Act suit by three employees was protected concerted activity).

Mortg. Corp., 2012 WL 1242318, *6 (W.D.Wis. Mar. 16, 2012).[11] Most recently, a federal court in California followed the NLRB in holding that class-action waivers violation the NLRA and are unenforceable. See Totten, 2016 WL 316019, *12-14. In Totten, the Court distinguished the Supreme Court's holding in Concepcion, 563 U.S. 333 (2011) as "distinguishable because it did not involve a waiver of time-honored *substantive* rights protected by a federal statute, i.e., Section 7 of the NLRA" and instead dealt with "a conflict between the FAA and state law, triggering application of the preemption doctrine." Id.,*13. Thus, Totten rejected the reasoning of other courts that have cited Concepcion as the basis for refusing to follow the NLRB's conclusion that class action waivers violate the NLRA. Id. As the Totten court explains, Concepcion dealt with a conflict between state law and federal (not two federal laws on equal footing) and it "did not involve a waiver of time-honored *substantive* rights" under the NLRA as opposed to a particular procedural device under Rule 23. 2016 WL 316019, *12-13 (emphasis in original). It is not clear why Section 7 rights should be distinguished from other substantive rights in the employment context, or why "concerted *legal* activity" such as class actions should be carved out from other types of protected concerted activity under Section 7. Id., *13-14.

Several courts of appeals are currently considering this issue. Briefing and argument is complete in Morris v. Ernst & Young LLP, No. 13-16599 (9th Cir., argued Nov. 24, 2015), and the court could rule on this issue at any time. Likewise, the Seventh Circuit also recently heard argument on this issue. See Lewis v. Epic Sys. Corp., No. 15-2997 (7th Cir., argued Feb. 12, 2016) (reviewing Lewis v. Epic Sys. Corp., 2015 WL 5330300, *2 (W.D. Wis. Sept. 11, 2015) (class waivers violate NLRA)). Moreover, given the uncertain and shifting composition of the Supreme Court, it is possible that this line of argument is becoming more viable. As such, we urge plaintiffs' lawyers to include this argument in any briefing opposing arbitration clauses containing class action waivers in employment cases, in order to preserve the issue for appeal.

We also urge plaintiffs' lawyers to argue that Concepcion and American Express should not apply in the employment context more generally (even if to preserve this issue for eventual consideration by the Supreme Court). The argument is that, because employees are beholden to their employers, their relationship is fundamentally different from the relationship between a consumer and a company, from whom the consumer has purchased a product.

[11] But see Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 297 n. 8 (2d Cir. 2013) (declining to follow D.R. Horton or to grant the NLRB's decision any deference); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir.2013) (same) Delock v. Securitas Sec. Servs. USA, Inc., 883 F.Supp.2d 784, 789 (E.D.Ark.2012) (same). However, it is not clear why these courts determined that the FAA would necessarily trump the NLRA, another federal statute. As Judge Crabb explained in Lewis, "the majority never persuasively rebutted the board's conclusion that a collective litigation waiver violates the NLRA and never explained why, if there is tension between the NLRA and the FAA, it is the FAA that should trump the NLRA, rather than the reverse." Lewis, 2015 WL 5330300, *4.

C. State Law Unconscionability Doctrine May Still Be Used to Invalidate an Arbitration Agreement.

Even after Concepcion and American Express effectively held that class action waivers in and of themselves do not make an arbitration provision unenforceable (holding that state law prohibiting class action waivers was preempted by the Federal Arbitration Act), many courts have continued to recognize that other unconscionable terms can allow state law to invalidate an enforcement of an arbitration clause (particularly where there are a combination of unconscionable terms).[12] Thus, even where plaintiffs' lawyers are facing an arbitration agreement containing a class action waiver, it may still be possible to defeat enforcement of the agreement on other bases besides the existence of the class action waiver itself. In fact, the Supreme Court in Concepcion expressly left open the possibility that courts could invalidate arbitration agreements under state unconscionability doctrine, so long as such doctrines do not

[12] See, e.g., Ridgeway v. Nabors Completion & Prod. Servs. Co., 2015 WL 5971545, at *8 (C.D. Cal. Oct. 13, 2015) (noting the inclusion of several unconscionable provisions, including "the fees and costs of arbitration; the discovery provision; and the unilateral modification provision" and finding that "the entire contract is permeated with the unconscionable effects of these provisions and the contract is thus unenforceable"); Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1225 (N.D. Cal. 2015) (noting that "the entire arbitration provision would fail… because the arbitration clause in the contract is permeated with a number of [] substantively unconscionable terms" including cost-splitting, a confidentiality provision, a unilateral modification provision, and a lack of mutuality regarding which claims must be brought in arbitration); Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 925-26 (9th Cir. 2013) (noting that "[i]n addition to the problematic cost provision, Ralphs' arbitration policy contains a provision that unilaterally assigns one party . . . the power to select the arbitrator whenever an employee brings a claim"); Newton v Am. Debt Servs., Inc., 549 F. App'x 692, 694 (9th Cir. 2013) (noting that "[f]our aspects of this arbitration agreement render it substantively unconscionable," including the forum provision, the one-sided process for selection of the arbitrator, the limitation on damages, and the increased potential liability for attorneys' fees beyond what's provided for by statute); Merkin v. Vonage Am. Inc., 2014 WL 457942, *6-7 (C.D. Cal. Feb. 3, 2014) (striking agreement in its entirety based on (1) procedural unconscionability where the agreement "is a contract of adhesion" which one party can "unilaterally modify" and where the arbitration provision is buried in a larger contract as well as (2) substantive unconscionability due to lack of mutuality); Brown v. MHN Gov't Servs., Inc., 178 Wash. 2d 258, 275-76 (2013) (noting that "[i]t is proper to decline to sever unconscionable provisions if the agreement is permeated with unconscionability" and finding that where "three provisions are found unconscionable," the lower court did not abuse its discretion in striking the whole agreement); Ruppelt v. Laurel Healthcare Providers, LLC, 293 P.3d 902, 909, cert. denied, 299 P.3d 422 (N.M. 2012) (rejecting the argument that the arbitration agreement's "savings clause should act to sever the offending portion" where "one-sided arbitration provisions were central to the overall arbitration scheme").

discriminate against arbitration agreements and thereby frustrate the purposes of the FAA (by treating them differently from other kinds of contracts).[13]

Thus, although a Court can no longer invalidate an arbitration agreement based on the class action waiver alone, plaintiffs' lawyers should scour arbitration agreements for other unconscionable provisions that may provide grounds for invalidation.[14] Examples of provisions that have led courts to invalidate arbitration agreements include: the requirement that the claimants would have to split the costs of arbitration with the company[15]; a shortened statute of limitations[16]; confidentiality provisions;[17] and unilateral modification provisions.[18]

[13] Footnote 6 of Concepcion states:

> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

Concepcion, 131 S. Ct. at 1750, n. 6.

[14] Many states require a showing of both procedural and substantive unconscionability. Thus, plaintiffs' lawyers should look for examples of both types of unconscionability, although "[t]hese two prongs operate on a sliding scale: greater substantive unconscionability can make up for a lesser showing of procedural unconscionability, and vice versa." Merkin, 2014 WL 457942, *5.

[15] Many courts have found that arbitration agreements that required plaintiffs with statutory claims to split the costs of arbitration are invalid because these costs can be prohibitively expensive for employees. See, e.g., Chavarria, 733 F.3d at 925-26 (9th Cir. 2013) (finding cost splitting provision unconscionable where "the arbitrator's fees must be apportioned at the outset of the arbitration and must be split evenly between [the parties]"); Ambler v. BT Americas Inc., 2013 WL 4427205, *5 (N.D. Cal. Aug. 15, 2013) (finding cost splitting provision of arbitration agreement unconscionable where plaintiff had to "pay one-half of the costs and expenses of such arbitration" as well as attorney's fees); Laughlin v. VMware, Inc., 2012 WL 298230, *5 (N.D. Cal. Feb. 1, 2012) (finding that where "Employment Agreement requires the parties to share the costs and expenses of arbitration and does not specifically authorize an arbitrator to alter this allocation," the cost split was unconscionable); Hwang v. J.P. Morgan Chase Bank, N.A., 2012 WL 3862338, *4 (C.D. Cal. Aug. 16, 2012) (finding that "[r]equiring [plaintiff] to pay the costs of arbitration would be substantively unconscionable under California law"); Van Voorhies v. Land/home Fin. Servs., 2010 WL 3961297, *6-7 (Conn. Super. Ct. Sept. 3, 2010) (finding "cost splitting provision of the arbitration agreement is substantively unconscionable").

In cases challenging independent contractor misclassification, where defendants frequently provide in their agreements that the AAA Commercial Rules will apply in arbitration, plaintiffs can argue that the application of the Commercial Rules (or the risk that the Commerical Rules may be held to apply) is unconscionable. The AAA Commercial Rules, unlike the Employment Rules, require the parties to split the costs of arbitration. (Note, however, that the

Sometimes, however, courts will simply sever the unconscionable provisions and will still compel plaintiffs to arbitration. However, in other instances, courts have found that where multiple unconscionable terms "pervade[] the arbitration agreement such that only a

Commercial Rules specify that the Employment Rules should apply in cases involving employment disputes. Arbitrators can often be persuaded to resolve up front the question of whether the claimants have been misclassified, so that the threshold issue of who is responsible for paying for the arbitration can be decided at the outset. However, because it is unclear whether plaintiffs will be able to obtain such a ruling up front, plaintiffs can argue that the risk of having to pay half the arbitration fees is unconscionable and will deter misclassified employees from pursuing their claims.)

[16] See, e.g., Anderson v. Comcast Corp., 500 F.3d 66, 76 (1st Cir. 2007) (finding a shortened statute of limitations to be unenforceable); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (finding arbitration agreement unenforceable where "it [] imposes a strict one year statute of limitations"); Zaborowski v. MHN Gov't Servs., Inc., 936 F. Supp. 2d 1145, 1153 (N.D. Cal. 2013) (invalidating six-month limitation); Beery v. Quest Diagnostics, Inc., 953 F. Supp. 2d 531, 543 (D.N.J. 2013) (invalidating "90–day limitations period"); D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 340 (D. Conn. 2011); Plaskett v. Bechtel Int'l, Inc., 243 F. Supp. 2d 334, 341 (D.V.I. 2003); Lelouis v. W. Directory Co., 230 F. Supp. 2d 1214, 1221 (D. Or. 2001); Martinez v. Master Prot. Corp., 118 Cal. App. 4th 107, 117-18 (2004).

[17] Confidentiality provisions are particularly inhibiting, if coupled with class action waivers, because, as courts have recognized, such provisions prevent "the claimant [and] her attorney [from] shar[ing] [] information with other potential claimants." Kinkel v. Cingular Wireless LLC, 223 Ill. 2d 1, 42 (2006). Thus, "the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case…" and "plaintiffs [will be] unable to mitigate the advantages inherent in being a repeat player." Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003). See also Pokorny v. Quixtar, Inc., 601 F.3d 987, 1001 (9th Cir. 2010) (noting that "[a]nother indicator of substantive unconscionability is the confidentiality requirement" in the arbitration agreement); Lima v. Gateway, Inc., 886 F. Supp. 2d 1170, 1185 (C.D. Cal. 2012); Schnuerle v. Insight Commc'ns Co., L.P., 376 S.W.3d 561, 579 (Ky. 2012); Mohamed, 109 F. Supp. 3d at 1226.

[18] A unilateral modification provision is one that affords the drafting party "the unilateral power to terminate or modify the contract is substantively unconscionable." Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1179 (9th Cir. 2003); see also Mohamed, 109 F. Supp. 3d at 1229; Chavarria, 733 F.3d at 921, 926 (noting that the employer may "unilaterally modify the policy without notice to the employee" and that this supports a finding of substantive unconscionability); Sparks v. Vista Del Mar Child & Family Servs., 207 Cal. App. 4th 1511, 1523 (2012), as modified on denial of reh'g (Aug. 20, 2012) ("An agreement to arbitrate is illusory if, as here, the employer can unilaterally modify the handbook"); Macias v. Excel Bldg. Servs. LLC, 767 F. Supp. 2d 1002, 1011 (N.D. Cal. 2011) (finding that a provision granting the employer "absolute control over the terms of the agreement" and "the right to modify, change or delete" terms of the agreement without prior notice was unconscionable).

disintegrated fragment would remain after hacking away the unenforceable parts," Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 84 (D.C. Cir. 2005), it is more appropriate to strike the agreement in its entirety. See, e.g., Newton v. Am. Debt Servs., Inc., 549 F. App'x 692, 695 (9th Cir. 2013) (holding that "[t]he district court did not implausibly or illogically decline to sever the unconscionable parts of this arbitration agreement, despite Congress's preference for arbitration," because where the "arbitration agreement included four unconscionable provisions," severing all of them "would have left a mere agreement to arbitrate, [] requiring extensive reformation…"); Nino v. Jewelry Exch., Inc., 609 F.3d 191, 207-08 (3d Cir. 2010) (reversing the District Court's decision to sever the unconscionable clauses from the arbitration agreement, and instead striking down the agreement in its entirety because when the unconscionable arbitration provisions are so one-sided that their *only possible purpose* is to undermine the neutrality of the proceeding, severance of those provisions and enforcement of the remainder of the arbitration agreement is not appropriate") (internal quotation omitted); Merkin v. Vonage Am. Inc., 2014 WL 457942, *11 (C.D. Cal. Feb. 3, 2014) (declining "to sever the offending provisions" of an arbitration agreement and finding "the entire agreement to arbitrate unconscionable" because "[s]everence is inappropriate if the agreement is 'permeated' by unconscionability"). Thus, plaintiffs' lawyers seeking to avoid arbitration altogether should emphasize to courts that they should not merely sever the unconscionable terms, but should instead strike the entire agreement as permeated by unconscionability.[19] In this way, plaintiffs can avoid class action waivers by avoiding arbitration

[19] Justice Roberts (while sitting on the D.C. Circuit) provided this helpful language that plaintiffs can use in urging courts to strike arbitration agreements in their entirety, rather than severing multiple unconscionable terms:

> If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . . the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties . . . Thus, the more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause, a dynamic that creates incentives against the very overreaching Booker fears.

Booker v. Robert Half Int'l Inc., 413 F.3d at 84-85. Relying on this language, plaintiffs should argue that companies should not be rewarded for overreaching and placing multiple unconscionable terms into their agreements, by knowing that if a court finds any of them unenforceable, they will merely be trimmed away from the agreement, and the parties still compelled to arbitration.

Another argument to be made is that the court should consider that, when an employee is faced with an arbitration clause that contains multiple deterring terms, she will not know that some or all may be excised from the agreement, and she may not know that another court has already held some of the terms to be unenforceable. Including those terms may thus deter employees, or their counsel, from the outset, from pursuing claims, even if they could ultimately be held to be unenforceable.

altogether (even though plaintiffs can no longer challenge arbitration clauses based solely on the existence of a class action waiver).

D. Waiver of the Right To Compel Arbitration.

Another avenue for plaintiffs' lawyers facing a motion to compel arbitration is to consider whether defendants have waived their right to compel arbitration. Thus, even if the agreement has a class action waiver and does not have enough unconscionable terms to allow the clause to be challenged, plaintiffs' lawyers may still be able to avoid arbitration if the defendant delayed too long in moving to compel arbitration or engaged in litigation conduct that is "inconsistent" with its right to arbitrate. Courts considering a defendant's waiver of the right to compel arbitration typically look at the aggregate of various acts of participation by the defendant that are inconsistent with invoking arbitration, along with any delay in invoking the right, and any prejudice caused to plaintiffs. Joca-Roca Real Estate, LLC v. Brennan, 772 F.3d 945, 949 (1st Cir. 2014) (noting that "[s]ome degree of prejudice ordinarily may be inferred from a protracted delay in the assertion of arbitral rights when that delay is accompanied by sufficient litigation activity").

Some recent decisions have suggested that a defendant may waive the right to compel arbitration by engaging in class-wide discovery during the discovery period, based on the logic that such discovery would not be available in arbitration, or that it is inconsistent with the position that individual arbitration should be compelled. See Bower v. Inter-Con Sec. Sys., Inc., 2014 WL 7447677, *5 (Cal. Ct. App. Dec. 31, 2014); Mata v. Regency Park Senior Living, Inc., 2014 WL 1428825, *6 (Cal. Ct. App. Apr. 14, 2014) (unpublished). Other courts have held that a "defendant waived whatever right to arbitrate it may have had by failing to plead arbitration as an affirmative defense and by actively participating in litigation for almost a year without asserting that it had a right to arbitration," Manasher v. NECC Telecom, 310 Fed.Appx. 804, 806 (6th Cir.2009). Where the "plaintiff has shown…judicial litigation of the merits of arbitrable issues, plaintiff need not demonstrate any additional prejudice." Gonsalves v. Infosys Technologies, Ltd., 2010 WL 3118861, *3 (N.D. Cal. Aug. 5, 2010) (internal quotation omitted) (noting that a "court's dismissal of [] claims with prejudice under Rule 12(b)(6) constitutes 'judicial litigation of the merits'" such that Defendant waived its right to compel arbitration). Delays of more than a year prior to invoking the right to arbitrate have also been found to support a finding of waiver. Manasher, 310 Fed.Appx. at 806; see also Tech. in P'ship v. Rudin, 538 F. App'x 38, 39 (2d Cir. 2013) (fifteen month delay supported finding of waiver); Com–Tech Assocs. v. Computer Assocs. Int'l, Inc., 938 F.2d 1574, 1576 (2d Cir.1998) (eighteen month delay supported finding of waiver); S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998) (fifteen month delay supported finding of waiver). In general, plaintiffs' attorneys should look for evidence that a defendant answered the complaint without properly asserting a right to arbitration, engaged in extensive class-wide discovery, or otherwise participated in the litigation and delayed asserting its right to compel arbitration.

A significant question that follows logically from the question of waiver is whether a defendant that has waived its right to compel arbitration with respect to the named plaintiffs in a class action has also waived its rights with respect to absent or prospective class members. Recently, the Eleventh Circuit ruled that a defendant did not waive its right to compel arbitration against putative class members where the defendant waived arbitration against the named plaintiffs in an as yet uncertified class. See In re Checking Account Overdraft Litig., 2015 WL 534657, *4 (11th Cir. Feb. 10, 2015) (noting that the fact that defendant waived arbitration with respect to named plaintiffs does not mean it waived arbitration with respect to unnamed putative class members and holding that "named plaintiffs lack[ed] standing to advance [the waiver argument] on behalf of the unnamed putative class members"). Other courts have reached similar conclusions, finding that a defendant may wait until after class certification to raise the issue of arbitration with respect to absent class members, without waiving any right to compel arbitration. See, e.g., In re Titanium Dioxide Antitrust Litig., 962 F. Supp. 2d 840, 853 (D. Md. 2013) (finding that "Defendants could not have waived their rights to enforce the contractual clauses at issue until the class composition was final" and therefore they did not waive their rights to compel arbitration with putative class members by waiting until class certification); Mora v. Harley-Davidson Credit Corp., 2012 WL 1189769, at *15 (E.D. Cal. Apr. 9, 2012) report and recommendation adopted, 2012 WL 3245518 (E.D. Cal. Aug. 7, 2012) (noting defendant "does not have a right to compel arbitration against unnamed Class members prior to class certification" because "until a class is certified and the opt-out period has expired, unnamed Class members are not parties to this action" such that waiting to compel arbitration until after class certification does not constitute a waiver); In re TFT–LCD (Flat Panel) Antitrust Litigation, 2011 WL 1753784, *4 (N.D.Cal., May 9, 2011) (finding that although defendants waived arbitration with respect to named plaintiffs, they could still move to compel arbitration against unnamed class members after class certification because "the composition of the [] class was not set until the expiration of the opt-out period…"); Davis v. Four Seasons Hotel Ltd., 2011 WL 4590393, at *4 (D. Haw. Sept. 30, 2011) (declining to find that defendant had waived right to compel arbitration of putative class members' claims by "extensively litigating" the case prior to class certification).[20]

However, some courts have found that permitting a defendant to compel arbitration with regard to the unnamed class members after waiving arbitration with respect to named plaintiffs "would be prejudicial to the named Plaintiffs" because "it would render the named Plaintiffs' efforts pursuing the class Claims meaningless" while allowing the named plaintiffs to "incur[] substantial costs . . . litigating the Claims on behalf of the entire class." Elliott v. KB Home N. Carolina, Inc., 2012 WL 5385181, *8 (N.C. Super. Nov. 2, 2012), aff'd, 752 S.E.2d 694 (N.C. Ct. App. 2013); Kingsbury v. U.S. Greenfiber, LLC, 2012 WL 2775022, *6 (C.D. Cal. June 29,

[20] As discussed below, these cases support an argument by plaintiffs that courts should address class certification before addressing the enforceability of arbitration agreements.

2012) (rejecting argument that "unnamed [class] members were not prejudiced because they were not before the Court until a class was certified" and noting that named plaintiff's interests as a class representative were prejudiced by Defendant's "waiting until *after* class certification to raise the issue of arbitration" with class members) (emphasis in original); Morgan v. AT & T Wireless Servs., Inc., 2013 WL 5034436, *2-3 (Cal. Ct. App. Sept. 13, 2013) (unpublished) (reversing trial court's ruling "that ATTM could not have moved to compel arbitration of the putative class members' claims before the issue of class certification was before the court" and finding that "ATTM did not have to await filing of a motion for class certification to move to compel arbitration as to putative class members"); Edwards v. First Am. Corp., 289 F.R.D. 296, 307 (C.D. Cal. 2012) (noting that where "Defendants could have asserted their intention to raise arbitration as a defense at a much earlier stage in the proceeding" and waited almost a year after class certification to raise the issue of arbitration they had waived their right to compel arbitration).

These cases recognize that the costs associated with pursuing class claims are unique and onerous and that litigating a putative class action for years, only to raise the specter of arbitration after a class has been certified, is unduly prejudicial to the named plaintiffs themselves. In these cases where a defendant's waiver of arbitration with respect to named plaintiffs was found to have also waived arbitration as to unnamed plaintiffs, the delay in moving to compel arbitration was often lengthy and even as long as several years. This delay likely contributed to the courts' decision on waiver. However, these cases also evince a different, more practical and less technical view of class action litigation. Instead of finding that "putative class members are not parties to an action prior to class certification," and therefore cannot be compelled to arbitration, In re TFT–LCD (Flat Panel) Antitrust Litigation, 2011 WL 1753784, *4, these courts recognize that where "Plaintiffs and their attorneys invested significant amounts of time and sums of money prosecuting this case on behalf of themselves and the purported class, [t]he fact that much of this expenditure occurred before the class was certified does not negate the fact that, upon certification, the class bec[omes] tangible beneficiaries of that expenditure." Elliott v. KB Home N. Carolina, Inc., 752 S.E.2d 694, 703 (N.C. Ct. App. 2013), appeal dismissed, review denied, 759 S.E.2d 98 (2014). This is a conceptual difference that will likely have importance as this issue continues to be litigated in the future.

E. Arbitration Agreements in California: Non-Severable Waivers of the Right to Bring Claims Under the Private Attorney General Act (PAGA) Can Invalidate The Entire Agreement.

Another avenue for attacking an arbitration agreement that is somewhat unique to California is also worth exploring. Plaintiffs' lawyers who are addressing arbitration agreements governed by California law should consider whether the agreement contains a waiver of the right to bring claims under the Private Attorney General Act ("PAGA"), Cal. Labor Code § 2699, *et seq*. The Private Attorney General Act allows individual workers to bring claims on behalf of

the state of California for Labor Code violations, with 25% of the total proceeds from the recovery allocated to workers and the rest going to the state's Labor and Workforce Development Agency. PAGA claims belong to the state of California and have been found to be fundamentally representative in nature, with the employee acting on behalf of all other current and former aggrieved employees. See Montano v. The Wet Seal Retail, Inc., 232 Cal. App. 4th 1214, 1222 (2015), as modified (Jan. 13, 2015) ("A PAGA representative action is in the nature of a qui tam proceeding in which the employee plaintiff is authorized to file suit as the proxy or agent of the state's labor law enforcement agencies for recovery of civil penalties"); Valdez v. Terminix Int'l Co. Ltd. P'ship, 2015 WL 4342867, *8 (C.D. Cal. July 14, 2015) (noting that "under California law a plaintiff may not bring an 'individual' PAGA claim [] – the claim is always a representative claim on behalf of the state"); Reyes v. Macy's, Inc., 202 Cal.App. 4th 1119, 1123 (2011) ("[T]he claim is not an individual one. A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include 'other current or former employees'").

The California Supreme Court and the Ninth Circuit have now squarely held that a waiver of the right to bring a representative claim under PAGA is unenforceable as a matter of California state law[21] and have further held that this rule is ***not*** preempted by the Federal Arbitration Act. See Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348, 384 (2014), cert. denied, 135 S. Ct. 1155 (2015) ("We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law"); Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 430 (9th Cir. 2015) ("Pre-dispute agreements to waive PAGA claims are unenforceable under California law"). Moreover, under Iskanian and Sakkab, a court need not even engage in an unconscionability analysis of the agreement because the presence of a PAGA waiver is against public policy (meaning that the agreement would fail regardless of whether the plaintiff can show both procedural and substantive unconscionability). Other courts have held that a PAGA waiver renders an agreement invalid even notwithstanding the fact that the arbitration agreement in question contains an opt-out clause.[22] Thus, the presence of a PAGA

[21] Because PAGA waivers are unenforceable under California law, many plaintiffs' lawyers in California are now frequently filing "PAGA-only" cases, in which they proceed in a representative action on behalf of the state, without attempting to overcome the class action waiver in the arbitration agreement. A discussion of this method is beyond the scope of this paper, but we note here the argument that can be made to resurrect class claims and invalidate an arbitration agreement when the agreement contains an illegal and non-severable PAGA waiver.

[22] See Securitas Sec. Servs. USA, Inc. v. Superior Court of San Diego Cty., 234 Cal. App. 4th 1109, 1121-22 (2015), reh'g denied (Mar. 26, 2015), review denied (June 10, 2015);); Williams v. Superior Court, 237 Cal. App. 4th 642, 647-48 (2015).

waiver can be a powerful and versatile weapon to invalidate an arbitration clause even where the rest of the agreement is not particularly unconscionable.

Many courts will simply sever an offending PAGA waiver, but in some instances the PAGA waiver is made expressly non-severable by the language of the agreement, and in these cases, plaintiffs' lawyers can argue that the entire agreement must be stricken. The California Court of Appeals has addressed the situation in which a contract contains an invalid PAGA waiver *and* a non-severability clause, and has concluded that in these instances, the entire agreement is void. See Securitas Sec. Servs. USA, Inc., 234 Cal. App. 4th at 1126; Montano v. The Wet Seal Retail, Inc., 232 Cal.App. 4th 1214, 1224 (2015). Likewise, a federal district court recently reached the same conclusion in O'Connor v. Uber Techs., Inc., 311 F.R.D. 547, 558-563 (N.D. Cal. 2015), where it held that an arbitration agreement was drafted in such a way as to create a waiver of the right to bring PAGA claims and that waiver was not severable from the rest of the agreement.

F. Plaintiffs May Be Able to Argue That They (Or The Defendant) Are Not Parties To The Agreement.

Another possible strategy to avoid being compelled to arbitration is to argue that either the plaintiff or the defendant is not a proper party to the agreement such that they cannot be compelled to arbitration (or lack standing to compel arbitration). It is a basic canon of the law of arbitrability that only entities that are parties to an arbitration agreement, or are covered by an arbitration agreement, can compel arbitration. See, e.g., InterGen N.V. v. Grina, 344 F.3d 134, 146-47 (1st Cir. 2003) (noting that "courts should be extremely cautious about forcing arbitration in situations in which the identity of the parties who have agreed to arbitrate is unclear"); McCarthy v. Azure, 22 F.3d 351, 355, 362 (1st Cir. 1994) (holding that third party could not claim benefit of arbitration agreement to which it was not a party and for which no intent was indicated that third party would be covered); Westmoreland v. Sadoux, 299 F.3d 462, 466-67 (5th Cir. 2002) (finding that "a nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories" and noting that "the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives"); Equal Employment Opportunity Comm'n. v. Waffle House, Inc., 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty").

Plaintiffs may thus challenge arbitration in a variety of situations that often arise such as where an employee did not actually sign or execute the arbitration agreement but may have had a family member or fellow employee do so, or when a parent company or subsidiary tries to invoke the benefit of an arbitration agreement that they did not sign (or are not referenced in the agreement) but that the employee signed with another related entity.

However, a common scenario in the employment context is when the defendant claims

that plaintiffs' claims are predicated on the very contract containing the arbitration clause and thus the plaintiffs should therefore be equitably estopped from "enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations." InterGen N.V. v. Grina, 344 F.3d 134, 145 (1st Cir. 2003). In such a situation, plaintiffs can argue that their claims are entirely independent of the contract and based on state or federal statutory law. See Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 315-316 (D.S.C. 2005) (noting that "[t]he plaintiff's *actual dependence* on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the sine qua non of an appropriate situation for applying equitable estoppel") (emphasis in original); Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 449 F. App'x at 709 (10th Cir. 2011) ("For a plaintiff's claims to rely on the contract containing the arbitration provision, the contract must form the legal basis of those claims; it is not enough that the contract is factually significant to the plaintiff's claims or has a 'but-for' relationship with them"). In fact, courts have held that "equitable estoppel should be used sparingly to compel arbitration, [because] [] this doctrine is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration." Eric Baker Architecture, P.C. v. Mehmel, 2013 WL 6169210, *3 (N.J. Super. Ct. App. Div. Nov. 26, 2013) (internal quotation omitted).

G. Some Plaintiffs Are Bound by Arbitration and Others Are Not: Can a Class or Collective Action Be Certified? Can Notice Be Sent To All Class Members?

Another strategy available to plaintiffs' attorneys is to file a class action with a lead plaintiff who is not bound by an otherwise applicable arbitration agreement (either because they started work before the arbitration policy was implemented or because they, for some reason, did not sign the arbitration clause, or are otherwise not bound, even while their fellow employees are). Where an individual who is not bound to arbitrate brings a class action claim, a number of courts have held that the enforceability of arbitration with respect to putative class members should not be addressed until after class certification. Thus, it may be possible to have notice sent out to the class before addressing arbitration. Then, if the court rules that the arbitration clause is enforceable, individuals who wish to participate in the case may bring their claims one-by-one in arbitration. As a practical matter, many employers will attempt to resolve a case once they are faced with many individual arbitrations. However, companies may take a gamble that Plaintiffs' attorneys are not able or willing to press forward with the one-by-one approach. It is therefore important, when proceeding with this approach, that plaintiffs' attorneys be willing, and show they are willing, to carry through many individual arbitrations.

A number of courts have agreed that until a collective action is certified and notice is distributed, it is inappropriate to entertain any motions to compel arbitration. Indeed, "[a] defendant bears the initial burden to make out a *prima facie* case that there is a written agreement at all to bring the case within the purview of the Federal Arbitration Act," Barkley v. Pizza Hut of Am., Inc., 2014 WL 3908197, *3 (M.D. Fla. Aug. 11, 2014), such that the defendant should

not be permitted to rely on general company policy that employees have to sign arbitration agreements as a matter of course. Thus, courts have found that in the context of FLSA collective actions potential plaintiffs should first have a right to opt-in to a FLSA collective action, before the court entertains whether plaintiffs should be compelled to arbitrate their claims. See Powell v. BJ's Wholesale Club, Inc., C.A. No. 3:14-cv-00081-AVC (M.D. Fla. Aug. 13, 2014) (granting the defendant's motions to compel arbitration in a collective action brought under the Fair Labor Standards Act ("FLSA") only after 49 plaintiffs had already opted in). These courts have agreed to provide notice to all putative class members, and then give those employees who opt in to the case the opportunity to challenge the arbitration agreement, if they have any particular basis for doing so. See e.g., Conde v. Open Door Marketing LLC, et al., Civ. A. No. 15-cv-04080 (April 12, 2016, N.D. Cal.), Dkt. 92 at 15 ("The Court [] will not exclude potential class members based only on [Defendant's] assertion that these yet-to-be identified individuals signed an arbitration agreement"); Lloyd v. J.P. Morgan Chase & Co., Case No. 11 Civ. 9305, Doc. 185 (S.D.N.Y. April 1, 2014) (magistrate report and recommendation reaching the same conclusion as D'Antuono); Romero v. La Revise Associates, L.L.C., 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013) (holding that "consideration of the validity of arbitration agreements is inappropriate in the context of a motion to approval an FLSA collective action"); D'Antuono v. C & G of Groton, Inc., 2011 WL 5878045, at *3 (D. Conn. Nov. 23, 2011) (in an independent contractor misclassification case, granting motion to issue notice pursuant to 29 U.S.C. § 216(b) where one lead plaintiff had not signed arbitration agreement, although other lead plaintiffs were compelled to arbitration; the court held that after notice and opportunity to opt-in period, it could then consider whether to compel arbitration for any opt-in plaintiffs who had signed arbitration agreements); Sealy v. Keiser Sch., Inc., 2011 WL 7641238, at *3-4 (S.D. Fla. Nov. 8, 2011) (conditionally certifying a class under § 216(b), rejecting the defendant's argument that the plaintiff could not meet the similarly situated requirement because the vast majority of the defendant's employees, including nearly all of the opt-in plaintiffs, had signed arbitration agreements); Green v. Plantation of Louisiana, LLC, 2010 WL 5256348, at *1 (W.D. La. Dec. 15, 2010) (where defendants "object to certification because certain employees signed arbitration agreements prohibiting them from joining an FLSA collective action suit," the Court would not consider the validity of the agreements at the notice stage); Ali v. Sugarland Petroleum, 2009 WL 5173508 (S.D. Tex. December 22, 2009) (refusing to consider at the notice stage the defendants' argument that certain employees signed arbitration agreements); Robertson v. LTS Mgmt. Servs. LLC, 642 F. Supp. 2d 922, 926 (W.D. Mo. 2008) (refusing to consider the validity of waivers signed by a large number of employees until after conditional certification). Whittington v. Taco Bell of America, Inc., 2011 WL 1772401 (D. Col. May 10, 2011); Davis v. Novastar Mortg., Inc., 408 F.Supp.2d 811 (W.D. Mo. 2005); Villatoro v. Kim Son Restaurant, L.P., 286 F.Supp.2d 807 (S.D. Tex. 2003).

Similarly, courts have also found that decisions on a motion to compel arbitration are properly left until after class certification under Rule 23 and that the presence of an arbitration agreement signed by certain class members does not preclude class certification. See In re

Evanston Nw. Corp. Antitrust Litig., 2013 WL 6490152, *5 (N.D. Ill. Dec. 10, 2013); Davis v. Four Seasons Hotel Ltd., No. CIV. 08-00525 HG-BMK, 2011 WL 4590393, at *4 (D. Haw. Sept. 30, 2011) ("The possibility that Four Seasons may be able to compel unnamed members of the putative class to arbitrate in the future does not preclude class certification"); Bond v. Fleet Bank (RI), N.A., 2002 WL 31500393, *7 (D.R.I. Oct. 10, 2002) ("[T]hat some members may be subject to a valid arbitration agreement does not preclude this court from certifying a class" under Rule 23); Collins v. Int'l Dairy Queen, Inc., 168 F.R.D. 668, 678 (M.D. Ga. 1996), modified, 169 F.R.D. 690 (M.D. Ga. 1997) (holding that it was improper to deny class certification under Rule 23 on that basis that some members of the putative class were subject to arbitration agreements); Coleman v. Gen. Motors Acceptance Corp., 220 F.R.D. 64, 91 (M.D. Tenn. 2004) ("The possibility that some class members might have signed arbitration agreements does not defeat class certification, although the court reserves the right to create a subclass, modify the class definition, or otherwise specially treat the class members subject to arbitration at a later juncture"); but see In re Titanium Dioxide Antitrust Litig., 962 F. Supp. 2d 840, 862 (D. Md. 2013) (finding that "the class as currently defined does not meet the commonality and typicality requirements of Rule 23(a)" where some prospective class members had agreed to arbitration agreements and others had not).

Courts that have granted conditional or class certification in such cases and have ordered notice should issue prior to entertaining motions to compel arbitration, have reasoned that:

> the sensible course . . . is to decide whether to certify the class without considering the possibility of arbitration, bring the [putative class] into the case, see what their position is on arbitration, and then decide who must arbitrate. If it turns out that . . . either group, must arbitrate . . . the Court can always decertify, subclassify, or otherwise alter the class later.

In re Evanston Nw. Corp. Antitrust Litig., 2013 WL 6490152, *5 (N.D. Ill. Dec. 10, 2013).

However, there are some courts that have held that where some putative class members are bound to arbitrate and others are not, it is appropriate to simply define the class to exclude those employees who are bound and that these individuals should not receive notice. See, e.g., O'Donovan v. CashCall, Inc., 2012 WL 2568174, *2 (N.D. Cal. July 2, 2012) (class definitions should be limited to borrowers who did not sign Defendant's [agreement]"); Lee v. S. California Univ. for Prof'l Studies, 2010 WL 5177885, *1 (Cal. Ct. App. Dec. 22, 2010) (noting that "the trial court ultimately certified a class that only included students who did not sign arbitration agreements" and therefore there was no abuse of discretion); Dienese v. McKenzie Check Advance of Wis., LLC, 2000 WL 34511333, *8 (E.D. Wis. Dec. 11, 2000) ("In the absence of any showing that the Arbitration Agreement is unenforceable or that plaintiffs' claims are not amenable to arbitration, this court will not permit those who have signed the Agreement to

participate in the class"). More often, the court will simply ignore the notice motion when it compels arbitration.

Plaintiffs' attorneys should argue in favor of certifying a class that includes both those who are bound by arbitration agreements and those who are not, and urge the court to address the issue of defining sub-classes and compelling arbitration *after* class certification, rather than defining the class to exclude those who are bound. This approach could potentially allow all class members – both those who are bound to arbitrate and those who are not – to receive notice regarding the case (whether it is an FLSA action, or a Rule 23 action). By obtaining notice to the class, plaintiffs' counsel may identify individuals who are bound by arbitration agreements but wish to pursue their claims individually in arbitration.

H. Appealing An Order Compelling Arbitration.

Finally, another frustrating issue related to arbitration facing plaintiffs' attorneys is that while defendants can automatically appeal from a denial of a motion to compel arbitration, it is not always easy for plaintiffs to appeal from an order compelling arbitration because defendants will often seek to have cases stayed, rather than dismissed, when they compel arbitration. See 9 U.S.C. § 16; Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 87 n. 2 (2000) (noting that "[h]ad the District Court entered a stay instead of a dismissal in this case, that order would not be appealable. 9 U.S.C. § 16(b)(1)"); Tice v. El Paso Educ. Initiative, Inc., 2013 WL 1032254, at *1 (Tex. App. Mar. 13, 2013) ("Under the Federal Arbitration Act (FAA), an order compelling arbitration and granting a stay is not immediately reviewable"). This asymmetry puts plaintiffs at a disadvantage in battles over compelling a case to arbitration.

However, there are avenues to appeal these orders. For example, in cases where courts have compelled arbitration, plaintiffs may request that the court dismiss the case (rather than stay the case) pending the outcome of arbitration because a dismissal is a final appealable order. Or Plaintiffs can request that the court certify the decision to compel arbitration pursuant to 28 U.S.C. § 1292.