

## In *Brown v. Ralphs Grocery Co.*, California Court of Appeal Strikes Back on Enforceability of Class Action Waivers in Arbitration Agreements

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In the recent decision of *AT&T Mobility v. Concepcion*, the U.S. Supreme Court held that the Federal Arbitration Act (FAA) “preempts California’s rule classifying most collective arbitration waivers in consumer contracts as unconscionable.”<sup>1</sup> Many believed this marked the end of California courts’ resistance to arbitration. *Concepcion*, after all, mandated that the FAA trumps any state law prohibiting arbitration of a particular type of claim. This rule, if faithfully applied, would surely be the death-knell for many other California judicially-created rules protecting from arbitration other types of class action claims, representative claims, and claims for public injunctions. Or so we thought.

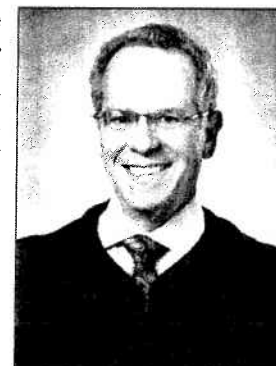
On July 12, 2011, a California court of appeal struck back in *Brown v. Ralphs Grocery Co.*, revealing that California courts’ resistance

(see “*Brown v. Ralphs*” on page 12)

## Brown Bag Lunch: Inside the Courtroom of Judge Ronald S. Prager

By Krista M. Cabrera, Esq.  
 and Silvia Paz Romero

On July 13, 2011, the Honorable Ronald S. Prager met with local attorneys in his courtroom for a brown bag luncheon presented by ABTL. Judge Prager discussed three primary areas of case management: discovery, trial and law and motion.



Judge Ronald S. Prager

### Discovery

Judge Prager sees the discovery dispute resolution process as a microcosm of how the overall case should be resolved. He explained that most discovery motions are usually voluminous, boilerplate and overly technical. In addition, once a formal motion is filed, there are many pitfalls (such as a non-conforming separate statement) which could result in the denial of an otherwise meritorious motion.

(see “*Brown Bag*” on page 16)

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## Tips

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den. Sit down with your staff, other attorneys in the office, your clients, even your family, and spend a few minutes talking about what needs to be done in your absence, and who can help get it done. You'll be glad you did when you come up for air at the end of trial, and find that much of what otherwise would have been waiting to pull you right back under again has been taken care of.

**THE "ZEN" IN THE ART OF MAINTAINING BALANCE DURING TRIAL:** As should be expected, the key to maintaining balance during trial, according to those who have become masters at the process, is to incorporate the many different ways of doing so into your trial routine. As a practical matter, time is a very valuable commodity during trial. For that reason, the true Zen master has learned how to incorporate two, three or more of the techniques simultaneously. A healthy meal, shared during a dinner break

after trial with your family simultaneously provides nourishment, a break and connection with your normal routine, while taking you away from trial preparation for no more than an hour. A half hour or hour-long walk after trial with your client or co-counsel, during which you discuss the case without the stress of interruption, actually enhances your trial preparation while reducing stress and increasing mental alertness. How you incorporate these tips from the trenches into your routine the next time you are in trial is not the important point. The important point is that you incorporate them in some fashion. I know I will. ▲

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## Brown v. Ralphs

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to arbitrating certain types of claims remains alive—or at least on life support—until the California Supreme Court says otherwise.<sup>2</sup> *Brown* held that *Concepcion* did not apply to representative claims under the Private Attorneys General Act of 2004 (PAGA). *Brown* also indicated that the California Supreme Court's holding in *Gentry v. Superior Court*,<sup>3</sup> which restricts class action waivers, remains the law in California, despite *Concepcion*, at least until the California Supreme Court says otherwise.

### Background

In *Brown*, the plaintiff filed a class action against Ralphs Grocery Company and The Kroger Company for alleged violations of the California Labor Code and unfair business practices. The plaintiff further alleged she had satisfied the prerequisites for bringing a representative action for sanctions under the PAGA. Defendants petitioned to compel arbitration based on Ralphs' arbitration policy incorporated by reference into the plaintiff's employment application. Plaintiff opposed the arbitration petition and argued that the arbitration policy's representative

and class action waiver was unconscionable.

Ralphs' arbitration policy applied to "any and all employment-related disputes" other than those relating to the terms and conditions of a collective bargaining agreement.<sup>4</sup> The policy specified that "there is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons alleged to be similarly situated. . . . [T]here are no judge or jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy."<sup>5</sup>

The trial court ruled that the arbitration policy was both procedurally and substantively unconscionable, and therefore unenforceable. Ralphs appealed.

While the *Brown* appeal was pending, the U.S. Supreme Court decided *Concepcion*. *Concepcion* held that the Federal Arbitration Act (FAA) preempted *Discover Bank*, and reaffirmed

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that Section 2 of the FAA requires enforcement of all arbitration agreements, “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>6</sup> In *Discover Bank*, the California Supreme Court ruled that class action waivers are unenforceable if (1) the waiver was in a contract of adhesion; (2) the damages at issue were small; and (3) the plaintiff had alleged a scheme to cheat large numbers of customers out of individually small sums.<sup>7</sup> This rule effectively killed most class action waivers found in arbitration agreements. The U.S. Supreme Court rejected this so-called *Discover Bank* rule, holding that the right to freedom of contract and federal policy favoring arbitration under the FAA trumps state policy concerns about protecting the rights of consumers to bring class actions.<sup>8</sup> “The overarching purpose of the FAA,” *Concepcion* explained, “is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>9</sup>

### The Majority In *Brown*

After receiving supplemental briefing in light of *Concepcion*, the *Brown* court in a 2-1 decision held that *Concepcion* does not require enforcement of arbitration agreements barring PAGA representative actions. *Brown* construed *Concepcion* to apply only to “the preemption of unconscionability determinations for class action waivers in consumer cases. . . . [*Concepcion*] does not purport to deal with the FAA’s possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code.”<sup>10</sup> *Brown* therefore invalidated the parties’ representative action waiver.

The *Brown* majority’s narrow interpretation of *Concepcion* may be a sign that some California courts will continue to resist its core holding that arbitration agreements under the FAA should be enforced according to their terms.<sup>11</sup> Under *Concepcion*, “parties may agree to limit the is-

(see “*Brown v. Ralphs*” on page 14)

## Visual Evidence Archive: Demonstratives That Made a Difference

### Practice Area: Breach of Contract

**Background:** In the wake of a multi-state E. coli O157:H7 breakout stemming from contaminated hamburger patties sold at fast food restaurants, plaintiff sued one of its meat suppliers for breaching its contract to furnish food safe for human consumption. Damages were sought to recover lost sales revenue in the tens of millions of dollars.

**A Demonstrative That Made a Difference:** We produced a comprehensive interactive multimedia presentation about how hamburger meat was prepared “from farm to fork” for use during trial. The presentation featured several detailed computer animations that demonstrated how different processes and machines could have promoted cross contamination during processing. The presentation was shown to defense counsel prior to settlement, who later commented that it was influential in their settlement decision.

**Outcome:** Plaintiff settled for \$58 million.



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sues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes.”<sup>12</sup> Additionally, *Concepcion* is clear that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>13</sup>

*Concepcion* addressed and explicitly rejected *Discover Bank*. It did not, however, expressly address the several other California Supreme Court decisions limiting arbitration agreements—such as *Gentry*; *Armendariz v. Foundation Health Psychcare Services, Inc.*;<sup>14</sup> *Cruz v. Pacific Health Systems, Inc.*;<sup>15</sup> and *Broughton v. Cigna Healthplans*.<sup>16</sup> In each of these cases, the California Supreme Court established rules exempting claims from arbitration and treating arbitration agreements differently from other agreements. *Gentry* held that an arbitration clause cannot waive a statutory right to a class action in certain circumstances. *Armendariz* imposed similar restrictions as well as other limitations on arbitration agreements, effectively re-writing such agreements to favor employees. *Cruz* and *Broughton* both denied arbitration of claims for public injunctions under the Unfair Competition Law and the CLRA. In light of *Concepcion*, some federal district courts in California have already held that the FAA also preempts some of these state court rules.<sup>17</sup>

Consumer advocates, however, might use the *Brown* majority’s reasoning to argue that *Concepcion* has no bearing on these state precedents because *Concepcion* involved only “the private individual right of a consumer to pursue class action remedies[.]”<sup>18</sup> In that regard, *Brown* likened a PAGA action to the injunctive relief claims in *Cruz* and *Broughton*: “the relief is in large part ‘for the benefit of the general public rather than the party bringing the action’[.]”<sup>19</sup>

*Brown* did, however, overturn the trial court’s decision that the class action waiver was unconscionable, but did so because plaintiff had failed to make the factual showing required under *Gentry*. The *Brown* court held that the *Gentry* rule only applies when the employee presents substantial evidence of unconscionability. Because the plaintiff failed to make this showing,

the *Brown* court reversed and remanded to the trial court to determine whether the entire arbitration policy should be unenforceable on the sole basis of the PAGA waiver provision. The majority did not address whether *Concepcion* invalidated the rule of *Gentry*.

### **The Dissent In *Brown***

Justice Kriegler concurred and dissented. He agreed that plaintiff failed to make the factual showing required under *Gentry*. He also noted that in light of *Concepcion*, “*Gentry*’s continuing vitality is in doubt.” “Nonetheless, as the majority correctly points out, *Gentry* remains the binding law of this state which we must follow.”<sup>20</sup>

Justice Kriegler disagreed with the majority’s finding that plaintiff’s PAGA claim was not subject to arbitration, “[g]iven the consistent line of Supreme Court cases mandating enforcement of arbitration clauses under the FAA, even in the face of California statutory or decisional law requiring court or administrative action rather than arbitration . . .”<sup>21</sup> Justice Kriegler quoted *Concepcion*’s clear mandate that, “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”<sup>22</sup> That mandate extends to PAGA claims, he argued.

Justice Kriegler also pointed out the direct conflict between the *Brown* majority’s decision and the post-*Concepcion* federal district court decision in *Quevedo v. Macy’s, Inc.*<sup>23</sup> *Quevedo* held that *Concepcion* requires the arbitration of PAGA claims when they are subject to representative action waivers in arbitration agreements. The *Quevedo* court had specifically considered the California appellate decision of *Franco v. Athens Disposal Co., Inc.*<sup>24</sup> — a decision which the *Brown* majority heavily relied on — and concluded that “*Franco* shows only that a state might reasonably wish to require arbitration agreements to allow for collective PAGA actions. . . . [*Concepcion*] makes clear however, that the state cannot impose such a requirement because it would be inconsistent with the FAA.”<sup>25</sup> *Quevedo* likewise found that *Concepcion* “undercut” the California Supreme Court’s reasoning in *Gentry*.<sup>26</sup>

*Quevedo* is not the only recent federal dis-

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strict court decision arrayed against the *Brown* majority's restrictive reading of *Concepcion*. The district court in *Zarandi v. Alliance Data Systems Corp.*<sup>27</sup> considered *Gentry* to have been "abrogated" by *Concepcion*, and held that the FAA required arbitration of plaintiff's injunctive relief claims. Likewise, *Arellano v. T-Mobile USA, Inc.*<sup>28</sup> held *Concepcion* disposed of both *Broughton* and *Cruz*, and ordered arbitration of CLRA and UCL injunctive relief claims.

### **The Aftermath**

The *Brown* majority's decision to narrowly construe *Concepcion*, invalidate the representative action waiver under PAGA, and bypass the issue of whether *Gentry* remains viable, invites the California Supreme Court, and, potentially, the United States Supreme Court, to address the

## **Article Submission**

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We reserve the right to edit articles for reasons of space or for other reasons, to decline to submit articles that are submitted, or to invite responses from those with other points of view.

Authors are responsible for Shephardizing and proofreading their submissions.

Articles should be no more than 2500 words with citations in end notes.

issue once again. In the meantime, the battle continues to rage between those who would arbitrate, and those who resist.

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- 1 131 S.Ct 1740, 1746 (Apr. 27, 2011)
- 2 --- Cal. Rptr. 3d ---, 2011 WL 2685959 (July 12, 2011)
- 3 42 Cal. 4th 443 (2007) (*cert. den.* 128 S. Ct. 1743, Mar. 31, 2008)
- 4 *Brown*, 2011 WL 2685959 at \*1
- 5 *Brown*, 2011 WL 2685959 at \*1
- 6 *Concepcion*, 131 S.Ct. at 1744
- 7 *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (Cal. 2005)
- 8 *Concepcion*, 131 S.Ct. at 1753
- 9 *Concepcion*, 131 S.Ct. at 1748
- 10 *Brown*, 2011 WL 2685959 at \*5
- 11 *Concepcion*, 131 S.Ct. at 1748 (internal quotations omitted)
- 12 *Concepcion*, 131 S.Ct. at 1749 (internal citations and emphasis omitted)
- 13 *Concepcion*, 131 S.Ct. at 1753
- 14 24 Cal. 4th 83 (2000)
- 15 30 Cal. 4th 303 (2003)
- 16 21 Cal. 4th 1066 (1999)
- 17 *See Zarandi v. Alliance Data Sys. Corp.*, No. CV 10-8309 DSF (JCGx) 2011 WL 1827228 (C.D. Cal. May 9, 2011) (stating *Gentry* was "abrogated" by *Concepcion*, and holding the FAA required arbitration of plaintiff's injunctive relief claims; *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011) (holding the FAA as interpreted by *Concepcion* preempted both *Broughton* and *Cruz*, and compelling arbitration on plaintiff's UCL and CLRA injunctive relief claims)
- 18 *See Brown*, 2011 WL 2685959 at \*5
- 19 *See Brown*, 2011 WL 2685959 at \*6, (quoting *Broughton*, 21 Cal. 4th at 1082)
- 20 *Brown*, 2011 WL 2685959 at \*8
- 21 *Brown*, 2011 WL 2685959 at \*11
- 22 *Brown*, 2011 WL 2685959 at \*10, (quoting *Concepcion*, 131 S.Ct. at 1747)
- 23 --- F. Supp. 2d ---, 2011 WL 3135052 (C.D. Cal. June 16, 2011).
- 24 171 Cal. App. 4th 1277 (2009)
- 25 *Quevedo*, 2011 WL 3135052 at \*17
- 26 *Quevedo*, 2011 WL 3135052 at \*1.
- 27 No. CV 10-8309 DSF (JCGx) 2011 WL 1827228 (C.D. Cal. May 9, 2011)
- 28 No. C 10-05663 WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011)