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FEATURES

14 Taking It Home
BY MICHAEL B. GURIEN
Secondary exposure, the sophisticated intermediary defense, and proof of causation continue to be key issues in asbestos duty-of-care litigation

Plus: Earn MCLE credit. MCLE Test No. 269 appears on page 17.

22 Loosen the Bonds
BY KARLA GILBRIDE AND ARTHUR H. BRYANT
Despite the widespread expansion in the application of binding arbitration clauses, various legal rulings offer relief to those who challenge these agreements

29 Special Section
2017 Semiannual Guide to Investigative Services

DEPARTMENTS

7 President’s Page
An adventure, a challenge, and a personal journey
BY MICHAEL E. MEYER

8 Barristers Tips
Fellowship and professional development for new attorneys
BY JEANNE NISHIMOTO

10 Practice Tips
Reevaluating gag orders in the era of social media
BY MARK J. GERAGOS, TENY R. GERAGOS, TINA GLANDIAN, AND KAYLEE S. KREITENBERG

40 Closing Argument
Transforming a mediation into a positive outcome for all parties
BY RANDE S. SOTOMAYOR

ON THE COVER
LACBA President Michael E. Meyer’s law office is a showcase for the sports memorabilia he began collecting as an 11-year-old who swept the stands at Wrigley Field in exchange for passes to the games.
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Los Angeles Lawyer July/August 2017 5
The expression, “May you live in interesting times,” might seem to be a blessing, but it is more widely known as a curse. Commonly referred to as “the Chinese curse” (despite its apocryphal origins), the expression is used ironically to imply that the qualities associated with “uninteresting” times (peace and tranquility, for example) are preferable to the disorder and conflict that historically have marked “interesting” times. However one reads the expression, most will agree we now live in interesting times. The election of Donald Trump. Threatened repeal of Obamacare. Firing FBI Director James Comey. Talk of impeachment. Brexit. Syria. Refugees. Climate change. Social and political polarization. The Occupy movement. Trigger warnings, safe spaces, and “snowflakes.” The Kardashians. The “sharing” or “gig” economy. Micro-influencers. Personal branding. The Internet, iPhones and Androids, social media, apps, streaming, driverless cars, and countless other technological innovations of disruptive impact. Then, of course, there is the legal profession.

In *Democracy in America*, Alexis de Tocqueville opined that lawyers, whom he viewed as America’s aristocracy and the “masters of a science…not very generally known,” have “nothing to gain by innovation.” However, the legal profession has hardly been immune to the developments that have transformed other aspects of the economy. To me, the profession today feels quite different from the one in which I began practicing less than 15 years ago.

A few years back, in an article for *The New Republic*, Noam Scheiber summarized this sense of change: “Of all the occupational golden ages to come and go in the twentieth century—for doctors, journalists, ad-men, autoworkers—none lasted longer, felt cushier, and was in all more golden than the reign of the law partner.” As Scheiber described it, the golden age lawyer’s existence was characterized by a “generous salary, the esteem of one’s neighbors, work that was more intellectual than purely commercial,” and most of all by “stability” and “a benevolent paternalism” under which, at many firms, “[a]dmission to the partnership after seven years was the natural order of the universe.”

Post-golden age, one could expect to find instead: the wholesale collapse of firms; firms aggressively poaching clients from other firms; partners aggressively poaching clients from each other and backstabbing each other over credit and compensation; de-equitization or not making partner in the first place; and the reification of a “rainmaker”-based business model under which “[t]he most profitable partners steadily discarded their underachieving colleagues, because they didn’t want to share the spoils.” While Scheiber focused on big law firms, he also noted more generally applicable problems facing those entering the law in recent years, including: dramatically higher unemployment; skyrocketing student loan debt; outsourcing of work to lower-paid contract attorneys; and automation of work through legal software.

Whatever the reasons for the sea changes, there seems little doubt that these are “interesting times” for lawyers. Against the backdrop of such rapid change, *Los Angeles Lawyer* has for decades striven to be a consistently informative and reliable source of legal information for the Los Angeles legal community. In my inaugural column as chair of the magazine’s editorial board, I want to assure our readers that we will continue to do so in the months and years to come.

John Keith is the 2017-18 chair of the Los Angeles Lawyer Editorial Board. He practices business litigation with the law firm of Fenigstein & Kaufman in Century City.
An Adventure, a Challenge, and a Personal Journey

AFTER ONE OF THE FIRST CONTESTED ELECTIONS in decades and various challenges to a subsequent election, the Los Angeles County Bar Association is still divided, with many of its members talking but not listening, to the overall detriment of LACBA. The world is changing and the legal profession has changed—in some ways not for the better. My initial goals are to unify LACBA to embrace change and challenges, to provide better services and resources for our members, and to change the culture through greater transparency and open decision-making.

Remember the pride we all took in being members of a noble profession? That noble profession has become a business where many lawyers and law firms are primarily ranked by how much money they make and where some lawyers who continue to do great legal work with integrity are being forced out of their firms when a simple solution would be to simply pay them less.

Now, please don’t jump to the conclusion of wishing for the good old days. The good old days were nice in many respects, but they were not so nice for people of color, women, people of some religions, and gays and transgenders. We need to come together and work together for the betterment of all our lawyers and their clients, to develop thicker skins to be able to ignore real and imaginary slights, and to emphasize the great things LACBA and its members are doing every day to make the world a better place.

I have served four terms as managing partner of the local offices of Pillsbury and then DLA Piper. I knew that each term would be temporary because if I did my job correctly over a long period of time I would eventually offend everyone. (Fortunately, the presidency of LACBA is only a one-year term.) I learned to listen and to thank those who sometimes disagreed with our policies because that meant they cared and wanted to make things better.

Some of my other goals are to make LACBA more relevant by increasing its public profile in a positive manner, getting younger (with myself as an exception) and more diverse people, as well as people of color and other minorities, into leadership positions.

I recently went back to my University of Chicago law school reunion where I shared many fond memories with my classmates. We had a class of about 160, but it included people who went on to become general counsel of General Motors, congressmen, a U.S. senator, the prime minister of New Zealand, and distinguished law professors. I was the only underachiever.

We need to come together and work together for the betterment of all our lawyers and their clients.

The 2017-18 president of LACBA, Michael E. Meyer is chairman of the Los Angeles offices of DLA Piper and a noted authority on real estate leasing transactions. An avid baseball fan and sports memorabilia collector, he serves on the boards of the Jackie Robinson Foundation, the Los Angeles Sports and Entertainment Commission, the Natasha Watley Foundation, and the Los Angeles Police Foundation.
**Fellowship and Professional Development for New Attorneys**

FOR NEWER ATTORNEYS IN LOS ANGELES, it can be difficult to find a foothold in what often feels like a sprawling legal community. One of L.A.’s greatest strengths—its sheer size—can be overwhelming, and people new to the legal community can easily become lost. As the incoming Los Angeles County Bar Association Barristers president, my goal is to prevent this by ensuring that there is a place for every new and young attorney in the Barristers Section.

With over 6,500 members, Barristers is the largest section of the Los Angeles County Bar Association and one of its most diverse. Attorneys under 37 years of age or within their first five years of practice are eligible to join the Barristers. As a result, our membership is made up of attorneys from across Los Angeles County who practice in all areas of the law and some who do not practice at all. We are employed as associates at small, midsize, and big firms, as solo practitioners, in-house counsel at major corporations, government attorneys at the local, state, and federal levels, and public interest attorneys at local and national legal services organizations. Our section is committed to providing relevant programs for this wide-ranging group.

If you are looking to gain new legal skills, develop your practice, or fulfill your MCLE requirements, our CLE Committee creates programs designed specifically for attorneys in their first 10 years of practice. Past training topics range from fundamental skills such as what to expect at your first trial to cutting edge issues like litigating in the age of social media.

If you are interested in providing free legal services to low- and moderate-income people, our Pro Bono Committee provides trainings and volunteer opportunities. Barristers has partnered with LACBA’s Veterans Legal Services Project to assist veterans seeking expungements, and with local legal services groups to provide members with trainings to assist unaccompanied immigrant minors seeking foster care benefits. (LACBA also has projects that assist people in the areas of domestic violence, immigration, and AIDS legal services.) If you want to get involved in mentoring your future peers, our Law Student Outreach Committee coordinates a mock interview program with the local law schools and participates in various law school events during the school year. This gives Barristers members an opportunity to find someone to mentor and to stay involved with their local law schools.

If you want to meet the judges that you appear before in court, our Bench and Bar Committee hosts an annual mixer with members of the judiciary. Barristers members have the rare chance to speak with judges outside of the courtroom. Our program always enjoys wide support from the judiciary, which is not surprising considering many judges—including the Honorable Margaret M. Morrow and the Honorable Lee Smalley Edmon—are former Barristers.

If you are interested in meeting your local government officials, the Government Relations Committee hosts events that feature state and local officials. The committee has hosted events featuring Los Angeles Mayor Eric Garcetti, state Senator Ben Allen, Los Angeles District Attorney Jackie Lacey Los Angeles County Sheriff Jim McDonnell, Los Angeles City Attorney Mike Feuer, Beverly Hills Mayor John Mirisch, and many others. These are often designed to be intimate events so that members are able to have real and meaningful conversations with the officials.

If you want to meet great people with diverse interests, our Networking Committee hosts quarterly mixers for attorneys and other professionals. Attorneys from around Los Angeles, working at both plaintiff and defense firms, public interest organizations, in-house, and everything in between, are able to come together to get to know each other in a relaxed and collegially setting, with an occasional celebrity sighting thrown in for good measure. After all, this is LA.

We know that each Barristers member will eventually age out of our section and we want to be a springboard to participation in other parts of LACBA. Through our Barristers Liaison Program, we have partnered with the other LACBA sections to have a Barristers member serve as a liaison to the executive committees of 18 active sections. Liaisons attend their section’s executive committee meetings and facilitate co-sponsored events between the Barristers and the other LACBA sections.

Now that you have heard all that the Barristers Section has to offer, I hope you are convinced there is a place for you with us. The next step is to visit LACBA.org to ensure that your Barristers membership is current, or call LACBA Member Services at (213) 896-6560 with any questions about your membership. We host programs throughout the year that are open to Barristers members, often for free and often with complimentary drinks. If you are interested in becoming more active in the section by joining a committee, you can visit the Barristers at LACBA.org/barristers where we provide contact information for each of our committee chairs.

If you are still not convinced there is a place for you with Barristers, contact me and tell me how we can improve! My e-mail address is jnishimoto@lafla.org. I am committed to ensuring that the Barristers Section is serving all its members, and cannot do that without your input. I hope to see you at a Barristers event soon.

The 2017-18 president of the Los Angeles County Bar Association Barristers Section, Jeanne Nishimoto is a Legal Aid Foundation of Los Angeles staff attorney.
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EXISTING LAWS GOVERNING GAG ORDERS require updates and revisions as times change and technology advances. This is especially true in light of the rapid growth and expansion of accessibility to information. Many of the current laws on the books pertaining to restrictive speech are now obsolete and should be reevaluated.

Historically, the intended use of gag orders was to protect defendants from prejudicial information that could potentially impede the right to a fair trial; however, courts have slowly deviated from that focus. In addition, there is ongoing tension between the constitutionality of gag orders and their effectiveness. It is difficult for trial judges to predict what information will undermine juror impartiality and narrowly tailor orders that will effectively keep prejudicial information from entering the courtroom without overreaching into constitutional protections.

The justification for gag orders was addressed in a 1994 amendment to the First Amendment of the U.S. Constitution that stated, "although [a] court order restraining news in advance of publication from reporting facts about trial or defendant violates the First Amendment guarantee of free press, [a] court order so restraining trial participants is constitutional as long as properly justified." The term “properly justified” has been scrutinized by the various circuit courts, and its interpretation has resulted in a myriad of definitions.

In Nebraska Press Association v. Stuart, the U.S. Supreme Court deemed invalid a restrictive order, entered by the Nebraska trial court and affirmed by the Nebraska Supreme Court, prohibiting reporting or commentary on judicial proceedings held in public. Justice Lewis Powell’s concurrence acknowledged that a prior restraint may only be issued when “necessary to prevent the dissemination of pretrial publicity that otherwise poses a high likelihood of preventing... the Sixth Amendment requirement of impartiality [by the jury members].” Similarly, in the decision in Radio & Television News Association of Southern California v. United States District Court for the Central District of California, the Ninth Circuit found that restrictions on the statements of defendant’s trial counsel were necessary to reduce prejudicial publicity. The Ninth Circuit concluded that the prior restraint under such circumstances was reasonable and served a legitimate purpose.

On the other hand, the Second and Fourth Circuits require that pretrial publicity pose a “reasonable likelihood” of prejudice to a defendant’s right to a fair trial. In In re Russell, the Fourth Circuit concluded that the court acted within constitutional limits when restricting any potential witness to the proceeding from making any statements to the public. Similarly, the Second Circuit, in In re Application of Dow Jones & Company, Inc., applied the “reasonably necessary” standard to determine whether the pretrial publicity pertaining to that matter would prejudice a defendant’s ability to have a fair trial. Ultimately, the Second Circuit denied the news agencies’ appeal from a gag order that restrained trial participants in that criminal case from speaking with the press, agreeing with the district court’s reasoning that the “failure to restrain trial participants would add ‘fuel to an already voracious fire of publicity’ and create a real substantial likelihood that some defendants... [m]ight be deprived a fair trial.”

Alternatively, the Sixth Circuit has utilized a standard of “clear and present danger.” In United States v. Ford, the defendant argued that a lower standard, also referred to as the “near standard” taken from the U.S. Supreme Court case, Sheppard v. Maxwell, should have been utilized. However, the Sixth Circuit explained that the “near standard” solely applies to restraints on the press in criminal cases as decided by the Supreme Court and that this matter did not fall within those constraints. The Sixth Circuit concluded that the gag order in Ford failed to meet the “clear and present danger” test, which requires more than a possibility or “reasonable likelihood in the future” as well as a “serious or imminent threat of a specific nature for which can be narrowly tailored in an injunctive order.”

In contrast, the Eleventh Circuit has acknowledged the various standards but expressly refuses to adopt any particular standard. The aforementioned opinions demonstrate the lack of universal application across the circuit courts regarding the standard for analyzing the propriety and scope of gag orders and the constitutional ramifications.
of the ongoing friction between First Amendment rights and the protection of the right to a fair trial. This dichotomy has widened substantially in the age of the Internet and the rise of social media. Pretrial publicity and media coverage have expanded globally and no longer stem from one source. Media and news platforms no longer focus on local events but are now structured to target universal and greatly expanded audiences on all manner of topics not limited to specific geographic locations. The lack of uniformity in the law concerning interpretation of proper justification for a gag order further complicates the analysis. Local issuance of gag orders with a municipal, statewide, or even nationwide restriction does not guarantee that international publications will refrain from reporting on these types of matters. Thus, it is imperative for courts to determine whether a gag order, in this era of instant information on a world-wide scale, will serve the purpose for which such orders historically were intended.

Gag orders, which are ultimately within a judge’s discretion, were born in an effort to protect parties involved in a proceeding from the disclosure to the press or any outsiders of the events occurring in the courtroom.14 “Judges are permitted to issue gag orders based on their own judgment or in response to a request by one of the parties to the proceeding.”15 Sheppard v. Maxwell was one of the first cases to address the “unfair and prejudicial news comment on pending cases” because of the court’s decision to allow the media to infiltrate the proceeding and courtroom.16 The Supreme Court delved into the framers’ intentions and particularly focused on why the courts have been unwilling to hinder the freedom exercised by the news, finding that the “unqualified prohibitions laid down by the framers were intended to give liberty of the press the broadest scope that could be countenanced in an orderly society.”17 It appears Sheppard v. Maxwell triggered the recognition by the courts that the public’s increasing accessibility to information and difficulty in differentiating between fact and fiction places the defendant (or others involved in civil or criminal proceedings) in the crossfire of various journalists and news reporting agencies and websites.

Specifically, defense counsel in Sheppard v. Maxwell brought to the court’s attention the influx of incorrectly reported testimony at trial and how the prosecution repeatedly made evidence available to the news media, ultimately causing most of the evidence disseminated to be inadmissible. Yet, the court did not attempt to warn the newspapers to check the accuracy of their commentaries and unilaterally refused to take action.18 In the Sheppard court’s defense, it was not unjustified to assume that the journalists were reporting events accurately, but since the 1966 Sheppard opinion in which the inability to effectively control media was acknowledged, such a conclusion may not be as reasonable or justified today. It is an undeniable conclusion that some 30 years later modern media is much more difficult to control. This is especially true in light of the rapid growth of technology and instantaneous access to information that could demonstrate the heightened need for controlling access to sensitive information by the media and the difficulty in effectively limiting access. Thus, the Supreme Court’s solution set forth in the Sheppard opinion to “continue the case until the threat abates or transfer it to another county”19 if it is determined “there is reasonable likelihood that prejudicial news prior to trial will prevent a fair trial” provides little in the way of guidance in this new era of unlimited information.19

The cause for concern no longer arises from local access to information. A gag order in present day proceedings likely may not serve the purpose for which it is intended: to protect a litigant from unwanted or prejudicial publicity that could affect the litigant’s right to a fair and impartial jury or fair trial in general. Thus, the applicability of the rationale in Sheppard could be viewed as obsolete. If courts adhere to the precedent established in Sheppard and its progeny, the notion of protection of rights to a fair trial should be sufficient to support gag orders. Protection of these rights has been the essence of what gag orders were historically intended to safeguard. However, the courts appear to have significantly broadened the notion of protection. If the courts substantially deviate from the historical context for gag orders (i.e. to preserve the right to a fair trial), the purpose of the orders could be rendered obloque. Moreover, as technology rapidly advances, the ability to limit the dissemination of information seems almost impossible.

**Server in Ireland**

The Second Circuit recently addressed this new reality in discussing the right to access information maintained on a server located in Ireland from a location within the United States. The issue was whether the United States could force Microsoft to produce an expansive amount of information associated with a specific e-mail account based in Ireland.20 The Second Circuit denied the warrant and concluded that electronic documents do not fall within the same category as hard copies. The court based the conclusion on the fact that the location of documents on a computer in a foreign country is “merely virtual.”21 Accordingly, the issue of access to discretionary information on a global scale and the ability to disseminate that information instantaneous in has now become a reality that courts are forced to acknowledge and address.

Other countries also have had to grapple with open access to vast forums of information and how to limit the information that poses a threat to national security. In Israel, for example, the government has often utilized gag orders in an effort to prevent perceived threats to national security.22 Thus, the creation of a censorship office was instituted early on in that country’s history. The Israeli Military Censor requires journalists writing about particular incidents to clear their stories with the censor’s office prior to publication. For many years the system was effective, but given the proliferation of blogs, Twitter, and global news sites, the censorship office may no longer be effective in curtailing the dissemination of information on a global level.23

For example, in December 2010, an Australian national broadcaster reported that an Australian-Israeli working for the Mossad had hung himself in prison.24 Subsequently, the censor’s office banned local media from discussing events pertaining to the alleged suicide. However, this local ban did not prevent the international media outlets from picking up the story, disclosing the incident, and reporting speculation and conjecture outside the state of Israel, thereby undermining the impact of the local ban. Israel did not confirm or deny any of the events until 16 hours after the Australian Broadcasting Corporation report was released, thereby causing unnecessary discussion and buzz surrounding what should have been a local event with little global newsworthiness. Clearly, the prior restraint used by the Israeli government was useless in that situation.

In the United States, currently no published cases specifically gag orders and their ability or lack thereof to limit pretrial and trial publicity on a global scale. But given the reality of instant access to information today, gag orders do not seem effectual in today’s society. With the ability to access reporting from other counties, states, and countries, much like the case in Israel, a local gag order would have little to no effect on access to information outside the reach of such an order. With such unfettered access to information, it is nearly impossible to protect a courtroom from media bias short of sequestering a jury, which in most cases is not feasible.

The number of unpublished authorities touching on the issue of pretrial publicity in the age of the Internet is limited. The courts, while acknowledging the difficulty of limiting access to information, have concluded that any bias can be ferreted out through voir dire. In Empire State Ethanol & Energy, L.L.C. v. BBF International, the court denied the defendant’s request for a gag order, concluding there was no evidence the limited media attention about the case had created a threat of
general bias against the defendant. The defendant argued that a gag order was necessary because a “reasonable likelihood” existed that the media disclosures would prejudice the defendant’s right to a fair trial. The court pointed out that the defendant did not establish that alternatives to a wholesale gag order would be insufficient. Specifically, the court found that through the voir dire process, “a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.” The rationale behind the court’s analysis arises from the belief that there is a tendency to overestimate the extent of public awareness and that even those who are aware are capable of setting aside their impressions to make an evaluation on the basis of evidence presented at trial. Even if the gag order had been granted in this case, there would have been no guarantee that it could have effectively removed all access to information concerning the litigation available through the various media outlets. At a certain point, there is only so much a gag order can control. But the assumptions made in Empire State Ethanol are premised on the likely incorrect conclusion that jurors are able to ignore media coverage of cases in which they are serving.

The recent opinion in Oracle America Inc. v. Google further complicates the boundary between the voir dire process and access to information. Since California has not yet promulgated a rule pertaining to the ethical propriety of Internet research on jurors by counsel, the court in Oracle exercised its discretion by imposing an outright ban preventing counsel and the parties from conducting social media and Internet searches on venire persons as well as the final empaneled jury. The court did address the notion that such a prohibition would cause the lawyers to be precluded from information that is readily available to the press and public. “[W]ith an outright ban, everyone in the gallery could have more information about the venire persons and the empaneled jurors than the lawyers themselves.” But the court concluded that while it cannot control the public, it can control the trial participants and help prevent certain dangers in the voir dire process including the inherent unfairness in permitting lawyers to investigate venires while no such reciprocal right exists for venires to investigate the lawyers. Moreover, such investigation could facilitate improper personal appeals to specific jurors and violate the privacy of venires. The Oracle court acknowledged the possibility that the attorneys would not easily agree to such a ban, and in that scenario, the court laid out instructions forcing the trial teams to disclose the full extent to which they would conduct research on jurors. Such limitation clearly infringes the right to access public information and rejects the notion that any bias can be ferreted out through the voir dire process. If the court places a unilateral ban on investigative efforts via the Internet by counsel, how can the trial parties be certain they are eliminating all possibility of bias from entering the courtroom?

With the advent of blogs and other personalized versions of the news online and elsewhere, an additional issue arises: even if a gag order could limit information coming from the press, how is the information limited when it comes from a blogger who is merely asserting his or her opinions in the exercise of free speech rights? If the Supreme Court can determine that the statements of a court bailiff have the capacity to bias a jury then certainly comments made by bloggers and social media personalities pose a threat to a defendant’s right to a fair trial. Even assuming the dissemination of such opinions over the Internet could be controlled, whose constitutional rights should prevail?

The media were originally intended to provide a platform to share accurate reporting of events occurring across the globe, but with the advent of online societies and chat groups coupled with the new phenomenon of minute-by-minute sharing of personal opinions through Twitter, Facebook or personal blogs and now the notion of “fake news,” the fine line between what is factual and what is opinion or what is newsworthy but potentially damaging to the right to a fair trial has blurred to the point of absurdity. Opinion is taken as fact and there is little to no probing or questioning the veracity of what is being disseminated. Accuracy in the media has been rendered irrelevant and further undermines the use and purpose of local gag orders. With these changes, it is impossible not to acknowledge that society today is far different from when our Founding Fathers enacted the Constitution.

During his speech on the bicentennial of the Constitution on May 6, 1987, Justice Thurgood Marshall stated:

[W]e must be careful when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective…. If, we seek instead a sensitive understanding of the Constitution’s inherent defects, and its promising evolution through 200 years of history, the celebration of the “Miracle of Philadelphia”… will, in my view, be a far more meaningful and humbling experience. In other words, the evolution of our country is something that needs to be considered at all times. If laws and procedures enacted in an era long past no longer address the
needs of society or serve the purpose for
which they were enacted, their legitimacy
and application must be questioned. Current
laws addressing media bias and the limiting
of information to ensure a fair trial are show-
ing signs of irrelevancy in the modern world.
But until a court or the legislature takes up
the issue squarely, attorneys are left with
extrapolating from prior precedent and have
little guidance in the navigation of Internet
waters that will only continue to complicate
the issue. For now, it is likely courts will con-
tinue to issue gag orders, but with little like-
lihood that such orders will limit the exposure
of information bound to escape into the
World Wide Web.

2 U.S. CONST. amend. I.
3 Nebraska Press Ass’n, 427 U.S. at 570.
4 Id. at 571.
5 Radio & Television News Ass’n of S. Cal. v. U.S.
Dist. Ct. for Cent. Dist. of Cal., 781 F. 2d 1443, 1447
(9th Cir. 1986).
6 Id. at 1448.
7 In re Russell, 726 F. 2d 1007, 1011 (4th Cir. 1984).
8 In re Application of Dow Jones & Co., Inc., 842 F.
2d 603, 610 (2d Cir. 1988).
9 Id. at 611.
10 United States v. Ford, 830 F. 2d 596, 598(6th Cir.
1987).
11 Id.
12 Id. at 600.
Fla. 1994), quoting News–Journal Corp. v. Foxman,
939 F. 2d 1499, 1515 n.18 (11th Cir.1991).
14 See Bonnie Birdsell, Reevaluating Gag Orders and
Rape Shield Laws in the Internet Age: How Can We
Better Protect Victims? 38 SETON HALL L. J. 71,
81 (2014).
15 Id., quoting Deanne Katz, Sex Assaults Victim
Savanna Dietrich’s Twitter Justice, FindLaw (July 23),
17 Id. at 530.
18 Id. at 360.
19 Id. at 363.
20 In re Warrant to Search a Certain E-mail Account
by Microsoft Corp., 829 F. 3d 197 (2d Cir. 2016).
21 Id. at 229.
22 Tia Goldenberg, Gag orders silence Israeli press in
digital age, Assoc. Press (Feb. 13, 2013), available at
23 Id.
24 Id.
25 Empire State Ethanol & Energy, LLC v. BBI Int’l,
No. 1:08-CV-623 GLS/DRH, 2009 WL 790962, at
*10 (N.D. N.Y. Mar. 20, 2009)
26 Id.
27 Id.
28 Id. at *11, quoting Press–Enterprise Co. v. Superior
Ct., U.S. 1, 15, 106 S. Ct. 2735, 92 L. Ed.2d 1 (1986).
29 Id., citing In re Application & Affidavit for a Search
Warrant, 923 F. 2d 324, 329 (4th Cir. 1991).
30 Oracle Am., Inc. v. Google Inc.,172 F. Supp.3d
1100 (N.D. Cal. 2016).
31 Id. at 1103.
32 Id.
33 Id.
35 Marshall, Thurgood, Reflections on the Bicentennial
of the United States Constitution (May 6, 1987), avail-
several decades, asbestos-related personal injury claims have been an active area of litigation nationwide, including in California. To this day, courts across the country continue to decide issues of importance in this area of the law, often with ramifications beyond asbestos litigation. Recent appellate decisions in California, including by the California Supreme Court, have addressed a variety of issues in the context of asbestos injury claims: liability for injuries from secondary or “take-home” exposure to asbestos, the scope and operation of the sophisticated intermediary doctrine as a product liability defense, and proof of causation.

In recent years, courts in California and elsewhere have addressed “whether employers or landowners owe a duty of care to prevent secondary exposure to asbestos.”1 This type of “exposure, sometimes called domestic or take-home exposure, occurs when a worker who is directly exposed to a toxin carries it home on his or her person or clothing, and a household member is in turn exposed through physical proximity or contact with that worker or the worker’s clothing.”2

The first published California appellate decision to address this issue in the asbestos context was Campbell v. Ford Motor Company3 in 2012. In Campbell, plaintiff Eileen Honer alleged that she developed “mesothelioma as a result of her exposure to asbestos from laundering her father’s and brother’s asbestos-covered clothing during the time they worked with asbestos as independent contractors hired by Ford [Motor Company] to install asbestos insulation at its Metuchen, New Jersey plant.”4 On appeal following a jury verdict and judgment in Honer’s favor, Ford argued that “it owed Honer no duty as a matter of law because a ‘property owner is not responsible for injuries caused by the acts or omissions of an independent contrac-

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A defendant asserting the sophisticated intermediary doctrine must do more than simply show "that the user is an employee or servant of the sophisticated intermediary."

Beginning its duty analysis with the general duty of care in Civil Code Section 1714(a), that "'[e]veryone is responsible...for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person,'" the court of appeal considered whether there was justification for a categorical exception to this fundamental duty rule for take-home asbestos injuries. In the factors identified in Rowland v. Christian, finding that an exception was warranted, the court held that "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business."9 In reaching its decision, the court found that two of the Rowland factors—the burden to the defendant and the consequences to the community—weighed heavily against a duty of care because "it is hard to draw the line between those non-employee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed," and because "[t]he gist of the matter is that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope."10

Two years after Campbell, two court of appeal decisions reached divergent conclusions on the take-home duty issue. In Kesner v. Superior Court, Johnny Kesner developed and died from mesothelioma allegedly caused by exposure to asbestos carried home on his uncle's clothing from his employment with the defendant, a manufacturer of asbestos-containing brake linings. Relying on Campbell, the trial court ruled that the defendant did not owe a duty of care to Kesner and granted a nonsuit for the defendant. The First District Court of Appeal reversed the judgment, holding that there was a duty of care. In reaching its decision, the court of appeal acknowledged that "the prospect of 'indeterminate liability' places a limitation on those to whom the duty of exercising reasonable care may extend."12 The court also "recognize[d] the difficulty in articulating the limits of that duty and the different conclusions that courts throughout the country have reached when considering claims for secondary exposure to toxics, particularly asbestos, emanating from the workplace."13 These considerations, however, did not justify a categorical no-duty rule under the Rowland factors. While "the duty of care undoubtedly does not extend to every person who comes into contact with an employer's workers," the court held that "the duty runs at least to members of an employee's household who are likely to be affected by toxic materials brought home on the worker's clothing."14 Although Kesner "was not a member of his uncle's household in the normal sense, he was a frequent visitor, spending several nights a week in the home."15 Balancing these circumstances under the Rowland analysis, the court held that "the likelihood of causing harm to a person with such recurring and non-incidental contact with the employer's employee...[w]as sufficient to bring Kesner within the scope of those to whom the employer...owes the duty to take reasonable measures to avoid causing harm."16

The court of appeal in Kesner distinguished Campbell because Campbell involved a claim for premises liability "based on Ford's passive involvement as owner of the plant in which an independent contractor was installing asbestos insulation."17 In contrast, the claim in Kesner arose out of the defendant's own use of asbestos in its manufacturing operations, a distinguishing circumstance that resulted in a different balance under the Rowland factors. That balance, the court concluded, did "not lead to the conclusion that an employer responsible for exposing its employees to a toxin such as asbestos, or for failing to warn or take reasonable protective measures, bears no responsibility to any nonemployee foreseeably affected by exposure to the toxin."18

Shortly after Kesner, the Second District Court of Appeal issued a divided opinion on the take-home duty issue in Haver v. BNSF Railway Company.19 In Haver, Lynne Haver died from mesothelioma allegedly caused by exposure to asbestos carried home by her husband from his employment with the defendant railroad. Relying on Campbell, the defendant demurred to the plaintiffs' complaint, arguing that it did not have a duty to protect Haver from exposure to asbestos used in its business operations. The trial court agreed and sustained the demurer without leave to amend.

Finding no basis to distinguish or disagree with Campbell, the majority held that the defendant did not owe Haver a duty of care and affirmed the judgment. Similar to Campbell, the majority expressed concern about "the consequences of extending employers' liability too far."20 The majority also distinguished Kesner on the ground that Kesner involved a claim for products liability, not premises liability, which was the claim in Haver. The dissent disagreed, finding that the defendant had a duty to protect Haver from asbestos exposures resulting from its negligent use of asbestos in its business. The dissent found that the defendant's "duty arises from Civil Code section 1714, subsection (a), which makes everyone responsible for injuries caused by his or her negligence," that the Rowland factors did not support a categorical exception to this fundamental duty rule for take-home asbestos injury claims, and that Kesner was correctly decided and indistinguishable.

To resolve the discrepancy between Kesner and Haver, the California Supreme Court granted review in both cases and consolidated them for argument and decision. Concluding that the Rowland factors did not justify a categorical no-duty rule, but instead called for a limitation on the class of persons to whom a duty of care is owed, the court said: We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to
intermediary doctrine, a product supplier is only required to warn about the product’s particular hazards. To provide an adequate warning to the intermediary purchaser or by selling to a sophisticated purchaser.

2. The factors identified in Rowland v. Christian, 69 Cal. 2d 108, 112-13 (1968), are used to determine whether there has been a breach of the duty of care in a negligence action.

3. Secondary or “take-home” exposure to asbestos, in the context of asbestos personal injury litigation, generally refers to a person’s exposure to asbestos from physical proximity to or contact with another person who was exposed to asbestos in the course of that person’s work activities.

4. Under California law, employers and landowners owe a duty of care to prevent take-home exposure to asbestos.

5. Under California law, the duty of care to prevent take-home exposure to asbestos extends to all persons injured from such exposure.

6. Whether a person is a member of a worker’s household, for purposes of the duty of care to prevent take-home exposure to asbestos, depends solely on whether the person has a traditional family or biological relationship with the worker.

7. California is the only state that recognizes a duty of care to prevent take-home exposure to asbestos.

8. The sophisticated intermediary doctrine addresses the circumstances under which a product supplier can discharge its duty to warn end users about the hazards of its product by conveying warnings to an intermediary purchaser or by selling to a sophisticated purchaser.

9. The sophisticated intermediary doctrine is an affirmaive defense that the product supplier has the burden of proving.

10. To discharge its duty to warn under the sophisticated intermediary doctrine, a product supplier must always provide an adequate warning to the intermediary purchaser about the product’s particular hazards.

11. To discharge its duty to warn under the sophisticated intermediary doctrine, a product supplier is only required to show that it provided an adequate warning to the intermediary purchaser or sold to a sophisticated purchaser.

12. In a claim for injury by an employee of an intermediary purchaser, a product supplier can establish a defense under the sophisticated intermediary doctrine based solely on evidence that the purchaser-employer was sophisticated.

13. Either direct or indirect (circumstantial) evidence can be used to prove the reliance element of the sophisticated intermediary doctrine.

14. Under the sophisticated intermediary doctrine, whether a product supplier actually and reasonably relied on an intermediary to convey warnings to end users typically raises questions of fact for the jury to determine.

15. To prove causation in an asbestos-related injury case, the plaintiff must first prove some exposure to asbestos from the defendant’s product and must then prove that the exposure was, in reasonable medical probability, a substantial factor in bringing about the injury.

16. To establish causation in an asbestos-related cancer case, the plaintiff is required to prove that asbestos fibers from the defendant’s product were the fibers, or among the fibers, that actually started the process of malignant cellular growth.

17. Causation in an asbestos-related cancer case can be proven by competent expert testimony that every exposure to asbestos contributes to the risk of developing the disease.

18. To prove causation in an asbestos-related injury case, the plaintiff must provide an estimate of the dose of asbestos received from the defendant’s product.

19. In determining causation in an asbestos-related injury case, the jury is required to consider the length, frequency, proximity, and intensity of exposure from the defendant’s product, the particular properties of the product, and any other potential causes of the injury.

20. Only the testimony of a medical doctor can establish causation in an asbestos-related injury case.
premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker’s household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker’s home, it does not extend beyond this circumscribed category of potential plaintiffs.22

Repeating arguments that the courts in Campbell and Haver found persuasive, the defendants claimed “that a finding of duty in these cases would open the door to an ‘enormous pool of potential plaintiffs,’” resulting in “great costs and uncertainty” and “voluminous and frequently meritless claims that will overwhelm the courts.”23 While acknowledging that these arguments “raise legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus,” the California Supreme Court held that they did not “clearly justify a categorical rule against liability for foreseeable take-home exposure.”24 Rather, these “concerns point to the need for a limitation on the scope of the duty here,” which, as noted, the court limited “to members of a worker’s household, i.e., persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time.”25 The court explained that “[t]his limitation comports with our duty analysis under Rowland,” because it “strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims.”26

As to the question of who is, and is not, a member of a worker’s household, the supreme court offered guidance by explaining that “[b]eing a household member refers not only to the relationships among members of a family, but also to the bonds which may be found among unrelated persons adopting nontraditional and quasi-familial living arrangements.”27 The court also observed that, “in other legal contexts, the term ‘household’ refers to persons who share ‘physical presence under a common roof’”28 or to “relationships aimed at common subsistence.”29 Additionally, the court recognized that “[t]he cause of asbestos-related diseases is the inhalation of asbestos fibers; [and that] the general foreseeability of harm turns on the regularity and intimacy of physical proximity, not the legal or biological relationship, between the asbestos worker and a potential plaintiff.”30

Accordingly, based on the supreme court’s decision in Kesner, California now “stand[s] in harmony” on the take-home duty issue with other states “that have adopted a general principle of tort liability analogous to section 1714 or that allow recovery, as...in Rowland, for foreseeable categories of injury regardless of the relationship of the parties.”31 Litigation on this subject will undoubtedly continue, including as to foreseeability and household member status,32 but the existence of a duty of care in this context is now settled law in California.

Sophisticated Intermediary Doctrine

A recurring question in asbestos injury litigation over the past several years has been whether a product manufacturer or supplier can satisfy its duty to warn ultimate users of the hazards of its product by conveying warnings to an intermediary purchaser or by selling to a sophisticated intermediary. This issue was recently addressed by the California Supreme Court in Webb v. Special Electric Company, Inc.33

In Webb, plaintiff William Webb developed mesothelioma from exposure to asbestos-cement pipe manufactured by Johns-Manville Corporation using raw asbestos supplied by defendant Special Electric Company, Inc. Webb and his wife filed suit against Special Electric and others alleging, among other theories, that Special Electric was liable for failing to warn Webb of the dangers of the asbestos it supplied. During trial, Special Electric moved for nonsuit and a directed verdict on plaintiffs’ failure-to-warn claims on the ground “that it had no duty to warn a sophisticated purchaser like Johns-Manville about the health risks of asbestos.”34 Construing the motions as a posttrial motion for judgment notwithstanding the verdict, the trial court granted the motions and entered judgment for Special Electric. The court of appeal reversed the judgment, holding that “the entry of JNOV was improper because substantial evidence demonstrated that Special Electric breached a duty to warn Johns-Manville and foreseeable downstream users like Webb about the risks of asbestos exposure.”35

In the supreme court, the court phrased the issue as follows: “[W]hen a company supplies a hazardous raw material for use in making a finished product, what is the scope of the supplier’s duty to warn ultimate users of the finished product about risks related to the raw material?”36 As the court explained, the answer to that question “implicates a defense known as the sophisticated intermediary doctrine,”37 which the court examined, adopted, and applied to affirm the judgment of the court of appeal.

The supreme court began its analysis of the sophisticated intermediary doctrine by first looking at several other product liability defenses. Next, it reviewed the doctrine’s origins in the Restatement (Second) of Torts,38 its prior application in California case law, and its most recent iteration in the Restatement (Third) of Torts.39 The court then formally adopted the doctrine as an affirmative defense and articulated a two-part test for its application:

We now formally adopt the sophisticated intermediary doctrine as it has been expressed in the Restatement provisions just discussed. Under this rule, a supplier may discharge its duty to warn end users about known or knowable risks in the use of its product if: (1) provides adequate warnings to the product’s immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger, and (2) reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product.

Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings.40

To satisfy the doctrine’s first prong, the supreme court held that “generally the supplier must have provided adequate warnings to the intermediary about the particular hazard.”41 As a “limited exception,” the court recognized that “[i]n some cases the buyer’s sophistication can be a substitute for actual warnings, but this...only applies if the buyer was so knowledgeable about the material supplied that it knew or should have known about the particular danger.”42 If “[t]his narrow exception” applies, “the seller is not required to give actual warnings telling the buyer what it already knows.”43 In all other instances, however, the supplier must provide the buyer with adequate warnings of the product’s specific dangers.

To satisfy the doctrine’s second prong, the supreme court made clear that a product supplier cannot simply show that it warned or sold to a sophisticated intermediary. “To establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users.”44 “Several factors are relevant in deciding whether it is reasonable for a supplier to rely on an intermediary to provide a warning,” including “the gravity of the risks posed by
the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.”64 Whether there was actual and reasonable reliance “will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed.”65

In applying the doctrine to the case at issue, the supreme court first noted that Special Electric “arguably forfeited the sophisticated intermediary defense by failing to present it to the jury.”47 “Assuming the defense was preserved,” the court held that “the record [did] not establish as a matter of law that Special Electric discharged its duty to warn by reasonably relying on a sophisticated intermediary.”48 The court observed that the evidence was in dispute as to whether Special Electric provided consistent warnings to Johns-Manville; that while the evidence showed that Johns-Manville had knowledge “of the risks of asbestos in general,” it did not establish that Johns-Manville “knew about the particularly acute risks posed by the crocidolite asbestos Special Electric supplied”; and that “the record [did] not establish as a matter of law that Special Electric actually and reasonably relied on Johns-Manville to warn end users like William Webb about the dangers of asbestos.”69 As to the reliance requirement, the court explained that although “direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago[,]...actual reliance is an inference the factfinder should be able to draw from circumstantial evidence about the parties’ dealings.”50 The trial record, however, was “devoid of evidence supporting such an inference.”51

Finally, when the defendant supplies a raw material to the purchaser for use in manufacturing a finished product, as was the case in Webb, the supreme court noted that, “[i]n addition to users of finished products incorporating the raw material, employees of the purchaser may also encounter the raw material in their work,” and that “[t]he question there is whether the supplier’s duty to warn extends to its customers’ employees.”52 Although the Webb court did not express any view on the application of the sophisticated intermediary doctrine in that context, it did cite and quote with approval from Pfeifer v. John Crane Inc.,53 another asbestos case that directly addressed the doctrine’s application to a claim by an employee of an intermediary purchaser.

In Pfeifer, the court of appeal held that a defendant asserting the sophisticated intermediary doctrine must do more than simply show “that the user is an employee or servant of the sophisticated intermediary.”54 There must also be proof that the defendant had reason to believe that the intermediary would act to protect the employee from the hazards of defendant’s product. As the court stated:

Accordingly, to avoid liability, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item’s hazards. In view of this requirement, the intermediary’s sophistication is not, as a matter of law, sufficient to avert liability; there must be a sufficient reason for believing that the intermediary’s sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner. The fact that the user is an employee or servant of the sophisticated intermediary cannot plausibly be regarded as sufficient reason, as a matter of law, to infer that the latter will protect the former. We therefore reject JCI’s contention that an intermediary’s sophistication invariably shields suppliers from liability to the intermediary’s employees or servants.55

Under Webb and Pfeifer, suppliers of asbestos or asbestos-containing products can assert the sophisticated intermediary doctrine as an affirmative defense to product liability failure-to-warn claims, provided they can satisfy its elements. Those elements, however, are fact-intensive and, in most instances, will raise questions of fact for the jury to determine, assuming the defendant has presented sufficient evidence for an instruction on the doctrine.

Almost 20 years ago, in Rutherford v. Owens-Illinois, Inc.,56 the California Supreme Court established the standard for proving causation in asbestos-related injury cases: In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant’s defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a ‘legal cause’ of his injury, i.e., a substantial factor in bringing about the injury.57 As to “asbestos-related cancer case[s],” the court held that the plaintiff is not required to “prove that fibers from the defendant’s product were the ones, or among the others, that actually began the process of malignant cellular growth,” but may instead “meet the burden of proving that exposure to defendant’s product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff’s or decedent’s risk of developing cancer.”58 The court explained that “[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be

“The substantial factor standard [requires] only that the contribution of the individual cause be more than negligible or theoretical.”
effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, Rutherford acknowledges the scientific debate between the “every exposure” and “insignificant exposure” camps, and recognizes that the conflict is one for the jury to resolve.66

Additionally, the court found that Union Carbide’s argument “ignores the distinction Dr. Mark drew between significant exposures that contributed to Mr. Izell’s risk of contracting the disease and ‘trivial exposures’ that would not have been substantial factors increasing his risk.”67

In Davis v. Honeywell Int’l Inc.,68 decided less than two years after Icel, the defendant, Honeywell International Inc., argued that the trial court should have excluded expert medical testimony based on the every exposure theory under Sargon Enterprises, Inc. v. University of Southern California,69 because the testimony was “speculative,” “devoup of evidentiary and logical support,” and “contrary to California causation law as set forth in Rutherford.”70 After “review[ing] much of the commentary and scientific literature cited in support of and against the ‘every exposure’ theory,” the court of appeal held that the trial court did not err in allowing the testimony because “the theory is the subject of legitimate scientific debate.”71

Explaining that “the trial court ‘does not resolve scientific controversies’” in determining the admissibility of expert testimony, the court held that “it is for the jury to resolve the conflict between the every exposure theory and any competing expert opinions.”72

‘Every Exposure’ Theory
With respect to Rutherford, Honeywell argued that “the ‘every exposure’ theory does not satisfy the supreme court’s direction in Rutherford that a causation analysis must proceed from an estimate concerning how great a dose was received.”73 Rejecting this argument, the court held that:

Rutherford does not require a “dose level estimation.” Instead, it requires a determination, to a reasonable medical probability, that the plaintiff’s (or decedent’s) exposure to the defendant’s asbestos-containing product was a substantial factor in contributing to the risk of developing mesothelioma. The Rutherford court itself acknowledged that a plaintiff may satisfy this requirement through the presentation of expert witness testimony that “each exposure, even a relatively small one, contributed to the occupational ‘dose’ and hence to the risk of cancer.”74

Finally, Honeywell argued that the trial court erred in refusing its proposed instruction on causation “because the instruction set forth ‘the requirement in Rutherford that causation be decided by taking into account “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed.”’”75 The court disagreed, explaining that “Rutherford does not require the jury to take these factors into account when deciding whether a plaintiff’s exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion.”76 While Honeywell was free to discuss during its closing argument the factors set forth in its proposed instruction as factors the jury might consider in assessing the credibility of Dr. Strauchen’s opinion testimony, instructing the jury on those factors was not required.”77

In Hernandez v. Amcord, Inc.,78 the trial court granted the defendant’s motion for nonsuit, finding that the plaintiff had failed to present evidence establishing substantial factor causation in accordance with Rutherford. One of the plaintiff’s medical experts, Dr. Richard Lemen, had a “degree of Ph.D., rather than M.D.,” but according to the trial court, Rutherford requires “a doctor of some kind, somebody with an M.D. after his name,” to establish substantial factor causation.79 The trial court “also expressed concern that Dr. Lemen used the words ‘reasonable scientific certainty’ and did not ‘utter the words “reasonable degree of medical probability.”’”80

Disagreeing with the trial court, the court of appeal held that Rutherford does not “mandate[] that a medical doctor must expressly link together the evidence of substantial factor causation.”81 Nor did Rutherford “create a requirement that specific words must be recited by appellant’s expert” or that “the testifying expert in asbestos cases must always be ‘somebody with an M.D. after his name.’”82 Explaining that Rutherford’s “reference to ‘medical probability’ in the [causation] standard “is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence,””83 the court held that “medical evidence does not necessarily have to be provided by a medical doctor.”84

Accordingly, although established by the California Supreme Court almost 20 years ago, the scope and operation of the Rutherford causation standard remains a subject of frequent litigation in California. Because of the decades-long latency ordinarily associated with asbestos-related diseases, asbestos injury litigation is likely to continue for a number of years, and the questions of causation, take-home asbestos injury liability, and the sophisticated intermediary defense are some of the key issues that courts in California and across the nation will continue to address in this area of the law.

1 Kesner v. Superior Ct., 1 Cal. 5th 1132, 1140 (2016); see id. at 1161-65 (discussing non-California cases).
2 Id. at 1140.
3 Campbell v. Ford Motor Co., 206 Cal. App. 4th 15 (2012), disapproved in Kesner, 1 Cal. 5th at 1156. An earlier case, Oddone v. Superior Ct., 179 Cal. App. 4th 813 (2009), disapproved in Kesner, 1 Cal. 5th at 1156, also addressed the issue of take-home exposure liability, but not in the asbestos context. The alleged exposures in Oddone involved toxic chemicals used in processing motion picture film. Id. at 815-16.
5 Id. at 29.
6 Id.
7 Id. at 26 (quoting Cabral v. Ralphs Grocery Co., 51 Cal. 4th 764, 771 (2011)).
8 Rowland v. Christian 69 Cal. 2d 108 (1968). In Rowland, the California Supreme Court explained that “[a] departure from this fundamental principle [in Civil Code section 1714(a)] involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.” Id. at 112-13. The court has instructed that, “in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where “clearly supported by public policy.”” Cabral v. Ralphs Grocery, 51 Cal. 4th 764, 771 (2011) (quoting Rowland, 69 Cal. 2d at 112).
9 Campbell, 206 Cal. App. 4th at 29-34.
10 Id. at 32-33 (quoting Oddone v. Superior Ct., 179 Cal. App. 4th 813, 822 (2009)).
13 Id.
14 Id.
15 Id.
16 Id; see id. at 236-61 (court’s analysis of Rowland factors).
17 Id. at 258.
18 Id. at 258-59 (emphasis in original).
22 Kesner, 1 Cal. 5th at 1140; see id. at 1145-58 (court’s analysis of Rowland factors).
23 Id. at 1153.
24 Id. at 1154.
25 Id. at 1154-55.
26 Id. at 1155. The supreme court disapproved Campbell and Oddone “to the extent they are inconsistent with this opinion” in Kesner. Id. at 1156.
ings are not required if the intermediary was so sophisticated in its evaluation. A warning to the intermediary will be necessary, warns the court in *Webb* at 176-77. 38 *Webb*, 63 Cal. 4th at 187 (emphasis in original). 39 In *Stewart v. Union Carbide Corp.*, 190 Cal. App. 4th 71, 79 (1999) (“a very minor force that does cause harm is a substantial factor,” citing *Rutherford*).

31 *Kesner*, 1 Cal. 5th at 1155 (citing *Safeco Ins. Co. of Am.* v. Parks, 122 Cal. App. 4th 779, 792 (2004)). 32 For example, the supreme court’s remand of the *Kesner* case “for further proceedings…included, if appropriate, a remand to the trial court for the parties to submit additional evidence on whether Johnny Kesner was a member of George Kesner’s household for purposes of the duty we recognize here.” *Id.* at 1165.

33 Webb v. Special Elec. Co., Inc., 63 Cal. 4th 167 (2016). 34 *Id.* at 178. 35 *Id.* at 179. 36 *Id.* at 176. 37 *Id.* 38 *Restatement (Second) of Torts, §388, cmt. n.* 39 *Restatement (Third) of Torts, Products Liability, §2, cmt. i (1998) [hereinafter *RESTATEMENT (THIRD)*].

32 *Id.* at 189. 40 *Id.* at 176. 41 *Id.* at 190 (quoting *RESTATEMENT (THIRD)*, supra note 39); *see also Webb*, 63 Cal. 4th at 177.

42 Id. 43 *Webb*, 63 Cal. 4th at 189-90. 44 *Id.* at 192. 45 *Id.* 46 *Id.* at 192-93 (emphasis in original).

47 *Id.* at 193. 48 *Id.* 49 *Id.* 50 *Id.* 51 *Id.* 52 *Id.* at 185 n.9. 53 *Pfeifer v. John Crane Inc.*, 220 Cal. App. 4th 1270 (2013).

54 *Id.* at 1296-97. 55 *Id.* (footnote omitted); *see also id.* at 1280 (“We hold that when a manufacturer provides hazardous goods to a ‘sophisticated’ intermediary that passes the goods to its employees or servants for their use, the supplier is subject to liability for a failure to warn the employees or servants of the hazards, absent some basis for the manufacturer to believe the ultimate users know or should know of the hazards.”); *Webb*, 63 Cal. 4th at 189 (quoting *Pfeifer*, 220 Cal. App. 4th at 1296-97).


57 *Id.* at 982 (emphases in original) (footnote omitted).

58 *Id.*; *see also id.* at 957-58. 59 *Id.* at 978; *see also Bockrath v. Aldrich Chem. Co.*, 21 Cal. 4th 71, 79 (1999) (“a very minor force that does cause harm is a substantial factor,” citing *Rutherford*).

60 *Rutherford*, 16 Cal. 4th at 969; *see Jones v. John Crane Inc.*, 132 Cal. App. 4th 990, 999-1000 (2005) (“We heed the admonition in *Rutherford* to be wary of the misapplication of the substantial factor test”) (footnote omitted).


62 *Id.* at 976.

63 *Id.* 64 *Id.* at 976-77.

65 *Id.* at 977.

66 *Id.* (citing *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 984-85 (1997)).


70 *Davis*, 245 Cal. App. 4th at 480.

71 *Id.; see id.* at 486-94 (court’s analysis of issue).

72 *Id.* at 480 (quoting *Sargent*, 55 Cal. 4th at 772).

73 *Davis*, 245 Cal. App. 4th at 492.

74 *Id.* at 492-493 (citations omitted).

75 *Id.* at 495.

76 *Id.* 77 *Id.* at 497.


79 *Id.* at 668.

80 *Id.* 81 *Id.* at 675.

82 *Id.*
by KARLA GILBRIDE and ARTHUR H. BRYANT

Loosen the Bonds

Complaints arising from arbitration clauses that prohibit litigating claims in court may still be filed with government agencies or on behalf of the general public.

Arbitration is an alternative dispute resolution system that people or organizations can agree to use as a precondition to litigation, a settlement strategy once litigation has begun, or increasingly as a binding alternative to litigation. It usually resembles courts in that an arbitrator hears an adversarial presentation of arguments and evidence before ruling on the dispute. Few rules govern how arbitration must operate. Rather, the parties can decide how the system will work, who the arbitrator(s) will be, and what rules will apply. In many arbitrations, the decisions and awards are kept confidential, and unless the arbitration clause requires it, arbitrators do not have to explain the reasons for their decisions in writing or follow legal precedents. Appellate rights also vary with the terms of each clause, but for the most part they are very limited.

Originally, arbitration was a way for merchants and businesses to resolve contractual disputes. However, courts were hesitant to enforce agreements to arbitrate, likely because of an old common law rule prohibiting private parties from ousting courts of their jurisdiction. Thus, in 1925, Congress passed the Federal Arbitration Act (FAA), which directed courts to enforce arbitration agreements in the same way they would enforce any other contract.1

The legislative history of the FAA reveals that the statute was limited in scope: it was meant to ensure that federal courts had the power to enforce businesses’ voluntary agreements to arbitrate.2 Indeed, the law’s proponents “emphatically” rejected the idea that the law would apply to contracts “offered on a take-it-or-leave-it basis to captive customers or employees.”3 They also made clear that arbitration was meant to settle commercial disputes, not constitutional or statutory claims.4 Finally, the FAA’s drafters stated on the record that the FAA was not intended to displace state law.5

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For years, the statute was enforced more or less the way it was written, but, in the 1980s, the conservative wing of the U.S. Supreme Court began expanding arbitration into areas in which the bargaining power between parties can be unbalanced. It did so by holding that, even though the FAA said that arbitration contracts should be treated like other contracts, the statute actually reflected a federal policy in favor of arbitration. The Supreme Court held that arbitration provisions in take-it-or-leave-it consumer and employment contracts are enforceable against individual litigants, that arbitrators can hear statutory claims as well as contract claims, and that state laws seeking to regulate arbitration by requiring arbitration clauses to be more prominent than other types of contract terms are preempted by the FAA.

In the last 10 years, the Supreme Court—in a series of 5-4 decisions written by the late Justice Antonin Scalia—continued to push the boundaries of arbitration jurisprudence. In Rent-A-Center v. Jackson, for example, the Court held that contracts can require that an arbitrator rather than a judge will decide whether an arbitration provision is enforceable in the first place. That same opinion held that a contractual provision delegating questions of an arbitration clause’s scope or enforceability to the arbitrator must be enforced even if the whole contract may be invalid.

The next year, in another 5-4 opinion in AT&T Mobility LLC v. Concepcion, the Supreme Court majority held that a California law forbidding class action waivers in consumer contracts of adhesion, regardless of whether those adhesive contracts also required arbitration, was preempted by the FAA because such a neutral law would disadvantage arbitration, which is intended to be simpler and faster than court and is thus incompatible with class action procedures. Finally, in American Express Co. v. Italian Colors Restaurant, Justice Scalia, again writing for five justices, held that small businesses were precluded by an arbitration clause with a class action ban (waiver) from joining together to prosecute their antitrust claims, even though the expert fees and other costs associated with pursuing those claims would have been 10 times the amount that any individual business could recover because it was still possible, if economically infeasible, for the businesses to vindicate their statutory rights in the arbitral forum.

These expansions of the Court’s arbitration jurisprudence have spurred corporations to insert predispute arbitration clauses, which are usually accompanied by class action bans (or waivers), into form contracts governing almost every aspect of modern life. A closer look at the mechanics of forced arbitration will show how these provisions play out in the context of real-world disputes between corporations and consumers, employees, and small businesses.

**Effects of Forced Arbitration**

When the parties to a contract have comparable bargaining power and agree in an arm’s-length negotiation about how to resolve their disputes, arbitration can work well. For example, arbitration provisions are common in collective bargaining agreements negotiated between unions and employers, and businesses often agree in advance to arbitrate disputes that may arise between them. The informality of arbitral proceedings can make arbitration faster and cheaper than litigation, and the ability to pick industry specialists to decide a matter can be more appealing than a trial before a generalist judge or a jury of laypeople. When a corporation is facing off against an individual or a small business, however, arbitration may favor the side that wrote the agreement and designed the system.

Features that make arbitration attractive in a complex technical dispute between equals or when there is a long bargaining history do not translate as well to disputes between cable companies and their customers or between nursing homes and the families of residents who died under their care.

As the Supreme Court has emphasized, arbitration is a “matter of consent, not coercion,” because it fundamentally is a matter of contract. When individual consumers, employees, or small businesses contract with large corporations, there may be no meaningful way for the smaller party to negotiate the terms of the deal. The corporations write the rules and thus have the opportunity to maximize their chances of success. For example, when consumers purchase a product or sign up for a service that comes with a mandatory arbitration provision, the circumstance is particularly tenuous because the agreement is achieved by an act as simple as clicking an “accept” button on a website or smartphone app (clickwrap) or sometimes even by visiting the website in which a link to the arbitration provision can be found without taking any additional steps (browsewrap). Indeed, a body of law has developed that concerns when a clickwrap agreement is sufficiently conspicuous to create a contract and when it is not. Generally, the browsewrap agreement has been found unenforceable. Contrast this with the “voluntary, knowing, and intelligent” standard used to test whether criminal defendants agreed to waive their Fifth Amendment rights. If that standard applied to determining whether consumers, workers, and small businesses were waiving their Seventh Amendment right to a jury trial, most arbitration clauses would not be enforced. Arbitration jurisprudence is based on the proposition that both parties are consenting to enter into a contract in which they are knowingly waiving certain rights, which for consumers and employees may not always be true.

Most arbitral services are for-profit entities, and regardless of the arbitral provider’s structure, all arbitrators rely on repeat business. Their primary customers are corporations that write arbitration clauses into their contracts. Arbitrators’ livelihoods depend on being hired to arbitrate disputes. The structural incentives are clear: arbitrators who give repeat clients favorable decisions are more likely to be hired again. In interviews with The New York Times, over 30 arbitrators admitted that there was real pressure on them to rule for corporations over consumers or employees. Researchers have been able to document this repeat player effect in arbitration results—consumers and employees are more likely to lose when they face corporations that have appeared before the same arbitrator in the past.

Arbitrators are not subject to the same ethics rules as judges, and, due to confidentiality concerns, arbitration is frequently conducted in secret. Moreover, judicial review is so limited and deferential that even decisions that violate the law may be allowed to stand. Thus, a system often characterized by diminished ethical standards, secret proceedings, and minimal review can present fertile ground to conceal and perpetuate bias, making it difficult at times to separate arbitrators who are doing their best to remain fair and impartial from those who are not.

These are not just theoretical concerns. For years, the largest provider of consumer arbitration in the country was the National Arbitration Forum (NAF). The NAF had direct financial ties to a major debt collector whose cases it arbitrated, and it marketed itself directly to creditors. Unsurprisingly, debt collectors sent the NAF hundreds of thousands of cases a year, and the NAF ruled for the collectors almost every time. These practices were stopped in 2009 when the Minnesota attorney general sued the NAF for fraud, leading to a consent decree under which the NAF agreed to stop handling consumer disputes. The same structural incentives and lack of oversight can be found today as when the NAF was in its prime, and as long as most arbitration proceedings remain shrouded in secrecy, it is difficult to determine whether this unfortunate history is repeating itself.

Most arbitration proceedings are conducted under strict confidentiality and secrecy rules with the result that the allegations, evidence, reasoning, and awards are kept out of public view. Depriving the public of this
information introduces an element of risk that others may be harmed by the practices that are the subject of the secret arbitration and prevents customers and investors from voting with their pocketbooks by choosing not to do business with companies that have been accused of misconduct.22

The secrecy that often characterizes arbitration impedes the development of the law. Without public opinions and awards, important areas of consumer and employment law are stunted for lack of information about factually similar cases. As arbitration clauses proliferate, the amount of valuable decisional information that is removed from these areas of law only grows, because fewer disputes are being resolved by judges whose opinions are public.

While the informality of arbitration can make it cheaper and faster than court, there are important caveats to this supposed benefit. First, there is no guarantee as to which, if any, procedural safeguards will apply. Some arbitration firms like the American Arbitration Association have detailed rules of procedure and evidence that mimic those found in court. But arbitration may also go forward with no rules at all, or with rules that may be dictated in the contract by the corporation that will later be participating in the arbitration as a party. For example, under some arbitration provisions, discovery is limited to one or two depositions or five document requests, or discovery may be prohibited altogether. There is usually no possibility to appeal an arbitrator’s decision, even if it is contrary to law.23 Arbitrators are not required to provide a written opinion explaining the reasons for their award unless the particular contract requires one.24 Even then the parties have to pay extra for the time it takes the arbitrator to write the opinion.

While the overall costs of arbitration may be low compared with traditional litigation, the actual costs for an individual or small business may be much higher. Arbitrators are paid for their services by the parties, and these services can be extremely expensive, often several hundred dollars per hour or more. Unlike the American rule in which each party pays its own attorneys’ fees, or the one-way statutory fee-shifting that requires defendants to pay the plaintiff’s attorneys’ fees if the plaintiff prevails, some arbitration provisions include two-way fee-shifting provisions that require the loser to pay the winner’s attorneys’ fees, which could be onerous if the corporation wins and the consumer or employee loses. The loser-pays provisions have a natural chilling effect on claim filing and may explain why fewer than 2000 employees initiated arbitration per year compared with 30,000 annually who filed federal lawsuits and nearly 100,000 annually who filed complaints with the Equal Employment Opportunity Commission (EEOC).25

The claim-suppressing effects of forced arbitration provisions are magnified when they are coupled with provisions banning the claims of more than one person from being arbitrated together and banning any other class or collective proceeding. These arbitration-class action ban combinations have become increasingly common in the aftermath of the Supreme Court’s decisions in Concepcion and Italian Colors. As a practical matter, they immunize their corporate drafters from almost all legal challenges from consumers and most challenges from employees, because when companies take small amounts of money from large numbers of people, as Judge Richard Posner of the Seventh Circuit observed, “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.”26

Consumer and employment claims that have sufficiently high value to justify individual litigation or arbitration are rare, and a $30,000 claim is not high-value for large corporations. It would make little difference to a corporate bottom line whether these disputes are resolved in a judicial or arbitral forum. However, a $30 million class claim is another matter. In an attempt to bar this type of claim, a corporation can simply include a phrase in the corporate arbitration clauses banning all class actions in court and in arbitration. For individuals with $30 claims who cannot consolidate their claims with others, the words of Justice Elena Kagan’s dissent in Italian Colors come to mind: “Too darn bad.”27

In 2015, the Consumer Financial Protection Bureau (CFPB) completed a comprehensive study on the use of arbitration clauses in consumer contracts.28 It found that the number of consumers pursuing claims against their financial service or product provider alone but their combination with class action waivers. As a result, on May 5, 2016, the CFPB formally proposed a regulation that would prohibit banks, credit card companies, payday lenders, and others in the industry from banning class actions.29 This proposed regulation has not yet been finalized, and the CFPB will no doubt face legal challenges if and when it publishes a final rule on arbitration. Even if this rule goes into effect, it will not restrict class action bans in mandatory arbitration clauses used by corporations outside of the financial services industry, including phone companies, Internet providers, and employers. Meanwhile, those seeking to get around forced arbitration provisions and preserve access to the courts will have to look to other legal strategies.

Despite Supreme Court decisions that have fostered the spread of forced arbitration, some challenges to unfair arbitration clauses remain viable. Arguments based on contract formation, unconscionability, and the effective vindication of rights can still succeed.30 Also, claims brought by or on behalf of the government are not subject to arbitration.

Since arbitration is based on the agreement of the parties, arbitration cannot be required

The Fourth Circuit recently refused to enforce an arbitration provision that prohibited consumers from bringing any state or federal law claims on the basis that such a provision impermissibly prevents consumers from effectively vindicating their statutory rights.
California courts have found numerous common arbitration terms unconscionable, including clauses that require: limiting the damages a party can receive; California residents to travel to a far-away state to arbitrate; individuals to arbitrate claims but give corporations a choice of arbitration or litigation; individuals to pay excessive fees to arbitrate; and the arbitration to be secret.37 As the California Supreme Court has clarified: “The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.”38

Three pitfalls can threaten an unconscionability challenge. First, unconscionability arguments must be directed solely at the arbitration provision, and not the contract as a whole. A challenge that seeks to invalidate the contract as a whole (other than a challenge about whether a contract was formed) must be decided by the arbitrator; a challenge that seeks to invalidate only the arbitration clause is decided by the court.39 Second, in a strange recursive exercise created by the Supreme Court’s opinion in Rent-A-Center, if the arbitration clause contains a delegation provision saying the arbitrator will decide the validity of the arbitration clause, any challenge must be directed to the delegation provision itself—either that it is unconscionable or that it does not clearly and unmistakably delegate the authority claimed to the arbitrator.40 Unless that delegation provision is invalid, the arbitrator will decide the rest. Finally, because of the Supreme Court’s ruling in Concepcion, arbitration clauses usually cannot be held unconscionable because they eliminate class actions, although the enforceability of the waiver may be undermined by applicable state law.

The Supreme Court has said that if an arbitration clause blocks people from “effectively vindicating” their statutory rights, the clause is unenforceable.41 However, in Italian Colors, Justice Scalia revised this to limit arbitration clauses that block people’s “right to pursue” their statutory remedies.42 The Supreme Court has not yet applied this doctrine to strike down an arbitration clause, but numerous California courts have. For example, in Parada v. Superior Court, the California Court of Appeals weighed the provisions of an arbitration clause against evidence of the plaintiffs’ ability to afford the process the clause mandated.43 The court found that the requirement of a three-arbitrator panel, combined with a preresolution deposit of fees and no meaningful option for waiver of the deposit requirement, put the arbitration far beyond the plaintiffs’ ability to pay, and therefore “would substantially discourage or prevent vindication of statutory rights.”44 Other courts are following similar approaches. The Fourth Circuit recently refused to enforce an arbitration provision that prohibited consumers from bringing any state or federal law claims on the basis that such a provision impermissibly prevents consumers from effectively vindicating their statutory rights.45 In another case, the Tenth Circuit held that a clause in the arbitration provision requiring that the plaintiff-employee bear her own costs in arbitration—including the arbitrator’s fee—blocked her from effectively vindicating her rights because those costs would be too high.46

Even when individuals are prohibited by an arbitration clause from litigating their own claims in court, they are not prevented from filing complaints with government agencies or even pursuing claims on the government’s behalf or on behalf of the general public. As the Supreme Court explained in the context of an employment discrimination claim, an agency like the EEOC is statutorily empowered to investigate and litigate discrimination claims and, as a nonsignatory to any individual employee’s contract, is not bound by an arbitration clause in that contract.47

**Claims Under PAGA**

Similarly, claims under California’s Private Attorneys General Act (PAGA),48 are not preempted by the FAA and cannot be waived by an arbitration clause. As the California Supreme Court reasoned, claims under PAGA are not part of a private dispute between an individual employee and employer but rather between the state labor and workforce development agency and the employer.49 The court explained that, because the FAA is about private disputes between contracting parties, a claim advancing the state agency’s interest in compliance with the Labor Code cannot be waived by an arbitration clause.50 This decision has been followed by the Ninth Circuit Court of Appeals, and the U.S. Supreme Court has declined review.51

More recently, the California Supreme Court reached the same conclusion about arbitration provisions that purport to waive a consumer’s ability to seek public injunctive relief under the Consumers Legal Remedies Act (CLRA)52, the Unfair Competition Law (UCL)53 or the False Advertising Law (FAL).54 When Sharon McGill sued over Citibank’s credit insurance program, Citibank tried to invoke an arbitration clause that, among other things, forbade an arbitrator from granting relief to anyone besides the individual bringing the claim. The California Supreme Court found that this clause prevented consumers from obtaining injunctive relief under the CLRA, UCL, or FAL in any forum, arbitral or judicial, that would benefit the general public. Since ending corporate misconduct in a manner that benefits the public as a whole is one of the goals of all three statutes, such a ban on public injunctive relief was contrary to California public policy.55 While this opinion could affect many arbitration provisions that prohibit broad injunctive relief, its ultimate fate is uncertain as the U.S. Supreme Court may weigh in to establish whether the California policy against public injunction bans is distinguishable from the policy against class action bans in adhesive consumer contracts that was invalidated in Concepcion.

Corporations have argued for years that arbitration is cheaper, faster, and more effec-
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tive than going to court. It may be, for those who truly agree to it, if the system itself is fair, and arbitration is used to resolve claims rather than eliminate them. But corporations’ use of adhesion contracts and fine print to force consumers, workers, and small businesses into arbitration—often without their knowledge and whether they like it or not—is not fair since it flouts the sole legal basis for contractual arbitration, namely, that the parties actually agreed to it. Furthermore, it relegates disputes to a forum with little transparency and limited judicial review. This process takes away important protections like the right to proceed collectively.

To remedy this power imbalance, Congress may need to restore the original limited scope of the Federal Arbitration Act through new legislation, or perhaps the Supreme Court in a future case will put some teeth into the “effective vindication” doctrine. Regulatory efforts by the CFPB and other federal agencies—e.g., the Department of Education—may also curtail the use of arbitration provisions in the industries over which these agencies have authority, as long as Congress and the president allow these regulations to remain in place. Regardless of what the various branches of the federal government do about forced arbitration in the years to come, traditional contract law defenses aimed at formation and unconscionability can continue to provide a bulwark against the further erosion of fundamental rights in the fine print. Of particular interest to California practitioners, the California Supreme Court’s rulings that PAGA claims and claims for public injunctive relief may not be waived through contract offer a public policy-based defense of certain statutory rights.

1 9 U.S.C. §§1 et seq.
9 See e.g., Shearson/Am. Express, 482 U.S. at 226.
12 Id.
17 See, e.g., N. Noble, Inc., 763 F. 3d 1171 (9th Cir. 2014). As explained in the syllabus of the case: “The panel held that there was no evidence that the website user had actual knowledge of the agreement. The panel further held that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—with more—is insufficient to give rise to constructive notice.”
27 See, e.g., Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 448-49 (2006). Note that this principle does not affect the formation challenges discussed above, because those cases argue that no contract was ever formed in the first place, and unconscionability proceeds from the assumption that a contract was formed but it should be voided in whole or in part.
29 American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310-12 (emphasis omitted).
30 Id.
33 Hayes v. Delbert, 811 F. 3d 666 (4th Cir. 2016).
36 LAB. CODE §§2698 et seq.
38 See id. at 388-89.
40 CIV. CODE §§1770 et seq.
41 BIS & PROF. CODE §§17200 et seq.
43 Id.
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Los Angeles Lawyer July/August 2017 39
Transforming a Mediation into a Positive Outcome for All Parties

WHILE NO TWO MEDIATIONS ARE EVER THE SAME, this one looked pretty “normal” in advance: a residential real estate sale involving claims of nondisclosure and concealment of water damage and extensive mold. The parties and lawyers were pessimistic about the prospects of settlement and, as usual, the attorneys initially objected to a joint opening session. It typically is an uphill battle with counsel and clients who think a joint session will exacerbate the dispute, prompt a blow-up, or reveal facts they would rather save for trial.

I strongly favor joint sessions. They allow the parties to observe their opponents as witnesses and the lawyers in action, as well as to informally exchange information, while everyone confronts the discomfort of the adversarial proceeding. Also, it all takes place in a confidential setting in which the parties are not required to settle, but well might.

In this case, the first thing that went right was that all parties and counsel kept an open mind about the joint session. We discussed pros and cons and all agreed to give it a try. Mediation sessions are necessarily flexible, and a good mediator can tell when it is time to separate into caucus.

Part of my regular spiel is to discuss the importance and value of listening to understand as opposed to listening in order to respond. Lawyers are trained to nimbly respond to arguments on the fly. It is difficult to put yourself in the other guy’s shoes, especially if your client is depending on you to set the other guy straight about the facts and be a tough negotiator. This is when determined lawyers and determined clients can be an effective team. Paying close attention to what one’s opponent is saying while trying to discover what he or she really thinks and wants helps solutions emerge, along with an evaluation of what you really think and want.

In this case, it got a little ugly. After all, the buyers were claiming they were deceived. Still, the joint session was civil and polite. The lawyers made full presentations, and the parties asked each other questions. Importantly, the parties and attorneys carefully examined the bases for each side’s position and the circumstances surrounding the sale of the house. I could see each side strategically deciding how to engage, how much to disclose at certain points, and becoming eager to work toward a nonlitigated solution.

The buyers insisted the seller must have been aware of the problem. Off they went to their separate caucus rooms to dig their heels in and maintain their righteousness in private. However, everyone still listened, primarily because the lawyers and parties were well prepared. Their documents, witness interviews, and expert reports were all in order. The lawyers knew their cases and had spent considerable time with their clients before the day of the mediation discussing process, objectives, risks, costs, and alternatives to settlement.

Over the course of the day, as I was shuttling back and forth between rooms and discussing compelling reasons for everyone to move closer to agreement, the gap between demands and offers remained stubbornly large. The lawyers were advising limits; the parties were convinced they were right and their opponents were wrong. They were ready to proceed to arbitration. Still, they listened.

And then it happened.

The day had grown long. The seller and I were chatting about his prior career, his family, and his new home in a new town. (And I did bring out the chocolate.) The seller became very quiet. Then, very slowly, and tearfully, he began to speak words that I believe were the “magic” in this case. He said, “As much as I feel I have been wronged, I can see how [the buyers] feel that they too have been wronged.” He suggested a compromise that I delivered to the other room along with his revelation. That led to more tears…and a settlement.

The agreement was drafted and signed. We had another joint session, followed by handshakes, expressions of gratitude (and awe), and a further agreement of “no hard feelings.”

These people got it. They took responsibility for exploring solutions. They prepared for the mediation independently and with their lawyers. They listened to each other. They turned destructive interaction into constructive cooperation by expanding their perception of the case through flexibility, open-mindedness, listening to understand, and humanizing the ordeal.

It all came together when the parties began to imagine each other’s point of view, even while disagreeing with it. The human interaction between warring counsel and parties allowed them to take a break from the war and discover reasons and ways to close the gap and end the dispute.

This case is cause to celebrate the trust lawyers can place in the parties once they have fully prepared themselves and their clients and set the stage for an empowering process of resolution. This was not just a mutually unhappy result of mediation. Instead, it was a result that reinforced the parties’ self-determination and the usefulness of a relational approach that led to understanding others’ points of view.

That day, everyone got to be a hero. I hope more parties, lawyers, and mediators have incredible days like that one.

BY RANDE S. SOTOMAYOR

Rande S. Sotomayor is a Los Angeles-based mediator, conflict management consultant, and arbitrator.
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