NEUTRAL NOTES

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MEDIATION MUSINGS

I have handled hundreds of mediations at this point in a variety of disciplines and there appear to be certain patterns that make some cases easier or more complicated.

Business Decline/Foreclosure

Unfortunately, there are still countless actions by banks or government institutions to collect on debts. Regardless of how the consumers got into the situation, most are not able to pay the debt or meaningfully handle it. Resolution of these disputes usually breaks down into a variety of categories:

· total intransigence by the lending institution resulting in no resolution;

· complete inability of the debtor to make any payments resulting in no resolution; and

· a fuzzy middle category of ability to make some, albeit limited, payments and mixed responses by lending institutions.

The most constructive resolutions have occurred when lending institutions have recognized that a "deal" is better than simply a judgment and probably no cash. Recently, I have worked with some parties where positive settlements have been structured to include long-term, perhaps never-ending, payouts of low dollar amounts but a full recognition that payment is due and that individuals are struggling but trying to resolve their debts. These types of resolutions have worked on a sliding scale of payments, particularly based on receptivity of the lenders and realistic expectations. Another factor that is of assistance in these matters is where individuals come prepared, particularly if discovery has not taken place, with some income justification, perhaps a budget, income tax filings, and a list of expenses. If the lender is realistically convinced that only limited payments are possible, such a resolution may actually make good business sense.

Complex Litigation Sent Early To Mediation

Case assessment by the mediator is usually critical to gauge how much progress can be made at a early stage. While it is possible, and I have settled a whole range of cases at an initial stage, in complex litigation it is more likely that a measured assessment of the parties' needs, including discovery and other issues, can be helpful. For example, I recently had a matter where there were multiple parties and claims many of which might have been dismissed by motion. Utilizing our mediation constructively resulted in a streamlining of the litigation so the parties could focus on the main issues and parties. Thus, the process saved time and expense litigating issues that were easily resolved at mediation.

Multi-Party Litigation

The most important part of multi-party litigation in mediation is sorting out the various positions and potentialities for settlement. Often, this requires understanding the relationship between client and counsel as well as goals. In a large multi-party complex litigation I generally advise the parties upon selection that the matter is not routine and will require some investment of time to both get up to speed and to be constructive. This strikes me as the first hurdle. Assuming the parties are serious about resolution, all relevant pleadings and some limited discovery should be turned over and reviewed. The mediator can only be as effective as the information submitted to him or her. When I have become familiar with nearly all of the issues and positions, I begin to discern a position that may be palatable to different sides.

I try to think through with the parties, working in what I have called concentric circles of settlement. Overlapping but separate resolutions are often possible and logical. A mediator's role is to assist the parties in moving towards positions that are acceptable to them and that may be acceptable to other parties, assuming progress on multiple issues at the same time. I liken the role

Cont'd on pg. 3, column 1

INSIDE THIS ISSUE:

The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

QUORUM VOTES

The decision by District Judge James E. Boasberg piqued my interest because he referred to Woody Allen in the opening sentence of the decision. Other than that reference, the rest of the decision was a fairly detailed discussion about quorum requirements at the National Labor Relations Board, in Chamber of Commerce of the United States of America and Coalition for a Democratic Workplace v. National Labor Relations Board. In his decision, the Court ruled that no quorum ever existed for the pivotal vote in question and that the challenged rule was invalid.

The Court went through a detailed history of the ability of the Board to function by two-member votes in certain circumstances. The Court reviewed the history of the five-member Board from its founding. The particular rule in question dealt with procedures for resolving disputes about union representation and also commented on the changes in Board composition that were taking place at the time.

The facts appear generally not to be in dispute. On December 22, 2011, the NLRB published a rule that amended the procedures for determining whether a majority of employees wished to be represented by a labor organization for the purposes of collective bargaining. Two of the Board's three members at the time voted in favor of adopting the final rule. The third member of the Board, Brian Hayes, did not cast a vote. Because Hayes had previously voted against initiating the rulemaking and against proceeding with the drafting and publication of the final rule, the Board nevertheless determined that he had effectively "indicated" his opposition.

The Court noted that absent limited circumstances "not present here, the Board must muster a quorum of three members in order to act."

The Court stated that two members of the Board participated in the decision to adopt the final rule but member Hayes could not be counted merely because he held office. His participation in earlier decisions relating to the drafting of the rule was insufficient. The Court stated that "[h]e need not necessarily have voted, but he had to at least show up," thus, the Court's reference to Woody Allen stating that "eighty percent of life is just showing up."

Based upon his failure to just show up, the Court ruled that the Board lacked the to at least show up," thus, the Court's reference authority to issue the final rule in Chamber of Commerce.

Prior to the meeting in question, there was a public meeting on November 30, 2011, and the three then remaining members of the Board considered a resolution to prepare a final rule to be published in the Federal Register to consider eight amendments. Various drafts were circulated on different dates in December up until the draft in dispute. On December 14, 2011, the Chairman distributed, by e-

Cont'd on pg. 3, column 3

THIRD-PARTY CLAIMS

The Appellate Division, in New Jersey, recently dealt with a number of issues regarding securities arbitration and essentially left certain parties without a viable remedy due to the nature of their relationships. In Merrill Lynch, et al. v. Cantone Research, Inc., et al., the Appellate Division reviewed four orders enjoining third-party arbitration claims for contribution and indemnification against Merrill Lynch and Andrew Katchen and denied cross-motions compelling FINRA arbitration.

Merrill Lynch is a securities broker-dealer registered with FINRA as a member firm. Katchen is registered with FINRA as an associated person of Merrill Lynch. Cantone Research, Inc., PNC Investments, LLC, and J.J.B. Hilliard, W.L. Lyons, LLC are securities broker-dealers also registered with FINRA as member firms. Individual defendants were registered with FINRA as associated persons of Cantone Research, Inc.

Four groups of investors filed claims against individual defendant Smith, Merrill Lynch, and defendants Cantone Research, Inc., Anthony J. Cantone, Christine L. Cantone, Victor Polokoff, PNC Investments, LLC, and J.J.B. Hilliard, J.L. Lyons, LLC. The investors were victims of a Ponzi scheme perpetrated by Smith, a former registered representative at each of the broker-dealer defendants. Smith induced the investors to invest in the aggregate approximately $8 million in a non-existent investment product called Healthcare Financial Partnership. Instead of investing their money, Smith deposited the funds into a Merrill Lynch account held by him and his wife. The investors sought to recoup their losses from defendants and Merrill Lynch alleging negligent supervision among other things. The actions were consolidated and Merrill Lynch moved for dismissal. Several related actions have been brought.

The court had previously found no viable negligence claim against Merrill Lynch existed to be arbitrated because Merrill Lynch never entered into an agreement to arbitrate any disputes that might arise with these parties. Cantone filed third-party FINRA arbitration claims against plaintiffs (Merrill Lynch and Katchen), seeking contribution and indemnification in the event liability was found in the arbitration actions.

Several principal issues were decided on appeal. Defendants argued the motion judge lacked authority to interpret FINRA's customer code and industry code and those issues should have been resolved by FINRA arbitrators under FINRA rules.

The court repeated the oft-cited policy favoring arbitration. However, the court cautioned, under both federal and state law, arbitration is a matter of contract and a party cannot be required to

Cont'd on pg. 5, column 2

Mediation Musings *(Cont'd from pg. 1)*

of the mediator in that circumstance to Houdini except in this case you cannot disappear. Quite the opposite. You must remain on center stage at all times, maintaining interest and continuity and momentum.

Multi-party complex litigation also requires paying attention to court deadlines and dockets. In older cases it is imperative that the mediator work in conjunction with the court, keeping the court apprised of progress and lack of progress.

Obviously, the nature of the claims are critical in resolving multi-party disputes. For example, I had a commercial matter involving about five parties where the dispute essentially was over a roof collapse. Recognizing that each side has its own issues, needs, and constituencies, I had moved the matter towards a resolution acceptable to all parties. However, after we had arrived at a number and a distribution of expenses that seemed to make sense, there was a significantly upward adjustment in the negotiated demand for the repairs. At that point, after several sessions and efforts, it was not possible to resolve the matter since we had worked towards resolution at one cost number and now were told we needed nearly twice that amount to make the repairs. Part of the job of the mediator is to get accurate assessments from the parties because it is very difficult to go back to the well once you have an established baseline. In other words, if the initial demand is $500,000 and you have worked towards a distribution of the cost among appropriate parties it is highly unlikely that a change to $1 million after several sessions will result in an actual resolution. Rather, it results in a loss of confidence by the parties and makes resolution practically impossible in mediation.

Employment Litigation

Employment litigation is similar to other litigation except the parties are usually more personally invested. Mediators need to use a full range in their skill set to both engage the parties and develop trust. In one case we had a discussion regarding tea and tea service to help engage the parties and develop rapport. After brewing and serving tea for them, we had developed confidence and comfort to move forward. In other words, each case is unique and requires a personalized approach to developing rapport.

Termination cases, sexual harassment cases, and the whole range of employment disputes leave parties angry. Part of the process of mediation can be healing. Alternatively, a judgment call needs to be made if the parties should even be in the same room. I always assess that by speaking to counsel and parties and never force the issue unless it is absolutely necessary. The process can sometimes be cathartic. However, my goal is not social work but claim resolution. Sometimes the two are intertwined quite a bit.

IP Issues

Intellectual property disputes generally are part of complex litigation and/or multi-party cases. Part of the difficulty can be in quantifying damages. While there is always the potential for a former employee or scientist or salesman to utilize confidential company information or trade secrets, coming to settlement requires actual numbers that can be quantified and not just conjectural claims of future loss. Usually, that issue is the hurdle to getting to resolution.

IP disputes may require consent to restraints and other controls which can be readily adopted and implemented by the parties and courts. However, where significant amounts of money are required to resolve the dispute, it is often the proof issue that proves to be most difficult.

Summary

In general, we need to go back to basics in resolving disputes in mediation. I always look at the interests of the parties, at the relationships of counsel to parties, and the relationships of parties to each other. Usually, after I get a feel for those factors as well as the primary issues in dispute, we can proceed towards a path that is more likely to be a continuum to resolution. Probably the most important point is that a mediator can bring the parties together. However, if the parties are not prepared for a resolution, tactically, mentally, or internally, it is critical for the mediator to recognize that his or her role must be circumscribed, at least at the moment.

Please feel free to share your mediation musings with me. If you think I can assist in resolving your disputes, please let me know.

Quorum Votes *(Cont'd from pg. 2)*

mail, a draft Order which directed the solicitor to publish the final rule in the Federal Register immediately upon approval of a final rule by a majority of the Board. That final rule continued to be revised and circulated. On December 16, 2011, the final version of the rule was circulated in the Board's internal Judicial Case Management System (JCMS) and Chairman Pearce and Member Becker voted to approve the rule. It was forwarded to the solicitor for publication in the Federal Register. Member Hayes did not vote nor was he asked by e-mail or phone to record a final vote in JCMS before or after the rule was modified, approved by Pearce and Becker, and forwarded by the solicitor for publication on December 16.

The Court noted that it was undisputed that the Board's rulemaking authority requires three members of the Board to constitute a quorum and that only two members voted to adopt the final rule toward the quorum in this case. The only issue to be decided was whether Hayes could be counted for the quorum. Based upon the facts and prior voting the Court concluded that the December 16 decision to adopt the final rule was the relevant action and not earlier votes.

In order to test or more likely challenge the comments regarding the Court's finding, Judge Boasberg remarked as follows:

> What if, for example, one of the three Board members had been tragically killed following the vote on the December 15th procedural Order but prior to the December 16th vote to adopt the final rule? Or what if one of the three Board members' terms had expired prior

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ARBITRATION ORDERED EVEN IF NO AGREEMENT

In Structural Steel Fabricators, Inc. v. LaConti Masonry & Concrete, Inc., the Appellate Division ruled, in a construction case, that all matters should be consolidated in an arbitration before the American Arbitration Association despite the fact that there was not privity between all parties. In other words, while there was an agreement to arbitrate certain claims, some of the parties did not have such an agreement. The issues involved construction of the Speedway Elementary School in Newark. The general contractor was Delric Construction Company. Delric entered into a subcontract with LaConti Masonry & Concrete, Inc. Both contracts stated that any and all disputes or claims arising out of and/or related to the subcontract and work performance shall be solely decided in the Superior Court with venue in Passaic County. The contract also stated that:

> Notwithstanding the above, any claims, disputes or other issues arising out of and/or related to the Subcontract and the performance of the work may, at Delric Construction Company, Inc. sole option, be decided in binding arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration and Mediation rules….

To obtain portions of the steel for the project, Structural Steel Fabricators (SSF) entered into a sub-subcontract with Consolidated Systems, Inc. (CSI). Subsequent to the execution of that contract, CSI informed SSF of an increase in the price of steel. The School's development authority declined to authorize the increase. As a result, SSF refused to pay the additional cost and CSI refused to deliver the steel. Various claims were filed in the court following. Delric moved for dismissal of the action against it invoking the arbitration provision of its contract with SSF. Delric filed a demand for arbitration with the AAA and discovery ensued. Hearings took place over seventeen days but were not concluded. Nearly contemporaneous LaConti, the masonry subcontractor, filed a demand with AAA for arbitration of a dispute with Delric. The matters were consolidated by order entered on June 15, 2010, over SSF's opposition. The interesting twist on this matter was that there was no arbitration provision between SSF and LaConti. Thus, SSF asserted that the delay claims could not be litigated before the AAA and should be removed from the arbitration pursuant to the New Jersey Arbitration Act.

While the appeal was pending the arbitrators issued their award. On appeal, SSF claimed that in the absence of a contractual arbitration agreement between SSF and LaConti, and the contract provision precluding the assertion of delay claims against Delric, the trial court erred

Cont'd on pg. 5, column 3

ARBITRATION CLASS CLAIMS REVISITED IN CALIFORNIA

California appears to generally/always be unique. In Iskanian v. CLS Transportation Los Angeles, LLC, the Appellate Court reviewed a renewed motion to compel arbitration in the post-AT&T v. Concepcion world. By applying the U.S. Supreme Court's ruling, the Court found that the trial court had properly ordered this case to arbitration and dismissed class claims.

The plaintiff was a driver for CLS from March 2004 to August 2005. In December 2004 he signed a "Proprietary Information and Arbitration Policy/Agreement" providing that all employment related claims were to be submitted to binding arbitration before a neutral arbitrator. The agreement provided for reasonable discovery, a written award, and judicial review of the award. Arbitration costs were to be paid by CLS. The agreement also contained a class and representative action waiver which read as follows:

> [E]xcept as otherwise required under applicable law (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.

In August 2006, Iskanian filed a class action complaint against CLS regarding overtime pay, meal and rest breaks, and other FLSA matters. The case was proceeding and Iskanian had moved to certify the class. During the course of that process, the U.S. Supreme Court decided Concepcion.

The California Court's reliance upon Concepcion stated that Concepcion "thoroughly rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them" and that nonconsensual class arbitration was inconsistent with the FAA. The California Appellate Court distinguished between its own high court's decision, in Gentry v. Superior Court, which held that a class waiver provision in an arbitration agreement should not be enforced if class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration but obviously needed to take into account the U.S. Supreme Court's decision in Concepcion.

The Court noted that Concepcion identified two types of state rules preempted by the FAA. When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA. The second type requires a more nuanced inquiry – when a defense

Cont'd on pg. 6, column 2

Quorum Votes *(Cont'd from pg. 3)*

to the vote to adopt the final rule? Under the NLRB's theory, the two remaining members could nevertheless have adopted the rule in either scenario. Such a result, however, would render the three-member quorum requirement meaningless.

The Court noted that defining "participation" in on online vote is somewhat problematic. The Court stated the salient facts as follows:

· Member Hayes did not vote on the adoption of the final rule when it was circulated through the JCMS system on December 12, 2011.

· No one from the agency requested that he provide a vote pursuant to the agency's usual practice.

Contrary to the arguments that Hayes' prior participation was sufficient, the Court stated that "[s]omething more than mere membership is necessary." The Court remarked that had Hayes affirmatively expressed his intent to abstain or even acknowledge receipt of the notification he may have been "legally present" for quorum purposes or, alternatively, had someone reached out to him for a vote it would have been a closer case. Since none of that occurred, his failure to be present or participate means that only two members voted. The Court also rejected the argument that a subsequent dissenting statement issued by Hayes cured the quorum defect. The Court expressed no comment on the substance of the rule and left its adoption to a Board quorum. Finally, the Court stated that "nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so."

In following the Court's analysis, and applying it to "To Rome With Love," Woody Allen's latest movie, it is hard to discern that mere participation [in making a movie] alone is sufficient. For this one, I would suggest absence.

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Third-Party Claims *(Cont'd from pg. 2)*

arbitrate any dispute which it has not agreed to submit to arbitration citing Supreme Court and other authority. The court detailed the difference between procedural and substantive arbitrability. Substantive arbitrability refers to whether the particular grievance is within the scope of the arbitration clause specifying what the parties agreed to arbitrate. Issues of substantive arbitrability are generally decided by the court. Procedural arbitrability refers to whether a party has met the procedural conditions for arbitration. Those matters should be left to the arbitrator. The Appellate Division noted that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute it has not agreed to submit. The court found it was "undisputed that there was no specific written arbitration agreement between plaintiffs and defendants concerning the Frederick and Tedesci arbitrations." The court ruled that plaintiffs and defendants were not engaged in exchange-related disputes with each other. In an opinion in Frederick, a separate but related matter, the court held that plaintiffs owed no duty to the investors who were non-customers. The court affirmed the decision finding that the Law Division was the correct venue to determine whether the parties agreed to arbitrate the claims in dispute. The court found that plaintiffs correctly asserted investors' third-party complaints are not covered, exchange-related transactions of either FINRA Code. The court ruled there was no separate agreement among the parties that required plaintiffs to submit to the Fredrick and Tedesci arbitrations. The court stated that citation to the FINRA By-Laws alone was not enough and that defendants failed to cite a section that binds a member exclusively to arbitration for all disputes. The court found the industry code compelling arbitration between member firms does not apply in this case nor does the Customer Code apply because neither defendants nor the investors are customers as defined by the Customer Code of Merrill Lynch.

The court failed to rule on the question regarding third-party claims for contribution and indemnification as derivative. The court said this assertion was speculative and that since defendants had not attempted to file a complaint against plaintiffs in the Law Division they would not decide that issue. The court concluded that neither FINRA's Industry or Customer Codes covered the claims at issue and the list cited by the Supreme Court outlines the matters strictly reserved to arbitrators: "prerequisites such as waiver, delay, time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." None of those issues were the subject of this court action.

The court enjoined defendants from pursuing third-party claims against plaintiffs in arbitration and denied cross-motions to compel arbitration. Interestingly, in footnote 9 the court stated that "[t]o the extent defendants have a viable claim against Merrill Lynch that is not purely derivative of the claims by the investors that have already been dismissed, nothing in Frederick or in this opinion prevents them from pursuing it in the Law Division."

Arbitration Ordered Even If No Agreement *(Cont'd from pg. 4)*

in dismissing its Superior Court action and ordering its claims be consolidated in the arbitration.

The Appellate Division concluded that the trial court had properly determined that the dispute between LaConti and SSF was

"equitably subject to SSF's agreement to arbitrate, N.J.S.A. 2A: 23B-6b, and that the court's order dismissing SSF's action against LaConti and referring the dispute to the AAA for consolidation with matters pending there was legally warranted."

The Court referred to an earlier decision in Bruno v. Mark McGrann Associates, 388 N.J. Super. 539 (App. Div. 2006), and its language to explain its decision:

> (contractor and project manager with no contractual relationship required to arbitrate their disputes because the claims were

Cont'd on pg. 6, column 1

Arbitration Ordered Even If No Agreement *(Cont'd from pg. 5)*

> "intimately founded in and intertwined with" an underlying contract that contained an arbitration clause) (quoting Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 839, 841 n.9 (7th Cir. 1981)(where plaintiff agreed in a contract with defendant to provide masonry service for construction of two schools, and contract contained arbitration provision, plaintiff was required to arbitrate with subcontractor without a direct contract because plaintiff's claim arose out of contract between plaintiff and general contractor)); Wasserstein [v. Kovatch,] 261 N.J.Super. [277,] 286 [(App. Div.), certif. denied, 133 N.J. 440 (1993)] (relationship of the claim to the subject matter of the arbitration clause determines arbitrability). [Bruno, supra, 388 N.J. Super. at 547.]

In sum, in the present case SSF entered into a contract with Delric that contained a broad arbitration clause permitting Delric to compel arbitration of any claim, dispute or other issues arising out of or related to the subcontract and the performance of the work. When SSF filed suit against Delric alleging nonpayment of monies owed to it, Delric invoked the arbitration clause to compel arbitration before the AAA. Thereafter, LaConti sought arbitration of its claims for damages against Delric. Based on the facts in this case, in which SSF's actions against Delric and LaConti had their basis in the provisions of the Delric/SSF contract, the Court found SSF to be "properly estopped from litigating a portion of its dispute in court" primarily because "arbitration provided the only forum where all parties could proceed in a single action to obtain resolution of their dispute…".

Practice Tips: Even if there was no agreement to arbitrate between all parties, courts appear to be willing to consolidate claims so that they are heard in one forum. Parties and counsel should be very clear in drafting their arbitration provisions for exclusion and inclusion of claims.

Arbitration Class Claims Revisited in California *(Cont'd from pg. 4)*

seemingly allowed by the FAA section 2 saving clause, such as unconscionability, was alleged to have been applied in a fashion that disfavors arbitration. The Supreme Court held, in Concepcion, that "[a]lthough §2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objective."

The California Gentry court had laid out a four-factor test for determining whether a class action waiver should be upheld. However, in Iskanian the California Appellate Court found that the Concepcion decision conclusively invalidated the Gentry test and thoroughly "rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them." The Court concluded, in Iskanian, that it must follow the Supreme Court's lead because the case involved the analysis of the effect of a federal law, the FAA, on a state rule. Accordingly it found the trial court properly applied the Concepcion holding and correctly declined to apply the Gentry test by enforcing the arbitration agreement according to its terms. The Court declared that "[a] rule like the one in *Gentry* – requiring courts to determine whether to impose class arbitration on parties who contractually rejected it – cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms."

The Court also commented on D.R. Horton (also see Roger B. Jacobs, "NOTES ON *D.R. HORTON*: NLRB LIMITS ARBITRATION RIGHTS," 63 Lab. L.J. 143 (Summer 2012)) and declined to follow the NLRB's decision noting that the NLRB's "attempt to read into the NLRA a prohibition of class waivers is contrary to another United States Supreme Court decision." The Court opined that since the FAA "is not a statute the NLRB is charged with interpreting, we are under no obligation to defer to the NLRB's analysis."

There were also claims under the California Labor Code (PAGA) which authorized an aggrieved employee to bring a civil action to recover civil penalties on behalf of himself or herself and other current or former employees. The Court said, following Concepcion, the public policy reasons underpinning the California law do not allow a court to disregard a binding arbitration agreement finding that "[t]he FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration."

The Court also said, in a footnote, the following:

> Although Iskanian may not pursue a representative action, we find that he may pursue his individual PAGA claims in arbitration. Nothing in the arbitration agreement prevents Iskanian from bringing individual claims for civil penalties.

Practice Notes: Iskanian presents much for the practitioner to ponder. Individual states will need to examine their own statutes in light of D.R. Horton and Concepcion as well as the FAA and state arbitration statutes. Obviously, this area is continuing to evolve. Arbitration is preferred but class claims remain problematic. Stay tuned!

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