SideBAR

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Message from the Chair

Susan D. Pitchford

Dear Litigators,

I am pleased to report that the Federal Litigation Section (FLS) continues its active role in supporting its members with accessible programming and opportunities to gain valuable experience putting their skills and education to work. In particular, I would like to highlight a new endeavor of the FLS to develop a "pro se clinic in a box", to offer a way for members to work with their Courts to ease the burden of pro bono litigation.

Most lawyers agree that they would like to do more pro bono work, but they hesitate to take on cases which would take too much time away from paying clients and other responsibilities. The idea of the pro se clinic is to offer short, 30-45 minute appointments for a pro se litigant with a volunteer lawyer, after which appointment, the litigant would continue pro se. During the appointment, the volunteer lawyer could, for example,

- advise on federal rules of procedure and those tricky "local customs" which all courts have but are not in the rules,
- provide access to forms,
- offer opinions about whether another venue (state court?) is more appropriate for the dispute,
- explain concepts such as exhaustion of remedies, lack of standing, and statute of limitations

The clinic could help de-escalate the tension which results when judges and court staff cannot give legal advice, but a litigant does not understand the rules or the rulings which they face. What makes the FLS effort different from other pro bono clinics is that we are trying to make the clinic as low-cost as possible by leveraging technology for sign ups, conflicts screening, intake, and reminders.

We are drawing on the experience and wisdom of many districts, including the District of Oregon, which launched a pro se clinic in January, with seed money from the FLS. I invite you to contact me (sdp@chernofflaw.com) if you are interested in helping with this project. **SB**

About the Chair • *Susan Pitchford is a partner at Chernoff Vilhauer LLP, an intellectual property law firm in Portland, Oregon, where she handles patent and trademark disputes and litigates a range of IP-related disputes. Susan served as President of the Oregon Chapter of the FBA 2011-12 and serves on the Board of Directors for Oregon Women Lawyers. Susan can be reached at sdp@chernofflaw.com or at (503) 227-5631.*

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Note from the Editor

Jeffrey T. Cox

One of the great benefits of serving on the Board of the Federal Litigation Section (besides meeting and working with so many extraordinary lawyers from across the country) is the perspective it affords in hearing about and witnessing the exceptional work of FBA chapters supported by the Section. While media attention is drawn to the hot-button issues advanced by the current Administration, and the resulting federal court cases challenging those initiatives, the work of our federal courts is not so limited. Our federal judges, the U.S. Attorneys, federal public defenders, U.S. Marshalls, and all of their respective staffs continue the imperative of administering justice and assuring the Rule of Law remains a guiding light for litigants across all manner of civil and criminal matters.

This edition of SideBAR reports on a number of programs that The Federal Litigation Section is sponsoring and also notes a couple of issues of interest to Section members; I encourage all Section members to read these articles, read the Section News Updates, and consider taking on a more active role in the Association. The profession is enriched by greater participation and thought leadership from each of us.

The importance of increasing engagement was manifested recently by the tremendous turnout in March for the FBA's Capitol Hill Day. Over 70 attendees from around the country travelled to our nation's capitol to advocate to our congressional representatives in support of issues important to our profession. Despite a gloomy, chilly day and soaking wind and rain, FBA members blanketed the House and Senate offices to underscore the important work of our federal courts. Many FLS members were in attendance, working the halls. The day culminated with a senior staffer from the Senate Judiciary Committee presenting an update on the judicial nomination process. Several FLS members also serve on the FBA's Government Relations Committee, and the GRC and Federal Litigation Section leadership continue to advise and counsel FBA leadership on issues effecting federal trial practice, including federal rules revisions, the need for potential modifications to the PACER system and other

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Greetings from the Vice Chair

Nicole Deese Newlon

My high school alma mater recently initiated a program seeking letters and cards from the graduates' families and community members offering advice, and extending their best wishes. The quote was, "as letter writing is becoming a thing of the past, the goal is to have something positive and tangible for the seniors to look back on in the years to come." Each graduate is to receive a red envelope at graduation with at least 3 of these letters. The request had me stumped, not because I don't have things to say, I generally do, but because I had to determine what I could add to a conversation they were likely hearing from greeting cards, family members, and graduation speakers. Then it occurred to me that the advice didn't have to be something novel, or even particularly wise, but what mattered was the fact that these graduates knew that someone from their community took an interest in them and then took the time to write them a letter.

So I wrote a letter. And then a second, and on and on.

I found that I had missed writing letters, and it was nice to sit down and put pen to paper, as they say. I would encourage you to do the same. We are often inundated with legal journals and magazines, identifying accomplishments of friends or fellow practitioners, containing articles tediously and meticulously researched and prepared, and recognizing job transfers and new firms. First, read these journals and magazines, particularly the SideBar. Second, take a moment and put your own pen to paper and send a note of congratulations, a note of gratitude, or even a note expressing an interest in something you've read. You will often find opportunities in these communications to engage, to inform, and to be informed. **SB**

About the Vice Chair • *Nicole Newlon is Vice Chair of the Federal Litigation Section of the FBA. She is a partner at Johnson & Cassidy, P.A. in Tampa, Florida, where she practices commercial litigation. Nicole served as President of the Tampa Bay Chapter of the FBA (2014-15) and previously served as Secretary-Treasurer of the Federal Litigation Section; she can be reached at nnewlon@jclaw.com or at (813) 699-4858.*

Treasurer's Report

Andrea L. Marconi

The Federal Litigation Section continues to perform well, utilizing the revenues earned from Section dues to fund a variety of programs and projects throughout the country. At the end of March 2019, the Section's balance totaled $106,384.00. The Section earns approximately $70,000.00 per year in dues revenue, and the vast majority of expenses are utilized to support Chapter events and continuing legal education events throughout the country.

Most recently, the Federal Litigation Section co-sponsored the Cardozo/Touro Symposium on the Singapore Convention in conjunction with the Alternative Dispute Resolution and International Law Sections, a civil rights program with the Kansas and Western District of Missouri Chapter, an event with the Dayton Chapter on The First Step Act, and a program involving current issues in government investigations with the Maryland and District of Columbia chapters. The Section is also excited to co-sponsor the June 20, 2019 Annual Federal Practice Seminar with the Minnesota Chapter, and looks forward to sponsoring additional Wagstaffe events during 2019.

All Chapter and other Section leaders are encouraged to contact the Federal Litigation Section to request assistance and support on program initiatives that meet the Federal Bar Association and Section's missions. The Section also sponsors the annual convention, the annual conference, and other events throughout the year. In particular, we look forward to seeing everyone in Tampa this September for the annual FBA convention. **SB**

About the Treasurer • *Andrea Marconi is Secretary/Treasurer of the Federal Litigation Section. She is a Director at Fennemore Craig, P.C. in Phoenix, where she practices commercial litigation. A former president of the Phoenix FBA Chapter, Andrea can be reached at amarconi@fclaw.com or at (602) 916-5335.*

First Step Act

On May 20, 2019 the Dayton Chapter of the Federal Bar Association, in conjunction with the Federal Litigation Section, presented a full-day CLE program on the First Step Act, the newly enacted criminal justice reform legislation. The CLE is believed to be the first of its kind offered by the Federal Bar Association on this important new law. The full-day CLE program was hosted at the University of Dayton School of Law. Featured speakers included the Honorable Edmund A. Sargus, Jr., Chief United States District Judge for the Southern District of Ohio; Rick Stover, Associate Warden, United States Penitentiary McCreary, United States Bureau of Prisons; Alan Dorhoffer, Deputy Director, Office of Education and Sentencing Practice, United States Sentencing Commission, as well as representatives of the U.S. Attorney and Public Defender Offices for the Southern District of Ohio as well as the United States Probation Office and several CJA panel counsel. The Federal Litigation Section provided a grant of $2,500 in support of the program; Federal Litigation Section Board Member Aaron Bulloff attended and greeted attendees on behalf of the Section.

Second Annual "Current Issues in Governmental Investigations"

The Federal Litigation Section was pleased to support the D.C. Chapter of the Federal Bar Association and to co-sponsor and provide funding for the Second Annual Current Issues in Government Investigations Program, which was held May 16, 2019 at the United States District Court for the District of Columbia. The sellout program, which was also sponsored by the Maryland Chapter of the Federal Bar Association, focused on the role and practice of independent counsel; coordination of parallel civil and criminal proceedings; whistleblowers versus leakers; and FCPA multi-jurisdictional enforcement. Other sponsors for the event included the FBA's Criminal Justice Section and the ABA Criminal Justice Section White Collar Crime Committee. Keynote speaker for the event was the Honorable Kenneth W. Starr, former United States Solicitor General, United States Circuit Judge and Independent Counsel during the Clinton Administration. General Starr, together with the Honorable Joe Whitley, former General Counsel for the United States Department of Homeland Security, who together presented on "the evolution of law and the importance of tradition."

Minnesota FBA Chapter's 45th Annual Federal Practice Seminar

The Federal Litigation Section Board of Directors recently approved a $5,500 grant in support of the Minnesota FBA Chapter's 45th Annual Federal Practice Seminar June 20, 2019 at Windows on Minnesota, IDS Center in Minneapolis. The Minnesota Chapter is the second largest FBA chapter in the country with more than 900 active members from all across the state. As evidenced by the 44 previous annual federal practice seminars, the Minnesota Chapter's annual program is one of the highlights of the Chapter's many program offerings. The program includes topics such as "hot federal practice topics with in-house counsel and clients," discussion of pressing immigration issues arising in federal litigation, a discussion of journalism in the age of "fake news," a video presentation introducing the new members of the Federal Bench, and a session about the Federal Re-entry Court and a Supreme Court review and several other outstanding presentations. The Federal Litigation Section is pleased to offer its support again this year to this outstanding program.

New Singapore Convention on Mediated Settlements

The Federal Litigation Section and the FBA's ADR Section were pleased to support a recent program held at the Cardozo Law School on March 18, 2019 in New York, New York addressing the new Singapore Convention on Mediated Settlements program. The symposium, co-sponsored by the Cardozo Journal of Conflict Resolution and Touro Law School was in support of the development of a reference book on the new U.N. Singapore Convention on Mediated Settlements. The Federal Litigation Section provided a $750 grant in support of this outstanding program.

Federal Litigation Section News

Civil Rights

Earlier this year the Federal Litigation Section provided a $1,000 grant in support of the March 2019 civil rights program offered by the Kansas and Western District of Missouri FBA Chapters. That outstanding program was well attended and the Federal Litigation Section was pleased to support it.

In Other News . . .

The Federal Litigation Section is working with the FBA's Corporate Counsel Section to coordinate a presentation at the September 2019 FBA Annual Meeting in Tampa to address prominent issues common to interactions between outside counsel and in-house counsel. A planning committee is formed; please watch for more information about this outstanding presentation as Annual Meeting materials become available.

The Federal Litigation Section Board of Directors has formed a planning committee to begin work on the third Federal Litigation Section Litigation Conference. Anyone interested in helping with the planning of this program, should please contact the editor of this newsletter (see Note from the Editor for contact information) who will put you in touch with members of the planning committee.

The Federal Litigation Section has instituted a new additional requirement for funding requests made to the Section for CLE programs and other events. Information about the request guidelines can be found on the FBA's website. The new requirement is that for those programs that are provided with a grant by the Federal Litigation Section, a representative of the receiving entity must provide a post-event write-up and provide photographs of the event suitable for re-publication in the Federal Litigation Section newsletter, SideBAR.

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practice issues. The more voices heard on these questions the better.

In close, this year marks my fifth as Editor of SideBAR; it's been a rewarding experience, made all the better because of all of the outstanding attorneys who shared their scholarship with me for publication in this newsletter. Like most things, I am confident many of you have thoughts about how this newsletter can be improved and better serve you. I look forward to hearing from you with your ideas. If anyone is interested in having a turn as Editor of this publication, please touch base and I will be happy to tell you about this fun and easy role serving our Section. Maybe the next Editor is you! **SB**

Fifth Circuit Reminds Practitioners Of The Importance of Compliance with the Strictures of Rule 50 When Submitting Motions for Judgment as a Matter of Law

Lionel Schooler

Through its establishment of "judgments as a matter of law," Rule 50 of the Federal Rules of Procedure provides a mechanism by which a party can seek to obtain judgment at various points in a case after the trial begins, and before judgment is entered. Rule 50(a) allows a party to challenge the sufficiency of evidence presented *before* a case is submitted to a jury, once the other party has had the full opportunity to be heard. Rule 50(b), by contrast, guides the procedure for renewing a sufficiency challenge *after* a jury verdict and before entry of judgment.

In *Puga v. RCX Solutions, Inc.,* ____ F.3d ____, 2019 WL 409698 (5th Cir. Feb. 1, 2019), the United States Court of Appeals for the Fifth Circuit recently reminded practitioners of Rule 50(a)'s expansive scope, and the corresponding hazard to a movant attempting to append a new argument in a post-verdict Rule 50(b) motion. That is, Rule 50 commands that any movant seeking relief under Rule 50(b) must first move for judgment as a matter of law under Rule 50(a) on the same grounds.

In *Puga,* a driver for RCX Solutions crashed into Mr. Puga's truck, causing significant injuries. The company was found liable by a jury for the driver's negligence, and the jury awarded a total of $3.4 million in damages.

Before the case went to the jury, the company timely but unsuccessfully moved for judgment as a matter of law under Rule 50(a), asserting insufficient evidence of the driver's relationship as a statutory employee of the company, and insufficient evidence of the driver's negligence. After the trial concluded, the company timely filed a Rule 50(b) motion, asserting for the first time that amendments to the federal law covering motor carriers precluded the adverse verdict, that is, that federal law barred liability against a motor carrier for the acts of independent contractors. This motion was likewise denied.

On appeal, the company challenged the trial court's Rule 50 denials. The *Puga* Court rejected these arguments. It noted that Rule 50(a) obliges a movant to specify the judgment sought and the law and the facts that entitle the movant to a judgment. It also noted that in the face of a denial of such a motion, the movant is entitled to *renew* that motion after trial pursuant to Rule 50(b).

In this case, the Court noted that the matter of potential federal law "pre-emption" raised by the company in its post-verdict Rule 50(b) motion was not asserted in the original Rule 50(a) motion, even though it had alluded in its Rule 50(a) motion to the legitimacy of the driver's status as a statutory employee. The Court further noted that such an argument was also absent from a Rule 56 motion for summary judgment that the company submitted before the trial. The Court therefore barred the company's attempt to obtain relief on its Rule 50(b) motion, focusing upon the purpose of Rule 50(b) as "prevent[ing] a litigant from ambushing both the district court and opposing counsel after trial." Puga, 2019 WL 409698, at p. *7, *citing Dimmitt Agri Indus., Inc. v. CPC Int'l., Inc.,* 679 F.2d 516, 521 (5th Cir. 1982). To the Court, Rule 50(b)'s limited scope is designed to promote the opportunity for a trial court to re-examine questions of evidentiary insufficiency, as well as the opportunity for opposing counsel to be alerted to such insufficiency before submission of the case to a jury. *Id.*

Asserting an expansive reading of Rule 50(b), the company claimed that it had permissibly raised its federal statutory claim in its Rule 50(b) motion because the novel issue raised was a "purely legal issue." *Puga*, 2019 WL 409698, *12, n. 2. The *Puga* Court rejected this assertion as well, noting that "purely legal conclusions" are covered within the scope of Rule 50(a) and, if not raised there, are waived. *Id. citing Feld Motor Sports, Inc. v. Traxxas,* L.P., 861 F.3d 591, 596 (5th Cir. 2017).

The *Puga* decision reminds practitioners of the importance of being inclusive, indeed overinclusive, when submitting a Rule 50(a) motion for judgment as a matter of law, irrespective of whether the basis for such a motion is grounded in "factual" or "legal" points.

Lionel M. Schooler is a partner at Jackson Walker LLP in Houston, Texas. A management-side employment lawyer, Lonnie's practice focuses on counseling clients and litigating on a nationwide basis claims under all employment laws, wage and hour claims, and investigations by the Equal Employment Opportunity Commission, the U.S. Department of Labor, and the Texas Workforce Commission.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or any of its or their respective affiliates. This article is for informational purposes only and does not constitute legal advice. Lionel can be reached at (713) 752-4516 or at lschooler@jw.com.

Supreme Court: Like School on Saturday, an Ambiguous Arbitration Agreement Has No Class (Arbitration)

Don Burton

In *Lamps Plus, Inc. v. Varela*, No. 17-988 (Apr. 24, 2019), the Supreme Court held that because of the "fundamental" differences between individual arbitration and class arbitration -- i.e., a class action claim that is determined in an arbitration proceeding -- it is error for a court to use a traditional tool for contract interpretation (construing an agreement against its drafter) to resolve ambiguous language in an agreement in favor of class arbitration.

As discussed below, the decision in *Lamps Plus* is the latest in a line of cases that the Supreme Court has decided based largely on the view of a bare majority of the court (the decisions have all been 5-4 or 5-3) that class arbitration is fundamentally inconsistent with the way arbitration is supposed to work. As also discussed below, while Lamps Plus is good news for corporate entities who want to avoid class actions, it leaves open a couple of procedural avenues by which a plaintiff may yet be able to compel class arbitration.

Lamps Plus involved a complaint filed in federal court by an employee against an employer (Lamps Plus) arising out of a data breach for which the employer was allegedly responsible. The claims were pled as class claims. The employer moved to compel arbitration of Plaintiff's individual claims, but not the class claims, which the employer asserted were not arbitrable under the arbitration clause in the parties' agreement. The district court compelled arbitration and dismissed the lawsuit, but the ruling was a loss for the employer, because the court ordered the arbitration to proceed on a class basis. *Lamps Plus*, slip op. at 2. The employer appealed to the Ninth Circuit, which affirmed, ruling that the arbitration agreement was ambiguous on the issue of whether it permitted class arbitration, and, under California law, ambiguity is construed against the drafter of the provision, in this instance, the employer. *Id.* at 2-3.

For purposes of its analysis, the Supreme Court accepted the Ninth Circuit's conclusion that the agreement was ambiguous on the subject of class arbitration, *id.* at 5, and defined the issue before it as "whether . . . an ambiguous agreement can provide the necessary 'contractual basis' for compelling class arbitration," *id.* at 6.

The Court's precedents in this area include *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), in which the parties had stipulated that their arbitration agreement was "silent" on the subject of class arbitration. The Court held that one could not infer from that silence that the parties had agreed to class arbitration. Consent to "individual" arbitration does not imply consent to class arbitration, because the two are "fundamental[ly]" different: parties agree to arbitration because of its "lower costs, greater efficiency and speed," which the Court found lacking in class arbitration. Id. at 685-86.

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Court held that a principle of California law, that class action waivers in consumer contracts of adhesion are unenforceable, conflicted with and was therefore pre-empted by the Federal Arbitration Act (FAA). Applying that California law would force unwilling parties into class arbitration, and undermine the FAA's goal of enforcing arbitration agreements "so as to facilitate streamlined proceedings." *Id.* at 344.

The majority in *Concepcion* treated the concept of class arbitration as almost oxymoronic. "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration -- its informality -- and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. Also, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Id.* at 350. In addition, in order to bind absent class members, due process requires adequate representation; notice and a hearing; and a procedure for opting out of the class -- all of which adds to the formality, costliness, and complexity of class arbitration. *Id.* at 349.

More recently, in *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612, 1619 (2018), the court held that the National Labor Relations Act does not preclude arbitration clauses that waive class actions in agreements between employers and employees. The court cited *Concepcion* for the point that "effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration" would "interfere[ ] with a fundamental attribute of arbitration." *Id.* at 1622-23. Classwide arbitration would shear away "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness . . . and arbitration would wind up looking like the litigation it was meant to displace." *Id.* at 1623.

Given that line of decisions, the court's ruling against class arbitration in Lamps Plus was unsurprising. The Court stated that "[o]ur reasoning in *Stolt-Nielsen* controls the question we face today. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[ ] the principal advantage of arbitration.'" Slip op. at 8. While the Ninth Circuit had resolved the ambiguity in the parties' agreement by applying the rule of *contra proferentem* (construing against the drafter), that rule, according to the Supreme Court, is merely "a default rule based on public policy considerations"; it does not determine the intent of the parties, slip op. at 10. Thus, applying the rule conflicts "with the foundational FAA principle that arbitration is a matter of consent," *id.* at 11. ("'[T]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" *Id.* at 7.)

Justice Kagan's dissent noted that the FAA does not displace all state law applicable to enforcement of arbitration agreements. Section 2 of the FAA (9 U.S.C. sec. 2) provides that arbitration agreements may be held unenforceable under state law "upon such grounds as exist at law or in equity for the revocation of any contract," *i.e.,* on grounds that are applicable to contracts in general. Section 2 is limited to "preclud[ing] States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996). Justice

Kagan argued that the *contra proferentem* rule is "a garden-variety principle of state law" that "extends to all contracts . . . without disfavoring arbitration," *Lamps Plus,* Kagan dissent, slip op. at 12, and thus pursuant to 9 U.S.C. sec 2 it should not be preempted. The majority nevertheless rejected neutral application of state law, because, in its view, that law failed to recognize the heightened level of evidence of consent needed to show that a defendant agreed to *class* arbitration.

In any event, despite four separate dissenting opinions (by Justices Breyer, Ginsburg, Sotomayor, and Kagan) *Lamps Plus* is currently, to use a phrase in vogue in judicial confirmation hearings, "settled law." However, it leaves at least two unsettled issues that could still result in a corporation finding itself in class arbitration.

The first such issue is who decides class arbitrability, a judge or the arbitrator. In general, "subsidiary" questions of arbitrability of a dispute (*e.g.,* fulfillment of a condition precedent to arbitration, like filing deadlines, or exhaustion of administrative remedies) are left to the arbitrator. In contrast, "gateway" questions, involving "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452 (2003) (plurality opinion), are to be decided by a court, not an arbitrator, "'[u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002). Lower courts have held that class arbitrability is a "gateway" question for a judge (*e.g.*, *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013), *cert. denied,* 572 U.S. 1114 (2014)), but the Supreme Court specifically noted in *Lamps Plus* that it has not yet ruled on that question. Slip op. at 9 n.4 (also noting that it wasn't an issue in *Lamps Plus* because both parties agreed that, under their agreement, the class arbitrability determination was for the court, not an arbitrator). Until the issue of "who decides" is resolved by the Supreme Court, a company could find itself before a judge who, when confronted with an arbitration clause that the plaintiff argues unambiguously permits class arbitration, orders the parties to arbitration, and defers the class arbitrability decision to the arbitrator as a "subsidiary" question.

The second open issue that could unexpectedly land a party in class arbitration is the appealability of a court order requiring class arbitration. That issue was alluded to in *Lamps Plus* -- in fact, Justice Breyer dissented on the ground that the ruling was unappealable. The majority, though, held that the ruling was appealable because it occurred simultaneously with the district court dismissing the case. "[A] final decision with respect to an arbitration," such as a dismissal ruling, is appealable under 9 U.S.C. sec. 16(a)(3). The Court acknowledged that if a district court, at request of the parties, merely *stays* the litigation pending arbitration, as is permitted by 9 U.S.C. sec. 3, then that order would be interlocutory and unappealable. *Lamps Plus*, slip op. at 4 n.1. The majority, though, declined to address in what circumstances a court *should* issue a stay rather than dismiss. *Id.*

Thus, even after *Lamps Plus,* a company with an arbitration agreement that is arguably ambiguous on class arbitrability, may still find itself mired in class arbitration, if a district court properly stays rather than dismisses the Plaintiff's lawsuit pending the arbitration, which makes its ruling unappealable under Section 9 U.S.C. sec. 16(b)(1), and then either a) orders class arbitration, because the court erroneously finds that the agreement clearly authorizes class arbitration, or b) sends the parties to arbitration without deciding class arbitrability, leaving that "subsidiary" issue to the arbitrator, and then the arbitrator rules that the clause permits class arbitration.

In either instance, class arbitration may ultimately be deemed to have been wrong after an appeal of a confirmation of the arbitration award (via 9 U.S.C. secs. 10(a), 16(a)(1)), but that would be only after the company has gone through all of the inefficiencies and expense that that class arbitration process entails. The best way for a company to minimize the risk of either scenario happening is the same as it was before *Lamps Plus*: drafting an arbitration agreement that clearly and unmistakably states that the company does not agree to class arbitration.

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My RPS Experience

Mark P. Yablon

What better place to attend my first Federal Bar Association's Rising Professionals Symposium leading up to Super Bowl weekend is there than Las Vegas?

Most of us arrived Thursday night, January 31, to attend an open-bar reception with snacks at the Four Seasons at Mandalay Bay. It was a great ice-breaker for us attendees, made up of recent law school graduates, to meet each other and to begin building nationwide relationships with professionals having a similar interest in the federal bar as well as other state court practice areas. We also had the opportunity to begin friendships with FBA leaders, speakers, and one of the symposium's sponsor, Prevail, through its on-site representative Jay Merjuste.

This was truly a laid back, friendly group of men and women of varied backgrounds, practice areas, ages, and geography. After the reception, many grabbed dinner in the miles-long, multiple hotel and casino venue.

As a career changer, I have attended many CLE meetings and business conventions. So I have something to compare to, and this intimate gathering was as good professionally, educationally, and socially as any targeted learning meetings I've attended.

I admit I intentionally passed on the opening "Power Hour" kick boxing event the next morning at 7 a.m. for a simple reason: I stayed at the Excalibur hotel a couple miles away at the opposite end of the hotel and casino complex and would not have had time to make it back for the opening presentation led by Maris T. Darden, an assistant U.S. attorney in Ohio. She gave an interesting perspective on voir dire that I suspect most novice attorneys have not yet experienced.

Joel Oster gave one of the most entertaining and hilarious CLE classes of the weekend. He spoke on ethics, but more accurately he showed and told using videos of attorneys behaving badly. And some were worse than bad. For example, a criminal defense attorney's television commercial showed multiple action vignettes of "clients" caught in the act of stealing, drug dealing, etc. who stop for a moment to thank their attorney for getting them out of jail and allowing them to return to work. And the attorney pitches the reason to hire him is because he thinks like a criminal!

There were also multiple speakers who gave career advice from their unique perspectives. For example, C.J. Vranca, senior vice president of legal and business affairs at Funny or Die, talked about her challenges of overseeing creative talent who produce cutting edge comedy. She talked about how her involvement increases when a production goes from mere on-line content to a television show on a network. The more money it costs to produce a show means more money at risk if the producers or talent screw up, so she has to be more active in those contract negotiations and risk management than for a inexpensive short web video.

And Allison Leotta, a mom, a wife, and a former federal prosecutor, enthralled us with her stories of going from gritty prosecutor to serial best-selling author and screen-play writer exploring the gritty side of life (and death).

And speaking of gritty stories, Andrew Rossow, a cyberspace and internet attorney, brought home the scary realities lurking on the internet that hurt children as well as can put our practices at serious risk.

One of the cool things about this event, was that many of these speakers hung out afterward at the formal after-hours parties, spontaneous dinners with a few of us, and social activities on our own. Everyone was approachable and expressed interest in getting to know and develop new bonds with others—including people of opposite world views.

I very much appreciate the FBA for producing such a great event to facilitate formal learning about different practice areas but also to develop new friendships and professional relationships. Hats off to the staff and volunteer leaders for pulling of the second annual symposium for rising professionals!

* * * * *

Mark Yablon is a law clerk at Pittenger, Nuspl & Crumley in Allen,Texas. The Federal Litigation Section was an underwriter for the 2019 FBA Rising Professional Symposium held early this year in Las Vegas. Mark can be reached at (972) 359-1207 or at mark@pnclawfirm.net.

Rising Professionals Symposium

Jessenia Rosales

Dear Federal Bar Association:

Attending the Rising Professional Symposium was a professionally rewarding experience. In addition to socializing amongst colleagues from other states, I was able to visit Las Vegas, Nevada for the first time. I particularly attended this FBA conference because its main focus was, on the rising professional and provided an informative experience to help lawyers triumph in their careers.

I think it is important to note that I've attended several FBA conferences: Women in Law Conference, FBA Annual Convention, Immigration Law Conference, amongst many others, but The Rising Professional Symposium was held with a slightly different spin and thus far the most amazing and unique experience amongst the conferences I've personally attended.

The presentations were very useful due to the fact that they had a wealth of information as to what the other practitioners were doing in different areas of the law. I also felt at ease, and I was encouraged to ask questions. All presenters were carefully selected and were very captivating in their presentations. The topics ranged and covered a multitude of topics and not just one area or aspect of the law.

Simply to name a few, Attorney Evan Gibbs made very important points in sharing with us how to effectively use speeches to generate business. Also, Thomas Ting another speaker, showed us how to transform negative situations into greater opportunities. Other topics included concepts such as smart contracts, effective presentations, data breach litigation, and the dark side of social media. I really enjoyed our Featured Speaker C.J. Vranca with Funny or Die, who exuded the utmost energy and reminded us all that no matter how stressful the life of a lawyer can be, it is quite alright to have some fun. "Find something you love to do, and you will never have to work a day in your life."

Of the several networking events, I attended the happy hour reception; after hours reception; I must say my favorite networking event was our Bingo exercise. During our welcoming reception, attorneys had to question each other and get to know each other in order to play bingo which I thought made the experience rather amusing. My unforgettable moment was the privilege and honor to have dinner with Maria Vathis, President of the FBA

I was provided an opportunity to learn a lot about my own work from talking to others — such as, seeing what perplexes people and receiving their ideas and suggestions. I learned the various techniques others are using and technical details of several practices of law. As my career advances, I have learned that even though listening to these presentations are invaluable, the goal here is to fine tune my interactions at these conferences. I was inspired to research ideas of my own and exposed to different styles of presentation. This conference has inspired me to continuing to advance in my career with more dedication and willpower than ever before.

In addition to practicing law, being a current LLM student in Intellectual Property, things were becoming monotonous. However, the excitement and admiration of others upon hearing about this topic, reminded me that this area of law could be interesting.

I returned ecstatic to inform others about my experience; how interesting, informational and purposeful it was. I made connections, with attorneys in all areas including, Intellectual Property, Immigration, Criminal on both state and defense. I was encouraged to pursue a national position in the FBA, and further my involvement in my local chapter which I hope to accomplish soon.

I am honored to have been the Rising Professionals Symposium Scholarship Recipient and sincerely grateful to have been afforded the opportunity to enjoy such a pleasant and rewarding experience.

Thank you to the FBA, Federal Litigation Section and the Younger Lawyers Division.

Sincerely,
Jessenia Rosales
Attorney and Counselor at Law

* * * * *

Jessenia Rosales was a Federal Litigation Section scholarship recipient to attend the 2019 FBA Rising Professionals Symposium held earlier this year in Las Vegas. Jessenia practices in Tampa, Florida, and can be reached at (813) 650-9618, admin@jesseniarosaleslaw.com, or at jesseniarosales28@gmail.com.

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