CDRC NEWSLETTER

Things have been largely quiet in the ADR legislative world during the past three years, largely because of the COVID epidemic. However, as the epidemic has become less invasive, the possibility of new legislation and regulation has increased. CDRC is monitoring these developments and we have decided to create a newsletter so that our members can be kept up to date on them. We hope to issue these newsletters on a regular basis.

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The Girardi Controversy and Confusion over "Private Judging": Possible Legislation?

On August 4, the Los Angeles Times published a lengthy article entitled "The Secret World of Private Judges". The article detailed how three retired judges, to wit, former Supreme Court Justice Edward Panelli, former Court of Appeals Justice John Trotter and the late former Superior Court Judge Jack Tenner, purportedly used their status as "private judges" to aid disgraced attorney Tom Girardi's theft of millions of dollars from settlement funds that were established to benefit Girardi's clients.

On August 9, the Times published another article in which it reported that the actions of the three retired justices led Chief Justice Tani Cantile-Sakauye to believe that "there are no adequate safeguards regarding the business of private judging" and to call for a review of and regulation of the practice of mediation in California. The article also stated that Senator Tom Umberg, who is chair of the Senate Judiciary Committee, has promised to hold hearings that would lead to legislation requiring mandatory disclosures by arbitrators and mediators. There was no reference in the article or in Senator Umberg's comments to the existing arbitrator disclosure requirements.

Judge Tenner in essence served as a trustee by supervising the disbursement of funds to Lockheed employees. The Times accused him of disbursing $7 million to Girardi in 2000 without the approval of defense counsel, as required by the settlement agreement. Justice Trotter was appointed by the Court in 2005 to act as special referee to "review and approve" payouts to class members in the Rezulin diabetes drug class action and purportedly approved a $750,000 payout to a jeweler for diamond earrings for Girardi's wife and $15 million (from a $66 million settlement) to Girardi for "costs". In 2011, Justice Panelli was hired by Girardi to allocate a $17 million settlement in the menopause drug Prempro settlement. Girardi falsely told his clients that Justice Panelli was appointed by a court, that he had sole authority over payouts, and that he had instructed Girardi to withhold $1 million from the settlement fund. Justice Panelli purportedly stated that this work took only 20 hours, yet Girardi billed $78,000 for Justice Panelli's time and sent him a check for $50,000.

The public has heard only one side of the story. The three jurists have excellent reputations, and one should not conclude that they engaged in any sort of nonfeasance without hearing the other side. Furthermore, the activities described in the articles occurred between ten

and twenty years ago and had nothing to do with arbitration, mediation, or any other form of "private judging".

Possible legislation and CDRC's role: CDRC is taking proactive steps to monitor the situation. CDRC will meet with the legislative staffs involved so that they fully understand the roles which were assigned to the three jurists and

and to assure that if legislation is introduced, it enhances, rather than detracts from, the ethical practice of ADR in California.

CDRC will keep members informed of any proposed legislation and will welcome input.

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The 2021 *Breslin* Case: *Possible Legislation?*

In 2021, the Second District Court of Appeal held in *Breslin v. Breslin* (2021) 62 Cal.App.5 801, that Probate Code section 17206 authorizes trial courts considering petitions brought pursuant to Probate Code section 17200 to order parties to mediation. It further held the outcome of that mediation is binding on non-participating persons who receive notice of the pending mediation, barring them from objecting to the terms of the mediated settlement.

The decision in *Breslin* did not establish key elements of notice or attendance at mediation. Consequently, courts have issued their own *Breslin* orders that compel mediation but with varying provisions for notice and attendance. To remedy this situation, the Trust and Estates Section of CLA has proposed legislation to address the issues of notice and attendance. The proposed legislation provides that the court may disregard the merits of any objection to a petition to approve a settlement reached at the mediation made by an interested person who received notice of the mediation but failed to attend the mediation. The legislation also codifies the manner in which notice of the mediation must be provided, the contents of such notice, and how persons may attend mediation to preserve the right to have their objection considered by the probate court.

Possible legislation and CDRC's role: The CLA has not yet approved the Section's proposal. If the legislation is introduced, the CDRC will keep members informed and will welcome input before the CDRC board takes a position.

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***The 2022 Viking River Cruises* Case: Possible Legislation?**

In its 2022 session, the United States Supreme Court issued five decisions involving arbitration. One that significantly affects California arbitration practice is *Viking River Cruises, Inc v. Moriana,*142 S. Ct. 1906. The Court, in an opinion written by Justice Alito, held that the rule set forth in *Iskanian v. CLS Transportation Los Angeles LLC,* (2014) 59 Cal. 4th 348 was preempted by the FAA insofar as it 1) precluded division of individual and

representative claims alleging violation of the Private Attorneys General Act (PAGA); and 2) barred arbitration of the individual claim. Thus, Viking was entitled to enforce its agreement with Moriana to the extent it mandated arbitration of her individual PAGA claim.

The remaining question was what the lower courts should have done with Moriana's representative claims. The Court held that those claims could not be dismissed simply because they were representative and *Iskanian*'s rule remained valid to that extent. But Justice Alito held that PAGA provided no mechanism to enable a court to adjudicate representative PAGA claims once an individual claim was committed to a separate proceeding and that, under PAGA's standing requirement, a plaintiff can maintain representative PAGA claims in an action only by virtue of also maintaining an individual claim in that action. Thus, when an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit.

Justice Alito cited *Kim v. Reins International California, Inc.* (2020) 9 Cal. 5th 73 as the basis for his statement that an employee whose claim is resolved in arbitration cannot be a PAGA representative. Some argue that Justice Alito may have misinterpreted *Kim.* PAGA has just two requirements for standing. The plaintiff need only be an "aggrieved employee" defined as someone "who was employed by the alleged violator" and "against whom one or more violations were committed". The fact that Kim settled his individual claim did not deprive him of the opportunity to serve as a representative. Thus, PAGA standing is defined in terms of violation, not injury.

Given that federal courts, including the United States Supreme Court, are bound by a state court's interpretation of state law that does not conflict with federal jurisprudence, it is possible that our Supreme Court will ignore this portion of Justice Alito's opinion. In fact, there have been two Court of Appeal decisions issued after *Viking* where the court ruled that resolution of the employees' individual claims did not bar them from pursuing a representative claim. See *Howitson v. Evans Hotels LLC* (2022) 81 Cal. App. 5th 475; *Gavriiloglou v. Prime Health Care Management, Inc.* (2022) 2002 Cal App LEXIS 805. In both cases, the decision rested on the issue of claim preclusion and the panels held that the two claims did not involve the same right, i.e., the individual claim belonged to the employee and the representative claim belonged to the state. Neither decision cited *Viking.*

But if California courts choose to follow *Viking,* then an employee who signs an arbitration agreement has no right to file a representative action in court because the employee's individual claim would have been resolved in arbitration and the employee would have no standing to represent other employees. This result would substantially reduce the number of representative PAGA actions filed in court.

Possible legislation and CDRC's role: The Legislature may attempt to amend PAGA to clarify the Supreme Court's ruling so that the *Viking* ruling will not severely impact representative PAGA claims. CDRC will monitor any proposed legislation in this area in order to determine the legislation's impact on arbitration in general, and will keep members informed.

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Remaining Uncertainty over AB 51: Possible Legislation?

In 2019, the Legislature passed AB 51 which 1) allowed employees to decline to enter into mandatory pre-dispute arbitration agreements, in essence prohibiting employers from requiring employees to enter into an arbitration agreement as a condition of employment; and 2) subjected employers to a misdemeanor if they violated the statute. The bill was similar to AB 3080, which was vetoed by Governor Brown on the ground that it was preempted by the FAA. Although CDRC has taken a position that disfavors mandatory pre-dispute employment arbitration, it opposed AB 51 primarily because it believed that the proposed statute was preempted and would lead to unnecessary litigation.

The proponents of AB 51 argued that the proposed statute was not preempted because it did not render a mandatory pre-dispute employment arbitration contract invalid, but simply gave the employee the right to decline to enter into it. Governor Newsom accepted this argument and signed the bill. Subsequently, the Chamber of Commerce and other interested parties filed suit in the Eastern District of California to enjoin enforcement of the new statute. The District Court granted the injunction, ruling that the statute was preempted.

The defendants appealed to the Ninth Circuit, which reversed the lower court in part. It held that the statute did not discriminate against arbitration agreements and was not preempted because it stated that the arbitration agreements that were the subject of the statute were valid and were enforceable if they were signed by the employee. However, the portion of the statute that charged an employer with a misdemeanor if it offered such a contract to the employee was preempted. That was so because the offering of a valid and enforceable contract could not be a criminal act. See *Chamber of Commerce of the United States v. Bonta* (9th Cir. 2021) 13 F. 3d 766.

The ruling created a bizarre situation where an employer who chose to ignore the statute would not be penalized so long as the employer successfully induced the employee to sign the arbitration agreement. On August 22, in order to resolve this anomaly, the panel that decided the case decided to rehear the matter. This rehearing mooted a petition for an en banc hearing filed by the Chamber.

Even if the panel reverses again, practicioners need to be careful. If the contract is in intrastate commerce or it states that the law of California will apply (without making an exception for the FAA), then the statute will be enforceable and an employer who requires its employees to enter into arbitration agreements may be subject to criminal penalties even if the employees sign the agreement.

Possible legislation and CDRC's role: A reversal of the decision may very well result in another attempt by the Legislature to eliminate mandatory pre-dispute employee

arbitration agreements. CDRC will monitor any proposed legislation in this area and will keep members informed.

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AWARDS TO CDRC BOARD MEMBERS

We are pleased to tell you that Jim Madison and Paul Dubow, who are both current CDRC board members and former presidents of CDRC, have been honored by the CLA Litigation Section for their achievements in ADR. Jim was selected as the second inductee into the CLA's ADR Hall of Fame. Paul was selected as the first recipient of CLA's ADR Distinguished Service Award. The awards were presented to Jim and Paul during the CLA's annual meeting in San Diego on September 17.

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COMMENTS WELCOME AND RENEWED CDRC MEMBERSHIP APPRECIATED:

As you may discern from the news above, we expect the 2023 legislative session to be an active one insofar as ADR legislation is concerned. If you have not renewed your CDRC membership, we hope that you will do so quickly. You may renew by going to www.cdrc.net and hitting the membership icon. Further, if you have any comments on the developments described above or suggestions on other topics, please feel free to contact CDRC. You will find our contact information on the website