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This Quarter in ADR – Delegation Battles, PAGA Limits, and the Boundaries of Unconscionability

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California Supreme Court holds that illegibility of arbitration terms cannot satisfy *both* the procedural *and* substantive prongs of unconscionability analysis.

In *Fuentes v. Empire Nissan, Inc.* (2026) 19 Cal.5th 93, Evangelina Yanez Fuentes applied to work at Empire Nissan, Inc. She signed a document titled “Applicant Statement and Agreement.” The document included an arbitration provision. The document was printed in a very small font and its text was so blurry and broken up that it was nearly unreadable. The document was part of an employment application packet that Empire Nissan gave Fuentes only five minutes to review. She also signed two other confidentiality agreements. After working for Empire Nissan for about two and a half years, she went on medical leave for cancer treatment. A year later, Fuentes requested a brief extension of her leave before returning to work. Empire Nissan terminated her employment, and Fuentes filed a complaint in court alleging wrongful discharge and related claims. Empire Nissan responded with a motion to compel arbitration, which Fuentes opposed on illegibility and unconscionability grounds. The trial court denied the motion, finding a high degree of procedural unconscionability. It further concluded there was a low to moderate degree of substantive unconscionability because of the “fine-print terms.” Empire Nissan appealed and a divided Court of Appeal reversed. The California Supreme Court granted review.

Reversed and remanded. To establish that a contract is unenforceable because it is unconscionable, the party opposing enforcement must show unfairness both in the procedure by which the contract was formed and the substance of its terms. The substantive unconscionability analysis examines the fairness of a contract’s terms. Since the two required elements need not be present in identical degrees, courts apply a sliding scale analysis wherein the more substantively oppressive a term, the less evidence of procedural unconscionability is required, and vice versa. In an employment contract, the ultimate question is whether the non-drafting employee, through oppression and surprise, was coerced or misled into making an unfair bargain. Most importantly, an otherwise fair and mutual term is not made substantively unconscionable by printing it in a manner that makes it difficult to read. However, difficult-to-read print contributes to procedural unconscionability and surprise and, in turn, requires a lesser showing of substantive unconscionability for the sliding scale analysis. Here, Fuentes was required to sign an illegible arbitration agreement as a condition of employment. There was a high degree of oppression and surprise, and the formatting and circumstances did not promote voluntary, informed agreement. However, the illegibility of the print could not serve double-duty as both the procedural *and* substantive elements, “[b]ecause font size does not affect the substance of an agreement’s terms, it cannot render a contractual term substantively unconscionable.”



Delegation clause lacked the specificity needed to rebut presumption that courts decide arbitrability and enforceability.

In *Wright v. WellQuest Elk Grove, LLC*, 2026 WL 762409 (Cal. Ct. App. Mar. 18, 2026, No. C105070), Kathleen Charles was diagnosed with dementia when her family decided to move her into the memory care wing of WellQuest Elk Grove, LLC. Kathleen’s family told staff that Kathleen was a “wanderer” and needed to be monitored or she would try to leave the facility. WellQuest noted in their service plan that Kathleen required “frequent supervision and oversight.” Three days after her admission, Kathleen was found sitting in a courtyard in the direct sun, unresponsive and unattended. The temperature that day was 102 degrees. She persisted in a comatose state before she died four days later. Her family sued WellQuest on Kathleen’s behalf for several claims, and her brother, niece, and nephew also asserted individual claims. WellQuest moved to compel arbitration pursuant to an arbitration agreement Kathleen’s niece had signed on her behalf upon her admission. The agreement stated that “all claims relating to this Agreement or to your rights or obligations ... shall be subject to arbitration. The parties agree that an arbitrator will decide any questions about whether a claim or dispute must be arbitrated.” The trial declined to compel arbitration holding that, although a valid arbitration agreement existed, threshold issues of arbitrability, including enforceability, had not clearly and unmistakably been delegated. It concluded that the family members pursuing individual claims were not parties to the agreement, and found a risk of inconsistent rulings if Kathleen’s claims were subject to arbitration. WellQuest appealed.

“Since the usual expectation of the parties is that enforceability of the arbitration itself will be left to the court, the absence of any express language pertaining to threshold enforceability questions fails to establish a clear and unmistakable delegation.”

Affirmed. Although parties can agree to arbitrate gateway questions of arbitrability, including whether they have agreed to arbitrate, or whether their agreement covers a particular issue, for such a delegation to be effective, it must: (1) use language that is clear and unmistakable; and (2) not be revocable under state contract defenses. Since the usual expectation of the parties is that enforceability of the arbitration itself will be left to the court, the absence of any express language pertaining to threshold enforceability questions fails to establish a clear and unmistakable delegation. Here, the language purporting to delegate arbitrability to an arbitrator was silent as to the issues of interpretation, enforceability, and unconscionability of the agreement. Accordingly, it did not express a clear and unmistakable intent to delegate all threshold issues to an arbitrator.

However, because the agreement clearly and unmistakably delegated gateway questions to the arbitrator, the agreement was subject to arbitration despite a severability clause empowering the court to sever unconscionable provisions.

In *Sandler v. Modernizing Medicine, Inc.*, 2026 WL 773099 (9th Cir. Mar. 19, 2026, No. 24-6623), Kara Sandler entered into an employment contract with Modernizing Medicine, Inc. (ModMed), which specified that any employment-related disputes “shall be subject to binding arbitration under the Federal Arbitration Act in conformity with the procedures of the California Arbitration Act.” The contract also provided that the arbitration shall be administered by JAMS (Judicial Arbitration & Mediation Services, Inc.), whose rules in turn say that an arbitrator must resolve questions of whether the contract itself (including the agreement to arbitrate) is valid and enforceable. Sandler sued ModMed in district court. ModMed moved to compel arbitration. Sandler opposed the motion,



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arguing the contract was unconscionable. The district court acknowledged that the arbitration agreement delegated the question of the agreement’s validity to an arbitrator to decide, but denied the motion because the contract contained a severability clause permitting a court to excise an unconscionable provision. According to the district court, the delegation clause did not constitute a clear and unmistakable delegation and thus could not be enforced. The district court also found the contract to be unconscionable. ModMed appealed.

Reversed and remanded. The parties clearly and unmistakably agreed to have the arbitrator resolve any challenge to the validity of the arbitration agreement. The incorporation of JAMS rules showed their clear and unmistakable intent to delegate gateway questions to the arbitrator. This intent was not negated by the presence of a severability clause, which did not conflict with nor undermine the delegation. Parties can agree that disputes over the arbitration agreement’s validity go to an arbitrator, while also providing that if a court somehow reaches the question anyway, any invalidity finding would be limited by severance rather than a wholesale voiding of the entire contract. Moreover, the district court’s attempt to adopt a state rule that disfavored arbitration was misplaced. The California state court decisions holding that a severability clause undermines delegation were inapplicable. Federal law governs arbitrability questions by default under the FAA. Finally, as to the district court’s conclusion the parties’ arbitration agreement was unconscionable, it should not have addressed the issue in the first place, but instead should have enforced the delegation clause requiring an arbitrator’s determination.

PAGA claim barred by issue preclusion since plaintiff lacked standing following an arbitral award for the employer on individual claims.

In *Sorokunov v. NetApp, Inc.* (2026) 118 Cal.App.5th 1009, Plaintiff Alexander Sorokunov sued his former employer NetApp, Inc., alleging various violations of the Labor Code. He also sought civil penalties and wages pursuant to the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq., “PAGA”). The trial court granted NetApp’s petition to compel arbitration of Sorokunov’s individual claims, and following the arbitration, the arbitrator entered an award in NetApp’s favor on each of those claims. The trial court then confirmed the arbitration award. While the arbitration was still pending, the trial court denied Sorokunov’s motion for summary adjudication of his PAGA claim. After confirmation of the arbitration award, the court granted NetApp’s motion for judgment on the pleadings on the PAGA cause of action on the ground that Sorokunov’s lack of standing as an “aggrieved employee” was conclusively determined by the arbitration award.

“Whether Sorokunov suffered a Labor Code violation was the same issue raised either in the context of an individual claim or in a PAGA standing analysis.”

Affirmed. PAGA defines an “aggrieved employee” who has standing to bring a PAGA claim as “any person who was employed by the alleged violator [of the Labor Code] against whom one or more of the alleged violations was committed.” Issue preclusion precludes relitigation of issues argued and decided in prior proceedings. The doctrine is applied only if the issues are identical, actually litigated, and necessarily decided in the former proceeding. In addition, the decision must have been final and on the merits, and the party against whom issue preclusion is sought is the same, or in privity with, the party to the former proceeding. Here, the arbitrator’s award was subject to issue preclusion. Whether Sorokunov suffered a Labor Code violation was the same issue raised



either in the context of an individual claim or in a PAGA standing analysis. Therefore, the trial court did not err in relying on the arbitrator's conclusive findings to conclude Sorokunov was not an aggrieved employee under PAGA and could not meet the standing requirement to bring a PAGA claim. However, as a matter of public policy, dismissal of the PAGA claim for lack of standing did not bind the Labor and Workforce Development Agency, which retained the ability to investigate and pursue its own action if Labor Code violations did in fact occur.

Regardless of whether the underlying employment relationship involved interstate commerce, trial court properly dismissed class claims and compelled arbitration where arbitration agreement consented to Federal Arbitration Act governance.

In *Tuufuli v. West Coast Dental Admin. Services* (2026) 117 Cal.App.5th 1048 (rev. granted Mar. 25, 2026, No. S295323) Plaintiff Sinedou S. Tuufuli was employed by West Coast Dental Administrative Services, LLC, as a collector and customer service representative. She electronically signed an arbitration agreement at the outset of her employment, which was governed by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.). After her termination, Tuufuli filed a complaint against West Coast Dental, asserting individual and class claims for violations of various provisions of the Labor and Business and Professions Codes. West Coast Dental moved to compel arbitration of Tuufuli's individual claims and to dismiss her class claims. West Coast Dental argued the parties' arbitration agreement was governed by the FAA and that its business involved interstate commerce. Tuufuli opposed arbitration, arguing that the FAA did not govern the arbitration agreement because West Coast Dental failed to present any evidence that the agreement involved interstate commerce or that the parties otherwise "contemplated interstate commerce." According to Tuufuli, West Coast Dental operated "exclusively within the State of California." The trial court granted West Coast Dental's motion to compel arbitration and dismissed Tuufuli's class claims. Tuufuli appealed.

Affirmed. The FAA applies not only to agreements evidencing transactions involving interstate commerce, but also when the parties expressly agree that the FAA will govern enforcement of their arbitration agreement. (*Victrola 89, LLC v. Jaman Properties 8 LLC* (2020) 46 Cal.App.5th 337, 355.). Unless the FAA expressly excludes the contract, courts must enforce arbitration agreements according to their terms. Here, the trial court correctly applied the FAA. Arbitration is contractual. Parties may voluntarily elect governance under the FAA through clear, contractual language. Such language was present here. The agreement stated unequivocally that it "shall be governed by the Federal Arbitration Act." This basis was independently sufficient, and no additional showing of interstate commerce was required. Because the FAA was applicable, the trial court correctly enforced the class-action waiver and compelled arbitration.

"Parties may voluntarily elect governance under the FAA through clear, contractual language."



Trial court’s judgment granting petition to appoint new arbitrator terminated a discrete action on the contract thereby authorizing award of fees even though other issues remained.

In *Barbanell v. Lodge*, (2025) 117 Cal.App.5th 1003 [certified for publication on Jan. 8, 2026], the parties entered an agreement that settled a century-old water rights dispute that arose between their parcels’ prior owners. The settlement agreement provided for mediation and arbitration. Attorney fees were available if the prevailing party was forced to seek judicial intervention to have any dispute ordered to mediation or arbitration. A subsequent dispute arose and the parties arbitrated for several years. Before the arbitrator could rule on a pending motion for summary judgment, appellants successfully sought disqualification of the arbitrator, causing the arbitrator to withdraw. Appellants then filed a superior court lawsuit asserting the same claims pending in arbitration. In response, respondents filed a petition in superior court seeking only appointment of a replacement arbitrator so the arbitration could resume. The trial court granted the petition, entered judgment in respondent’s favor, and awarded them attorney fees. Appellants appealed, arguing the award of attorney fees was premature because respondents could not be the prevailing parties until the remaining issues were resolved.

“Here, respondents achieved a complete and unqualified victory on the sole contract issue litigated before the court - whether a new arbitrator should be appointed.”

Affirmed. Generally, Civil Code section 1717 authorizes attorney fees to prevailing parties when provided for in the contract between the parties. A prevailing party determination requires a final resolution of the discrete action before the court, not the termination of all disputes arising under the contract. In this case, the appellate court distinguished between orders compelling arbitration and orders appointing an arbitrator. Courts retain “twilight jurisdiction” over pending claims compelling arbitration, making prevailing party determinations premature until the arbitration concludes. By contrast, a petition to appoint an arbitrator filed as an independent action does not confer jurisdiction over the underlying contractual claims already pending in arbitration. Here, respondents achieved a complete and unqualified victory on the sole contract issue litigated before the court - whether a new arbitrator should be appointed. As the trial court had no jurisdiction over the substantive contract disputes themselves, there was no risk that further proceedings could alter the parties’ success on resolution of that sole issue and subsequent, final judgment. Therefore, the presence of any related disputes in arbitration or in a separate lawsuit did not preclude respondents’ status as the prevailing party in this discrete action entitling them to an award of attorney fees.

District court properly declined to compel arbitration where employer implemented new arbitration agreement requiring employee-class members to “opt out” to remain part of the pending class litigation (9th Cir.).

In *Avery v. TekSystems, Inc.*, 165 F.4th 1219 (9th Cir. 2026), Plaintiffs Bo Avery, Jill Unverferth, Kristy Camilleri, and Phoebe Rogers filed a putative class action for wage and hour violations against their employer, Defendant TEKsystems, Inc., a professional staffing agency. Over 22 months after the commencement of the litigation, and after briefing on class certification had closed, TEK rolled out a new, mandatory arbitration agreement that automatically applied to putative class members unless they quit their jobs or opted out of the Arbitration Agreement. The district court granted Plaintiffs’ motion for class certification, and the class



notice period began. Defendant moved to compel arbitration. The district court denied the motion under Federal Rule of Civil Procedure 23(d).

“Thus, the district court found that TEK subverted FRCP 23 by turning FRCP 23’s opt-out class procedures into opt-in class procedures.”

Affirmed. FRCP 23 creates an opt-out requirement for class members because it mandates that members of a certified class must be provided with the “best notice that is practicable” and an opportunity to request exclusion during the class notice period. If class members did nothing, they automatically became members of the class. On the other hand, under TEK’s Arbitration Agreement, class members who did nothing automatically opted out of the class. In order to remain in the class, class members had to quit their jobs or affirmatively opt out of the Arbitration Agreement. Thus, the district court found that TEK subverted FRCP 23 by turning FRCP 23’s opt-out class procedures into opt-in class procedures. The district court also concluded that TEK’s Arbitration Agreement roll out communications threatened the fairness of the litigation. These communications stated that class actions are “wasteful,” “inefficient,” involve “exorbitant fees,” “tend to enrich only attorneys,” and would “require” TEK “to ignore individual employee issues and concerns.” In addition, the communications were sent and required action during the holidays; contained inconsistent statements about how and when to opt out of the Arbitration Agreement; and also implied that putative class members must consult their own attorneys at their own expense rather than class counsel. Because these irregularities threatened the fairness of the class action proceedings, the denial of the motion to compel arbitration was proper.

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