Expanding Challenges Facing US Accounting Firms

June 2011

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June 2011

Regulatory and Litigation Developments:
China Reverse Merger Companies

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Overview:

- Securities class actions have been filed against over 30 China companies (26 in 2011), most of which went public through reverse mergers.
- SEC has announced it has a task force addressing these areas involving multiple offices.
- PCAOB issued a research note on audit implications of China reverse mergers.

The PCAOB's: March 14, 2011 Research Note

China Region (1/1/2007 to 3/31/2010)

- 159 China reverse mergers ("CRMs") with total market cap of $12.8 billion. Under counts the number of CRMs.
- 56 Chinese companies did U.S. IPOs with total market cap of $27.2 billion.
- The CRMs are relatively small with approximately 60% having assets and revenues below $50 million.
- Includes 34 listed on NASDAQ and 15 on NYSE Euronext.

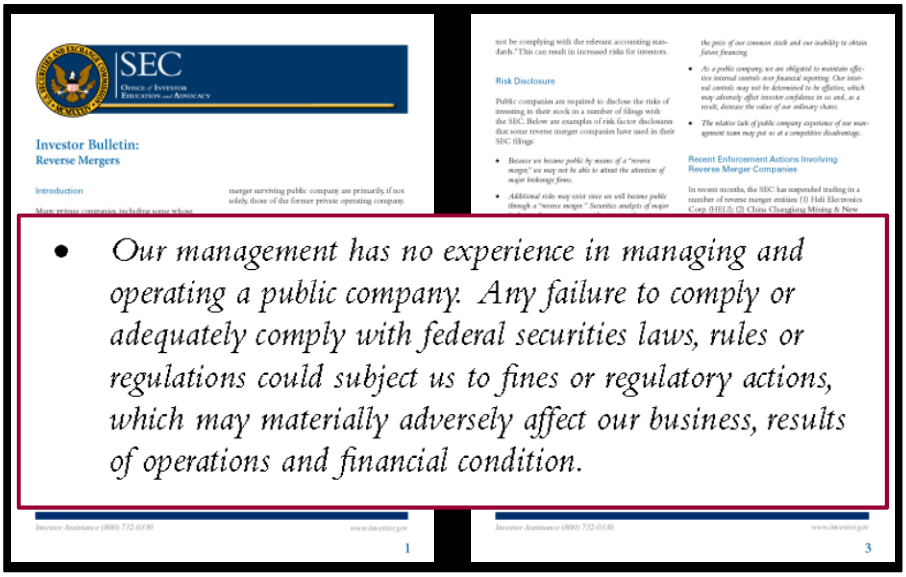
The PCAOB:

- Chairman Doty announced breakthrough in negotiations with China and expects an agreement on inspections later this year.
- Not clear that the Chinese authorities share this view. Recent article discusses strained relationship exacerbated by CRMs.
- Consistent with announced policy change, PCAOB rejected new registration of PRC based accounting firm.

The SEC:

- CRMs have been a frequent topic of speeches and presentations by the SEC staff.
- Chairman Shapiro letter to Chairman McHenry addressed SEC actions including:
  - "SEC launched a proactive, risk-based inquiry" into U.S. audit firms that audit China based companies.
  - Problems reported in 8-Ks around confirmation of cash and receivables.
  - NASDAQ listing requirements.
- Recent reports of tension between SEC and Chinese regulators and lack of cooperation in obtaining documents, audit work papers, etc.
- SEC Investor Bulletin on Reverse Mergers.

SEC Bulletin (June 9, 2011)



SEC
Office of Investor Education and Advocacy

Investor Bulletin: Reverse Mergers

Introduction

Risk Disclosure

Recent Enforcement Actions Involving Reverse Merger Companies

- *Our management has no experience in managing and operating a public company. Any failure to comply or adequately comply with federal securities laws, rules or regulations could subject us to fines or regulatory actions, which may materially adversely affect our business, results of operations and financial condition.*

SEC Bulletin (June 9, 2011)

SEC
Office of Investor

Risk Disclosure

- *We may not be able to meet the filing and internal control reporting requirements imposed by the Securities and Exchange Commission resulting in a possible decline in the price of our common stock and our inability to obtain future financing.*

SEC Bulletin (June 9, 2011)

- *The relative lack of public company experience of our management team may put us at a competitive disadvantage.*

Many private companies, including some whose operations are located in foreign countries, seek to access the U.S. capital markets by merging with existing public companies. These transactions are commonly referred to as "reverse mergers" or "reverse takeovers (RTOs)."

What is a Reverse Merger?

In a reverse merger transaction, an existing public "shell company," which is a public reporting company with few or no operations,[1] acquires a private operating company—usually one that is seeking access to funding in the U.S. capital markets. Typically, the shareholders of the private operating company exchange their shares for a large majority of the shares of the public company. Although the public shell company survives the merger, the private operating company's shareholders gain a controlling interest in the voting power and outstanding shares of stock of the public shell company. Also typically, the private operating company's management takes over the board of directors and management of the public shell company. The assets and business operations of the post-

1 See Securities Act Release No. 8587 (July 15, 2005) [70 FR 42234, 42238 (July 21, 2005)].

Why Pursue a Reverse Merger?

A private operating company may pursue a reverse merger in order to facilitate its access to the capital markets, including the liquidity that comes with having its stock quoted on a market or listed on an exchange. Private operating companies generally have access only to private forms of equity, while public companies potentially have access to funding from a broader pool of public investors. A reverse merger often is perceived to be a quicker and cheaper method of "going public" than an initial public offering (IPO). The legal and accounting fees associated with a reverse merger tend to be lower than for an IPO. And while the public shell company is required to report the reverse merger in a Form 8-K filing with the SEC, there are no registration requirements under the Securities Act of 1933 as there would be for an IPO. In addition, being public may give a company increased value in the eyes of potential acquirers.

Trading Reverse Merger Company Stock

Shares of reverse merger companies may be traded in exchange markets or over-the-counter (OTC), as described on page 2.

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not be complying with the relevant accounting stan-

the price of our common stock and our inability to obtain

brokerage firms may not provide coverage of us since there is little incentive to brokerage firms to recommend the purchase of our common stock. We cannot assure you that brokerage firms will want to conduct any secondary offerings on behalf of our company in the future.

- *The transaction involves a reverse merger of a foreign company into a domestic shell company; as a result, there is no history of compliance with United States securities laws and accounting rules.*
- *Our management has no experience in managing and operating a public company. Any failure to comply or adequately comply with federal securities laws, rules or regulations could subject us to fines or regulatory actions, which may materially adversely affect our business, results of operations and financial condition.*
- *We will incur significant costs to ensure compliance with United States corporate governance and accounting requirements.*
- *We may not be able to meet the filing and internal control reporting requirements imposed by the Securities and Exchange Commission resulting in a possible decline in*

4 See Public Company Accounting Oversight Board Staff Audit Practice Alert No. 6, Auditor Considerations Regarding Using the Work of Other Auditors and Engaging Assistants from Outside the Firm (July 12, 2010).

Corp. (HELI); (2) China Changjiang Mining & New Energy Co (CHJI); (3) RINO International Corporation (RINO); (4) Advanced Refractive Technologies, Inc. (ARFR); (5) Hillenergy Technologies, Inc. (HIET); and (6) Digital Youth Network Corp. (DYOU#):

- On March 21, 2011, the SEC suspended trading in HELI because questions had arisen regarding the accuracy and completeness of information contained in HELI's public filings concerning, among other things, the company's cash balances and accounts receivable. HELI also failed to disclose that its independent auditor had resigned due to accounting irregularities.
- On April 1, 2011, the SEC suspended trading in CHJI because questions had arisen regarding the accuracy and completeness of information contained in CHJI's public filings concerning, among other things, the company's financial statements for 2009 and 2010. CHJI also failed to disclose that it filed its most recent Form 10-Q without the required review of interim financial statements by an independent public accountant and that the company's independent auditor had resigned, withdrawn its audit opinion issued April 16, 2010 relating to the audit of the company's consolidated financial statements as of December 21, 2009, and informed the company that the financial state-

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The Freedom of Information Act: The U.S. Supreme Court Weighs In

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FOIA Exemptions

Federal Communications Commission v. AT&T Inc., No. 09-1279, Decided March 1, 2011

- A competitor of AT&T submitted a FOIA request to the FCC seeking pleadings and other documents produced by AT&T during an investigation related to the e-Rate program.
- AT&T asked the FCC to withhold customer information, including corporate customer information, under FOIA Exemption 7(C).
- Exemption 7(C) exempts disclosure of information which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

A Unanimous U.S. Supreme Court Decides:

Corporations do not fall within the "personal privacy" exemption

"We often use the word 'personal' to mean precisely the opposite of business-related: We speak of personal expenses and business expenses, personal life and work life, personal opinion and a company's view."

- The decision cites to the Restatement (Second) of Torts for the proposition that "a corporation, partnership or unincorporated association has no personal right of privacy" -- so it would seem that the holding also applies to partnerships.
- The Court "trust[s] that AT&T will not take it personally."

Implications for Professional Service Firms:

This Supreme Court term has shown that FOIA exemptions will be narrowly construed:

(See also Milner v. Dep't of the Navy, No. 09-1163, decided March 7, 2011 – **narrows** Exemption 2, which covers information related to the internal personnel rules and practices of an agency).

- Exemption 4, applying to trade secrets and commercial or financial information, remains available.
- Special consideration should be given to the production to government agencies of (1) client information and (2) firm information that does not squarely fall within Exemption 4.
- Consider redaction of documents prior to production.

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State Board Limitations On Name Use:
Proposed NASBA Change

Stanley J. Parzen

June 2011

I. Present Law

A. Current version of Uniform Act would permit a network name to be used in whole or in part as a firm name because the Uniform Act by rule permits a fictitious name (one not consisting of the names of present or former partners) so long as the name is not false or misleading and is approved by the Board of Accountancy.

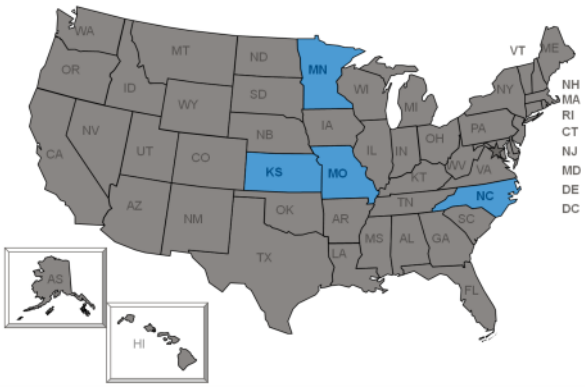
B. Most state Boards of Accountancy permit firm names that are network names under applicable state law which is usually some version of the Uniform Act.

Boards of Accountancy generally conclude that network names are not misleading.

I. Present Law

C. Some state Boards of Accountancy are not hospitable to new network based names

- Kansas
- Minnesota
- Missouri
- North Carolina



II. New Proposed NASBA Rule

(comment date ended June 1)

A. The proposed new NASBA rule would provide that that a network name is not, in and of itself, impermissible so long as it is not misleading.

B. However, the term misleading has now been defined in a way that more names may be found to be misleading and the new rule mandates that to in order to use a network name the firm must comply with the AICPA independence standards applicable to network firms.

A misleading name is one which:
"contains any representation that would be likely to cause a reasonable person to misunderstand or be confused about the legal form of the firm, or about who are the owners or members of the firm …"

C. No grandfather provision.*

* There may be no vested right to a name use. *See Missouri Real Estate Com'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. Apr 13, 2010)

TAB 2

Employment Litigation:
Employment Class Actions and Arbitration

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Focus Area: Overtime Class Actions

I. Why are our professional employees suing us for overtime?

II. Can a white collar employer actually win an overtime class action?

III. Can we make employees arbitrate their employment claims individually?

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Basic Rule:

An employee must be paid a premium for overtime work, unless the employer proves the affirmative defense that the employee is exempt from the overtime requirements.

- **Federal:** Fair Labor Standards Act (FLSA)
- **States:** most track the FLSA, but some states (e.g., California) are more restrictive than the FLSA

Collective and Class Actions:

FLSA:

- Opt-in "collective action"
- Cases usually start with a small number of plaintiffs, who request conditional certification and notice to all allegedly similarly situated current and former employees
- Two-year statute of limitations, expanded to three years for willful violations

State law claims:

- Rule 23(b)(3) opt-out class action, or state equivalent
- Claims may be supplemental to FLSA claims
- Typically longer limitations periods under state law

But aren't our professional employees exempt from overtime requirements?

The Fight:

Yesterday's fight:
CPA's and other licensed professionals

- Professional exemption
- Administrative exemption

Today's fight:
Unlicensed accountants

- Professional exemption
- Administrative exemption
- Control and supervision under the AICPA Auditing Standards

Case Study: *Campbell v. PwC* (9th Cir., No. 09-16370)

Background:

Class Action Certification

- **2006:** Class action filed E.D. Cal., seeking to represent all "non-licensed associate accountants" working for PwC in California from October 2002.
- **October 2007:** Plaintiffs moved to certify a class of PwC employees who: (i) did not have a CPA license; (ii) assisted CPAs in the practice of public accountancy; and (iii) worked as Associates or Senior Associates in PwC's Assurance and Tax Lines of Service.

Result

The district court ultimately certified a class of unlicensed accountants working as Attest Associates and ruled that plaintiff class was not exempt, but allowed an interlocutory appeal to the Ninth Circuit, argued in February 2011.

Case Study: *Campbell v. PwC* (9th Cir., No. 09-16370)

At Issue:

Professional Exemption

Plaintiffs argue:
- The absence of licensure controls, and that their work was routine and non-discretionary.

Defendant argues:
- Attest Associates are engaged in a "learned profession" and the governing law does not require licensure.

Administrative Exemption

Plaintiffs argue:
- They did not work "under only general supervision."

Defendant argues:
- The level of supervision during the performance of an employee's work is the relevant test, as compared to review of the results and conclusions reached by the Attest Associates.

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Case Study: *Campbell v. PwC* (9th Cir., No. 09-16370)

At Issue:

AICPA Auditing Standards (AU § 311)

District Court holding:
- The Auditing Standards "mandate supervision" in excess of mere "general supervision."

Amici supporting defendant point out that under the Auditing Standards, the amount of supervision that is appropriate varies on an individual basis.

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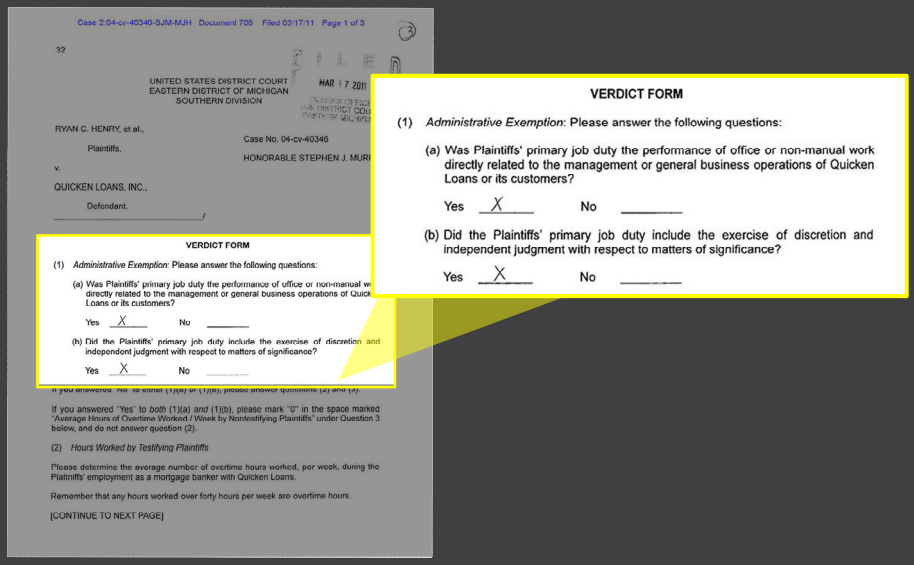
Can an employer win an exempt status class action tried to a jury?

The Answer: YES



Case 2:04-cv-40346-SJM-MJH Document 708 Filed 03/17/11 Page 1 of 3

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
MAR 17 2011

RYAN C. HENRY, et al.,

Plaintiffs,

v.

QUICKEN LOANS, INC.,

Defendant.

Case No. 04-cv-40346

HONORABLE STEPHEN J. MURP

VERDICT FORM

(1) *Administrative Exemption:* Please answer the following questions:

(a) Was Plaintiffs' primary job duty the performance of office or non-manual w directly related to the management or general business operations of Quick Loans or its customers?

Yes X No

(b) Did the Plaintiffs' primary job duty include the exercise of discretion and independent judgment with respect to matters of significance?

Yes X No

If you answered "Yes" to *both* (1)(a) *and* (1)(b), please mark "0" in the space marked "Average Hours of Overtime Worked / Week by Nontestifying Plaintiffs" under Question 3 below, and do not answer question (2).

(2) *Hours Worked by Testifying Plaintiffs*

Please determine the average number of overtime hours worked, per week, during the Plaintiffs' employment as a mortgage banker with Quicken Loans.

Remember that any hours worked over forty hours per week are overtime hours.

[CONTINUE TO NEXT PAGE]

VERDICT FORM

(1) *Administrative Exemption:* Please answer the following questions:

(a) Was Plaintiffs' primary job duty the performance of office or non-manual work directly related to the management or general business operations of Quicken Loans or its customers?

Yes X No

(b) Did the Plaintiffs' primary job duty include the exercise of discretion and independent judgment with respect to matters of significance?

Yes X No

I heard something about a new case from the Supreme Court.

Should we require arbitration?

Overview

I. Background on the use of arbitration agreements by businesses.

II. The Road to *Concepcion*.

III. The Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.

IV. The Plaintiffs' Bar Reloads: Potential Attacks on and Strategies for Arbitration Agreements After *Concepcion*.

V. Proposed legislation and regulations that would restrict the use of arbitration.

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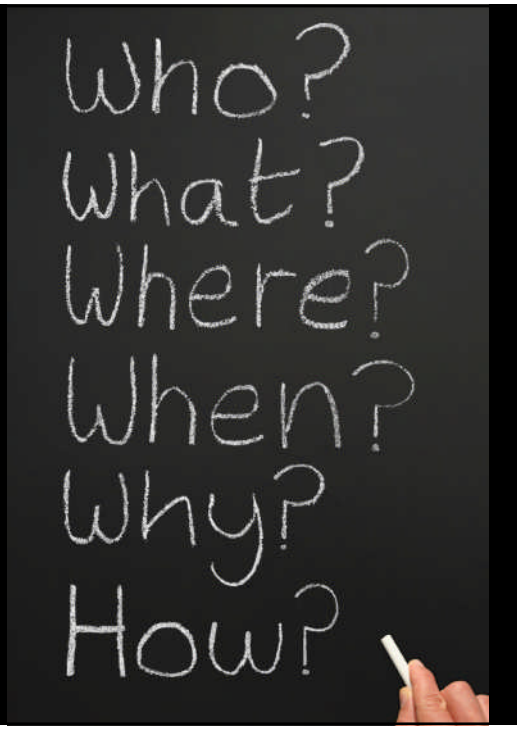
Background



Advantages of Arbitration

- Reduced transaction costs
- Less adversarial than litigation
- Fair, expeditious process to resolve disputes
- N.B.: An employee may agree to arbitrate only his or her own claims. The EEOC remains free to pursue claims in court on behalf of that employee. *See EEOC v. Waffle House, Inc.* (U.S. 2002).

Congressional Support for Arbitration

- Federal Arbitration Act (FAA) adopted in 1925 to reverse long-standing judicial hostility to arbitration.
- Section 2 of the Act provides that arbitration agreements must be enforced, unless there is a generally applicable rule of state law that would authorize invalidating any contract.

The Road to *Concepcion*

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Agreements
Arbitration Provisions

Businesses began including arbitration provisions in their customer and employee agreements in the 1990s.

Plaintiffs responded by invoking state unconscionability law.

Many arbitration provisions were struck down on the ground that they were one-sided. CA courts became particularly aggressive in striking them down.

Plaintiffs attacked the following features of early arbitration provisions:

- Non-mutuality (only plaintiff had to arbitrate; company could sue).
- Fee splitting.
- Limitations on remedies (e.g., punitive damages and/or attorneys' fees).
- Shortened statutes of limitations.
- Confidentiality requirements.
- Requirements that arbitration take place near company's headquarters (or in some other inconvenient location).
- Biased arbitrator-selection process.

California Courts

***Armendariz v. Foundation Health Psychcare Servs., Inc.* (CA 2000)**

Specified minimum requirements to arbitration "unwaivable" statutory employment rights (like those under the Fair Employment and Housing Act). Agreement must:

- Require employers to pay all "unique" costs of arbitration;
- Permit "more than minimal" discovery;
- Allow arbitrator to award any remedies a court could award; and
- Require the arbitrator to produce a reasoned written decision.

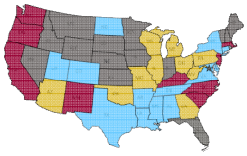
***Little v. Auto Stiegler, Inc.* (CA 2003)**

Extended *Armendariz* requirements to arbitration agreements covering nonstatutory employment claims (e.g., wrongful termination in violation of public policy).

REVISED
Arbitration Provisions

Businesses responded to these decisions by revising their arbitration clauses to address the courts' concerns.

The battle then shifted to the issue of class-wide arbitration.



Early arbitration clauses did not address class procedures, which led most courts to hold that class-wide arbitration was not authorized. Some courts disagreed, creating a circuit split.

- The Supreme Court added to the confusion in 2003 in *Green Tree Financial Corp. v. Bazzle*. A plurality concluded that the arbitrator should first decide whether class-wide arbitration is permitted if the arbitration agreement is "silent" on the subject.
- Lower courts began sending businesses with "silent" clauses to arbitration to decide whether the agreement permits class arbitration.
- Post-*Bazzle*, many businesses are forced into class arbitration.

Post-*Bazzle*

- Most arbitrators concluded that "silent" arbitration clauses permit class arbitration. Courts deemed themselves barred from revisiting the issue by the narrow standard of judicial review of arbitral awards.
- Arbitrators then presided over class-wide arbitrations—which replicated the worst excesses of class actions in court (without the safety valve of appellate review).

  E.g., the Fair Labor Standards Act (FLSA) is crystal clear that collective actions may proceed only on an opt-in basis. One arbitrator nevertheless decided to certify an opt-out FLSA class. The courts then held that they could not set aside the obvious error. *Long John Silvers Rests., Inc. v. Cole* (4th Cir. 2008).

REVISED
Arbitration Provisions

In response, many businesses revised their arbitration provisions with employees and customers to bar class-wide arbitration.

Plaintiffs argued these clauses were unconscionable.

The CA Supreme Court, however, held that, at least in some circumstances, such provisions are unconscionable. Courts in several other states have followed.

Many early decisions upheld arbitration provisions that did not allow for class-wide arbitration.

Class-Wide Arbitration

The majority position remains that agreements that do not allow for class-wide arbitration are enforceable when

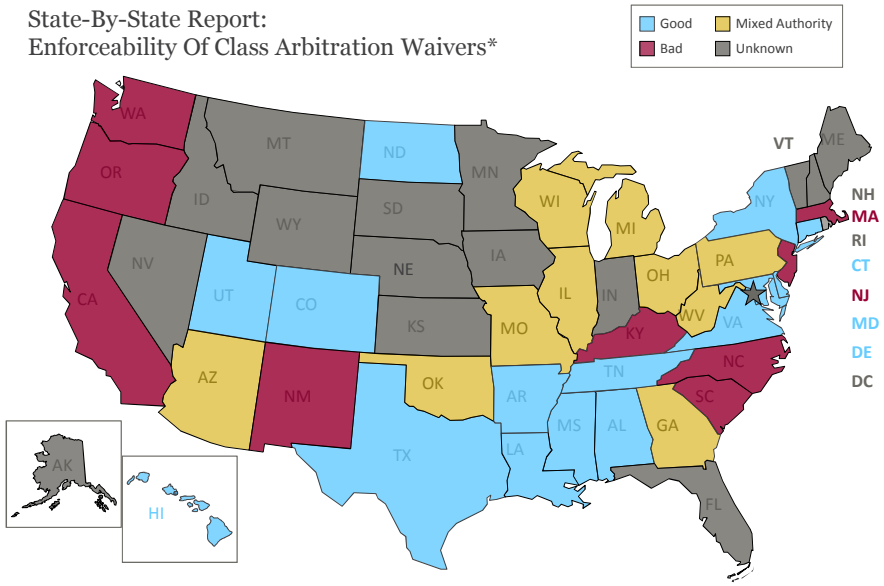
(1) The consumer's share of arbitration costs is capped at or below the equivalent court filing fee;

and

(2) The arbitrator is authorized to award whatever individual remedies, including attorneys' fees, are available in court.

The Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.

State-By-State Report:
Enforceability Of Class Arbitration Waivers*



This report provides our assessment of how a federal court in a particular state might have ruled before *Concepcion*. Past performance is no guarantee of future results.

AT&T's Arbitration Provision

- Mayer Brown worked with AT&T to draft the clause at issue in *Concepcion* and to defend it in court.
- AT&T's arbitration provision is designed to eliminate impediments to the vindication of small claims and to provide affirmative incentives to consumers and their attorneys to pursue them.

Key Features of AT&T's Arbitration Provision

- Consumer pays **no arbitration costs** as long as the claim is not frivolous.
- AT&T must **pay the consumer a minimum of $5,000** (now, $10,000) plus **double attorneys' fees** if the arbitrator awards the consumer **more than AT&T's final settlement offer**.
- **Arbitrator may award any form of individual relief** (including punitive damages, attorneys' fees, and injunctive relief) that would be available to the consumer in court. AT&T waives any right to obtain attorneys' fees.
- Consumer may file suit in **small claims court** rather than arbitrating.
- Arbitration takes place in the **county in which the consumer resides**, and for claims under $10,000, the consumer may choose whether the arbitration will be in person, by telephone, or on written submission.
- Proceedings (including the process for selecting the arbitrator) are governed by consumer arbitration rules of the independent, non-profit American Arbitration Association.
- Consumers and their attorneys are **not required to keep arbitration confidential**, and may bring issues to the attention of federal or state agencies.

Background of *Concepcion*

- The Concepcions filed a class action alleging that AT&T had violated California consumer-protection law. AT&T moved to compel arbitration.
- The lower courts concluded that the Concepcions could vindicate their claims in arbitration under AT&T's arbitration clause, but held that it was unconscionable because class-wide proceedings weren't permitted.

We persuaded the Supreme Court to review the case.

Background of *Concepcion*

By a 5-4 vote, the Supreme Court reversed the Ninth Circuit.

- The majority held that California law is preempted under the doctrine of conflict preemption.

  "*Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.*"

- Justice Thomas joins Justice Scalia's majority opinion but writes a separate concurring opinion to suggest another approach to FAA preemption—one that would "often lead to the same outcome."

- Justice Breyer authors the dissent.

Background of *Concepcion*

The Court rejected the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." Court gave two reasons:

- "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

- "Moreover, the ***claim here was most likely to go unresolved***" because of the special features of the AT&T arbitration agreement:
  - "The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and ***the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole***. "
  - "Indeed, the District Court concluded that the Concepcions were ***better off*** under their arbitration agreement with AT&T than they would have been as participants in a class action."

The Plaintiffs' Bar Reloads: Potential Attacks on and Strategies for Arbitration Agreements After *Concepcion*

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The Next Wave of Arguments Against Arbitration

- Attacking contract formation.
- Challenging the scope of the arbitration agreement.
- Distinguishing *Concepcion* as limited to AT&T's clause.
- Distinguishing *Concepcion* as limited to preemption of California unconscionability law.
- Arguing that individual arbitration would be an impermissible waiver of federal statutory rights.

Businesses drafting/revising arbitration clauses should consider not only the needs of the business but also this next wave of attacks on arbitration.

Drafting an Arbitration Agreement After *Concepcion*

After Concepcion, plaintiffs may seek to assert unfairness or defects in the manner of contract formation.

- Some contracting defects would allow only the named plaintiff to litigate. Others potentially would apply to all customers or employees.
- E.g., insufficient notice of a class waiver; agreed under duress.

Footnote 6 in Concepcion may lend some force to these arguments:

"Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."

✓ **Make the requirement of arbitration on an individual basis prominent in the contract.**

✓ **Consider giving employees time to reject the arbitration clause or separate consideration for accepting it.**

Drafting an Arbitration Agreement After *Concepcion*

Plaintiffs might argue that the claims at issue fall outside the scope of the arbitration provision.

✓ **Consider using broad language and extending the clause to cover disputes against related entities (subsidiaries, parents, agents, etc.).**

✓ **If clause applies to preexisting claims, say so expressly.**

Drafting an Arbitration Agreement After *Concepcion*

Plaintiffs may argue that *Concepcion* is distinguishable.

- Plaintiffs will attempt to limit the case to AT&T's clause, arguing that if another clause makes arbitration unrealistic, a court could deem it unconscionable without preemption.
- Plaintiffs will attempt to limit the case to California's Discover Bank rule, which the Court said was categorical. Other states' laws, plaintiffs will argue, are more nuanced and require proof that class procedures are necessary.
- Plaintiffs will similarly defend the California Supreme Court's decision in *Gentry v. Superior Court* (2007). *Gentry* directs courts to consider several factors in assessing agreement to arbitrate statutory employment claims on an individual basis (e.g., size of individual recovery, potential for retaliation, likelihood that absent class members are unaware of their rights).

Plaintiffs may argue that *Concepcion* applies only in state court, based on idiosyncrasies in Justice Thomas's past arbitration jurisprudence.

Drafting an Arbitration Agreement After *Concepcion*

Even if courts read *Concepcion's* preemption holding broadly, plaintiffs may seek to invoke distinct arguments under federal law.

Here, the question is one of statutory interpretation:
Did Congress intend to bar enforcement of agreements to arbitrate claims under a statute on an individual basis?

- Plaintiffs have had some success—prior to *Concepcion*—in complex antitrust cases. In these cases, plaintiffs submitted evidence that the cost of pursuing an individual claim (including expert witnesses' fees) would far exceed the amount of the claim. See *Kristian v. Comcast Corp.* (1st Cir.); *In re Am. Express Merchants' Litig.* (2d Cir.).

Drafting an Arbitration Agreement After *Concepcion*

The argument will spread to other statutes.

- At least one court has held that the Fair Labor Standards Act bars the enforcement of a class waiver in an overtime case in which the plaintiff sought under $2,000, but presented evidence that it would cost her well over $200,000 to arbitrate. *Sutherland v. Ernst & Young LLP* (S.D.N.Y. Mar. 3, 2011).
- The day after *Concepcion* (but not citing it), a court held that Title VII pattern-or-practice claims are not subject to agreements to arbitrate on an individual basis. *See Chen-Oster v. Goldman, Sachs & Co.* (S.D.N.Y. Apr. 28, 2011).

Drafting an Arbitration Agreement After *Concepcion*

- To anticipate these challenges, the provision should make the arbitration process **fair and attractive** to employees:
  - **Low-cost or cost-free arbitration**: Make arbitration affordable for customers and employees. If possible, offer to pay the full costs of arbitration.
  - **Mutuality**: To the greatest extent possible, have both parties agree to arbitrate.
  - **Do not impose limits on legal remedies**. Courts will remain skeptical of efforts to bar punitive damages and recovery of statutory attorneys' fees, or to shorten statutes of limitations.
  - **Offer a convenient location** for the non-business party.
  - Do not require the consumer or employee to keep arbitration **confidential**.
- Consider using **premiums**: **financial incentives** for employees to arbitrate; allowing the arbitrator to award the employee **attorneys' fees**; and reimbursing **expert witnesses** even if not required by law.
- **Protect against class arbitration** with an express (non-)severability clause that explains which aspects of the arbitration provision **can** be severed (cost-sharing) and which **cannot** (class waiver).

Drafting an Arbitration Agreement After *Concepcion*

- Include disclosures suggested by NLRB guidance.

  Section 7 of the National Labor Relations Act guarantees employees the right "to engage in … concerted activities for the purpose of," among other things, "mutual aid and protection."

  - Applies to all employees—not just union members.
  - Employer policies that violate those rights are unfair labor practices.

Drafting an Arbitration Agreement After *Concepcion*

NLRB Guideline Memorandum:

- Filing a class action is a protected activity, and retaliating against an employee for doing so violates Section 7.
- Section 7 is not violated when employee knowingly waives right to pursue a class action, so long as agreement makes clear that employees may challenge enforceability of agreement without retaliation.
- Class waivers are not per se impermissible.
- Recommends language that the arbitration agreement is not a waiver of the employee's rights under Section 7, including the right to pursue a covered claim in court on a class or collective basis, and that no employee will be retaliated against for exercising Section 7 rights.

Anti-Arbitration Legislation and Regulation

Possible State and Federal Measures

- California legislators may propose legislation at the state level.
- The plaintiffs' bar is lobbying Congress for re-introduction of the Arbitration Fairness Act.
  - Would invalidate **all** "**predispute arbitration agreements**" in employment and consumer contracts and bar enforcement of agreements to arbitrate any "dispute arising under any statute intended to **protect civil rights**."
  - Would **apply retroactively** to all pre-existing arbitration agreements, so long as the "dispute or claim . . . arises on or after" its effective date—invalidating hundreds of millions of arbitration agreements .
  - Would preempt state policies favoring arbitration.

Possible State and Federal Measures

- The Consumer Financial Protection Bureau may propose rules regarding the use of arbitration by businesses subject to its jurisdiction.
- State Attorneys General may pressure arbitration providers not to handle arbitrations under "unfair" arbitration agreements.

Thank You!

With appreciation to our colleague Kevin Ranlett from the Mayer Brown office in Washington DC, and a member of the *Concepcion* team, for his great assistance in preparing the materials on arbitration.

TAB 3

Identifying and Mitigating Risks Associated with Local Government Contracting: Staying Out of the IG's Crosshairs

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Introduction

- In recent years, state and local Inspectors General have become increasingly more active and have especially dedicated resources to focus on contracts with outside vendors.
- In the United States today there are literally hundreds of IGs at all levels of government.

The Proliferation of State and Local IGs

For example:

- In New York City, the Department of Investigations, is headed by a former Assistant United States Attorney ("AUSA"), Rose Gil Hearn, and has Deputy IGs embedded in 45 different City agencies.
- The NYC DOI also works very closely with municipal, state and federal law enforcement on various investigations.

According to the DOI:
"[a]t any time, the DOI may have several ongoing procurement-related corruption investigations involving bribery, bid-rigging, prevailing wage fraud, billing fraud and tax evations."

The Proliferation of State and Local IGs

- In Chicago, like New York, the IG is a former AUSA, Joe Ferguson. The Chicago IG does not have the same reach of the NYC DOI, however, it has placed particular emphasis on addressing contractor fraud and has specifically focused on the City's M/W/DBE Program. Aside from the City's IG, the so-called sister agencies, the Chicago Transit Authority, Public Schools, Housing Authority, all have separate Inspectors General.
- Los Angeles, Philadelphia and other major cities have similar IGs with similar jurisdictions.

Why IGs Matter

- Many IGs have a very broad mandate by ordinance or statute which covers outside contractors/vendors.
- Many government contracts include a provision which subjects a contracting party to the jurisdiction of the relevant IG.

For example, the City of Chicago includes the following broad language in every City contract which mandates cooperation with the IG:

"It is the duty of any Grantee, bidder, proposer, or consultant, all Subcontractors, every applicant for certification of eligibility for a City contract or program, all officers, directors, agents, partners and employees of any Grantee, bidder, proposer or contractor, Subcontractor or such applicant to cooperate with the Inspector General in any Investigation or hearing undertaken pursuant to Chapter 2-56 of the Municipal Code. Grantee understands and will abide by all provisions of Chapter 2-56 of the Municipal Code. All subcontractors must inform Subcontractors of the provision and require understanding and compliance with it."

Why IGs Matter

- Many IGs have announced initiatives specifically to deal with procurement/contract waste, fraud and abuse.

For example, the NYC DOI has identified procurement and vendor-related investigations as one of its 'significant initiatives."

Why IGs Matter

- Local and state IGs are highly incentivized to investigate outside vendors.
- With the depleted resources of state and municipal governments, they are looking to outside sources to supplement revenues and outside vendors can provide a potentially lucrative deep pocket.
- IGs also matter because many businesses have a very lucrative government contract practice.
  - As city resources dwindle and cities try to reduce employees with their costly benefit and pension packages, there has been an uptick in privatizing city functions which creates both opportunities and risks.

Why Should You Care?

If you are participating in even one contract with a government entity, then you have potentially significant risk.

Why?

Given the broad jurisdiction of state and local IGs, the heightened attention to contract compliance, IGs have outside vendors in their sights.

- Investigations can be costly.
- Brand injury.
- And the threat of debarment which has far-reaching and long-term negative consequences.

What Can You Do To Mitigate Risks?

First understand the various points where risks exist.

- General contract compliance: Failing to live up to terms can now subject you to risk
  - Failing to meet M/D/WBE goals
  - Contract "amendments"
- "Customer requests"
  - Expanding the Scope of the Contract
  - Hiring Additional People
- Gifts to decision-makers or administrators
- Sole Source Contracts
- Emergency Contracts
- Failing to report misconduct by government employees
- "Heads up calls" when a competitive bid is imminent
- "Whistleblower" – competitor or disgruntled employee
  - Most IGs encourage and investigate anonymous complaints

What Can You Do To Mitigate Risks?

Bottom Line:

Recognize that what may work or be standard fare in the private sector may be viewed in a totally different light in the public sector.

How To Address The Risks

- Know what's in your contracts.
  - Does your contract subject you to IG jurisdiction?
  - Are there any other unique provisions which restrict the manner in which you can service your contract?
  - Are there any discount provisions which are tied to some outside factor?
  - Any other unique contract provisions?
  - Gift policy restrictions?
  - Any other ethics requirements?
- Understand the unique procurement rules for the particular governmental entity.
- M/W/DBE requirements are not for amateurs.
- Training, training, training.
  - Educate your people about the range of risks and the restrictions that are unique to government contracting.
  - Periodic auditing.
  - Many IGs offer workshops for outside vendors.

Take IG Investigations Seriously

- Subpoenas, requests for interviews – could be a normal inquiry or the start of a much more complicated process.

Questions?

TAB 4

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"His practice has all the elements . . . that allow him to play on a three-dimensional level, while everyone else is in 2D." — *Chambers USA 2008*

Experience

Bob Davis is widely acknowledged as one of the nation's leading legal authorities and litigators working across a broad spectrum of employment and ERISA issues. According to *Chambers USA* (2010), Bob "is a top flight litigator who is always looking around corners for his clients." *Chambers USA* (2007) also characterized Bob as a "'terrific lawyer' [who is] highly respected for his ERISA practice."

Chambers USA notes, too, that Bob is "definitely a key player in the labor and employment field," and that "as well as being recognized for his employee benefits expertise, Bob . . . focuses on wage and hour compliance and litigation. . . Clients describe him as a 'big-picture lawyer' who 'communicates an intelligent game plan.'"

He handles trial and appellate ERISA litigation and represents plans, fiduciaries, plan sponsors, and service providers in ERISA investigations and litigation. His victories in the ERISA area include denial of class certification on employer stock claims; interlocutory appeal and vacatur of class certification of ERISA fiduciary claims in a 100,000+ persons class action; successful defense at trial, resulting in a defense judgment affirmed on appeal, of one of the first major "stock drop" cases; winning summary judgment, affirmed on appeal, on all of the substantial claims in a major LMRA § 301/ERISA class action; dismissal of a stock drop case complaint with prejudice against plaintiffs; and successful defense of several national-level ERISA investigations by the US Department of Labor.

Bob has been responsible for over 100 Fair Labor Standards Act and state wage and hour cases, including collective action and class action certification and decertification issues, enforcement of arbitration agreements when class claims are involved, and notice and discovery in class cases. His most recent victory was a jury verdict for a large financial services company, after five weeks of trial, in what we believe is the largest FLSA exempt status ever tried to a defense verdict. Bob's other victories for employers include a precedent-setting appellate decision on the salary basis test under the FLSA, successful coordination of 28 statewide FLSA and wage and hour cases through the Judicial Panel for Multi-District Litigation, and defeat of class certification in several cases. Bob also has devised innovative structures for negotiated settlements.

Prior to joining Mayer Brown as a Partner in 1991, Bob served as the Solicitor of Labor for the US Department of Labor (1989–1991) and as Chief of Staff to the US Secretary of Transportation (1983–1985). Previously he served in senior positions in the US Department of Justice.

Education

Georgetown University Law Center, JD, magna cum laude, 1980; Editor, Georgetown Law Journal • Syracuse University, MPA, 1973 • Boston University, MA, 1972 • Brown University, AB, 1971

Admissions

- District of Columbia, 1980
- United States Supreme Court
- United States Courts of Appeals for the First, Second, Fourth, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits
- United States District Courts in over 30 districts

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Experience

Dana Douglas focuses on a wide range of complex commercial litigation and criminal matters, including professional liability litigation, antitrust litigation, post-merger shareholder litigation, post-closing disputes, contract disputes, partnership disputes and complex discovery matters. Dana also has represented witnesses in connection with federal criminal investigations and has defended indicted individuals and corporations.

In the professional liability field, Dana represents many major accounting firms in connection with a wide variety of claims brought by client and client successors, including claims related to allegedly negligent and fraudulent audit work. Dana also has provided representation to accounting firms in federal securities actions, as well as in other claims brought by third parties. Dana currently is representing a major accounting firm in connection with a federal regulatory investigation.

In the antitrust field, Dana has represented domestic and international corporations in price-fixing, market allocation, resale price maintenance and conspiracy cases. As a part of her litigation practice, Dana has extensive experience managing complex discovery projects.

Prior to joining Mayer Brown in 2002, Dana served as a law clerk to the Honorable Samuel A. Alito Jr., who then served on the US Court of Appeals for the Third Circuit.

Notable Engagements

- Representation of accounting firms and their audit partners in SEC and PCAOB investigations.
- Representation of PwCIL in *In re Satyam Computer Services, Ltd. Securities Litigation*, 09-MD-2027, SDNY.
- Participation in the briefing leading to significant decisions in favor of accounting firms and financial institutions. *See The People ex rel. v. Siemens Financial Services, et al.,* 387 Ill.App.3d 606 (2009); *FDIC v. Ernst & Young LLP*, 374 F.3d 579 (7th Cir. 2004); *Donnybrook Investments, Ltd. v. Arthur Andersen LLP*, 2006 WL 1049588 (N.D.Ill. 2006); *Baker O'Neal Holdings v. Ernst & Young LLP*, 2004 WL 771230 (S.D. Ind. 2004).
- Development and implementation of records retention policies and procedures for a major accounting firm's business lines, risk functions and administrative functions.
- Representation of the sellers of a construction company in a post-closing adjustment arbitration and related allegations of breaches of representations and warranties.
- Representation at arbitration of a real estate investment company in connection with a partnership dispute involving allegations of financial fraud. The representation involved the supervision of complex forensic accounting experts.

- Representation of a state pension fund and its employees in connection with a high-profile federal fraud investigation and trial.
- Representation of Arthur Andersen in a federal jury trial resulting in verdicts of 13 breaches on 13 claims against a fiduciary liability insurer and subsequent significant judgments and recoveries for defense and indemnity.

Education

University of Pennsylvania Law School, JD, 2001; Associate Editor, Journal of International Economic Law • Northwestern University, BA, with honors, 1998; Gamma Sigma Alpha

Admissions

- US District Court for the Central District of Illinois, 2008
- US District Court for the Eastern District of Wisconsin, 2007
- US District Court for the Northern District of Illinois, 2003
- US District Court for the District of Colorado, 2003
- US Court of Appeals for the Third Circuit, 2002
- Illinois, 2002

Publications

- "New York Court Reaffirms Strong In Pari Delicto Defense," Mayer Brown Legal Update, October 29, 2010
- "Fraud and Forbearance: State Courts Divided on Whether to Recognize Claims by Securities Holders," *Financial Fraud Law Report*, October 2010
- "Claims Against Accounting Firms – Implications of Merck & Co. v. Reynolds," Mayer Brown LLP, April 30, 2010
- "Illinois Appellate Court Resolves Issue of When Limitations Period for Accounting Malpractice Claim in a Tax Liability Case Begins to Run," Mayer Brown LLP, April 20, 2010
- "Parties that Settle with the US SEC May Face Greater Collateral Legal Risk," Mayer Brown LLP, April 15, 2010
- "A View from the Trenches - Four 'All American' Jury Concepts," (co-author with Alan Salpeter) *The 7th Circuit Rider* , 2006

Seminars & Presentations

- "The Great Debate – States' Rights and Immigration Enforcement," Chicago Inn of Court, January 12, 2011

Professional Activities

- Chicago Chapter of the American Inn of Court
- Member, American Bar Association: Professional Liability and Securities sections

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Experience

Lori Lightfoot is a trial attorney, investigator and risk manager. She has extensive experience in every facet of complex civil and criminal litigation in areas ranging from federal and state criminal violations, including mail and wire fraud, tax prosecutions, perjury, and obstruction of justice. Lori has also litigated disputes concerning employment discrimination matters, particularly class actions and those involving senior executives; foreclosure actions; franchisee/franchisor disputes; products liability; and a variety of business torts, among other matters. Lori regularly advises clients on avoidance of and preparation for potential litigation.

Lori also has extensive experience in representing clients in legal ethics and malpractice issues.

Lori also has direct experience in designing and implementing media and marketing strategies for clients.

Other experience includes advising on all facets of the federal Disadvantaged Business Enterprise (DBE) rules and regulations as well as related state and local programs. Lori has served as an expert witness on these matters. She has advised clients on a variety of other matters such as internal compliance, risk management, corporate governance, procurement processes, disciplinary systems, ethics.

Both as a civil litigator and as Assistant US Attorney in the Criminal Division of the US Attorney's Office, Northern District of Illinois (1996–2002), Lori has tried over 20 federal and state jury and bench trials. She has also argued cases in state and federal appellate courts, and she has successfully conducted numerous internal investigations. In addition, Lori has considerable experience in instituting risk-management and compliance practices for municipal government departments, such as police, procurement services, emergency management, homeland security and 9-1-1 emergency call systems.

From 2002 to 2005, Lori worked with the City of Chicago as Interim First Deputy Procurement Officer, Department of Procurement Services (DPS); General Counsel and Chief of Staff, Office of Emergency Management and Communications (OEMC); and Chief Administrator, Office of Professional Standards (OPS) of the Chicago Police Department. At OPS, Lori managed a 100-person office of civilian investigators charged with investigating police-involved shootings, allegations of excessive force and other misconduct alleged against Chicago police officers. She also coordinated joint investigations with state and federal criminal authorities and facilitated the implementation of new compliance and risk-management systems that included redesign of the disciplinary processes for sworn and civilian members, creation of a management intervention program for problem employees, and targeted tracking of litigation costs associated with complaints against department members.

During her service as Interim First Deputy Procurement Officer of the city's Department of Procurement Services, Lori conducted an across-the-department reorganization and reform of DPS business practices. She was responsible for redesigning Chicago's minority and women business enterprise program; streamlining the annual $2 billion procurement process; developing training curricula for internal and external use; and creating and implementing vendor and buyer accountability measures.

As Chief of Staff and General Counsel for Chicago's Office of Emergency Management and Communications, Lori oversaw the City's 9-1-1 emergency and non-emergency call systems, emergency response operations, homeland security initiatives and related technologies. She also developed management accountability metrics for each OEMC operational unit. Highlights of her OEMC experience include managing the recovery of the city's 9-1-1 system following a catastrophic crash and serving as point person for recovery efforts during and following natural disasters, such as large scale fires and weather-related emergencies.

Lori has been associated with Mayer Brown since 2005 and, previously, between 1990 and 1996. Earlier, she served as Law Clerk to The Honorable Charles Levin, Michigan Supreme Court (1989–1990).

Notable Engagements

- *McReynolds v. Merrill Lynch.* Serves as one of lead counsel in defending an international financial services provider in a class action lawsuit filed in the Northern District of Illinois, in which the putative class alleges race discrimination in hiring, promotion and retention.
- *Offutt v. Doctor's Associates Inc.* Lightfoot served as one of the lead counsel in representing franchisee controlled advertising fund in contractual dispute against the Subway quick service restaurant franchisor in federal court proceeding that resulted in a bench trial and then eventual settlement.
- *Art's Rental, et al. v. Bear Creek Construction, et al.,* Lightfoot serves as the litigation lead for a large international bank in a $80 million foreclosure action pending in Ohio state court which involves over 100 parties.
- *State v. Planey, et al.,* Lightfoot won the acquittal of a police officer in the Circuit Court of Cook County, Criminal Division, who was charged with aggravated battery and other charges stemming from an off-duty incident with civilians. Lightfoot continues to defend officers in related civil and disciplinary proceedings.
- *United States v. Veysey*. Served as one of the lead AUSAs in the investigation, charging, trial, conviction and sentencing of a complex insurance and mail fraud prosecution of a serial arsonist and murderer. Following conviction, the defendant received a 110-year sentence that was upheld on appeal.
- *United States v. Baxter International*. Participated in the defense of a large international medical devices, pharmaceuticals and biotechnology company against federal prosecution for alleged violations of the anti-boycott statute.
- *United States v. Jones, et al*. Served as one of the lead AUSAs in the investigation, charging, trial, conviction and sentencing of a Chicago City alderman and associate for bribery and extortion.

- *Hastert v. Board of Elections*. Participated in the successful litigation of the 1990 Illinois Congressional redistricting plan before a three judge panel on behalf of the Illinois Republican Congressional delegation. This litigation led to establishment of the first majority Latino Congressional district in Illinois.
- *U.S. v. Donaldson, et al*. Served as lead AUSA in the prosecution of multiple defendants in a Medicare fraud case involving the submission of fraudulent billings for purported mental health treatments of elderly nursing home patients.

Education

University of Chicago Law School, JD, 1989 • The University of Michigan, BA, with honors, 1984 • Additional coursework at American University, Washington, DC, 1983

Admissions

- Illinois, 1989

Publications

- *Securities Investigations: Internal, Civil and Criminal*, PLI Corporate and Securities Law Library (2d ed. 2010)
- "Sentencing Guidelines," *Securities Investigations: Internal, Civil, and Criminal*, Practising Law Institute, Corporate and Securities Library, Mayer Brown LLP, editor.
- "Internal Investigations," *Credit Market and Subprime Distress, Responding to Legal Issues*, Practising Law Institute, Corporate and Securities Library, Mayer Brown LLP, editor.
- "Facilitating Success - DBE Administrators, Vendors Must Have Solid Relationship," *Airport Revenue News*, June 2009

Professional Activities

- Adjunct Professor, Adler School of Professional Psychology, in the graduate program for the Psychology of Police Organizations
- Adjunct Professor, Northwestern University School of Law, Trial Advocacy
- Taught trial advocacy at various law schools and bar association-sponsored seminars
- Lectured on ethics and discipline at the Chicago Police Academy, the Police Executive Institute, and to City of Chicago employees as part of basic procurement training

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Experience

Brian Massengill focuses his practice on the intersection of litigation with accounting and finance issues. He is the co-leader of the firm's Professional Liability practice group.

Brian brings his background as a Certified Public Accountant (license inactive), including eight years with a national accounting firm, to bear on his legal work. He devotes the majority of his practice to the defense of accounting firms and has represented national firms in a variety of matters including securities class actions, arbitrations, SEC and PCAOB investigations, and state accountancy board proceedings.

Brian's combined legal and accounting experience also enables him to serve clients in a variety of other contexts. He has represented companies in disputes arising from purchases and sales of businesses, including purchase price (post-closing adjustment) disputes, and suits alleging breaches of representations and warranties. He also has represented companies in contract and other disputes involving complex causation and damages issues. As part of his litigation practice, Brian has worked extensively with experts in the areas of auditing, accounting, causation and damages.

Prior to joining Mayer Brown in 1996, he was Law Clerk to The Honorable Frank H. Easterbrook, US Court of Appeals for the Seventh Circuit.

Notable Engagements

- Representing PricewaterhouseCoopers International in matters relating to Satyam Computer Services Ltd.
- Representing Ernst & Young LLP in a series of matters concerning Bally Total Fitness, including securities class actions and shareholder derivative suits.
- Representing accounting firms and their audit partners of in a number of SEC and PCAOB investigations.
- Assisting a major accounting firm in the analysis of risk issues, and the development and implementation of records retention policies and procedures for its business lines, risk functions and administrative functions.
- Consult with major accounting firms on risk management and regulatory compliance matters.
- Successfully represented Ernst & Young LLP in a series of matters arising out of the bankruptcy of Asche Transportation Services, including obtaining dismissal of a securities class action and judgment for the firm after a lengthy arbitration hearing.
- Successfully represented clients in purchase price arbitrations and matters involving assertions of breaches of representations and warranties in M&A transactions. These include the

representation of a Fortune 100 company in a dispute relating to its $800 million acquisition of a manufacturing company; the representation of a privately held company in a post-closing adjustment arbitration relating to the sale of a major appliance manufacturer; the representation of the sellers of a construction company in a post-closing adjustment arbitration and related allegations of breaches of representations and warranties; representation of the seller of an airline catering business in a post-closing adjustment arbitration; and the representation of the seller of a members only manufacturer direct buying company in a post-closing adjustment arbitration.

- Representing a domestic manufacturer in an international arbitration relating to a contract dispute with a supplier involving complex damages issues.

Education

University of Chicago Law School, JD, 1995; University of Chicago Law Review • Certified Public Accountant (CPA), Illinois, 1985 (license inactive) • Indiana University, BS in Accounting, 1984

Admissions

- US Court of Appeals for the Third Circuit, 2001
- US Court of Appeals for the Seventh Circuit, 1996
- US District Court for the Northern District of Illinois, 1995
- Illinois, 1995

Publications

- *Securities Investigations: Internal, Civil and Criminal*, PLI Corporate and Securities Law Library (2d ed. 2010)
- "Fraud and Forbearance: State Courts Divided on Whether to Recognize Claims by Securities Holders," *Financial Fraud Law Report*, October 2010

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"...'as good as any I've seen'..." — *Chambers USA 2007*

Experience

Jonathan Medow is a senior trial lawyer who has practiced with Mayer Brown since 1983. Throughout his career, and particularly during the last ten years, Jonathan's practice has focused heavily on the defense of major accounting firms in significant cases across the country. He has represented Ernst & Young, Deloitte & Touche, KPMG, Arthur Andersen and Grant Thornton.

Over the entirety of his career, Jonathan has handled a variety of matters in a number of fields. He has extensive trial experience, including in disputes between natural gas producers and pipelines, challenges to dead-hand poison pills, and a host of bankruptcy matters (contested plan proceedings, valuation disputes, etc.). He has successfully argued appeals in various courts, including in the United States Court of Appeals for the Second Circuit. Jonathan has also represented clients on a pro bono basis. He has, among other things, used DNA evidence to secure the acquittal of a defendant wrongfully charged with aggravated sexual assault.

Among the comments clients have made about Jonathan are: he is "as good as any I've seen" (*Chambers USA* 2007); he "does a fantastic job – he is capable, smart and works hard" (*Chambers USA* 2006); and he is an "expert" in the field of securities litigation (*Chambers USA* 2008).

Prior to joining Mayer Brown, Jonathan served as a Law Clerk to The Honorable Susan Getzendanner, US District Court for the Northern District of Illinois (1981-1983).

Notable Engagements

- *SEC Investigation of Waste Management*. Negotiating on behalf of Arthur Andersen a resolution of one of the largest investigations of a major accounting firm in Commission history.
- *IKON Securities Litigation*. Obtaining summary judgment in Ernst & Young's favor in a major market fraud case.
- *Asche Arbitration*. Defeating all claims asserted against Ernst & Young during a 30+ day arbitration initiated by a bankruptcy trustee.
- *Grand Court Lifestyles Litigation*. Obtaining partial summary judgment in Deloitte & Touche's favor on claims filed by a committee of unsecured creditors, and thereafter negotiating a favorable settlement.
- *Alabama Hospital Association v. Ernst &Young*. Negotiating a favorable resolution on behalf of Ernst & Young of claims arising out of a series of health care mergers.

- *Charter Communications Security Litigation*. Negotiating a favorable resolution on behalf of Arthur Andersen in a major market fraud case.
- *Confidential SEC Investigations*. Successfully representing auditors and audit firms in various SEC investigations closed without the institution of charges.
- *People v. Larry Lee*. Obtaining an acquittal of a defendant wrongfully charged with aggravated sexual assault.
- *Magma Power v. Dow Chemical*. Obtaining judgment in Dow's favor on claims asserted under Section 16(b) of the Securities Exchange Act and thereafter defending the judgment on appeal.
- *In re Sheffield Properties*. Successfully establishing the valuation of the One Magnificent Mile office and retail tower in Chicago.
- *Natural Gas Pipeline v. The Anschutz Corporation*. Successfully arbitrating a claim for the return of substantial proceeds.

Education

Harvard Law School, JD, magna cum laude, 1981; Board of Editors, Law Review • Stanford University, BA, with distinction, 1978; Phi Beta Kappa

Admissions

- US Court of Appeals for the Third Circuit, 2001
- US Court of Appeals for the Second Circuit, 1997
- Various federal district courts, 1995-1996
- US Court of Appeals for the Seventh Circuit, 1988
- US District Court for the Northern District of Illinois, 1981
- Illinois, 1981

Publications

- "The First Amendment and the Secrecy State: *Snepp v. United States*," 130 *U. Pa. L. Rev.* 775, 1982
- "The Supreme Court, 1979 Term," 94 *Harv.L.Rev.* 75, 223-31, 1980

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Experience

Stanley Parzen focuses on complex litigation in federal and state courts and in arbitration, including trials and appeals. He devotes the majority of his practice to the defense of accounting firms and other professionals.

Stanley has represented accounting firms in connection with a wide variety of claims brought by clients and client successors, including trustees and liquidators, including claims relating to allegedly faulty audit work, often relating to failed banks, savings associations, or insurance companies; allegedly faulty computer systems design; and allegedly improper tax advice and tax return preparation. A variety of issues has arisen in these cases, including the auditor's obligation with respect to alleged internal controls at an audit client, whether the knowledge and actions of the client's officers and directors and shareholders should be attributed to the client, whether the deepening insolvency theory is an appropriate theory or measure of damages, accounting for subprime loans and securitizations, and whether the actions of the accountant had any causal relationship to the damages sought in the case.

In addition, he has provided representation to accounting firms in numerous federal securities and derivative actions brought by stockholders in diverse federal and state courts as well as other claims brought by third parties. A variety of issues has arisen in these cases including the propriety of the use of the fraud on the market theory, whether the plaintiffs had ever pleaded a claim for fraud under the applicable pleading standards, and whether the demand requirement for a derivative case to be filed had been satisfied. He has also represented a number of accounting firms in disputes with partners and retired partners, primarily relating to covenants not to compete and retirement benefits. Stanley has also represented international associations of member firms in dispute with former member firms.

Stanley has also represented accounting firms and a coordinating entity in matters before various federal and state regulatory bodies. Among other such work, he has represented clients in investigations conducted by the SEC, the PCAOB, the FDIC and the Comptroller of the Currency. He has also represented a number of firms before various state boards of accountancy.

Prior to joining Mayer Brown, he served as a Law Clerk to The Honorable Harrison L. Winter, US Court of Appeals for the Fourth Circuit, Maryland (1976-1977).

Notable Engagements

- Successfully argued that an accounting firm could not be liable for negligence to a prospective employee of an audit client who relied upon audit report in accepting employment. *Ellis* v. *Grant Thornton LLP*, 530 F.3d 280 (4th Cir. 2008).

- Successfully argued that the Comptroller of the Currency could not bring an enforcement action against an accounting firm where the only participation by the firm in the bank's operations was issuance of an audit report. *Grant Thornton LLP* v. *Comptroller of the Currency.* 514 F.3d 1328 (D.C. Cir. 2008).
- Successfully argued that the trustee of a bankrupt company could not sue the auditor of the company for failure to include a going concern in the audit report. *Fehribach* v. *Ernst & Young LLP*, 493 F.3d 905 (7th Cir. 2007).
- Successfully briefed and argued motions to dismiss in litigation brought by purchasers of a series of affiliated mutual funds against Ernst & Young LLP; among other things, the district court held that purchasers of a close-ended mutual fund could not proceed on a fraud on the market theory because there was no market on which the mutual fund shares traded (*In re Van Wagoner Funds, Inc. Securities Litigation*, 382 F. Supp. 2d 1173 (ND Cal. 2004), Order of July 25, 2005).
- Successfully argued to the Illinois Supreme Court that taxpayers of Cook County, Illinois could not bring an action on behalf of the county under the common law against an accounting firm that had allegedly failed to determine that a municipal refinancing had involved yield burning (*County of Cook ex rel Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E. 2d 563 (2005); see also *Schachitti v. UBS Financial Services, et al.*, 215 Ill. 2d 484, 831 N.E. 2d 544 (2005)).
- Successfully sought interlocutory review and obtained reversal of an order of the district court certifying a class of securities purchasers against Grant Thornton LLP; the United States Court of Appeals for the Fourth Circuit held that a defendant could challenge the efficiency of the market at the class certification stage when the plaintiffs sought to base the propriety of the class device upon the fraud on the market theory and that the plaintiffs had not shown sufficient indicia of an efficient market to permit class certification (*Gariety et al. v. Grant Thornton LLP*, 368 F.3d 356 (4th Cir. 2004)).
- Successfully argued to the United States Court of Appeals for the Sixth Circuit that the fact that the alleged errors in the financial statements were large in magnitude and the fact that the accounting firm had been sued in other cases were both not germane in determining whether the complaint sufficiently alleged scienter against the accounting firm (*Fidel v. Ernst & Young LLP*, 392 F.3d 220 (6th Cir. 2004)).
- Successfully opposed a preliminary injunction motion filed by a retired partner of Arthur Andersen LLP seeking to enjoin arbitration under the arbitration clause in the Arthur Andersen LLP partnership agreement (*Viets v. Arthur Andersen LLP,* 2003 WL 21525062, 31 Employee Benefits Cas. 1388 (SD Ind. 2003)).
- Successfully defended Arthur Andersen LLP in connection with a request from retired partners for an injunction to enjoin the sale of certain of its practices after its indictment by the United States Government; the United States District Court for the Northern District of Illinois denied the request for injunctive relief.
- Argued a number of other cases establishing important principles for accounting firms; for example, (1) the United States Court of Appeals for the Eighth Circuit upheld the right of an accounting firm to sue its audit client under RICO for defrauding the accounting firm in the course of its audit work (*Alexander Grant & Company v. Tiffany Industries*, 742 F.2d 408 (8th Cir. 1984)), (2) the Illinois appellate court held that a claim by an audit client was time barred because the books and records of the audit client reflected what was allegedly not told to the board of directors of the client (*Illinois College of Optometry v. Grant Thornton*, LLP, No. 1-98-0037, 746 N.E.2d 908 (1st Dist. Mar. 1, 1999)), and (3) the Illinois appellate court held that an accounting firm had been released from claims because the plaintiff had previously released

other persons who had alleged breached a fiduciary duty to the plaintiff (*Cherney v. Soldinger*, 299 Ill. App. 3d 1066, 702 N.E.2d 231 (Ill. App. 1998)).

- Tried a number of matters for accounting firms both in court and in arbitration; for example, (1) obtained a judgment for an accounting firm, after a two-week bench trial, in which the plaintiffs sued the accounting firm alleging negligence in the audit reports of an acquired firm (*Pioneer Computer Group, Ltd. v. Grant Thornton*, SD Cal.), (2) succeeded in having the Kansas appellate court overturn the trial court judgment (finding the accountants liable for failing to tell the trustee of a trust not to make certain investments) and enter judgment for the accountants holding they had no duty to speak (*Gillespie v. Seymour*, 876 P.2d 204 (Kan. App. 1994)).
- Drafted and argued numerous other motions and appeals resulting in favorable decisions for accountants; for example, see *Donnybrook Investments, Ltd. v. Arthur Andersen LLP*, 2006 WL 1049588 (N.D.Ill. 2006); *Courtney v. Halleran*, 2005 WL 241471 (N.D.Ill. 2005) aff'd, 485 F.3d 942 (7th Cir. 2007). ; *Baker O'Neal Holdings v. Ernst & Young LLP*, 2004 WL 771230 (S.D. Ind. 2004); *New England Health Care Employees Pension Fund v. Ernst & Young LLP*, 336 F.3d 495 (6th Cir. 2003); and many others.
- Participated in the briefing leading to other significant decisions in favor of accounting firms; see *FDIC v. Ernst & Young LLP*, 374 F.3d 579 (7th Cir. 2004); *RTC v. Grant Thornton LLP*, 41 F.3d 1539 (D.C. Cir.1994); *Hendricks v. Grant Thornton*, 973 S.W.2d 348 (Tex. Civ. App—Beaumont); and *Hartman v. Blinder*, 687 F. Supp. 938 (D. NJ 1987).
- *MDIF v. Grant Thornton*, Maryland State Court, lawsuit brought by receiver of state-insured savings and loan.
- *FDIC v. Shah, et al.*, ND Cal., third-party claims brought by officers and directors of savings and loan; motion to dismiss granted.
- *FSLIC v. Wagner*, E.D. Cal., third-party claim brought by officers and directors of savings and loan; voluntarily dismissed in response to motion to dismiss.
- *Comeau v. Rupp*, 762 F. Supp. 1434, D. Kan., 1991, lawsuit by FDIC asserting claim on behalf of savings and loan.
- *Phelan v. First California Savings*, CD Cal., lawsuit brought by stockholder of savings and loan; motion for summary judgment granted.
- *Washburn v. Brown*, ND Ill., lawsuit brought by liquidator of insurance company.
- *Carrier Ins. Co. v. Alexander Grant & Company*, SD Iowa, lawsuit brought by insurance company and its majority stockholder.
- *Harden v. Firstmark*, SD Ind., lawsuit brought by stockholders of financial services and insurance company against Price Waterhouse alleging failure to issue a going concern qualification; court rejected fraud created the market theory.
- *RTC v. Arthur Andersen*, ND Ill., alleged malpractice claim brought by RTC on behalf of failed financial institution.
- *RTC v. Grant Thornton*, SD NY and D. NM, alleged malpractice claims brought by RTC on behalf of failed financial institutions.
- *Commissioner of Insurance, State of Michigan v. Ernst & Young, LLP*, defense of claim brought on behalf of US estate of Canadian insurance company.
- *Gateway 2000 v. Ernst & Young LLP*, claim relating to computer order system.

Education

Harvard Law School, JD, cum laude, 1976; Harvard Law Review • Earlham College, BA, 1973

Admissions

- US District Court for the District of Colorado, 2011
- US Court of Appeals for the Fourth Circuit, 2003
- US District Court for the Eastern District of Wisconsin, 2002
- US Court of Appeals for the Sixth Circuit, 2002
- US District Court for the Eastern District of Michigan, 1997
- US District Court for the Western District of Michigan, 1995
- US Court of Appeals for the Tenth Circuit, 1994
- US Court of Appeals for the District of Columbia, 1994
- US Court of Appeals for the Fifth Circuit, 1992
- US Court of Appeals for the Second Circuit, 1990
- US District Court for the Northern District of California, 1988
- US Court of Appeals for the Ninth Circuit, 1986
- US Court of Appeals for the Eighth Circuit, 1984
- US Court of Appeals for the Seventh Circuit, 1981
- US District Court for the Northern District of Illinois, 1978
- Illinois, 1978

Publications

- "Fraud and Forbearance: State Courts Divided on Whether to Recognize Claims by Securities Holders," *Financial Fraud Law Report*, October 2010