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# March 2018

# I. JURISDICTIONAL ISSUES: GENERAL

**Order Compelling Arbitration Under FAA Does Not Violate Constitution.** AT&T customers brought a putative class action alleging false advertising relating to AT&T's unlimited wireless data program. AT&T moved to compel arbitration based on an arbitration provision in its customer contracts and the motion was granted. On appeal, the Ninth Circuit affirmed. The customers argued that state action exists because the court order forcing arbitration violated the Constitution's Petition Clause as the customers did not knowingly give up their right to litigate their claims. The Ninth Circuit rejected the customers' allegation that AT&T was a state actor. The court reasoned that there would be no distinction between private and government action if "every private right was transformed into a governmental action just by raising a direct constitutional challenge." The court also rejected the argument that the FAA violates the Constitution by authorizing the fiction that any adhesive arbitration clause constitutes a contract. The court explained that the FAA did not require private parties to arbitrate, only enforces their contract if they agree to do so. Rather than compel arbitration, the FAA and relevant court decisions interpreting it can best be viewed, according to the court, as "state *inaction* – the government's decision not to interfere with private parties' choices to arbitrate." (emphasis in original). *Roberts v. AT&T Mobility*, 877 F.3d 833 (9th Cir. 2017). See also *Sharp Corporation v. Hisense USA Corp.*, 2017 WL 5449805 (D.D.C.) (a foreign arbitration award which precluded disparaging comments by a business competitor does not violate U.S. public policy or the First Amendment which requires state action, which was absent here).

**FAA Exemption Applies to Contract Between Trucking Company and Driver.** The FAA exempts contracts of employment of transportation workers from the Act's coverage. The dispute here was between a former truck driver and the trucking company that he drove for under the terms of an "Independent Contractor Operating Agreement." The driver brought a class action alleging violations of the FLSA, and the trucking company moved to compel arbitration under the arbitration provision in the Agreement. The First Circuit framed the question before it as whether the FAA exemption "extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships." Here, the trucking company conceded that the driver was a transportation worker. This concession, along with the legislative history and giving the phrase "contract of employment" its ordinary meaning, led the First Circuit to conclude that "the contract in this case is excluded from the FAA's reach." The court emphasized that its holding was limited to situations in which the "arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.,* 857 F.3d 7 (1st Cir. 2017), cert. granted, 2018 WL 1037577 (U.S. Feb. 26, 2018).

**Transportation Worker Not Subject to Arbitration Under FAA.** A trucker signed an employment agreement with a staffing agency that included an arbitration clause with a class action waiver. The trucker brought a wage and hour class action against the staffing firm and its client. The staffing firm moved to compel, and the California trial court denied the motion. The appellate court affirmed, finding that the FAA exempts transportation workers from its reach. The court rejected the staffing agency's argument that it was not in the transportation industry as a significant portion of its revenue derived from non-transportation related operations. The court declined "to engraft additional language on Section One [of the FAA] by requiring that workers were actually engaged in transporting goods in foreign or interstate commerce *also* prove that their employer is involved in the 'transportation industry.'" Rather, the court concluded that the "focus on the worker and his or her job description – rather than on the employer and whether the employer has other non-transportation profit centers – in assessing whether Section One's exemption was triggered" is appropriate. *Muro v. Cornerstone Staffing Solutions*, 2018 WL 1024168 (Cal. App. 4th Dist.).

**Court May Not *Sua Sponte* Enforce Arbitration Agreement.** A shareholder dispute resulted in litigation involving at least a dozen claims and numerous parties. After issuing a variety of rulings, the trial court dismissed *sua sponte* all but one of the claims based on an arbitration provision in a key contract. The trial court reasoned that it lacked jurisdiction as a result. The Nebraska Supreme Court reversed. The Court explained that subject matter jurisdiction may neither be conferred on a court nor deprived to a court based on the action of the parties and "while an arbitration provision, like a forum selection provision, may create an enforceable right to resolve disputes between the parties to the contract in another forum, such provisions do not bear on the subject matter jurisdiction of the court." The Court acknowledged that an order compelling arbitration "may deprive a court of jurisdiction to adjudicate the claims subject to arbitration, but it is the arbitration order and the underlying statute, not the arbitration agreement itself, that deprive the court of jurisdiction." The Court concluded that since no party sought to enforce the arbitration agreement, the trial court could not do so on its own. *Boyd v. Cook*, 298 Neb. 819 (2018).

**Mediator Empowered to Resolve Post-Settlement Disputes.** A mediator helped the parties resolve their dispute. The parties entered into a Memorandum of Understanding which provided that their disputes relating to the drafting and execution of the settlement agreement would be submitted to the mediator "for review and resolution." Disputes arose, and the mediator resolved the issues and signed an order submitted by one of the parties. Upon review, the Maine Supreme Court rejected the argument that the mediator's order was nothing more than an extension of the mediation and not a binding determination. Instead, the Court ruled that the Memorandum of Understanding was an integrated binding agreement and that the mediator's order was enforceable as an arbitration award under Maine law. The Court reasoned that a plain reading of the terms "review and resolution" in

the Memorandum of Understanding "indicates that the parties agreed to yield authority to the mediator to resolve – not make recommendations on or merely assist the parties themselves to resolve – any disputes." *Eastwick v. Cate Street Capital*, 171 A. 3d 1152 (Me. 2017), modified (Nov. 30, 2017).

**Rape Claim Ruled Arbitrable Against Employer But Not Non-Signatory.** The plaintiff alleged that she was raped while working on a Princess Cruise ship. Plaintiff, who worked in a spa on the ship, was employed by a vendor and not Princess. Plaintiff had entered into an employment agreement with the vendor which included an arbitration provision. The claims against the vendor were ruled subject to arbitration; her claims against Princess, a non-signatory, were not and she was allowed to pursue them in court. The court rejected plaintiff's claim that the rape, which occurred while on the ship but not while she was on duty, was not arbitrable, instead finding that under prevailing Eleventh Circuit law the broad arbitration language encompassed "claims premised on an after-hours, off-duty, rape." The court rejected the efforts by Princess to compel claims against it on equitable estoppel grounds. The court noted that the law of the Bahamas applied to this dispute and no authority was provided finding that the equitable estoppel doctrine is "recognized under that body of law." *Haasbroek v. Princess Cruise Lines*, 2017 WL 6343620 (S.D. Fla.).

**Dodd-Frank Whistleblower Claim Subject to Arbitration:** Plaintiff sued Citigroup for gender discrimination and retaliatory termination in violation of various state and federal statutes, including the whistleblower protections found within SOX and Dodd-Frank. The federal district court granted Citigroup's motion to compel arbitration, finding the claims were governed by the broad arbitration clause in the parties' agreements. Drawing a distinction between plaintiff's SOX claims and her Dodd-Frank claim, the court noted that when Congress enacted Dodd-Frank, it amended SOX to exempt claims under the SOX whistleblower provision from pre-dispute arbitration agreements. Congress did not, however, enact a non-arbitration provision for whistleblower claims arising under the Dodd-Frank Act itself. Therefore, the court held that the SOX claims, which were dismissed for other reasons, would have been heard in court but the Dodd-Frank claims had to be arbitrated. *Daly v. Citigroup*, 2018 WL 741414 (S.D.N.Y.).

**Summary Judgment Standard Applied to Motion to Compel.** The magistrate judge recommended that defendant's motion to compel be granted. In doing so, the magistrate judge found, by a preponderance of the evidence, that an agreement to arbitrate existed. The district court adopted the magistrate's recommendation, but in doing so noted that the normal summary judgment motion standard is applied in analyzing a motion to compel, that is, if a *prima facie* case for the existence of an arbitration agreement is proffered the opposing party must come forward with competent evidence sufficient to raise a genuine issue of fact. If that occurs, then a hearing on that question must occur. Here, the district court noted that the magistrate judge phrased her report "in a manner suggesting that the

magistrate judge perhaps resolved the dispute resolving the existence of an agreement to arbitrate on the basis of what she viewed as a preponderance of the credible evidence." Even if that were the case, the court found such an error to be "harmless" as the court found that "no trier of fact reasonably could have found that an agreement to arbitrate did not exist between the parties." *Bernardino v. Barnes & Noble Booksellers*, 2018 WL 671258 (S.D.N.Y.).

**Fraud Claims Subject to Broad Arbitration Clause:** The Sixth Circuit upheld a district court order holding that FINRA governed former customers' claims for fraud and failure to supervise. The court specifically found that the investments in question happened in the context of the customers' relationship with the brokerage firm and therefore fell under FINRA Rule 12200(2), requiring parties to arbitrate when "[t]he dispute arises in connection with the business activities of the member or the associated person." The brokerage firm argued that the investments did not arise in connection with its business activities because it "had no involvement with the trades," "did not even know the trades took place," and the customers' losses occurred after they transferred funds out of the brokerage accounts. The court rejected those arguments, holding that Sixth Circuit precedent provides that the applicability of this FINRA rule may be satisfied by a claim that a brokerage firm failed to supervise its brokers, even though the firm did not receive commissions for the transactions and the transactions were placed through other broker-dealers. Finding that such allegations were made here, the court held that the dispute was governed by FINRA and arbitration was required. *Wilson-Davis v. Mirgliotta,* 2018 WL 315097 (6th Cir.). See also *Koudela v. Johnson & Johnson Custom Builders*, 2017 WL 6729380 (Ohio App.) (fraud claims subject to arbitration where no claim made that arbitration agreement itself was fraudulently induced).

**Tort Claims Relating to Underlying Agreement Found Arbitrable.** A resident in an assisted-living facility was injured when two residents got into an altercation. The plaintiff was subject to an arbitration agreement in her Residency Agreement requiring that all claims "arising out of or relating to this Agreement" be arbitrated. Plaintiff brought tort claims relating to her injuries in court. The Alabama Supreme Court ruled that the tort claims were arbitrable. The Court reasoned that the dispute related to the facility's duty to provide a safe residential environment and a party may not seek to avoid arbitration by attempting to recast its complaint in tort rather than contract. *STV One Nineteen Senior Living v. Boyd*, 2018 WL 914992 (Ala.).

**Federal Court Action Stayed Pending Determination of Dispute in International Arbitration Forum.** Plaintiffs, a group of mining companies with the exclusive right to mine in the Simandou region of Guinea, filed a federal lawsuit against George Soros, accusing him of inducing Guinea to end their mining rights. Soros moved to dismiss or, in the alternative, to stay the action pending determination of a related International Centre for

the Settlement of Investment Disputes arbitration between one of the plaintiffs and the government of Guinea. The court agreed with Soros and stayed the litigation, noting that many of the underlying issues in the federal lawsuit were also at issue in the international arbitration and holding that "judicial economy weighs in favor of a stay to allow for resolution of these underlying issues and to avoid inconsistent results." *BSG Res. (Guinea) Ltd. v. Soros*, 2017 WL 5897450 (S.D.N.Y.).

## II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

**No Clear Intent to Delegate Arbitrability Question to Arbitrator Where Dueling Arbitration Provisions.** Renmatix entered into two agreements, one with UPM which required that disputes be arbitrated before the ICC, and a second agreement with UPM and BASF which required disputes to be arbitrated before the AAA. Renmatix had a dispute with UPM under the second agreement and initiated an arbitration before the AAA. UPM moved in Delaware court for injunctive and declaratory relief requiring arbitration before the ICC. The Delaware Court of Chancery ruled that the issue of arbitrability was for it to decide as there was no clear and unmistakable delegation of the arbitrability issue to an arbitrator. "In the face of such dueling arbitration clauses, I cannot discern an intention, much less a clear and unmistakable intention, that the parties wish to have one arbitrator rather than the other determine where the claims asserted in the Demand should be arbitrated." The court concluded that arbitration was properly before the AAA. *UPM-Kymmene Corp. v. Renmatix, Inc.*, 2017 WL 4461130 (Del. Ch.). See also *Grillo v. Opendoor Trading, LLC*, Index No. 656036/2017 (N.Y. Sup. Ct. October 12, 2017) (Sherwood, J.S.C.) (whether one arbitration clause should take precedence over another arbitration clause raising overlapping issues is for arbitrators to decide).

**Question of Arbitrability Properly Delegated to Arbitrator:** Plaintiff entered into a Registration Agreement with Amway, which permitted her to sell Amway products and be compensated through various commissions and bonuses. After allegedly being deprived of an annual bonus, plaintiff brought an action seeking a declaratory judgment that the arbitration agreement contained in the Registration Agreement was unconscionable and thus unenforceable. The court rejected plaintiff's argument, holding that the agreement made clear that the parties intended to delegate to the arbitrator the power to determine arbitrability. Since plaintiff challenged the arbitration agreement as a whole but did not raise a specific challenge to the delegation clause, the entire dispute must be sent to arbitration. *Long v. Amway Corp.,* 2018 WL 619885 (S.D.N.Y). See also *Simply Wireless v. T-Mobile US*, 877 F. 3d 522 (4th Cir. 2017) ("in the context of a commercial contract between sophisticated parties, the explicit incorporation of JAMS Rules serves as 'clear and unmistakable' evidence of the parties' intent to arbitrate arbitrability"). But see *Archer and White Sales v. Henry Schein*, 878 F. 3d 488 (5th Cir. 2017) (district court may decide the gateway issue of arbitrability despite a valid delegation clause that delegated the question

of arbitrability to an arbitrator under the "wholly groundless" doctrine where there is no plausible argument for the arbitrability of the dispute).

**Merits-Based Litigation Strategy Constitutes Waiver of Arbitration.** A gentleman's club included an arbitration provision in its independent contractor agreement with its exotic dancers. The dancers brought a wage and hour class action, and after over two years of litigation the club moved to compel arbitration. Before doing so, the club engaged in discovery and moved for summary judgment and asked on several occasions that questions be certified to the South Carolina Supreme Court. When all these merits-based strategies failed, the club moved to compel arbitration. The Fourth Circuit denied the motion. It concluded that the club "did not seek to use arbitration as an efficient *alternative* to litigation; it instead used it as an insurance policy in an attempt to give itself a second opportunity to evade liability." By pursuing its merits-based litigation strategy, the court complained that it and the dancers were forced "to spend unnecessary time and expense" on this matter and such "conduct could not be more at odds with the FAA's goal of facilitating the expeditious settlement of disputes." For these reasons, the club's motion was denied. *Degidio v. Crazy Horse Saloon*, 880 F.3d 135 (4th Cir. 2018). Cf. *Henry v. Cash Biz, LP*, 2018 WL 1022838 (Tex.) (providing truthful information to the district attorney by a payday lender about borrowers' defaults on loans did not constitute sufficient invocation of the judicial process to constitute waiver of a valid arbitration agreement); *Chevron USA v. Bonar*, 2018 WL 871567 (W. Va.) (no waiver found under arbitration clause requiring "any question concerning applicable lease to be heard in arbitration" where pre-litigation deductions made under the lease was not inconsistent with a party's obligation to arbitrate disputes as the dispute arose after the deductions were made).

## III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

**Arbitration Agreement in Law Firm Partnership Agreement Ruled Substantively Unconscionable.** The State of Washington, unlike many states, will refuse to enforce an arbitration agreement which is found to be either procedurally or substantively unconscionable, rather than requiring both to be present. The California appellate court here, applying Washington law, found the Perkins Coie Partnership Agreement containing the arbitration provision not to be procedurally unconscionable. The court found that the arbitration provision did not meet the requirement under Washington law that no meaningful choice be present, even when as here the arbitration provision is in a contract of adhesion. The court found, however, that three of the four relevant provisions of the arbitration agreement to be substantively unconscionable. For example, the court ruled that a provision mandating that the "nonprevailing party will be required to pay any and all of the fees and costs incurred by the prevailing party in arbitrating the matter before the arbitrator, which would include the attorneys' fees incurred by that party." The court noted that the arbitration clause provided that Perkins Coie could be compensated for its fees

incurred if it represented itself but did not provide the same benefit to the individual partner. Similarly, the provision "limiting the class of arbitrators to lawyers, combined with defendants' unilateral right to refuse to stipulate to an arbitrator proposed by plaintiff, narrowed the pool of eligible arbitrators to those who would be biased in defendants' favor." This was particularly so, the court noted, since Perkins Coie was "the largest firm in the state of Washington." The court also found the confidentiality provision to be unconscionable and concluded that severance of the offending provisions "would require essentially a rewriting of the arbitration agreement" and, for these reasons, declined to enforce the arbitration agreement. *DeGraff v. Perkins Coie,* 2018 WL 992193 (Cal. App. 1st Dist.).

**Unconscionability Claim Under California Law Rejected.** Airbnb moved to compel a class action alleging, among other things, fraud and deceptive practices. Airbnb moved to compel based on its on-line terms of service. Plaintiff opposed the motion on unconscionability grounds. A New York district court, applying California law, rejected plaintiff's unconscionability claim. The court began by noting that the question of the "unconscionability of a contractual provision is a highly contextual inquiry." The court recognized that the on-line terms of service were a "standard adhesive contract which does suggest some level of procedural unconscionability" but concluded that the factual circumstances present do not rise to the level of being "an unfair surprise or unduly oppressive, such that they warrant invalidation of the arbitration provision." The court also rejected plaintiff's claim of substantive unconscionability based on an alleged lack of mutuality. While acknowledging that it is true that class action waivers accompanying arbitration claims only impact users of the service and not Airbnb, the court concluded that to so rule would violate the Supreme Court's ruling in *Concepcion*. The court also found unpersuasive plaintiff's claim that the exemption from arbitration for injunctive proceedings for intellectual property claims unduly favored Airbnb as it did not "shock the conscience." *Plazza v. Airbnb, Inc.*, 2018 WL 583122 (S.D.N.Y.).

**Shortened Statute of Limitations Does Not Render Arbitration Agreement Unconscionable.** A coal miner was required to sign a Mutual Arbitration Agreement. Among its provisions was a shortening of all statutes of limitations to the shorter of the actual limitations or one year. The coal miner was injured on the job and sued in court and raised a number of claims, including the Human Rights Law claim under West Virginia law. The employer's motion to compel was denied by the appellate court on unconscionability and other grounds and the West Virginia Supreme Court of Appeals reversed. The Court ruled that a shortened statute of limitations is not unconscionable so long as it is reasonable. Here, the West Virginia Human Rights Law had a two-year statute of limitations for court actions and a one-year statute of limitations for administrative proceedings. "This statutory one-year certainly diminishes any argument that the one-year limitations period in the Agreement is so unreasonable as to render it substantively unconscionable." Moreover,

the coal miner's action was brought within the one-year limitations period which supported the Court's finding that the shorter limitations period was reasonable. The Court also rejected the coal miner's argument that the arbitration agreement was procedurally unconscionable for, among other reasons, he only had a high school education. The Court emphasized that there was no evidence that the coal miner sought or was denied the opportunity to consult with counsel or negotiated any terms of the Agreement. For these reasons, the West Virginia Supreme Court of Appeals reversed the lower court ruling of unconscionability and remanded with directions that the matter be sent to arbitration. *Hampden Coal v. Varney*, 2018 WL 944159 (W. Va.). See also *Chevron USA v. Bonar*, 2018 WL 871567 (W. Va.) (substantive unconscionability argument based on requirement of three arbitrators resulting in possible arbitration costs over $20,000 rejected where the costs under the commercial agreement were shared equally and the argument that the cost of arbitration would be prohibitive was speculative).

## IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

**Airbnb On-Line Arbitration Terms Enforced.** Over the years, Airbnb's on-line terms of service and sign up procedures have evolved. In 2009, its on-line terms of service did not include an arbitration provision. By 2011, it did. To use its site to secure accommodations, on-line applicants were required and urged to review its modified terms of service which were conveniently available by hyperlink, and told that by signing up they were accepting those terms which they could only do by clicking a red button "I agree." Similarly, the first time an Airbnb user accessed the site they were notified of the modified terms of service, urged to review them, and were required to click a button confirming their agreement to them. A putative class action was brought against Airbnb by users of the service and Airbnb moved to compel arbitration. The court began its analysis by noting "although the Internet age has certainly introduced new twists with regard to entering into contracts, the fundamental elements of contract law, including mutual assent of the parties, have not changed." The court identified Airbnb's site as a clickwrap site requiring users to affirmatively click indicating their agreement to the terms of service. The court rejected the plaintiffs' claim that Airbnb's site provided inadequate notice of arbitration. "Given that Airbnb's broad arbitration clause applies retroactively, the arbitration clauses in the modified versions of the TOS are sufficient to govern this dispute and refer the entire matter to arbitration, including any claims of [a plaintiff] that arose when she first signed up for Airbnb in 2009 prior to the incorporation of any arbitration provision." Plaintiffs also raised a fraudulent inducement claim. The court acknowledged that "if the claim involves fraudulent inducement of an arbitration provision as opposed to the contract itself, a court as opposed to the arbitrator may decide the claim." Here, however, the court found no support for plaintiffs' fraudulent inducement claim and, on this basis, rejected it. *Plazza v. Airbnb, Inc.*, 2018 WL 583122 (S.D.N.Y.). See also *Mallh v. Showtime Networks*, 2017 WL 5157247 (S.D.N.Y.) (arbitration compelled where terms of use included arbitration provision

found on uncluttered and neatly organized purchase page and the provision was otherwise reasonably conspicuous).

**Non-Signatory Precluded from Invoking Arbitration Under Party's Agreement.** Verizon included an arbitration provision in its customer agreement with its wireless customers. A class action was brought against Turn, Inc., a "middleman" for internet-based ads, alleging deceptive practices. Turn moved to compel based on the arbitration provision in Verizon's customer agreement, which was granted by the district court. The Ninth Circuit reversed, finding the lower court guilty of "clear error" in ordering arbitration. The court reasoned that Turn was not a party to the Verizon customer agreement and the agreement between Verizon and Turn made clear that the two entities "are independent of each other." The court rejected Turn's equitable estoppel argument as the alleged wrongdoing by Turn was unrelated to Verizon's customer agreement and the evidence was clear that Verizon did not collude with Turn. For these reasons, Turn was not entitled to compel arbitration and the class action was ordered to proceed in court. *In Re Henson*, 869 F. 3d 1052 (9th Cir. 2017). See also *Rizzo v. Kohn Law Firm*, 2018 WL 851386 (W. D. Wisc.) (co-defendant cannot invoke arbitration provision in agreement between plaintiff and a co-defendant which had been previously dismissed from the case).

**FAA Does Not Preempt Requirement for Clients' Informed Consent.** The Maine Supreme Court ruled that an arbitration agreement between an attorney and a client violates public policy where the attorney failed to obtain informed consent for the client's waiver of judicial proceedings. In this case, the client signed an engagement letter which referred to an attached document of standard terms that included a promise to arbitrate claims against counsel. The Maine Supreme Court upheld the lower court's refusal to compel arbitration. The Court cited the attorney's fiduciary duty to provide undivided loyalty to the client as well as the state Constitution's guarantee of a jury trial in concluding that Maine public policy requires attorneys to obtain informed consent from a client agreeing to arbitrate malpractice claims. "To obtain the client's informed consent, the attorney must effectively communicate to the client that the malpractice claims are covered under the agreement to arbitrate." The Court concluded that the arbitration provision here was not sufficiently clear so as to inform the client that she was agreeing to submit malpractice claims to arbitration and therefore failed to satisfy an attorney's ethical obligation to obtain informed consent. The Court found no FAA preemption here because "this obligation is rooted in principles unrelated to arbitration in particular and applies to situations that go beyond arbitration: namely, that as a general matter, an attorney – who stands as a fiduciary to his client – should fully inform that client as to the scope and effect of her decision to waive significant rights." *Snow v. Bernstein, Shur, Sawyer & Nelson*, 176 A.3d 729 (Me. 2017).

**Arbitration Agreement Signed by Parent of Minor's Friend Not Enforceable.** A minor visited a trampoline park twice, the first time with his mother and the second time with a friend's mother. A release and arbitration agreement was signed by his mother on his first visit, and by his friend's mother on the second visit. The park's agreement required a parent or guardian to sign. The minor was injured on his second visit. The minor's parents sued, and the park moved to compel. The trial court denied the motion and the New Jersey appellate court affirmed. The court ruled that the signer of the agreement when the injury occurred was neither a parent nor guardian and therefore the release was not enforceable. The court also rejected the argument that the earlier release, signed by the minor's mother, was enforceable, as that release was silent as to the length of its validity. Under these circumstances, the court rejected the motion to compel. *Weed v. Sky NJ*, 2018 WL 1004206 (N.J. App.).

**Claim Under Separation Agreement Governed by Arbitration Clause in Employment Agreement.** Valeant Pharmaceuticals and its CEO entered into an employment agreement with an arbitration provision. When the CEO was terminated, the parties entered into a separation agreement which did not have an arbitration requirement. The CEO sued for claims under the separation agreement and Valeant moved to compel. The court granted the motion. The court explained that "an arbitration provision in a prior agreement is superseded by a later agreement without an arbitration provision only if the subsequent agreement contains an unambiguous *complete* integration or merger clause." (emphasis in original). Here, the separation agreement only superseded those provisions in the employment agreement specifically addressed within it. The court concluded that the arbitration provision in the employment agreement "clearly concerned a distinct subject matter" from the separation agreement which was silent on the topic of dispute resolution. *Pearson v. Valeant Pharmaceuticals Int'l*, 2017 WL 6508358 (D. N.J.). Cf. *Ngo v. Oppenheimer and Co.*, 2017 WL 5956772 (S.D.N.Y.) (motion to compel granted where employer's arbitration agreement was separate from handbook and therefore disclaimer in handbook did not apply to the terms of the arbitration agreement).

**At-Will Employment Insufficient Consideration for Arbitration Agreement.** On her first day of employment plaintiff Wilder executed an arbitration agreement with her employer. Wilder later sued for wrongful termination in a Missouri trial court and the employer moved to compel. The motion was denied, and that ruling was affirmed on appeal. The appellate court confirmed that at-will employment does not constitute sufficient consideration to support an agreement to arbitrate, emphasizing that at-will employment was unilaterally imposed on employees by the employer. The court also rejected the employer's alternative argument that "mutuality of agreement" existed, noting that the employer unilaterally excluded certain claims from arbitration and reserved for itself the right to seek "all appropriate relief." The result, in the court's view, was that the employer "is exempted from arbitrating all those causes of action most likely to arise in the course of its at-will

employment relationship with Wilder, as well as those it can passably shoehorn into the descriptive invocations of the exemption provision." As a result, the court concluded that mutuality was lacking, and the arbitration agreement was devoid of consideration. *Wilder v. John Youngblood Motors*, 2017 WL 5663600 (Mo. App.).

**Continued Employment Not Sufficient Consideration:** A Michigan district court denied employer's motion to compel arbitration of employees' discrimination claims, finding there was insufficient consideration for the arbitration agreement. The employer argued that employees assented to arbitration when they continued to work after receiving notice of the arbitration policy which stated: "IT APPLIES TO YOU. It will govern all future legal disputes between you and [the employer] that are covered under the Process." The court disagreed, relying on Sixth Circuit precedent providing that continued employment can only manifest assent when the employee *knows* that continued employment manifests assent. Finding there was no signed agreement or any employer-distributed materials expressly telling employees that they would accept the terms of the arbitration policy by continuing their employment, the court held continued employment would not constitute adequate consideration here. *Cerjanec v. FCA US, LLC*, 2017 WL 640733 (E.D. Mich.). Cf. *Green v. Infosys, Ltd.*, 2018 WL 1046637 (E.D. Tex.) (court finds no authority for proposition that "an employee signing an arbitration agreement as a condition of employment must have notice of such agreement prior to starting his employment" and, therefore, an arbitration agreement signed by an employee three-days after she started her employment is enforceable).

**Non-English Speaker's Consent to Arbitrate Is Valid:** A federal district court rejected plaintiff's challenge to an arbitration agreement, holding that her unfamiliarity with the English language will not invalidate her consent to arbitrate. Plaintiff argued that her inability to read English prevented her from consenting to the agreement because she did not understand the terms. The court disagreed, stating that a non-English speaker presented with an agreement in English must make a reasonable effort to have the contract read to him or her; a failure to do so will not invalidate the agreement. *Long v. Amway Corp.,* 2018 WL 619885 (S.D.N.Y).

## V. CHALLENGES TO ARBITRATOR OR FORUM

**Arbitral Immunity Does Not Apply to AAA.** An American Arbitration Association client sued it for false advertising, arguing that its promise to provide neutrals was false because the arbitrators were independent contractors. The district court granted the AAA's motion to dismiss on arbitral immunity grounds, but the Ninth Circuit reversed. The appellate court explained that arbitration immunity arises out of "a decisional act" and was designed to protect the decision-maker. The false advertising claim here, however, "is predicated on AAA's descriptions of its arbitrators disseminated through its web site and direct mail." The

court found this to be distinct from the decisional act of an arbitrator. The court concluded that the "adjudication of claims, like false advertising, that arise before a formal arbitration relationship between parties to arbitration, arbitrators, and arbitration companies like AAA will not lead to 'undue influence' over the arbitration process, nor will it expose arbitrators' decisions to 'reprisals by dissatisfied litigants'". *Hopper v. American Arbitration Association*, 708 F. App'x 373 (9th Cir. 2017).

**Arbitration Stayed Pending Resolution of Declaratory Judgment Claim.** GEICO sued a doctor and his practice alleging, among other things, that the physician filed fraudulent no-fault claims in violation of New York law. Defendants moved for summary judgment seeking to proceed instead with the pending arbitration for payment on some of those claims that GEICO argued were fraudulent. GEICO in turn moved for a preliminary injunction seeking to enjoin those arbitrations and the AAA from accepting the filing of new claims. The court granted GEICO's application and enjoined the arbitration. The court ruled that "multiple federal and state courts have concluded that wasting time and resources in arbitrations that might result in awards inconsistent with future judicial rulings constitutes irreparable harm sufficient to stay arbitration." The court reasoned that the issuance of a preliminary injunction was necessary to prevent repetitive litigation and arbitration of numerous no-fault claims where the insurer was raising the same defense of fraud. The court also found the balance of hardships tipped in GEICO's favor and a lack of undue hardship as defendants would recover interest if they ultimately prevailed in the arbitrations against GEICO. *GEICO v. Strutsovskiy,* 2017 WL 4837584 (W.D.N.Y.). See also *NCL (Bahamas) LTD v. O.W. Bunker USA, Inc.*, 280 F. Supp.3d 324 (D. Conn. 2017) (arbitration enjoined where no valid arbitration contract was in force and plaintiff would be irreparably injured by being forced to arbitrate in the designated venue for the arbitration, London).

**Arbitrators Not Subject to Post-Award Subpoenas Seeking Evidence of Bias:** Claimants moved to set aside a FINRA arbitration award in their favor alleging, among other things, that one of the three arbitrators demonstrated evident partiality when she failed to disclose a previous relationship with an attorney representing the respondent brokerage firm. Following the arbitration, Claimants served subpoenas on each of the three arbitrators seeking evidence of alleged non-disclosure of relationships with counsel. The arbitrators moved to quash. Noting that "the weight of persuasive case law" demanded application of the "clear evidence of impropriety" standard, the court found that Claimants failed to meet that standard and held that an arbitrator's undisclosed professional relationship with one of the parties was insufficient to establish clear evidence of impropriety and did not justify discovery into the issue. Therefore, the subpoenas were "in direct conflict with a policy favoring the finality of arbitration" and were quashed. *In re Subpoenas Issued to Albert*, 2017 WL 4976443 (E.D.N.C.).

## VI. CLASS & COLLECTIVE ACTIONS

**Arbitrator Exceeded Her Authority in Certifying 70,000 Class Members.** Almost nine years after an arbitrator's initial ruling and numerous interim judicial determinations a court held that the arbitrator exceeded her authority in certifying a class encompassing approximately 70,000 present and former Sterling Jewelry employees. All class members signed the same arbitration agreement which the arbitrator initially ruled permitted class arbitration. Class members were permitted to opt out of the class following certification. The court found it to be the law of the case, based on an earlier Second Circuit decision, that "those individuals who did not affirmatively opt in to the class proceeding here did not agree to permit class procedures by virtue of having signed [the arbitration] agreements." The question for the court to determine was whether the authority was nonetheless conferred on the arbitrator by the named claimants and respondent when they submitted the question for resolution. The court concluded that the arbitrator did not have such authority to bind absent class members because a possible erroneous ruling purporting to bind someone who has not consented to that authority would be improper and would open the award to collateral lawsuits. The court explained that that was "because, given that the Arbitrator was wrong as a matter of law about whether the [arbitration] agreement permits opt-out classes, it is hard to see how courts could bind individuals who do not opt out, but who have not otherwise opted in, to her decisions. After all, arbitrators are not judges." The court concluded that the "Arbitrator here had no authority to decide whether the [arbitration] agreement permitted class action procedures for anyone other than the named parties who chose to present her with that question and those other individuals who chose to opt in to the proceeding before her." *Jock v. Sterling Jewelers*, 2018 WL 418571 (S.D.N.Y.). See also *Forsyth v. HP, Inc.*, 2018 WL 732722 (N. D. Cal.) (group of 15 claimants not sufficient for class and therefore class waiver not enforceable).

**FLSA Claims Arbitrable.** The Second Circuit reached the predictable conclusion that FLSA claims are arbitrable. In doing so, however, the court addressed in passing an open and controversial issue, namely, do arbitration awards resolving FLSA claims require court approval? Plaintiff here, in seeking to avoid arbitration, relied on the Second Circuit decision in *Cheeks v. Freeport Pancake House* which held that stipulated dismissals require court approval. The court rejected that argument and distinguished *Cheeks'* which, in the court's view, sought "assurance of the fairness of a settlement of a claim filed in court, not a guarantee of a judicial forum." *Rodriguez-Depena v. Parts Authority*, 877 F. 3d 122 (2d Cir. 2017).

## VII. HEARING-RELATED ISSUES

**Third Party Arbitration Discovery Subpoenas Not Enforceable in Ninth Circuit.** The Second, Third, and Fourth Circuits have ruled that the FAA does not authorize third-party discovery subpoenas. The Ninth Circuit has now joined their ranks. The court explained that a "plain reading of the text of Section 7 reveals that an arbitrator's power to compel the production of documents is limited to production at an arbitration hearing." The court noted that Section 7 authorized arbitrators to compel the attendance of witnesses at a hearing and to compel them to "bring with him or her" relevant documents. "Under this framework, any document productions ordered against third-parties can happen only 'before' the arbitrator." The court ruled that Section 7 "grants an arbitrator no freestanding power to order third parties to produce documents other than in the context of a hearing." The Ninth Circuit rejected the reasoning of the only Circuit allowing third-party discovery, the Eighth Circuit, which found implicit in an arbitrator's authority to subpoena documents at a hearing the lesser power to do so pre-hearing. The Ninth Circuit joined the Third Circuit in finding logic in limiting discovery from non-parties who did not agree to arbitrate. The court added that in support of its position that Section 7 only allows subpoenas of "material" evidence at the hearing "further demonstrating that under the FAA an arbitrator is not necessarily vested with the full range of discovery powers that courts possess." *CVS Health Corp. v. Vividus*, 878 F.3d 703 (9th Cir. 2017).

**Panel's Discovery Rulings Not Grounds for Vacatur.** The plaintiff prevailed before a FINRA panel and was awarded over two million dollars but not the fifteen million dollars he sought. He moved to vacate the award, arguing in part that the panel was guilty of "misbehavior" by denying certain discovery motions. In fact, the panel granted a number of plaintiff's motions and accepted all 130 of his exhibits tendered during the nine-day hearing. The court failed to find "anything that could remotely be called" a denial of fundamental fairness in the way the panel conducted the pre-hearing and hearing stages of the proceeding and instead found plaintiff's complaints to "smack more of litigator's remorse - the regret that comes when strategic decisions and arguments fail to produce the desired result." In sum, the court revealed that the panel "strove to give both sides a full and fair hearing rather than a Panel that deprived one side of the right to fundamental fairness." *Doscher v. Sea Port Group Secs.*, 2017 WL 6061653 (S.D.N.Y.).

## VIII. CHALLENGES TO AWARD

***De Novo* Judicial Review of Award Moots Arbitration Agreement.** The parties' arbitration agreement provided that an award could be reviewed *de novo* by a court. An award issued, and the district court enforced it. The Tenth Circuit reversed and found the arbitration agreement to be unenforceable. The court ruled that under the Supreme Court decision in *Hall Street Associates* an arbitration agreement requiring *de novo* review is

invalid as the FAA bars parties from contracting for *de novo* review of arbitration awards. The court rejected the argument that the offensive provision could be severed as it found that the *de novo* review provision was material to the parties' agreement. As a result, the court vacated the award and found the arbitration agreement to be unenforceable. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226 (10th Cir. 2018).

**Award Overturned by Court Under California Rule Allowing Expanded Judicial Review.** The arbitration agreement here provided that the arbitrator's "findings of fact and conclusions of law shall be reviewed on appeal and then . . . upon the same grounds and standards of review as if said decision" were entered by a court. The award in this case was issued granting almost three million dollars in damages and interest and fees. On appeal, the award was vacated. The court ruled that the parties had unambiguously required the arbitrator to apply applicable law, and under California law the court was empowered to review the arbitrator's "factual findings for substantial evidence and legal conclusions *de novo*." The appellate court found no substantial evidence supporting a finding of an agreement to perform the work at issue or a writing sufficient to satisfy the statute of limitations and on this basis vacated the award. *Harshad & Nasir Corp. v. Global Sign Systems*, 14 Cal. App. 5th 523 (2d Dist. 2017), review denied (Nov. 1, 2017). Cf. *Shirom Acupuncture v. Country-Wide Insurance Co.*, 57 Misc. 3d 1212 (A), 66 N.Y.S. 3d 380 (N. Y. Suffolk. Cty. 2017) (master arbitrator's vacatur of arbitration award itself vacated, and original award reinstated, where master arbitrator exceeded his authority by overturning the award which was not arbitrary, capricious, irrational, or incorrect as a matter of law).

**Expanded Review of Awards Permitted Under New Jersey Law.** A divorcing couple agreed to arbitrate disputes and agreed to a handwritten insertion allowing the parties "to appeal the arbitrator's award to the appellate division as if the matter was determined by the trial court." A dispute arose, and arbitration was initiated, and an award was rendered in favor of the wife. The husband appealed to the trial court, which severed the handwritten insertion as improperly purporting to create subject matter jurisdiction but concluded that the parties were seeking greater review than normally would be afforded to arbitration awards under New Jersey law. The trial court confirmed the award. The husband then argued to the Appellate Division that the insertion was illegal and therefore it voided the arbitration proceeding. The Appellate Division rejected that argument and affirmed the trial court determination. The court acknowledged that under established New Jersey law parties to an arbitration agreement may elect to expand the review normally afforded to arbitration awards. The court interpreted the insertion here as an "attempt to expand the judicial scope of a review." The court explained that "parties may not bypass the trial court and seek immediate appellate review. The parties cannot create subject matter jurisdiction by agreement." Under the circumstances presented here, the appellate court concluded that the trial court properly severed the inappropriate insertion which did not serve to void

the arbitration agreement in full, and provided to the parties the review of the merits of the award that they sought. *Curran v. Curran*, 2018 WL 774496 (N. J. App. Div.).

**Arbitration Award Lacks Finality.** The Fourth Circuit reversed a district court's confirmation of an arbitration award, finding the award lacked finality. The drafter of the award, one of a three-member panel, based his decision on two "extraordinary" assumptions and stated that he reserved his right to withdraw his assent if the assumptions are found to be false. The court held that because the arbitration panel member "did not merely base his assent on certain assumptions, but rather reserved the right to withdraw his assent if his assumptions proved to be incorrect," it could not be squared with any conception of finality. The Fourth Circuit remanded to the district court with instructions to vacate the award. The parties were directed to resume arbitration and obtain "an award that is final and otherwise complies with the FAA and this opinion." *Norfolk Southern Railway Co., v. Sprint Communications Co.*, 2018 WL 1004805 (4th Cir.).

**Challenge to Award on Misconduct and Exceeding Power Grounds Rejected.** The arbitrator issued an award in favor of the franchisor, Hyatt, and against its franchisee. In doing so, the arbitrator refused the franchisee's request to issue a subpoena to its own attorney, Cadwalader, who negotiated the franchise agreement on its behalf. The arbitrator also refused to disqualify the franchisor's law firm, DLA Piper, which Cadwalader joined after negotiating the franchise agreement. The Seventh Circuit rejected these same arguments and affirmed the district court's confirmation of the award. The appellate court reasoned that whether "Cadwalader furnished good advice when negotiating a contract might be relevant in a malpractice action against her but that does not bear on Hyatt's contention that [the franchisee] broke its promises." With respect to the disqualification claim, the court noted that the arbitrator ruled that the ethical screen established by DLA Piper ensured that no confidential information from Cadwalader reached the DLA Piper's attorneys representing Hyatt. The court explained that perhaps the franchisee "believes that Cadwalader or other lawyers at DLA Piper have engaged in misbehavior, and if so it could complain to the state bar, but the arbitrator is free of any plausible charge of misbehavior – and only misbehavior by the arbitrator comes within" the bounds of the FAA. *Hyatt Franchising v. Shen Zhen New World I*, 876 F. 3d 900 (7th Cir. 2017). See also *NRT v. Spell,* 2018 WL 623531 (N.Y. Sup. Ct. N.Y. Cty.) (award vacated as irrational and violation of public policy where arbitrator ignored prevailing law that contracting parties are deemed to have read and understood what they signed).

**Post-Judgment Interest Awarded at Federal Rate.** The arbitrator here awarded both parties monetary damages and pre-judgment interest at the contractual rate of 12%. The award was confirmed. The party with a significantly greater monetary recovery also sought post-judgment interest at the contract rate from the date the award was issued. The district court instead awarded post-judgment interest under the federal rate from the date of the

court's judgment. The court analogized the confirmation of an award to the entering of a court judgment and applied 28 U.S.C. § 1961 in ordering post-judgment interest at the federal rate. The court ruled that the post-judgment interest would commence from the date of issuance of the court order rather than from the date that the award was issued. The court reasoned that the award merged into the court judgment and the contractual interest rate applied by the arbitrator "disappeared for post-judgment purposes." *Exploraciones Y Perforadora Central v. Axxis Drilling*, 2:17-CV02833 (E.D. La. October 4, 2017).

## IX. ADR – GENERAL

**An Arbitration by Any Other Name is Still an Arbitration**. The parties selected a retired judge to resolve their property damage dispute. The judge forwarded to the parties a form agreement entitled "civil mediation agreement". The parties signed the agreement but one counsel pointed out to the judge that the proceeding "is properly an arbitration proceeding for which you will be asked to render an award." Arbitration was referenced in various other communications between the parties and the judge. The retired judge rendered an "Award in Arbitration" resolving the dispute. The losing party argued that the parties did not arbitrate but rather merely mediated their dispute and, therefore, the award was not binding. The trial court confirmed the award and the appellate court affirmed that decision. The appellate court concluded that with "the exception of the retired judge's mistake in having the parties execute a document memorializing the terms of a 'civil mediation', there is no doubt that the parties agreed to and in fact participated in binding arbitration." *Marano v. Hills Highlands Master Ass'n*, 2017 WL 5494624 (N.J. App. Div.).

**Fees Awarded as Sanction against Losing Party Challenging Award.** An award was issued against the franchisee here who moved to vacate the award and then appealed the denial of that motion. The award included the payment of $1.3 million in fees to the franchisor. Rather than pay the fees, the franchisee brought an action in federal district court challenging its obligation to pay the fees. The Seventh Circuit, which had confirmed the original award, ruled that under 28 U.S.C. § 1927 it had authority to award to the franchisee both the fees it incurred in the district court and the appellate proceedings relating to the confirmation of the award and its collections efforts. "If one round of litigation on top of arbitral proceedings is too much, as our opinion concluded, it is hard to find words to describe the conduct of a party that refuses to accept not only the arbitrator's decision but also a final judicial outcome and scours the nation in search of a different opinion." The court concluded that since the franchisee was unwilling to pay the franchisor's fees "as a matter of contract, we now order it to do so as a sanction for unnecessary and pointless litigation." The court also required the franchisee's attorneys to show cause why they should not be held jointly and severally responsible for the sanction. *Hyatt Franchising v. Shen Zhen New World I*, 880 F. 3d 335 (7th Cir. 2018).

## X. COLLECTIVE BARGAINING SETTING

**Court Applies Clear Error Standard under ERISA and Upholds Award.** The arbitration award here found that the employer was not subject to withdrawal liability for ceasing to contribute to a multiemployer fund under a collective bargaining agreement (CBA) governed by ERISA. The pension fund and its administrator sought to vacate the award. The district court confirmed the award and an appeal was taken to the Seventh Circuit. On appeal, the fund sought *de novo* review and the employer argued that the clear error standard applied because the arbitrator's review during the arbitration was limited to applying the facts to the language of the CBA rather than interpreting the statute itself. The Seventh Circuit agreed, finding that under ERISA, 29 U.S.C. § 1401, the arbitrator's findings of fact may be set aside only if clearly erroneous, while the arbitrator's legal conclusions are subject to *de novo* review. The court found no clear error and upheld the confirmation of the arbitration award. *Laborers' Pension Fund v. W.R. Weis Company, Inc.*, 879 F.3d 760 (7th Cir. 2018).

## XI. STATE LAWS

**California Mandatory Mediation Statute Violates California Constitution.** The California Agricultural Labor Relations Act provides for a Mandatory Mediation and Conciliation ("MMC") process, known as compulsory interest arbitration. A California appellate ruled that the MMC was unconstitutional, and in a unanimous decision the California Supreme Court reversed. Among other things, the Supreme Court rejected the appellate court's view that the MMC violates equal protection principles and unconstitutionally delegates legislative power. Rather, the Supreme Court held that equal protection principles were not violated because the Legislature had a rational basis for enacting the MMC to facilitate collective bargaining agreements between agricultural employers and employees. The Supreme Court reasoned that the MMC did not unconstitutionally delegate legislative authority because it provides a nonexclusive list of factors for a mediator to consider when developing a fair and reasonable agreement based on the parties' individualized circumstances, which the court held was constitutionally "adequate direction." *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 3 Cal.5th 1118, 405 P.3d 1087 (2017).

**Offer of Judgment Under Michigan Rule Enforced Where Award Less Favorable Than Offer.** Michigan's offer of judgment rule permits award of costs and attorneys' fees against a party that rejects an offer more favorable than received in a "verdict". Plaintiff filed a breach of contract claim and rejected an offer of $2,200 under Michigan's offer of judgment rule. The case was ordered to arbitration and the contract claim was dismissed by the arbitrator. A motion to vacate was denied and the court confirmed the award. Defendants moved for sanctions based on the rejected offer of judgment. The Michigan appellate court have ruled that an order confirming an award met the definition of a verdict under

Michigan's offer of judgment rule. "Thus, we hold that if a party rejects an offer of judgment, an arbitrator enters an arbitration award, and a judgment is entered as a result of a ruling on a motion to vacate the arbitration award, then the rejecting party must pay the opposing party's actual costs unless the judgment affecting the arbitration award is more favorable to the rejecting party than the offer of judgment." *Simcor Construction v. Trupp*, 2018 WL 344128 (Mich. App.).

**Manifest Disregard Claim Under Georgia Law Rejected.** Georgia's arbitration code allows for the overturning of an arbitration award on manifest disregard of the law grounds. A dispute arose relating to the intellectual property rights associated with the Cabbage Patch Dolls. A motion to vacate was denied and the award was confirmed. On appeal, the Eleventh Circuit affirmed. The court explained that to overturn an arbitration award under Georgia's manifest disregard of the law standard, the moving party must offer "concrete evidence" of the arbitrator's intent to "purposefully disregard the law." It is not enough that the correct law was communicated to the arbitrator, it must also be shown that the arbitrator "appreciated the existence of a clearly controlling legal principle" and deliberately ignored it. Even assuming here that the arbitrator misapplied applicable law, it was "just as plausible that the arbitrator simply made a mistake in interpreting, understanding, or applying that rule as it is that he manifestly disregarded it." *Original Appalachian Artworks, Inc. v. JAKKS Pacific, Inc.*, 2017 WL 5508498 (11th Cir.).

**New York Law Requires Inquiry into Employee's Ability to Afford Mandated Arbitration.** Plaintiff brought a putative class action under New York labor law. The employer moved to compel, and the employee opposed the motion arguing, among other things, that he was unable to pay the cost of arbitration. The trial court granted the motion, but the appellate court unanimously reversed. The court found that plaintiff made a preliminary showing that the fee-sharing provision had the effect of precluding him from pursuing his statutory claim. The court remanded the matter to the trial court for further proceedings with respect to the anticipated costs of the arbitration and plaintiff's ability to pay his share. The court also ruled that the provision in the arbitration agreement that permitted the employer to recover its fees if it prevailed may be taken into "account in considering whether the total costs associated with arbitration preclude plaintiff from pursuing his claim in the arbitral forum." *Adams v. Kent Security of New York*, 156 A.D.3d 588 (1st Dep't 2017).

**New York Law Requires Greater Scrutiny for Compulsory Award.** A car accident resulted in a dispute that was submitted to a compulsory no-fault benefit arbitration proceeding. The arbitrator issued her award, and the losing party moved to vacate. The court denied the motion, finding a failure to demonstrate that the "arbitrator committed corruption, fraud or misconduct, was partial to [the prevailing party], or that the award was arbitrary, capricious, or incorrect as a matter of law." In doing so, the court acknowledged

that under established New York law, compulsory arbitration awards such as are required in the case of no-fault insurance claims "are subject to closer judicial scrutiny of the arbitrator's determination and a broader scope of review than awards resulting from voluntary arbitration." To be sustained, a court must find, and found here, that the award "must have evidentiary support or other basis in reason, as may be appropriate, and appearing in the record, and cannot be arbitrary and capricious." *Countrywide Insurance v. National Liability and Fire Insurance*, Index No. 653302/2016 (N.Y. Sup. Ct. N.Y. Cty. November 14, 2017) (St. George, J.S.C.).

## XII. NEWS AND DEVELOPMENTS

**Lawmakers Seek to Exclude Sexual Harassment Cases from Arbitration Pacts.** A group of bipartisan senators, accompanied by former FOX News host Gretchen Carlson, introduced new legislation at the end of November 2017, making it illegal for companies to enforce arbitration agreements against employees when their claims involve allegations of sexual harassment or gender discrimination under Title VII. The bill, known as Ending Forced Arbitration of Sexual Harassment Act, would also give workers the option of taking those types of claims to court. The bill was drafted in response to the flood of sexual harassment allegations perpetrating almost every industry, including media and Congress, in the wake of the accusations made against Hollywood producer Harvey Weinstein that reach back decades. The supporters of the bill argue that forced arbitration policies involving violations of Title VII can be used by companies to shield harassers' bad behavior and perpetuates the continuation of hostile work environments.

**Support Grows for Legislation Banning Sex Harassment Claims from Arbitration Agreements**. On February 12, 2018, Congress was notified that the attorneys general from all 50 states and the District of Columbia supported "any appropriately tailored" legislation to prohibit the use of mandatory arbitration agreements for claims involving sexual harassment. The two-page letter signed by each of the attorneys general states that arbitration agreements are problematic with regard to sexual harassment claims because they keep the claims and rulings confidential and also because arbitrators are not always qualified to issue rulings on sexual harassment claims.

**Microsoft Drops Forcing Arbitration for Sexual Harassment Claims.** Microsoft supports a proposed federal law banning mandatory arbitration for claims involving sexual harassment. With that in mind, the company decided to take action on its own agreements. In December 2017, Microsoft announced that, effective immediately, it would waive contractual clauses requiring employees to arbitrate sexual harassment claims. The company also claimed that, while only a small percentage of its agreements had such clauses, it had actually never sought to enforce the arbitration requirement for sexual harassment claims.

# XIII. TABLE OF CASES

Federal Cases