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NYSBA Dispute Resolution Section: Under the Radar Case Law Developments in Domestic Arbitration

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I. CASES FOR THE PRESENTATION

A. Offer and Acceptance

Arbitration Provision on Product Wrapping Constitutes Valid Offer. The consumer here purchased roof shingles. The shingle wrapping had conspicuously written on it warranty and other important information including a mandatory arbitration provision which contained a class action waiver. The consumer filed a class action alleging that the shingles were faulty. The manufacturer's motion to compel was granted and affirmed by the Eleventh Circuit. The court ruled that under Florida law opening a product package following notice of terms of sale constitutes acceptance of the manufacturer's offer. The court found that the manufacturer's "packaging provided conspicuous notice of its offer – something a reasonable, objective person would understand as an invitation to contract." The court reached this conclusion while acknowledging that it is the contractor who generally receives the shingles, the packages are "large and unwieldy", and the packaging is unlikely to be kept once opened. The court found "those distinctions neither alter the underlying principles nor require a different result." Further, the court noted in the age of Amazon Prime as "fewer and fewer purchases are consummated face to face, and more and more are made online, consumers should (and must) know that vendors will often employ a 'simple approve-or-return' model, enclosing their full legal terms with a product at shipment." The court added that as "master" of the offer the manufacturer "was free to invite acceptance by specified conduct, and it did." The court also rejected the argument that it was the roofer rather than the consumer who accepted the offer on agency grounds, that is, the roofer was the duly authorized agent of the consumer and the acts of the roofer were properly imputed to the consumer. *Dye v. Tamko Building Products*, 908 F. 3d 675 (11th Cir. 2018).

Use of Website Constitutes Acceptance of Terms of Use. Plaintiff alleged that he used the adult dating website AdultFriendFinder for 20 years. The website did not require acknowledgement of acceptance of the Terms of Use but rather adopted the browsewrap approach which assumes consent based on notice of the Terms of Use and use of the website. A dispute arose and the defendant moved to compel arbitration based on an arbitration requirement in the Terms of Use. The court granted the motion, finding that under prevailing Ninth Circuit law the plaintiff did not need to affirmatively assent to the Terms of Use in order to be bound by them. Here, "he continued to use the website knowing that his use of the site was governed by the Terms." The court concluded "because Plaintiff had at least inquiry notice of his need to comply with the Terms in using the website, and he continued to use this site knowing he was bound by the Terms, the Court holds that Plaintiff accepted the Terms by using the site." *Gutierrez v. FriendFinder*

Networks, 2019 WL 1974900 (N.D. Cal.). See also *Olsen v. Charter Communications,* 2019 WL 3779190 (S.D.N.Y.) (successor service provider put customers on inquiry notice by repeatedly alerting them in billing statements, in terms that were sufficiently conspicuous, of updated terms of use including arbitration provision); *Sultan v. Coinbase, Inc.*, 354 F. Supp.3d 156 (E.D.N.Y.) (digital currency depositor bound by arbitration provision in the on-line user agreement where he was put on inquiry notice and required to click acceptance of user agreement on a single screen containing all relevant screens "with a minimalist layout and no distractions"); *Scotti v. Tough Mudder Inc.,* 63 Misc.3d 843 (Sup. Ct. Kings Cty. 2019) (inquiry notice lacking where evidence of how on-line registration webpage appeared to registrants during relevant time period).

Arbitration Compelled Where Terms of Use Unambiguous. Wayfair moved to compel the arbitration of a complaint brought by dissatisfied customer. Wayfair's Terms of Use, in which its arbitration clause was contained, was available by hyperlink on all 1300 pages the plaintiff accessed. Various warnings were present during use of the web site and when making a purchase that continued use of the website constituted acceptance of the Terms of Use. The plaintiff argued that the representation in the arbitration provision that disputes "arising from or relating to the Terms of Use" served to limit arbitration to Wayfair's privacy and rewards programs and its intellectual property. Since some of his claims sounded in tort, plaintiff argued that his claims did not relate to use of the web site. The court rejected this reading, finding the arbitration clause "unambiguous." The court reasoned that plaintiff's "reading ignores much of the provision's language – most critically the portion about disputes arising from relationships resulting from the terms of use – and, as a result, is contrary to law." In particular, the court found that "Wayfair terms of use include numerous provisions governing the purchase and sale of goods, such as those regarding warranties and product complaints. As a result, the terms of use shape the contours of a contractual buyer-seller relationship." For these reasons, the court granted the motion to compel. *Gorny v. Wayfair*, 2019 WL 2409595 (N.D. Ill.).

Agreement to Arbitrate Not Evidenced in Hybridwrap Agreement. In a browsewrap agreement, the user of a website is deemed to have accepted its terms of use without affirmatively assenting to them. In a clickwrap agreement, the user is required to click "accept" the terms of use before being allowed to continue on the site. Courts have recognized a third approach, "hybridwrap" that share the characteristics of both. "Hybridwrap agreements typically prompt the user to manifest assent after 'merely present[ing] the user with a hyperlink to the terms and conditions, rather than displaying the terms themselves.'" The court in this case involving a putative class action under the Telephone Consumer Protection Act noted that courts generally give effect to hybridwrap agreements where the button indicating approval is located directly next to the hyperlink leading to the terms of use. Here, the court found the hybridwrap agreement not to be enforceable because there was nothing telling users that by clicking through the website

they were agreeing to the terms of use -- including the arbitration provision. In this case, the court found that there was no "connection" between the statement that the user agreed to the terms of use and the continue button apart from the fact that both were next to each other. "But the mere proximity of a terms and conditions hyperlink to a button that the user must click to proceed does not equate to an affirmative manifestation of assent to the terms and conditions." As the defendant failed to show that plaintiffs' continued navigation through the site constituted acceptance of the terms of use or was otherwise linked to the arbitration provision, the court ruled that plaintiff could not be compelled to arbitrate her claim. *Anand v. Heath*, 2019 WL 2716213 (N.D. Ill.).

Second Circuit Finds Fact Question under Reasonably Prudent Internet User Test. The Second Circuit reversed the granting of a motion to dismiss by the district court in a putative class action against an online retailer. In doing so, the court applied a "reasonably prudent internet user" test in determining when an internet user agrees to arbitrate future disputes. The court noted that "one common way of alerting internet users to terms and conditions is via a 'clickwrap' agreement, which typically requires users to click an 'I agree' box after being presented with a list of terms and conditions of use." The court noted that clickwraps force the user to manifest his or her assent to the term presented. In contrast, "browsewrap" agreements involved terms and conditions "posted via hyperlink, commonly at the bottom of the screen, and do not request an express manifestation of assent." The court emphasized that the enforceability of any provision on a webpage "depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous." The more obscure the provision is on a webpage, the less likely a court is to find that the user has constructive notice. The court concluded that this Amazon site was a hybrid between a clickwrap and browsewrap approach and reasonable minds could disagree as to the clarity of the notice provided. The court pointed out that the button placing the order was not bolded, capitalized, or conspicuous in light of the overall web page. The court estimated that there were 15 to 25 links on the order page and various text displayed in different font sizes and colors. Further, the court noted that the "presence of customers' personal address, credit card information, shipping options, and purchase summary are sufficiently distracting so as to temper whatever effect the notification has." The court remanded this matter for further proceedings by the district court. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016).

Judge, On Remand, Rules Need for Conspicuous Contract Terms on Website a "Superfluity". On remand from the Second Circuit, District Judge Ira Glasser compels arbitration of dispute with Amazon.com, but in doing so varies from the standard established by the appellate court. Judge Glasser ruled that the plaintiff in this case was required to agree to Amazon.com's terms and conditions in order to sign up for the services. The court was persuaded by the proximity between the "sign up" button on the website and notice that by doing so the user was put on "inquiry notice" of and agreed to the applicable terms and conditions, including the obligation to arbitrate. The court further

noted that this conclusion was further buttressed by the user's clicking on the "continue" button which contained notice that by doing so the user was agreeing to further terms and conditions which included a link to obligation to arbitrate. Having so ruled, Judge Glasser proceeded to provide his view that the requirement that terms of internet use must be "reasonably conspicuous" is, in his view, "largely a superfluity." He argued that "the struggle to make the common law of contracts applicable when people interacted with people in the commercial world, fit comfortably in a time when people interact with machines in that world and with each other" presents a different reality. In particular, Judge Glasser asserted that "most consumers will not read the terms and conditions, no matter how prominently the notice is displayed, and those that do will usually not understand them." Even if the consumer read and understood the terms, "most will proceed with the transaction anyway, because the terms are presented on a take-it-or-leave-it basis." From this, Judge Glasser reasons that requiring notices to be reasonably conspicuous "is unlikely to have much effect, if any, on overall consumer welfare." Judge Glasser recognized the need to protect consumers against "unscrupulous merchants" who place "any contractual term they wish into the hybridwrap agreement and expect automatic enforcement" in the face legal rules that incentivize "merchants to adopt some judicially-favored website designs" which are likely to have only a "negligible impact on the way buyers and sellers contract over the internet." Judge Glasser's urged that "rather than scrutinizing hybridwrap agreements for contract formation issues, courts should recognize that such agreements, like other adhesive contracts, represent in substance a 'blanket assent' to any terms that are not objectively unreasonable." From this, Judge Glasser concludes that a "judicial approach which shifts the inquiry away from the formal trappings of the contract, *e.g.,* notice and acceptance, to the substance of its terms, will much more readily honor the merchant's legitimate commercial expectations while safeguarding the consumer from abuse." Undoubtedly, on appeal, the Second Circuit will have an opportunity to weigh in on Judge Glasser's proscription. *Nicosia v. Amazon.com,* 384 F. Supp.3d 254 (E.D.N.Y. 2019).

Trial Necessary to Resolve Genuine Issues of Fact on Whether Agreement Was Formed. A potential customer of concert promoter Live Nation sued the company for violations of the Americans with Disabilities Act after discovering that its website did not have wheelchair-accessible seating available at a concert venue. Live Nation moved to compel arbitration, arguing that in order to navigate its website, the customer must have agreed to its terms of use, which included an arbitration agreement. Live Nation also argued that the customer had previously purchased tickets through its ticket website and must have agreed to its terms of use then. The customer disputed that claim, claiming he never saw or agreed to the terms of use when he visited Live Nation's website. Applying a summary judgment standard, the district court held that Live Nation did not meet its burden to prove that the parties had agreed to arbitrate. On appeal by Live Nation, the Third Circuit explained that a district court should only use a summary judgment standard to decide a motion to compel arbitration when no genuine dispute of material fact exists. However, where, as here,

genuine issues of fact exist as to whether the agreement was formed, a trial is necessary. Finding that the lower court erred in applying a summary judgment standard, the court vacated its order and remanded the case for trial on the existence of an arbitration agreement. *Egan v. Live Nation Worldwide, Inc.*, 764 F. App'x 204 (3d Cir. 2019). See also *Abedi v. New Age Medical Clinic PA*, 2019 WL 1760845 (D. N.J.) (expedited discovery ordered on the issue of arbitrability where arbitration agreement ruled ambiguous; arbitration issue will be addressed on summary judgment or at trial); *Epps-Stowers v. Uber Technologies, Inc.*, 2019 WL 3430566 (N.D. Cal.) (arbitration compelled following evidentiary hearing demonstrating that named plaintiffs in class action received a notice of, and consented to, arbitration when they signed up with Uber).

Electronic Acceptance of Arbitration Agreement Sufficient. A Southwest Airlines employee sued the company for wage and hour violations and Southwest moved to compel arbitration. In support of its motion, Southwest presented evidence about its employee communication intranet, which it uses to distribute certain employment policies to its workers. Employees are given unique login credentials. When they login to the intranet, any new policies or company announcements are posted on the main page. Electronic links to the written policies are provided and the employees are instructed to "CHECK THE BOX" to acknowledge they received, read, and reviewed the policies and that they understand and agree to comply with them. No actual signature is required but when an employee checks the box, an electronic record is created in Southwest's database with the employee's name, identification number, and the date and time that the employee executed the acknowledgement. Southwest presented a report of plaintiff's history accessing the intranet which showed that the employee checked the box affirming receipt of the arbitration agreement on August 14, 2017. Noting that the employee did not dispute whether she checked the box but "only generally declares that she 'could bypass' the announcements, and 'if' she checked the box, she did not understand what she was doing," the court found that no material issue of fact existed. Therefore, the court held that Southwest met its burden of authenticating the employee's signature and an arbitration agreement was formed. On this basis, Southwest's motion to compel was granted. *Tanis v. Southwest Airlines, Inc.*, 2019 WL 1111240 (S.D. Cal.). See also *Perez-Tejada v. Mattress Firm*, 2019 WL 830450 (D. Mass.) (adequate notice present where employer sent emails "to all of its employees calling special attention to the Agreement, including a video explaining its impact, inserting clear warning language in the Agreement and providing all of its new and integrated employees with the Agreement as part of a new hire process).

Unequivocal Acceptance of Arbitration Agreement Lacking. The employer sought to compel arbitration of its employee's FLSA claims based on an arbitration provision contained in the addendum to its employee handbook. The employee was given access to the handbook electronically when she joined the company as she clicked through various new hire documents. Plaintiff did not recall if she actually clicked to open the handbook. The same opportunity presented itself when she engaged in her annual review. The district

court rejected the employer's argument that the employee was bound by the arbitration provision and the Eighth Circuit affirmed. The court explained that under Missouri law the parties may choose to delegate to an arbitrator threshold issues relating to the arbitration of future disputes. A delegation clause is to be treated, the court made clear, as an additional antecedent agreement. The court concluded that plaintiff never accepted the delegation clause here. While it is true that plaintiff may have "acknowledged the existence of the delegation provision" but that did not satisfy Missouri law's requirement that she "unequivocally accept" those terms if for no other reason than there is no proof that they were accepted. "Even assuming the delegation provision, as presented, constitutes an offer, [plaintiff's] document review, and the subsequent system-generated acknowledgment, does not create an unequivocal acceptance; therefore, no contract was created." As the same fatal flaw is present with respect to the arbitration agreement itself, the Eighth Circuit denied the motion to compel and declined to give effect to the delegation clause. *Shockley v. PrimeLending*, 929 F.3d 1012 (8th Cir. 2019).

Electronic Acknowledgement Constitutes Acceptance of Dispute Resolution Policy. Plaintiff filed a court action against her former employer, TSI, alleging claims for employment discrimination in violation of the New Jersey Law Against Discrimination and the New Jersey Family Leave Act. TSI moved to dismiss the action and compel arbitration, arguing that plaintiff had agreed to arbitrate all workplace disputes. The court agreed, finding that plaintiff's written employment offer conditioned her employment on existing TSI policies, which included the dispute resolution policy. During her onboarding process, plaintiff electronically signed an acknowledgement of her agreement to the dispute resolution policy which provided "[i]f (1) your dispute involves a claim under federal, state, or local law, (2) you are not satisfied with the results you received through the internal process, and (3) you want to pursue the matter further against TSI, you must file a request for arbitration with the American Arbitration Association ("AAA") to pursue the claim." Although plaintiff did not print a copy of the policy, the court found that all employees had access to it from any TSI network computer as well as a website available to them on the internet. In addition, the court found that plaintiff was aware of and enforced the TSI dispute resolution policy against other employees in her capacity as a TSI manager. Holding that the language of the dispute resolution policy was broad and covered the claims at issue, the court dismissed the action and ordered the parties to arbitrate. Plaintiff appealed, arguing that the trial court erred in concluding that she accepted the dispute resolution policy and that her electronic acknowledgement was valid. The appellate court rejected plaintiff's arguments and affirmed the lower court order, holding that the record contained ample evidence supporting the trial court's findings of fact and conclusions of law. *Brownlee v. Town Sports International Holdings, Inc.*, 2019 WL 149645 (N.J. App.).

Acceptance of Arbitration Agreement by a Text Message Enforceable. Plaintiff sought to engage the services of defendant, and defendant forwarded by text message the agreement which included an arbitration provision. Plaintiff responded by texting "Agree".

After a dispute arose, defendant sought to compel arbitration and plaintiff opposed the motion, arguing that he did not affirmatively assent to arbitration. The court rejected plaintiff's arguments and compelled arbitration. Defendant submitted a declaration from a custodian confirming receipt of plaintiff's text message "Agree" and other records related to plaintiff's relationship with defendant. The court ruled the declaration to be acceptable as a business record under the Federal Rules of Evidence. The court also distinguished the authority cited by plaintiff as relating to "browsewrap" agreements where "a party seeking to enforce a browsewrap agreement must establish that the other party had actual or constructive knowledge of the agreement." Here, plaintiff affirmatively gave his assent to the agreement when he texted "Agree" after receiving the agreement by text. For these reasons, the court granted defendant's motion to compel. *Starace v. Lexington Law Firm,* 2019 WL 2642555 (E.D. Cal.).

Arbitration Agreement Incorporated by Reference Ruled Enforceable. The Ninth Circuit was clear – "This case tests the outer limits of what constitutes a 'reasonably conspicuous' provision as part of the terms of usage so prevalent in the adhesion contracts of modern internet commerce." The district court compelled arbitration on an individual basis of the claims of the named plaintiff in a putative class action against UPS. Upon limited mandamus review, the Ninth Circuit ruled that because it could not say with "definite and firm conviction" that the district court erred it upheld the lower court's ruling. Here, the plaintiff admitted to agreeing to UPS's service terms, but argues that the arbitration provision was so inconspicuous that no reasonable user would be on notice of its existence. The court acknowledged that "locating the arbitration clause at issue here requires several steps and a fair amount of web-browsing intuition." In short, the user must (a) access the enrollment forms hyperlink, (b) read the service terms and understand that another set of terms and conditions are incorporated by reference, (c) go to UPS's website to find the other set of terms and conditions, (d) select those terms and conditions, (e) locate the link to the terms and conditions, and (f) read those terms and conditions to find the arbitration provision. The Ninth Circuit noted that the incorporation appears in the first section of the service terms and instructs that those terms can be found on UPS's website. The court made clear that the "rules of consumer online agreements and consumer paper agreements are the same" and that courts have upheld analogous incorporation by reference in the online context. The court concluded that plaintiff "unequivocally assented to the [UPS service terms] and those terms clearly incorporated the document containing the arbitration clause in question, we are not left with the definite and firm conviction that the district court erred in a manner sufficient to justify mandamus." *In re Randal Holl*, 925 F. 3d 1076 (9th Cir.). See also *Federal Insurance Co. v. MTA*, 2019 WL 4127343 (2d Cir.) (non-signatory surety bound by broadly-framed arbitration agreement incorporated by reference in underlying agreement).

Motion to Compel Denied Where Evidence of Agreement to Arbitrate Not Authenticated. Uber moved to compel the arbitration of claims brought under the Telephone Consumer Protection Act alleging that the named plaintiff had registered with it using Uber's mobile app. The court noted that the "existence of an agreement to arbitrate must be supported by admissible evidence." Here, Uber introduced documents purporting to show that the named plaintiff registered for the Uber service and called for and then cancelled a call for a ride. These documents were not authenticated. Rather, the declarations supplied merely reviewed the registration process generally. "Snippets from a database, reproduced without any context, explanation, or supporting testimony, are not properly authenticated evidence." The court found sufficient evidence to create a dispute of material fact based on plaintiff's claim that his cellphone lacked the technology to use Uber's mobile app to register. "Because Uber bears the burden of proving the existence of the agreement to arbitrate, and all inferences must be drawn in [plaintiff's] favor, the Court cannot grant the motion to compel based on the present record." *In re Uber Text Messaging*, 2019 WL 2509337 (N.D. Cal.). See also *Scotti v. Tough Mudder Inc.,* 63 Misc.3d 843 (Sup. Ct. Kings Cty. 2019) (affidavit supporting on-line registration process "holds little evidentiary value" where affiant did not set forth basis for personal knowledge or indicate that she was employed during relevant time period).

Arbitration Agreement Ruled to Exist Despite Employee's Failure to Recollect its Receipt. Knepper, a former lawyer with Ogletree Deakins, did not recall receiving the various e-mail transmissions relating to the firm's arbitration agreement and the employee's right to opt out of it. The firm was able to demonstrate both the transmission of the emails and that Knepper responded to one of them agreeing to turn in the agreement. The court rejected Knepper's argument that an evidentiary hearing was required on the issue. "Even taken in the light most favorable to Knepper, the only potential dispute is whether Knepper read the three e-mail notices, not whether she received them." The court also rejected Knepper's argument that no agreement was formed because she did not affirmatively agree to the obligation to arbitrate. The court found that Knepper was on notice that she could opt out of the agreement and continued to work after that date set by the firm to opt out. For these reasons, the court granted Ogletree Deakins' motion to compel arbitration of Knepper's claim. *Knepper v. Ogletree Deakins*, 2019 WL 1449502 (C.D. Cal.). See also *Dicent v. Kaplan University*, 758 F. App'x 311 (3rd Cir. 2019) (student ruled bound to arbitrate where student "simply did not read or review the Enrollment Packet PDF closely before she e-signed it, which will not save her from her obligation to arbitrate").

Signature Not Required for Arbitration Agreement. A former employee filed an action in court alleging various employment discrimination claims against her former employer. The employer moved to compel arbitration, relying on an arbitration agreement that the company emailed to all its employees. The arbitration agreement required all employees

who did not wish to be bound by it to opt out by emailing the company within fourteen days of receiving it. The former employee did not opt out but also did not sign the agreement and therefore argued it was invalid and unenforceable. The court disagreed, finding that the lack of signature was immaterial and did not render the arbitration agreement invalid. The court granted employer's motion to compel arbitration, holding that the employee's failure to opt out and continued employment with the company demonstrated acceptance as well as the consideration required for an enforceable agreement. *Hoffman v. Compassus*, 2019 WL 1791413 (E.D. Pa.). See also *Gray v. Uber, Inc.,* 362 F. Supp. 3d 1242 (M.D. Fla. 2019), reconsideration denied, 2019 WL 1785094 (M.D. Fla. Apr. 10, 2019), appeal dismissed, 2019 WL 3408912 (11th Cir.) (court rejects Uber driver's claim that he opted out of enforceable arbitration agreement and compelled arbitration of his claims where driver's evidence was conclusory and did not allege that the decision to opt out was timely); *Diaz v. Sohnen Enterprises*, 34 Cal. App. 5th 126 (2019) (arbitration compelled even though employee refused to sign arbitration agreement as continued employment constituted consent to employer's dispute resolution policy). Cf. *Schultz v. Midland*, 2019 WL 2083302 (D.N.J.) (existence of an enforceable arbitration agreement not apparent when defendant relied on an exemplar agreement that did not contain plaintiff's signature or personally identifying information.);

B. Unconscionability

Substantive Unconscionability Not Established. A driver for Lyft sued the company alleging it wrongfully classified drivers as independent contractors. Lyft moved to compel, relying on an arbitration agreement the driver signed when he was hired. The motion to compel was granted and the driver appealed. On appeal, the driver argued that the arbitration agreement was substantively unconscionable because it selected the AAA Commercial Rules requiring the parties to split the arbitration fees and because it granted Lyft the unilateral right to modify the agreement's terms. The First Circuit rejected both arguments. Turning first to the AAA Rules, the court noted that when courts evaluate fee-splitting arrangements, they are permitted to consider facts developed during the litigation before them. Here, Lyft had offered to pay all arbitration fees. Therefore, the court held that the driver's argument, and any damage the fee-splitting arrangement would have caused him, were extinguished. The court then examined the modification of terms provision and found that it was not one-sided at all. Rather, the provision required both parties to act before any of the terms could be modified. Lyft was required to provide notice to the driver and the driver had to accept the modification for it to be effective. For these reasons, the lower court's order to compel arbitration was affirmed. *Bekele v. Lyft,* 918 F.3d 181 (1st Cir. 2019).

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.*, 289 F. Supp.3d 537 (S.D.N.Y. 2018).

Finding of Unconscionability Reversed. An experienced physical therapist challenged the enforcement of an arbitration clause on unconscionability grounds and succeeded before a South Carolina trial court. The appellate court reversed. The court acknowledged that unequal bargaining positions here existed between the employer, a hospital, and the plaintiff, a former employee, but rejected the notion that the disparate bargaining power was fundamentally unfair. "Employees of large corporations almost always wield weaker bargaining tools than their employer, but that alone cannot prove unconscionability." The court noted that the therapist was a college graduate who had done graduate work and had practiced physical therapy for more than four decades. The court added that she was not pressured into signing the agreement and had the opportunity, but chose not, to retain counsel. The court also noted that the arbitration provision was in the same font size as the rest of the one-page agreement. In rejecting the unconscionability claim, the court added that an experienced arbitrator acceptable to both parties was required, all civil remedies were available to both sides, and "importantly, the Agreement stipulated any arbitration was to be administered by the American Arbitration Association, a well-respected neutral forum." Finally, the court concluded that plaintiff's defamation claim was encompassed by the broad arbitration clause which applied to "any and all claims and disputes that are related in any way" to plaintiff's employment. *Marzulli v. Tenet South Carolina*, 2018 WL 1531507 (S. C. App.).

Unconscionability Claim by a "Not Unsophisticated" Executive Rejected. Plaintiff, a successful executive at Facebook, was recruited and hired by Snapchat. As noted by the court, Snapchat "had to make an aggressive pitch to convince" plaintiff to join. Plaintiff was able to negotiate a $15,000 raise, but nonetheless argued that his agreement containing an

arbitration clause was adhesive and that he was not given an opportunity to negotiate its terms. The executive worked for three "tension-filled weeks" after which he was terminated for allegedly disputing Snapchat's key metrics. The executive sued, and Snapchat moved to compel arbitration. The executive's unconscionability argument was rejected by the court. The court emphasized that the executive was not "unsophisticated" and negotiated a raise in salary and "as a matter of law, he cannot claim lack of knowledge of contract terms to which he agreed." The court concluded that under the circumstances of this case "any oppression or surprise is minimal and procedural unconscionability is present only to a limited degree due to the speed with which the agreement had to be signed after the terms were finalized." *Pompliano v. Snap Inc.*, 2018 WL 3198454 (C.D. Cal.).

Substantive Unconscionability Determined at Inception of Agreement. The arbitration agreement here required a worker to waive claims including claims under California's Private Attorneys General Act ("PAGA") statute. Plaintiff brought a wage claim before California's Labor Commission but did not file a PAGA claim and the employer moved to compel. The court ruled that waiver of a PAGA claim, along with other terms, made the arbitration agreement substantively unconscionable. In determining whether the provision is unconscionable, the court held that it must "review the arbitration clause for substantive unconscionability at the time the agreement was made." The court found the agreement to be substantively unconscionable for, among other reasons, it required the worker to share costs of three arbitrators and barred recovery of attorneys' fees and other statutory remedies such as punitive damages and equitable relief. The agreement was also procedurally unconscionable because the worker had no opportunity to negotiate its terms, was asked to sign it "on the spot", the agreement was in the English and the worker had only limited fluency in English, and the agreement was in small font and was five pages long. The court also found the agreement to be procedurally unconscionable because the applicable AAA rules were neither designated nor was a copy of those rules provided. The court ruled that the defects could not be remedied and declined to sever the unconscionable terms from the agreement and upheld the lower court's refusal to enforce the arbitration agreement. *Subcontracting Concepts (CT), LLC v. De Melo*, 34 Cal. App. 5th 201 (2019). See also *Abedi v. New Age Medical Clinic*, 2019 WL 1760845 (D. N.J.) (discovery ordered with respect to a unconscionability argument where "the determination of unconscionability is based on facts that are not presented in the four corners of the Arbitration Agreement, such as whether deceptive or high-pressured tactics were employed, the experience and education of [plaintiff], and whether there was a disparity in bargaining power").

Arbitration Provision Agreed to by Potential Class Members After Initiation of Litigation Ruled Substantively Unconscionable. While this wage and hour class action was pending, the employer revised its handbook to include an arbitration provision on the handbook's penultimate page. The employer moved to compel arbitration for those who

signed the handbook. A California trial court denied the motion, and the appellate court affirmed, finding that the arbitration provision was procedurally and substantively unconscionable. In ruling the arbitration provision procedurally unconscionable, the appellate court noted that "no style elements, such as a heading, indentations, or emphasized text, differentiated the arbitration provision from the other unrelated paragraphs on the page." The court also found the provision to be substantively unconscionable, noting that it purported to cover disputes "which may arise." "An employee, particularly one who was unaware of the pending class action, could reasonably understand this language to apply only to disputes that 'may arise' in the future rather than to disputes that already had arisen and remain ongoing. Nothing else in the text of the lengthy provision clarified that the provision was both forward- and backward-looking." For these reasons, the court concluded that "the language of the provision and the circumstances under which it was presented to putative class members rendered it unfair, one-sided, and substantively unconscionable." *Nguyen v. Inter-Coast International Training*, 2018 WL 1887347 (Cal. App.). Cf. *Davis v. USA Nutra Labs*, 303 F. Supp.3d 1183 (D. N. Mex. 2018) (provision allowing modification or cessation of arbitration provision not substantively unconscionable where it only has prospective affect).

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 several 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*,

240 W. Va. 284 (2018). 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).

Unconscionable Terms Severed. The arbitration provision applicable to this employment dispute was found to be procedurally unconscionable because it was in an adhesion contract and the applicable rules of procedure were not attached to it. The court also found the arbitrator selection process to be substantively unconscionable. Under this unique process, the employer initially proposed three JAMS arbitrators to which the employee was to react. If the parties could not agree, the employee could then propose three JAMS arbitrators and then if no agreement was reached at that point the employer was empowered to designate two JAMS arbitrators from which the employee was required to select one. The "likely consequence" of this procedure, in the court's view, was that the employer can "force the employee to pick between defendant's two favorite arbitrators. There is nothing to prevent defendant from always rejecting the three names proposed by the employee, thereby ensuring that defendant always has complete and unilateral control over the pool of potential arbitrators." The court found, however, that these unconscionable provisions did not permeate the agreement. The arbitrator could be fairly selected, the court reasoned, through normal JAMS processes. The court concluded that severance of the substantively unconscionable provision was in keeping with prevailing law which favors enforcement of arbitration agreements and "considering the ease" here with which it "can be made entirely conscionable" the court found severance to be appropriate. *Pichardo v. American Financial Network*, 2019 WL 153704 (Cal. App.).

Case Shorts:

- *U.S. Home Corp. v. Lanier*, 431 P. 3d 38 (Nev. 2018) (requiring that arbitration provision be more prominent than other contractual provisions would disfavor arbitration and therefore arbitration provision in normal typeface and prominence is not procedurally unconscionable).
- *Molina v. Kaleo*, 363 F. Supp.3d 344 (S.D.N.Y. 2019) (arbitration provision in all caps and bold lettering on page 6 of a 22-page terms and conditions not "hidden" and therefore not procedurally unconscionable).
- *Spaulding v. PJCA-2*, 2019 WL 517667 (Cal. App.) (AAA rule giving arbitrator discretion to limit discovery "consistent with the expedited nature of arbitration" not substantively unconscionable under California law).
- *Molina v. Kaleo*, 363 F. Supp.3d 344 (S.D.N.Y. 2019) (provision in arbitration agreement authorizing employer, but not employee, to seek injunctive relief "does not reflect a broader lack of mutuality" and therefore did not render the agreement substantively unconscionable).

- *Sanfilippo v. Tinder*, 2018 WL 6681197 (C.D. Cal.) (retroactive application of arbitration provision not substantively unconscionable).
- *Perez-Tejada v. Mattress Firm*, 2019 WL 830450 (D. Mass.) (modification provision in arbitration agreement not substantively unconscionable where employer may only modify the agreement on 30 days' notice and the modification may only have prospective effect).
- *Gardner v. Yucaipa Trading Co.*, 2019 WL 2950200 (Cal. App.) (procedural unconscionability claim rejected where both sides were represented by counsel when negotiating the agreement, negotiated modifications were made, and the process was not one-sided).
- *Tessemae's LLC v. Atlantis Capital LLC,* 2019 WL 3936964 (S.D.N.Y.) (mere financial pressure, here broker's threat to cancel financing deal if fee not paid, does not rise to level of procedural unconscionability).
- *O'Neil v. Comcast Corp.*, 2018-CV-04249 (N.D. Ill. February 27, 2019) (unconscionability claim rejected as the "presence of an arbitration opt-out clause 'weighs heavily against' a finding of procedural unconscionability").
- *SCI Alabama Funeral Services v. Hinton*, 260 So.3d 34 (Ala. 2018) (overbroad arbitration terms in agreement with funeral home, by itself, did not render the agreement substantively unconscionable).
- *Bolden v. DG TRC Management Co.*, 2019 WL 2119622 (S.D.N.Y.) (question of whether arbitration provision precluding discovery is unconscionable is for arbitrator to decide where delegation provision was not directly challenged and therefore "must be treated as valid and enforceable under the FAA").
- *Bowles v. Onemain Financial Group*, 927 F. 3d 878 (5th Cir.) (under Mississippi law claim of procedural unconscionability goes to contract formation and is for the court, not the arbitrator, to decide).
- *Gutierrez v. FriendFinder Networks*, 2019 WL 1974900 (N.D. Cal.) (clear and unmistakable delegation present where arbitration agreement provided that any claim or dispute subject to arbitration and where the AAA and JAMS Rules, were incorporated, both of which delegate arbitrability questions to arbitrator).

C. Arbitration By or Against Non-signatories and Third Parties

New York Convention Requires Signed Arbitration Agreement. The Eleventh Circuit ruled that an arbitration agreement must be in writing to be enforceable under the New York Convention. GE Energy sought to arbitrate a dispute it had with a steel mill owner based on an arbitration clause in a contract that the mill owner entered into with a supplier of motors. Subcontractors were expressly made parties to that agreement. GE Energy was a subcontractor to the contractor that made the motors and invoked the arbitration clause in an effort to arbitrate its dispute with the steel mill. The district court granted GE Energy's

motion to compel, but the Eleventh Circuit reversed, finding that GE Energy "is undeniably not a signatory" to the applicable agreement. The court based this on its holding that the New York convention requires that arbitration agreements be signed by the parties. The court also rejected GE Energy's estoppel and third-party beneficiary theories. In doing so, the court noted that GE Energy did not become a subcontractor until after the agreement between the mill and the motor manufacturer had been signed, undercutting any notion that the motor manufacturer was acting as GE Energy's agent. *Outokumpu Stainless USA v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018), cert. granted, 139 S. Ct. 2776 (June 28, 2019).

Employee Bound to Arbitrate Claim Against Non-Signatory Employer. An offer of employment was made to Noye by Kelly Services for work with Johnson & Johnson. Noye signed an employment agreement with J&J's logo on it, and an arbitration agreement bearing Kelly's logo. In the documentation Kelly was identified as the "employer" and J&J the "customer". Kelly obtained a consumer report for Noye and J&J informed Kelly that it "would not be hiring him." Noye brought a class action under the Fair Credit Reporting Act against Kelly and J&J asserting some of the same claims against both. The district court compelled arbitration as to Kelly, but not J&J. On appeal, the Third Circuit vacated and ruled that Noye must arbitrate his claims against J&J as well. The Third Circuit, applying Pennsylvania's alternative equitable estoppel doctrine, noted that the claims raised by Noye against both J&J and Kelly were indistinguishable as they stemmed from the same incidents and invoke the same legal principles. The court pointed out that Noye's FCRA claim resulted from his employment relationship and the arbitration agreement contemplated the arbitration of employment disputes. Also, "Noye alleges concerted and interdependent misconduct by J&J and Kelly, collectively accusing them . . . of failing to provide Noye with proper background check information." For this reason, the court vacated the district court's order denying J&J's motion to compel. *Noye v. Johnson & Johnson Services*, 765 F. App'x 742 (3d Cir. 2019). See also *Fridman v. Uber Technologies*, 2019 WL 1385887 (N.D. Cal.) (motion to stay denied for related class action filed by non-signatory who was not bound to arbitrate).

Non-Signatory May Compel Arbitration on Agency Grounds. Smith sought employment with TruGreen and in the process of applying agreed to be bound by TruGreen's arbitration program. Under the program, Smith was required to arbitrate all claims against TruGreen, its officers, and agents. Smith's application for employment was ultimately denied based on a background check conducted by GIS. Smith sued GIS, and GIS moved to compel. The district court reviewed the grounds under which a non-signatory may compel arbitration or be compelled to arbitrate. One of those grounds is where an agency relationship exists. The court concluded that Smith was bound to arbitrate his claim against GIS under agency principles. The court explained that it was clear that GIS was

acting as TruGreen's agent when the alleged illegal activity occurred which "points convincingly to the conclusion that GIS, as TruGreen's agent, is entitled to the protection of the Agreement between Smith and TruGreen, GIS's principal." *Smith v. General Information Solutions*, 2018 WL 6528155 (D. S.C.). Cf. *Lesico Initiation and Civil Engineering v. Travelers Casualty and Surety Co.*, (D. Conn. June 13, 2018) (non-signatory surety may not compel parties to the agreement containing an arbitration provision to arbitrate the dispute).

Non-Signatory Not Bound to Arbitrate. Two pediatric practices brought a putative antitrust class action against Merck alleging antitrust violations involving the sale of Merck's rotavirus vaccines. Merck moved to compel arbitration pursuant to mandatory arbitration provisions in Merck's contracts with the Physician Buying Groups (PBGs) from whom the pediatric practices obtained the drugs. The court found that the pediatric practices were not parties or signatories to that agreement and therefore were not bound by it unless one of five exceptions to this general rule applied. Of these exceptions, the only two theories that could apply were agency and estoppel. The court found, however, that neither of these theories could bind plaintiffs to arbitrate. First, the court found there was no evidence that an agency relationship existed – expressly or impliedly. There was also no parent-subsidiary, ownership, or other similar relationship between the pediatric practices and the contract signatories. As a result, the agency theory failed. The court then considered the estoppel theory and rejected that as well, finding that the pediatric practices did not knowingly exploit the agreement or have a "obvious and close nexus" with the contract or the parties who signed it. The motion to compel was therefore denied. *In re Rotavirus Antitrust Litigation*, 362 F. Supp.3d 255 (E.D. Pa. 2019). See also *Orn v. Alltran Financial*, 2019 WL 3061530 (3d Cir.) (non-party debt collector's third-party beneficiary and agency arguments in support of compelling arbitration rejected where applicable agreement was not for the benefit of the debt collection agency and there was no evidence of interdependence or concerted misconduct among the defendants).

Non-Signatory Insurance Agency Not Bound to Arbitrate. The agreement between the insured and the insurance company provided for the arbitration of disputes. The insured sued the insurance agency through which the insurance coverage was obtained for deceptive practices. The agency moved to compel based on the arbitration provision in the insurance agreement to which the agency was not a party. The Texas Supreme Court ruled that the insured could not be compelled to arbitrate the dispute with the non-signatory agency. In doing so, the Court rejected the agency's third-party beneficiary and estoppel theories. For example, the estoppel claim was rejected because plaintiff's claim was independent of the insurance agreement and raised statutory and non-contractual obligations. The Court also rejected an estoppel argument based on an "intertwined claims" argument. The Court acknowledged that the insurance agency and insurance company have "an entangled business relationship" but are nonetheless "independent and distinct entities." The Court concluded that a "reasonable consumer would not anticipate being

forced to litigate complaints against an independent insurance agent in the same manner they agreed to litigate disputes with the insurer." *Jody James Farms v. Altman Group*, 547 S.W.3d 624 (Tex. 2018). Cf. *Novick v. Credit One Bank*, 757 F. App'x 263 (4th Cir. 2019) (plaintiff homeowner can be required to arbitrate claims under arbitration agreement in a Construction Contract against building designer whose agreement did not have an arbitration agreement where homeowner's "allegations of related and interdependent misconduct by both parties were intimately founded in or intertwined with the Construction Contract").

Non-Signatory Who Is Not an Alter-Ego Has No Standing to Stay Arbitration. A non-signatory to an arbitration agreement had no standing to stay an arbitration against a defunct party even though it has a potential financial stake in the outcome of the arbitration. The arbitration agreement at issue was contained in an exclusivity agreement between Cognac Ferrand SAS, a French liquor producer, and Mystique Brands, LLC, an American importer. The agreement was terminated, and an arbitration ensued. The arbitrator ultimately dismissed Mystique's claims and granted Cognac's counterclaims. The issue of damages remained but before the arbitrator could rule Mystique filed for bankruptcy. When the bankruptcy proceeding was final, Cognac filed a new arbitration seeking damages. However, Royal Wine Corp., a non-party to the arbitration agreement, intervened in the action by filing a preliminary injunction in state court seeking to stay the arbitration and raising defenses on behalf of Mystique. Royal argued that it was not an alter-ego of Mystique but since a judgment against Mystique could potentially impact Royal, it had the right to raise defenses on Mystique's behalf. The court rejected Royal's arguments, finding first that as a non-signatory to the agreement, Royal had no standing. The court then found that where Royal denied a legal relationship with Mystique, it was insufficient to ground its arguments on the fact that a decision in the arbitration may financially impact it. Royal's preliminary injunction action was therefore dismissed. *Royal Wine Corp. v. Cognac Ferrand SAS*, 2018 WL 1087812 (N.Y. Sup. Ct.).

Arbitration Agreement Does Not Apply to Non-Signatory Employer. The Fourth Circuit upheld a district court's ruling that no valid arbitration agreement existed between and an employee and his employer where the agreement was signed by the employer's parent company. The court rejected the employer's argument that the reference to the parent company was a clerical error and pointed to textual evidence in the agreement itself supporting its conclusion that it was indeed the parent company who was intended to be bound, including the venue and choice of law provisions, which designated Florida, where the parent operates and not South Carolina, where the employer does. *Weckesser v. Knight Enterprises S.E., LLC*, 735 F. App'x 816 (4th Cir. 2018).

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).

Non-Signatories Not Bound to Arbitrate Where Contractual Benefits Indirect. Insureds and competing agents brought a series of arbitrations against an insurance agency and its agents. The respondents moved to compel arbitration against the non-signatory insureds and competing agents as third-party beneficiaries under an Agency Agreement signed by certain of the respondents. The South Carolina Supreme Court ruled that arbitration against non-signatories was not appropriate. The Court explained that non-signatories may be bound to arbitrate their claims where they directly benefit from the terms of the agreement containing the arbitration clause, that is, where a direct benefit "flows directly from the agreement." The Court added that in contrast "any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties but does not exploit (and thereby assume) the agreement itself." Here, the plaintiffs did not, in the Court's view, knowingly exploit or receive a direct benefit from the Agency Agreement. The Court found that the Agency Agreement "was purely for the benefit of the parties to the contract in outlining their business relationships and rights of the parties to the Agency Agreement." Indeed, plaintiffs did not know the Agency Agreement existed until the litigation was filed. For these reasons, the Court refused to apply the equitable estoppel doctrine and rejected the application to compel arbitration of the dispute. *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019). See also *McCullough v. Royal Caribbean Cruises*, 2019 WL 2076192 (S.D. Fla.) (non-signatory may not be bound under New York Convention based on third party-beneficiary or estoppel theories).

Arbitration Agreement Binds Father of Signatory Based on Privity. A lawyer received unauthorized telemarketing calls and negotiated a settlement with the telemarketer which included a commitment to arbitrate future disputes. Two years later the same lawyer sued the telemarketer, this time on behalf of his father alleging the same injury asserted

previously. The lawyer and his father lived together and share the same landline telephone at issue. The telemarketer moved to compel. The district court granted the motion, and the Sixth Circuit affirmed. The court found that under governing Ohio law privity existed between father and son. The court explained that "privity does not require identical interests – it just requires that the interests of one party adequately represent the interests of another." The court pointed out that father and son "both sought relief for an alleged injury stemming from calls to the same *shared*, residential landline" and both sought injunctive relief. The court concluded that the injunctive relief would benefit both father and son and the son could adequately represent the father's interests. On this basis, the court compelled arbitration based on the earlier settlement agreement. *Reo v. Palmer Administrative Services,* 770 F. App'x 746 (6th Cir. 2019). Cf. *Girolametti v. Michael Horton Associates,* 332 Conn. 67 (2019) (subcontracts are presumptively in privity with general contractors and are bound by arbitration awards for res judicata purposes).

Teenage Daughter Not Bound to Arbitrate Under Mother's Credit Card Agreement. A mother and daughter pre-ordered smoothies at a mall and the mother gave her daughter a credit card to pay for the smoothies. When the mother fell behind in her payments, the credit card company made calls to the daughter's cell phone seeking payment. The daughter brought a class action under the Telephone Consumer Protection Act, and the credit card company sought to invoke the arbitration provision in the mother's agreement with it. The district court ordered arbitration, but the Seventh Circuit reversed. The court concluded that the daughter was a minor and could not be an "authorized user" under the credit card agreement. The court also rejected the credit card company's effort to invoke equitable estoppel principles against the non-signatory daughter here. The court emphasized that the non-signatory must derive a "direct benefit" from the transaction in order to invoke the equitable estoppel doctrine. The court reasoned that any benefit that the daughter "received with respect to the credit card was limited to following her mother's directions to pick up the smoothies that her mother had ordered previously . . .. Her mother . . . benefited from the agreement, which allowed her, not [her daughter], to buy the smoothies." For these reasons, the motion to compel was denied. *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054 (7th Cir. 2018).

Non-Signatory Not Bound by Arbitration Agreement. The Supreme Court of Mississippi upheld a circuit court order denying a motion to compel arbitration in an action for emotional distress brought against a contractor by the adult daughter of the parties who contracted his services. Stating that a signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of equitable estoppel applies, the Mississippi Supreme Court found neither exception applied here. First, the Court found that the contract terms were not broad enough to include the daughter as a third-party beneficiary and that her residence in the home only made her an

incidental beneficiary, and not a direct beneficiary of the contract. Next, the court found that the daughter's action was not based on the contract terms and did not seek contract damages therefore making equitable estoppel inapplicable. *Olshan Found. Repair Co. of Jackson, LLC v. Moore*, 251 So. 3d 725 (Miss. 2018), reh'g denied (Sept. 6, 2018).

Equitable Estoppel Not Applicable Where Non-Signatory's Claims Fall Outside the Scope of the Agreement. Defendant hosts a website where its customers can purchase, exchange, and sell digital cryptocurrencies, such as Bitcoin. One of defendant's customers opened a cryptocurrency exchange on the website under the business name Cryptsy and allegedly stole money from its clients. Plaintiff, one of those customers, filed claims against Defendant alleging violations of the Bank Secrecy Act ("BSA"). Defendant moved to compel arbitration, arguing that equitable estoppel required plaintiff to arbitrate the claims because they were "based upon" the User Agreements that established Cryptsy's accounts on defendant's website. The district court disagreed, and the Eleventh Circuit affirmed. The court noted that, under Florida law, defendant must show both that plaintiff is relying on a contract to assert its claims and that the scope of the arbitration clause in that contract covers the dispute. Moreover, because the arbitration clause in the User Agreement was "narrow in scope," defendant was also required to show that customer's claims "have a direct relationship to [the User Agreements'] terms and provisions." The Eleventh Circuit concluded that since the customer had not raised claims concerning Cryptsy's performance of its agreement, but only claims involving the company's obligations under the BSA, equitable estoppel did not apply, and arbitration was not appropriate. *Leidel v. Coinbase, Inc.*, 2018 WL 1905954 (11th Cir.). See *Smith Jamison Constr. v. APAC-Atl., Inc.,* 811 S.E.2d 635 (N.C. Ct. App. 2018) (non-signatory subcontractor may not invoke arbitration agreement between general contractor and contractor where claims against the subcontractor were rooted in tort and not the agreement containing the arbitration provision).

Non-Signatories Bound to Arbitrate Where Direct Benefit Received. The owners of a security firm entered into a Security Representative Consulting Agreement with the NFL containing an arbitration provision. They signed the Agreement as owners rather than in their individual capacities. A dispute arose and a litigation was initiated by the security firm. The NFL's motion to compel was granted. The court rejected the owners' argument that they were not bound by the arbitration provision in the Agreement because they were non-signatories. The court noted that the Second Circuit will enforce an agreement against a non-signatory where the non-signatory received a direct benefit from the agreement containing the arbitration clause. Here, the Agreement was the "sole means by which [security firm owners] could be compensated for their success" and, therefore, were required to arbitrate the dispute. *Buckley v. National Football League*, 2018 WL 6198367 (S.D.N.Y.). See also *BML Properties v. China Construction America*, 174 A.D.3d 419 (1st Dep't 2019)

(developer alleging breach of contract and fraud against construction company not bound by agreement entered into by subsequent purchaser of project in receivership where no evidence that developer intended to be bound by arbitration agreement, to which it was not a signatory, or that it directly benefited from that agreement).

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, Ltd.*, 286 F. Supp. 3d 1352 (S.D. Fla. 2017), appeal dismissed, 2018 WL 3545908 (11th Cir.).

Non-Signatory May Compel Arbitration on Equitable Estoppel Grounds Where Detrimental Reliance Present. The Colorado Supreme Court, in answering a certified question from a federal court, concluded that a non-party may compel arbitration under Colorado's equitable estoppel doctrine on the same grounds as the doctrine is applied in other settings as long as a showing of detrimental reliance is made. The elements of an equitable estoppel claim are: (1) the party against whom the estoppel is asserted must know the relevant facts; (2) that party must intend that its conduct is acted upon or must result in the other party believing that the conduct was so intended; (3) the party seeking estoppel must not know the true facts; and (4) the party asserting estoppel must detrimentally rely on the other party's conduct. A Colorado appellate court previously endorsed an arbitration-specific equitable estoppel doctrine relying on the intertwined relationship between the signatory and non-signatory as opposed to the traditional detrimental reliance prong of the test. The Colorado Supreme Court saw no reason to vary from traditional equitable estoppel principles and disavowed the arbitration-specific test. The Court concluded that "non-signatories to a contract containing an arbitration provision might be able to compel arbitration on equitable estoppel grounds, but to do so they would need to prove all four traditionally defined elements of the doctrine, including, but not limited to, the element of detrimental reliance." *Santich v. VCG Holding Corp.*, 443. P. 3d 62 (Colo.). Cf. *Melendez v. Horning*, 908 N.W. 2d 115 (N.Dak.) (non-signatories can compel arbitration under equitable

estoppel principles where plaintiff raises claims of intertwined conduct by the non-signatories and signatories to the operating agreement at issue).

Equitable Estoppel Claim Rejected. Plaintiff worked in Tesla's Fremont, California factory for six months. During that time, he applied for a position as a permanent production associate and Tesla offered him the job. Tesla's offer letter contained an arbitration agreement providing: "If you choose to accept our offer . . . please indicate your acceptance, by signing below and returning it." Plaintiff never signed or returned the offer letter and Tesla withdrew the offer about two weeks later and plaintiff ceased working for the company. Plaintiff then filed a putative class action against Tesla claiming discrimination and harassment stemming from his employment as a factory worker. Tesla moved to compel arbitration, arguing in part that although plaintiff never signed the arbitration agreement contained in the offer letter, the doctrine of equitable estoppel applied. Tesla reasoned that plaintiff's claims relied "on the existence of an employment relationship with Tesla, and in turn, the [offer letter] containing the arbitration agreement." The trial court denied the motion to compel, noting that the offer letter "was apparently intended to supersede some other contractual relationship" between the parties. The trial court also expressed "no opinion on the existence, terms, or effect of whatever contractual relationship governed the relationship between [the parties]" when plaintiff worked in the Fremont, California factory. On appeal by Tesla, the appellate court agreed that plaintiff was not relying on the offer letter to hold Tesla liable, and that the offer letter did not control the terms of his employment as a factory worker. The court therefore affirmed the lower court's denial of the motion to compel, holding that "the basis for equitable estoppel - relying on an agreement for one purpose while disavowing the arbitration clause of the agreement - is completely absent." *Vaughn v. Tesla*, 2019 WL 2181391 (Cal. App.).

D. Class and Collective Actions

Class Arbitration Gateway Issue for Court. The Fifth Circuit joins the Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits in ruling that class arbitration is a gateway question for courts and not the arbitrator to decide. The Fifth Circuit also agrees with the Third, Fourth, Sixth, and Eighth Circuits that this is the case even where the parties have delegated arbitrability issues to the arbitrator. The arbitration provision here permitted the arbitrator to hear "only individual claims" and barred class or collective action arbitrations. The agreement also provided that the arbitrator was empowered to resolve arbitrability issues. The court rejected application of the delegation provision in the AAA rules, finding that the rules and therefore the arbitration provision under the AAA rules were not applicable "where such rules are inconsistent with this agreement." The court concluded that the express class action waiver trumped the delegation provision. The court concluded that "this class arbitration bar operates not only to bar class arbitrations to the maximum extent permitted by law, but also to foreclose any suggestion that the parties meant to

disrupt the presumption that questions of class arbitration are decided by courts rather than arbitrators." *20/20 Communications v. Crawford*, 930 F. 3d 715 (5th Cir.).

Notice of Collective Action Sent to Arbitration Eligible Employees. The court granted conditional certification of a wage and hour case involving the overtime eligibility of Facebook's Client Solutions Managers (CSMs). Over half and as much as 80% of the collective signed arbitration agreements and class action waivers. Facebook argued that notice should not be sent to the CSMs who signed arbitration agreements. The district court here acknowledged that courts were divided as to whether notice of a collective action should be sent to employees who signed arbitration agreements. The court concluded that notice should be sent to those arbitration-eligible employees. The court noted, however, that Facebook was not in a position to move to compel because the sole plaintiff here did not sign an arbitration agreement. In effect, the court reasoned, Facebook would be asking the court to issue an advisory opinion which it could not and would not do. The court also pointed out that the question of whether arbitration agreements are enforceable is a merits-based decision which was not appropriately addressed at the conditional certification stage. Because two different arbitration agreements were at issue and state law contract principles govern contract formation, the court concluded that it would "determine whether to exclude CSMs who signed arbitration agreements at the conclusion of discovery, when it can properly analyze the validity of any arbitration agreements to which the opt-in plaintiffs may be a party." *Bigger v. Facebook, Inc.*, 375 F. Supp. 3d 1007 (N.D. Ill. 2019).

Case Shorts.

- *Herrington v. Waterstone Mortgage*, 2019 WL 1966314 (W.D. Wisc.) (class arbitration award of over $10,000,000 overturned where court had previously ruled class action waiver unenforceable under the NLRA which was later rejected by the Supreme Court in the *Epic Systems* decision).
- *Horton v. Dow Jones & Co.*, 2019 WL 952314 (S.D.N.Y.) (class action waiver present in arbitration provision ruled not limited to waiving class claims in arbitration where language, although in the arbitration setting, also referenced waiver of "class actions" and therefore applied to class actions in court).

II. JURISDICTIONAL ISSUES: GENERAL

FAA Transportation Worker Exemption Expanded. The FAA exempts from its reach "contracts of employment" of transportation workers. The truck drivers in this case were retained as independent contractors. The Supreme Court ruled that under the usage at the time the FAA was enacted the term "'contract of employment' usually meant nothing more than an agreement to perform work. As a result, most people then would have understood

§1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." In support, the Court cited to dictionaries at the time which afforded the word "employee" broad construction as a synonym for work. The Court also emphasized that Congress used the term "workers" with respect to the exemption, not the word employees. The Court rejected policy arguments offered by the trucking company in favor of strict application of the statute's terms. "If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing" to consider a legislative compromise which the Court noted was essential to the passage of legislation. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

FAA Transportation Exemption Does Not Apply to Food Delivery Services. The question posed in this case is: are Grubhub food delivery couriers "engaged in interstate commerce" when they make deliveries intrastate. The court here ruled that they are not engaged in interstate commerce and therefore are not exempt under the FAA's transportation worker exemption. Grubhub moved to compel arbitration of the drivers' wage and hour claims. In finding that the couriers were not engaged in interstate commerce, the court noted that their "day-to-day duties do not involve handling goods that remain in the stream of interstate commerce, traveling to and from other states." The court observed that food delivery drivers are not comparable to the transportation worker categories listed in the FAA, including seamen and railroad workers. The court also rejected the plaintiff's argument that since the FAA applied, the court should also apply the transportation worker exemption. The court countered this argument by noting that the FAA jurisdictional provision only requires activities "involving commerce" rather than the standard for the transportation workers exemption, which is whether the employee was "engaged in commerce." The court concluded that the employees were required to arbitrate their claims which fell within the bounds of the arbitration agreement they signed. *Wallace v. Grubhub Holdings*, 2019 WL 1399986 (N.D. Ill.).

FAA Exemption Applies to Truck Driver. A delivery truck driver employed by a beverage distributor filed a class action complaint alleging various wage and hour violations under California law. The employer moved to compel arbitration, pointing to the parties' arbitration agreement and arguing that the FAA requires courts to enforce arbitration agreements for all contracts involving interstate commerce. The employee opposed, asserting that as a delivery truck driver engaged in interstate commerce his employment was excluded from the FAA's coverage based on the statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." (9 U.S.C. § 1). The trial court disagreed, holding that the employee was exempt from the FAA because his employment "involved transporting goods received from out of state." On appeal, the Court of Appeal for the Fifth District affirmed. Citing the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001), the court first noted that Section 1 of the FAA is a narrow exemption that applies to

transportation workers "*actually engaged in* the movement of goods in interstate commerce" and that it is not necessary for a driver to personally cross state lines to engage in interstate commerce. The court then found that the employee at issue did engage in interstate commerce because he "participat[ed] in the continuation of the movement of interstate goods to their destinations," and his deliveries "although intrastate, were essentially the last phase of a continuous journey of the interstate ecommerce." Accordingly, the employee was held to be a transportation worker exempt from the FAA and could not be forced to arbitrate his employment action. *Nieto v. Fresno Beverage Co.*, 33 Cal. App. 5th 274 (2019), reh'g denied (Mar. 27, 2019), review denied (July 10, 2019). See also *Rittman v. Amazon.com, Inc,* 383 F. Supp.3d 1196 (W.D. Wash. 2019) (delivery drivers for Amazon.com who deliver "packaged goods that are shipped from around the country and deliver to the consumer untransformed" fall within the transportation worker exemption "even if it is the last leg of the journey").

Supreme Court Rejects "Wholly Groundless" Exception. Can a court rule on the question of arbitrability in contravention of the assignment of the arbitrability question to the arbitrator where it finds the claim wholly groundless? The Supreme Court ruled unanimously that it may not. Rather, the Court reasoned that a court must enforce the arbitration agreement as written. "That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." The Court analogized it to a court's inability to rule on the merits of a dispute subject to arbitration. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." In sum, the Supreme Court concluded that the wholly groundless exception was contrary to both the FAA and its own precedent. "It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019).

Court Must Decide Whether Arbitration Agreement Covers Dispute. A law firm non-equity partner filed a sex discrimination class action against her firm. The law firm moved to compel arbitration based on e-mail notices to the partner of the mandatory arbitration program which provided to the attorneys the ability to opt out of the program. The partner argued that she was unaware of the arbitration program and therefore was not bound to arbitrate her dispute. This, the court reasoned, raised issues of contract formation which it framed as "whether [the partner] agreed to arbitration when she did not sign the Agreement and failed to opt out, but then continued to work at [the law firm]." This issue, the court concluded, was one to be decided by the court in the first instance. The court, in doing so, rejected the partner's argument that she was unaware that she had been sent the arbitration agreement via e-mail and had the ability to opt out of it. In particular, the court noted that the partner had in fact replied to one of these notices. The court observed that

the partner – "an experienced employment lawyer – may not have read or fully comprehended the contents of those emails and their attachments" but concluded that this did not "preclude a determination that she is bound by the Arbitration Agreement." Finally, the court rejected the partner's argument that the arbitration agreement could only be enforceable if she actually signed it, noting that failure to opt out of the program would be deemed consent to the agreement as provided for under the program. *Knepper v. Ogletree, Deakins*, 2019 WL 144585 (N.D. Cal.).

Jurisdictional Issues Related to Arbitration Subpoena. Petitioner filed a petition under §7 of the FAA to enforce two third-party arbitration subpoenas seeking information to substantiate its fraudulent inducement claim. The third-party respondents moved to dismiss the petition and quash the subpoenas on the grounds that there was no subject matter jurisdiction because (1) there was no diversity of the parties; (2) petitioner failed to allege an amount in controversy that would trigger diversity jurisdiction; and (3) the arbitrators were not sitting in the district court's venue. The court denied respondents' motion and respondents moved for reconsideration or reargument. The court began by observing that respondents' motion was a thinly-veiled attempt to relitigate the motion to dismiss and, on that basis alone, it was groundless. Regarding diversity of the parties, the respondents argued that the court should determine that issue by looking at the underlying arbitration and determine whether those parties were diverse. The court rejected the argument, holding that it should consider the citizenships of the parties to the controversy before it, namely, the parties appearing before the court on the petition to enforce the subpoena. Next, turning to the issue of whether the amount in controversy exceeded the $75,000 threshold, the court found that the arbitration panel had "already determined that the summonses seek relevant information." Noting that even if documents produced in compliance with the subpoena pertained to only a small fraction of the $134 million in damages sought in the underlying arbitration, the court held the amount in controversy requirement was satisfied. Finally, turning to the venue argument, the court rejected respondents' view that the court should look to the business address of the arbitrators in determining where they sit. Finding instead that "nothing in Section 7 requires an arbitration panel to sit in only one location," the court held the proper inquiry is to consider the location the arbitrators specified in the subpoena. Here, the subpoena set New York City as the hearing location, and therefore the court concluded that it was the proper venue for the enforcement petition. Accordingly, the petition to enforce the arbitration subpoenas was granted. *Washington National Insurance Co. v. Obex Group LLC*, 2019 WL 266681 (S.D.N.Y.).

California *McGill* Decision Preempted By FAA. The California Supreme Court in *McGill v. Citibank* ruled that an arbitration provision that purports to bar a plaintiff's statutory right to seek injunctive relief under California's Unfair Competition Law was unenforceable. The bank here sought to compel the arbitration of a claim for damages and injunctive relief under the Unfair Competition Law relating to the charge of ATM fees by Citibank. The

district court granted the bank's motion. In doing so, the court ruled that California's *McGill* ruling was preempted by the FAA. The court reasoned that the ruling disfavored arbitration as it did not apply to all contracts, only arbitration agreements. The "*McGill* rule makes public injunctive relief waivers unenforceable regardless of the fact that public injunctive relief is, by definition, unnecessary to make a plaintiff whole in an individual arbitration." For this reason, the court concluded that the *McGill* rule stood as an obstacle to the proper enforcement of the FAA and was preempted. *McGovern v. U.S. Bank, N. A.*, Case No. 18-CV-1794 (S.D. Cal. January 25, 2019).

***Epic Systems* Did Not Require Arbitration of PAGA Claim**. The California Supreme Court in *Iskanian v. CLS Transportation* ruled that claims under California's Private Attorney General Act may not be forced into arbitration. The employer here argued that the Supreme Court ruling in *Epic Systems* overruled *Iskanian* and made PAGA claims arbitrable. The trial court rejected this claim and the California appellate court agreed. The appellate court noted that a PAGA plaintiff is serving as a proxy for the state and for enforcing state law and regulation. The court observed that the Supreme Court in *Epic Systems* addressed the enforceability of individual arbitration agreements under the NLRA, where in contrast the *Iskanian* decision addressed the situation where "the employee had been deputized by the state to bring a *Qui Tam* claim on behalf of the state, not on behalf of other employees." The court explained that that is because "the California Supreme Court found a PAGA claim involved a dispute not governed by the FAA, and the waiver would have precluded the PAGA action in *any* forum, it held its PAGA-waiver enforceability determination was not preempted." The court also ruled that because the state was the real party-in-interest, an individual could not agree to bring a PAGA claim in arbitration without state approval. "Thus, a single representative claim cannot be split into an arbitrable individual claim and a non-arbitrable representative claim." *Correia v. NB Baker Electric*, 32 Cal. App. 5th 602 (2019). See also, *Zakaryan v. Men's Wearhouse, Inc.*, 33 Cal. App. 5th 659 (2019), review filed (May 6, 2019) (PAGA claims may not be split into individual claims submitted to arbitration and statutory penalties adjudicated in court proceeding "because an individual employee bringing a PAGA claim is vindicating one *and only one* 'particular injury' – namely, the injury to the public that the 'state labor law enforcement agencies' were created to safeguard."); *Knepper v. Ogletree Deakins*, 2019 WL 1449502 (C.D. Cal.) (PAGA claim in court stayed while related arbitration proceeds "because an arbitration finding on [the plaintiff's] individual claims could impact her ability to be a representative on the PAGA claim").

Order Compelling Arbitration Not Subject to Interlocutory Appeal. Section 16(b) of the FAA bars appeals of interlocutory orders compelling arbitration and staying the judicial proceedings. Does the order compelling arbitration become appealable if the claimant dismisses his claims after they are compelled to arbitration? The Ninth Circuit ruled that it lacks jurisdiction to hear such an appeal. The court explained that the district court's order compelling arbitration and staying the proceeding was not a final decision subject to appeal. Further, claimant failed to "obtain the district court's permission for an interlocutory

appeal under 28 U.S.C. § 1292(b)." The court also rejected claimant's procedural ploy of dismissing his claims solely to gain immediate review of the arbitration order. In the Ninth Circuit's view, it "makes no difference that [claimant] then secured a voluntary dismissal without prejudice" as such a dismissal was not a final judgment subject to appeal. *Gonzalez v. Coverall North America*, 754 F. App'x 594 (9th Cir. 2019). See also *Berkeley County School District v. Hub International*, 2019 WL 2233145 (D.S.C.) (appeal of order denying a motion to compel divests district court of jurisdiction unless the appeal is deemed frivolous).

Home State Law Governs Preclusive Effect of Arbitration Award in Diversity Proceeding. The arbitration award here was confirmed by a court. In a subsequent court proceeding, the claim was made that the prior confirmed award precluded a claim raised in a subsequent proceeding. What law governs the determination of the preclusive effect of the confirmed award? The Ninth Circuit ruled that "when a federal court sitting in diversity confirms an arbitration award, the preclusion law of the state where that court sits determines the preclusive effect of the arbitration award." The court observed that this mirrors the rule applicable when a federal court is asked to give preclusive effect to an arbitration award confirmed by a state court. In this case, the arbitration took place in Florida and was confirmed by a Florida district court. "Because a federal district court in Florida confirmed the arbitration award, we hold that Florida law governs its preclusive effect." *NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175 (9th Cir. 2019).

Tribal Law Cannot Foreclose Applicable Federal and State Law in Arbitration. The Chippewa Cree tribe owned an online lending operation that required tribal law to be applied to any disputes which must be heard in arbitration. Borrowers brought a putative class action relating to payday loans made by the lending operation and defendants moved to compel arbitration. The trial court denied the motion, and the Second Circuit affirmed. The loan agreements required that tribal law be applied, provided that the claims were not governed by federal or state law and allowed tribal courts to set aside any arbitration award that did not comply with tribal law. The Second Circuit, in declining to compel arbitration, found that "the arbitration agreements are unenforceable because they are designed to avoid federal and state consumer laws . . . by applying tribal law only, arbitration for the [lending firm's] borrowers appears wholly to foreclose them from vindicating rights granted by federal and state law." The court also ruled the arbitration agreements to be substantively unconscionable under Vermont law because tribal courts had "unfettered discretion to overturn an arbitrator's award." Tribal courts, the Second Circuit reasoned, by interpreting its only law "effectively insulates the tribe from any adverse award and leaves prospective litigants without a fair chance of prevailing in arbitration." It did not help that several tribal leaders pled guilty to federal corruption charges. "Requiring non-tribal plaintiffs to be subject to an illusory arbitration reviewed in toto by a tribal court with a strong interest in avoiding an award adverse to the lender is unconscionable." Finally, the court declined to sever the offensive provisions "because, given the pervasive,

unconscionable effects of the arbitration agreement interwoven within it, nothing meaningful would be left to enforce. *Gingris v. Think Finance*, 922 F. 3d 112 (2d Cir.).

Fees Request Properly Directed to Arbitrator. Under California law "an arbitrator's authority does not expire at the moment an award is issued, even when the award was intended as final." Further, as in civil litigation, a party can recover its costs where a pre-hearing settlement offer is greater than that received at the conclusion of the proceeding. In this case, claimant was awarded less than respondent had offered in settlement prior to the hearing, and respondent sought its costs but only filed this request after the final award was issued. The arbitrator declined to award costs to respondent and the dispute made its way to the California Supreme Court. The Court ruled that the arbitrator maintained jurisdiction to entertain respondent's request after the final award was issued in the face of a challenge based on *functus officio* grounds but rejected the request that the award be vacated. The Court reasoned that while respondent was entitled to hold off submitting a fee request until after the final award was issued, "he ran the risk that the arbitrator would erroneously refuse to award costs, leaving him without recourse under the narrow grounds for vacation or correction contained in the statutory scheme." The Court concluded that arbitrators, like judges, are fallible and errors by arbitrators are not grounds for overturning an award. *Heimlich v. Shivji*, 7 Cal. 5th 350 (2019).

New York Convention Preempts Louisiana Statute Barring Arbitration. Louisiana law bars arbitration agreements in policies insuring property in the state. The insurance policy here contained an arbitration provision but was governed by the New York Convention requiring the enforcement of arbitration agreements governed by the Convention. The Fifth Circuit ruled that the New York Convention preempted Louisiana's statute. The court did this despite a provision in the insurance agreement that required any term that conflicted with Louisiana law to be conformed to state law. Because the state law was preempted, the court reasoned, the law did not apply and did not need to be conformed. The court also rejected the application of the McCarran-Ferguson Act which protects state laws regulating the insurance industry from the preemptive effect of federal law. Here, however, it was a treaty that preempted state law, not federal law, and therefore the McCarran-Ferguson Act did not apply. For these reasons, the Fifth Circuit enforced the arbitration agreement despite Louisiana law rejecting the enforcement of such agreements in insurance agreements in that state. *McDonnel Group v. Great Lakes Insurance*, 2019 WL 2382061 (5th Cir.). Cf. *Stemcor USA v. CIA Siderurgica Do Para Cosipar*, 2019 WL 2041826 (La.), reh'g denied (Louisiana statute allowing creditors pursuing arbitration to seize assets applied where monetary damages sought, here a $15.5 million dispute over purchase of iron, and statutory requirements met).

Case Shorts:

- *Simmons v. Trans Express, Inc.*, 355 F.Supp.3d 165 (E.D.N.Y. 2019) (small claims arbitrator's award entitled to *res judicata* effect under New York law).

- *Tailor v. Rushmore Service Center*, 2019 WL 518543 (D. N.J.) (motion to compel under Fed. R. Civ. P. 12(b)(6) denied where no arbitration clause is referenced in the complaint nor was one incorporated by reference and lack of clarity requires discovery on the issue).
- *Bernardino v. Barnes & Noble Booksellers*, 763 F. App'x 101 (2d Cir. 2019) (order compelling arbitration and staying court proceeding "was an interlocutory order rather than a final decision and is not appealable under the FAA").
- *Lambert v. Tesla, Inc.*, 923 F.3d 1246 (9th Cir. 2019) (Section 1981 race discrimination claims subject to mandatory arbitration).
- *Espiritu Santo Holdings v. L1bero Partners*, 2019 WL 2240204 (S.D.N.Y.) (injunction in aid of arbitration under the New York Convention granted in part as court found evidence of "corporate malfeasance" underlying the request for an injunction persuasive).

III. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Scope and Enforceability of Opt-Out Provision for Arbitrator to Decide. Plaintiff sued TitleMax alleging violations of consumer protection practices relating to three title loans the company made to him on three different dates. He used the second loan to pay off the first, and the third loan to pay off the second. Each loan agreement had the same broadly worded arbitration clause and stated it did not apply to "disputes about the validity, coverage, or scope of" the arbitration clause. The loan agreements also contained an opt-out provision allowing the borrower to opt out of the arbitration clause if he provided notice to TitleMax within 60 days of taking out the loan. Plaintiff did not opt out of the arbitration clause in his first or second loan agreements, but he did elect to opt out of the clause in his third agreement. TitleMax moved to compel all of plaintiff's claims to arbitration. Finding that the loan agreements were three individual agreements, the court granted the motion with regard to the first and second loans but denied it regarding the third, stating that plaintiff properly opted-out of it. On appeal, TitleMax argued that the third loan was actually a refinancing of the second loan and since "refinancing" was not defined in the agreement, the question of arbitrability should have been determined by an arbitrator. The Tenth Circuit disagreed and affirmed the trial court's ruling that the loan agreements were individual. The court also rejected TitleMax's "refinancing" argument, stating "whether the third loan agreement is a refinancing of the second loan agreement is actually a dispute about the coverage, scope, or another part (the opt-out provision) of the Arbitration Clause. Therefore, under the plain language of the Arbitration Clause, such a dispute is for a court to decide, not an arbitrator." *Romero v. Titlemax of New Mexico, Inc.,* 762 F. App'x 560 (10th Cir. 2019).

Arbitrator to Rule on Choice of Law Issue Despite Public Policy Concerns. Quinn Emmanuel moved to compel arbitration of a dispute with former partners who left to start

their own firm. The former partners argued that a court must hear the dispute because public policy concerns were raised. In particular, the partners argued Quinn Emmanuel was seeking to enforce restrictive covenants contrary to New York's Rules of Professional Responsibility. The trial court granted Quinn Emmanuel's motion. In doing so, the court ruled that "the public policy issue here i.e. whether . . . the Partnership Agreement is prohibitively anticompetitive under New York law, does not overcome the broad Arbitration Provision, which must be given effect as overriding policy." The court noted that the former partners offered "competent proof" supporting their claim of a violation of New York's Professional Conduct Rules, but the court concluded that it was "for the arbitrator in the first instance to consider the submissions when determining whether the provision at issue is an unenforceable forfeiture-for-competition clause. Any further inquiry on my part is precluded by the broad arbitration provision and the strong public policy compelling its enforcement." The court also concluded that it was for the arbitrator to rule on the choice of law issue as to whether California law would apply and the extent to which it would respect New York public policy regarding the enforcement of restrictive covenants in the law firm context. *Selendy v. Quinn Emanuel Urquhart & Sullivan, LLP*, 63 Misc. 3d 954 (N.Y. Sup. Ct. 2019). Cf. *Gingris v. Think Finance*, 922 F. 3d 112 (2d Cir. 2019) (allegation that arbitration clause and, in particular, delegation clause were fraudulent is "sufficient to make the issue of arbitrability one for a federal court").

Arbitrability Issue for Arbitrator Where Delegation Provision Not Challenged. The plaintiffs here, employees of Dollar General, were required to execute arbitration agreements that incorporated the AAA's Employment Arbitration Rules. Those rules grant to the arbitrator the authority to rule on his or her own jurisdiction. Plaintiffs sued for discrimination and Dollar General moved to compel arbitration. The employees acknowledged that they signed the agreements but alleged that they did not understand its terms and were told that if they opted out of the agreement they would be fired. The employer's motion to compel was granted and the Missouri Supreme Court affirmed. The Court concluded that the AAA's rules constituted a clear and unmistakable delegation to the arbitrator of arbitrability issues. The Court also rejected plaintiffs' belated attempt to convert their lack of consideration argument relating to the entire agreement to an argument specific to the delegation clause. "Because the lack of consideration [plaintiffs] assert with respect to the delegation clauses is the same lack of consideration they claim should invalidate the overall arbitration agreements, they do not raise a unique challenge to the delegation clauses. Accordingly, the delegation provisions are valid . . .." *Newberry v. Jackson*, 575 S.W.3d 471 (Mo. 2019). Accord: *Hughes v. Ancestry.com*, 2019 WL 2260666 (Mo. Ct. App.), reh'g and/or transfer denied (June 25, 2019) (arbitrability issue for arbitrator where AAA's Commercial Rules adopted, and party challenging arbitration attacked the arbitration agreement as a whole and not the delegation term specifically). See also *Bolden v. DG TRC Management Co.*, 2019 WL 2119622 (S.D.N.Y.) (court rules broad referral of all claims arising out of or with respect to agreement constituted clear and unmistakable

delegation of arbitrability question to the arbitrator, noting that "parties need not specifically reference arbitrability in order to demonstrate their intent to arbitrate all issues, including arbitrability").

Filing of Lawsuit Constitutes Waiver. An insurance company sued an agent alleging breaches of contract and of a noncompete agreement. In that action, the insurance company sought both injunctive relief and legal relief which "had a contractual nexus to the agent agreement that contain the arbitration provision." The agent counterclaimed and the insurance company then moved to compel arbitration. The trial court granted the insurance company's motion but the Florida appellate court reversed. The appellate court emphasized that a "party which seeks to rely on its right to arbitration must safeguard the right and not act inconsistently with it." Here the court reasoned that "by filing its complaint, [the insurance company] actively participated in the lawsuit thereby waving its right to arbitration of [the agent's] counterclaims." The court concluded that by suing on arbitrable claims, the insurance company "acted inconsistently with its right to arbitrate the legal claims and as a result waived its right to seek arbitration of any claims arising out of the agent agreement." In doing so, the court rejected the argument that the agent, by counter claiming, revived the insurance company's claims, finding that the counterclaims were "reasonably foreseeable in the context of the complaint that was filed." *Wilson v. Aerilife of East Pasco*, 270 So.3d 542 (Fla. App. 2019).

No Waiver When Party Invoked Right to Arbitrate Early and Often. Plaintiff filed a putative class action against a collection agency alleging deceptive business practices. The collection agency moved to dismiss and, in the alternative, to compel arbitration. The district court granted the motion to dismiss but the Third Circuit reversed, finding that the complaint stated a plausible claim and remanded for further proceedings. On remand, the collection agency moved again to compel arbitration, arguing that the credit card agreement between plaintiff and the creditor contained an arbitration agreement. Plaintiff opposed, arguing that the collection agency waived any right to arbitrate by moving to dismiss the complaint and litigating its motion through appeal and on remand. The district court found otherwise. Holding that the collection agency "has proceeded as a party seeking to arbitrate should proceed: by invoking its right to arbitrate early and often, and by objecting to the further litigation of this dispute," the court refused to infer waiver. *Schultz v. Midland*, 2019 WL 2083302 (D.N.J.).

Case Shorts:

- *Bolden v. DG TRC Management Co.*, 2019 WL 2119622 (S.D.N.Y.) (court rules broad referral of all claims arising out of or with respect to agreement constituted clear and unmistakable delegation of arbitrability question to the arbitrator, noting that "parties need not specifically reference arbitrability in order to demonstrate their intent to arbitrate all issues, including arbitrability").

- *Gingris v. Think Finance*, 922 F. 3d 112 (2d Cir.) (allegation that arbitration clause and, in particular, delegation clause were fraudulent is "sufficient to make the issue of arbitrability one for a federal court").

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Arbitration Agreement Binds Father of Signatory Based on Privity. A lawyer received unauthorized telemarketing calls and negotiated a settlement with the telemarketer which included a commitment to arbitrate future disputes. Two years later the same lawyer sued the telemarketer, this time on behalf of his father alleging the same injury asserted previously. The lawyer and his father lived together and share the same landline telephone at issue. The telemarketer moved to compel. The district court granted the motion, and the Sixth Circuit affirmed. The court found that under governing Ohio law privity existed between father and son. The court explained that "privity does not require identical interests – it just requires that the interests of one party adequately represent the interests of another." The court pointed out that father and son "both sought relief for an alleged injury stemming from calls to the same *shared*, residential landline" and both sought injunctive relief. The court concluded that the injunctive relief would benefit both father and son and the son could adequately represent the father's interests. On this basis, the court compelled arbitration based on the earlier settlement agreement. *Reo v. Palmer Administrative Services,* 770 F. App'x 746 (6th Cir. 2019).

New Jersey Supreme Court Refuses to Enforce "Debatable, Confusing, and Contradictory" ADR Provision. New Jersey courts require that mutual assent be clear when enforcing a mandatory arbitration provision. The New Jersey Supreme Court found in this case that the ADR provision in a home warranty agreement was unenforceable. The Court noted that the obligation to arbitrate was included under the "Mediation" section of the agreement and referred to the AAA's "Commercial Mediation Rules". The Court found other "material discrepancies" in the agreement which called into question "the essential terms of the purported agreement to arbitrate." For this reason, the Court found that mutual assent was lacking. "The small typeface, confusing sentence order, and misleading caption exacerbate the lack of clarity in expression. It is unreasonable to expect a lay consumer to parse through the contents of this small-font provision to unravel its material discrepancies." *Kernahan v. Home Warranty Administrator of Florida*, 236 N.J. 301 (2019). See also *Skuse v. Pfizer, Inc.*, 457 N.J. Super. 539 (N.J. App. 2019) (Pfizer's on-line arbitration training module ruled a "prosaic effort" and insufficient to gain employee's assent to waive legal rights in favor of arbitration of claims).

Fraudulent Inducement Claim Not Covered by Arbitration Agreement. Plaintiffs filed an action for fraudulent inducement, claiming that defendant made fraudulent representations to induce them to purchase membership interests in an athletic training facility. Defendant

countered with a motion to compel arbitration, arguing that although the Unit Purchase Agreement did not contain an arbitration provision, it incorporated the terms of the parties' Operating Agreement, which did contain an arbitration provision. The trial court agreed that the arbitration provision was incorporated into the Purchase Agreement but, applying Tennessee law to the contract formation issues, held that the fraudulent inducement claim was not arbitrable. The appellate court upheld the denial of the motion to compel arbitration but disagreed on the incorporation issue. The appellate court examined the specific terms of the two agreements and found that "the purchase agreements merely include an obligation to be bound by a separate agreement; they do not evidence an intent that the provisions of the referenced separate agreement define and shape the understanding of the purchase agreement." The appellate court therefore held that the purchase agreement did not contain an arbitration provision, whether by incorporation or otherwise, and the trial court's decision was affirmed on these other grounds. *Melo Enterprises, LLC v. D1 Sports Holdings*, LLC, 2019 WL 338941 (Tenn. App.).

Sexual Assault Claim Not Arbitrable. Two law firm employees in separate suits accused Morse, the sole owner and the employing law firm's named partner, of sexual assault. The trial court granted the law firm's motion to compel arbitration, but the Michigan appeals court, by a 2 to 1 majority, reversed. The court reasoned that the fact that the sexual assault would not have happened but for employment with the firm "did not provide a sufficient nexus between the terms of the [dispute resolution program] and the sexual assault perpetrated by Morse." The court explained that the sexual assaults were unrelated to employees' roles as receptionist and paralegal. "Furthermore, under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm." The court emphasized that "central to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." On these grounds, the appellate court refused to compel arbitration of these claims. *Lichon v. Morse*, 2019 WL 1217579 (Mich. App.).

Case shorts:

- *Perez-Tejada v. Mattress Firm*, 2019 WL 830450 (D. Mass.) (officers of employer entitled to invoke arbitration defensively where mutual arbitration agreement signed by employees defined the employer to include officers, directors, and managers).
- *Stagg Restaurants v. Serra*, 2019 WL 573957 (Tex. App.) (motion to compel denied where facts disputed as to whether McDonald's employee received occupational injury plan containing arbitration provision).
- *Alliance Family of Companies v. Nevarez*, 2019 WL 1486911 (Tex. App.) (arbitration clause in nondisclosure agreement not applicable to claims of sexual assault and battery by employee against employer's CEO).
- *Liu v. Four Seasons Hotel*, 2019 Ill. App. (1st) 182645 (claims under Illinois' Biometric Information Privacy Act not encompassed by arbitration agreement covering wage

and hour claims despite employer's claim that biometric data, i.e. fingerprints, were collected solely for timekeeping purposes).

- *Leber v. Citigroup*, 2019 WL 1331313 (S.D.N.Y.) (dispute between two firms regarding allocation of fees awarded by court must be submitted to mediation and arbitration in accordance with the terms of the co-counsel agreement).
- *SMJ Gen. Constr., Inc. v. Jet Commercial Constr., LLC*, 440 P.3d 210 (Alaska 2019) (settlement agreement releasing any and all claims between the parties precludes subsequent arbitration as obligation to arbitrate was released with all other obligations between the parties).
- *Medford Township School District v. Schneider Electric Buildings Americas*, 459 N.J. Super. 1 (N.J. App. 2019) (party may not be required to arbitrate dispute where arbitration clause provides that claims "may be settled" by arbitration rendering arbitration permissive, not mandatory).
- *Monfared v. St. Luke's University Health Network*, 767 F. App'x 377 (3d Cir. 2019) (arbitration appropriately compelled where agreement requires arbitration "if a dispute or claim should arise" which the court ruled as "functionally equivalent to more standard language that would expressly sweep in any claim" relating to plaintiff's employment).
- *Philbin v. Carneros Resort and Spa*, 2019 WL 1783718 (Cal. App.) (arbitration denied were agreement did not identify specific "employer" bound by the agreement were several changes of ownership occurred).

V. CHALLENGES TO ARBITRATOR OR FORUM

AAA Afforded Arbitral Immunity. The University of Iowa hired a contractor to perform work on one of its buildings. After legal disputes arose between the parties, the contractor filed a demand for arbitration before the AAA. In response, the University sought an order from an Iowa trial court enjoining the AAA from adjudicating the dispute, contending that it did not have jurisdiction. The University argued that the AAA improperly considered its case alongside another arbitration between the University and a different contractor. The trial court dismissed the action, finding that the doctrine of arbitral immunity applied, and the Iowa Court of Appeals affirmed. The Court of Appeals explained that the doctrine "provides that arbitrators are immune from liability for acts performed in their arbitral capacity," and "applies unless there is a 'clear absence' of jurisdiction." The University argued that a clear absence of jurisdiction existed because there was not a court order determining AAA's jurisdiction. Rejecting that contention, the court stated that "the question is not whether the court has determined that AAA has jurisdiction to arbitrate a dispute; the question is whether the arbitration demand 'was not facially valid so that jurisdiction was clearly lacking.'" Finding that the University failed to show that the arbitration demand was so deficient on its face as to signal a "clear absence" of jurisdiction, the court held that arbitral

immunity applied, and the University could not enjoin the AAA from arbitrating the case. *University of Iowa v. American Arbitration Association*, No. 17-0949 (Iowa App. 2019).

Arbitration Barred Where Designated Arbitration Forum Not Available. A consumer lender sued a borrower on a defaulted loan, and the borrower counterclaimed on a class basis alleging a violation of the Missouri Merchandising Practices Act. The loan agreement contained an arbitration provision that designated the National Arbitration Forum as the provider of arbitration services. The NAF entered into a consent decree with the government and was no longer arbitrating consumer claims. The Missouri Supreme Court held that the plain language of the arbitration agreement makes clear that arbitrations must be "before – but only before – NAF." The court rejected the lender's request that the court designate another arbitration forum to hear the case. The court reasoned that the "unequivocal, plain and clear terms" of the arbitration agreement established that the parties "agreed to arbitrate before NAF." In further support of its holding, the court noted that the arbitration was required to proceed under the NAF Code of Procedure which by its own terms' mandates that "only NAF can apply and administer that code." The court cautioned that merely naming an arbitrator or arbitration forum did not preclude naming a substitute under the FAA in the absence of a basis, as is present in this case, for limiting arbitration to that arbitrator or forum. *A-1 Premium Acceptance v. Hunter*, 557 S.W. 3d 923 (Mo.) (en banc), cert. denied, 139 S. Ct. 1340 (2019).

FINRA Arbitration Enjoined. When plaintiff joined MetLife's premium client division in 2002, MetLife was a NASD member and he registered with the NASD. MetLife terminated its NASD membership in 2007. Plaintiff was terminated in 2016 and filed an arbitration raising claims dating back to 2011. MetLife moved for and obtained a preliminary injunction barring plaintiff from pursuing his arbitration. The Second Circuit, in affirming the preliminary injunction, reasoned that the NASD and later the FINRA code could not "reasonably be interpreted to provide for arbitration of [the plaintiff's] claims" because the events at issue occurred years after MetLife terminated its NASD membership. The court found that plaintiff's interpretation that MetLife was still bound to arbitrate his claims would produce "untenable" and "absurd results" that could not have been intended by the parties. *Metropolitan Life Insurance v. Bucsek*, 919 F. 3d 184 (2d Cir. 2019).

VI. CLASS & COLLECTIVE ACTIONS

Supreme Court Rules Ambiguous Contractual Terms Insufficient Basis for Class Arbitration. The Supreme Court in *Stolt-Nielsen* ruled that agreements that were silent regarding class arbitration would not support compelling such arbitration. The Court now extends that ruling by holding that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." Here, the employee signed an arbitration agreement that provided that "any and all disputes, claims or controversies

arising out of or relating to . . . the employment relationship between the parties" was required to be arbitrated. The Ninth Circuit, applying California law, ruled that the agreement was ambiguous with respect to class arbitration and, applying general contract principles holding that any ambiguity is to be read against the drafter, compelled class arbitration. By a 5-4 majority, the Supreme Court reversed. The Court reasoned that "[l]ike silence, ambiguity did not provide a sufficient basis to conclude that parties to an arbitration agreement" agreed to the benefits that come with bilateral arbitration such as expedition, simplicity, and cost savings. The majority emphasized that consent is essential in arbitration "because arbitrators wield only the authority they are given." Class arbitration, according to the majority, lacks the traditional benefits of bilateral arbitration and is likely to create a procedural morass and serious due process concerns. The majority compared the issue here to gateway questions where the Court has consistently held that such questions are presumed to be for the court rather than the arbitrator – silence or ambiguous terms are insufficient to overcome that presumption. The majority also reasoned that the otherwise neutral contract principle that ambiguity is to be construed against the drafter did not apply here because arbitration is a matter of consent and that this contract principle by its terms only applies after a court cannot discern the parties' intent. For this reason, the majority concluded that courts "may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (U.S.).

FLSA Collective Action Notice Not Issued to Employees Subject to Arbitration. The district court conditionally certified a collective of approximately 42,000 call center employees alleging wage and hour violations under the Fair Labor Standards Act. The court ordered that notice be issued to all putative collective members, 35,000 of which were subject to arbitration agreements. On appeal, the Fifth Circuit concluded that notice should not issue to those employees who are subject to arbitration. The court found that only potential plaintiffs were entitled to notice, and employees bound to an enforceable arbitration agreement were not potential plaintiffs to whom notice must be sent. According to the Fifth Circuit, notice may only be sent to employees who are subject to arbitration if the record demonstrates "that nothing in the [arbitration] agreement would prohibit that employee from participating in the collective action." *In Re JPMorgan Chase & Co.,* 916 F.3d 494 (5th Cir. 2019). See *Smigelski v. PennyMac Fin. Servs., Inc.*, 2018 WL 6629406 (Cal. App.), reh'g denied (Jan. 9, 2019), review denied (Apr. 10, 2019) (waiver of right to bring representative actions is illegal waiver of right to file PAGA claim under California law which renders arbitration provision unenforceable).

VII. HEARING-RELATED ISSUES

Arbitrator Abused Discretion in Failing to Consider Federal Employer's New Evidence. A federal employee was terminated for drinking on the job and other serious misconduct. The employer rejected certain mitigating evidence, including that the employee was seeking treatment for alcoholism. The union challenged the dismissal, but the arbitrator upheld it. The union attempted to put in evidence before the arbitrator of the employee's improvement under the employee assistance program, prior work-related traumatic events, and personal stressful events affecting to the employee. The arbitrator refused to consider this mitigating evidence which had not been presented to the employer when the termination decision was made. The federal circuit court vacated the award. The court concluded that the arbitrator abused his discretion by failing to consider these mitigating circumstances. The court added that the error was not harmless because the arbitrator did not give an alternative explanation for excluding the evidence. As a result, the court concluded that it could not "say without impermissibly reweighing the evidence ourselves whether that new body of evidence would alter the arbitrator's evaluation of the reasonableness of the agency's removal penalty" and remanded to the arbitrator the case to reassess the penalty with all evidence taken into account. *Koester v. United States Park Police*, 2019 WL 81105 (Fed. Cir.).

Vacatur Based on Refusal to Hear Rebuttal Testimony Denied. An expert witness for claimant testified before a FINRA arbitration panel. Weeks after the expert's testimony was completed, respondent discovered that 30,000 pages of documents arguably contradicting the expert's testimony had not been produced. The panel granted claimant's motion to strike the expert's testimony in full, to draw an adverse inference against claimant, and ordered that respondent's fees for making the motion be paid by claimant. The panel also denied claimant's request to submit rebuttal testimony which was offered contrary to the panel's instructions and belatedly. Following an award in favor of respondent, claimant moved to vacate, arguing among other things that the refusal to hear rebuttal testimony prejudiced its case and the panel was guilty of misconduct in refusing to hear pertinent evidence. The court reviewed the parties' submissions to the panel with respect to this issue, as the panel offered no opinion with respect to its decision and concluded that the panel had "a reasonable basis to exclude the proposed rebuttal testimony." The court noted that the panel gave claimant a fair opportunity to present its case in chief (the hearing lasted 25 days) and accommodated claimant's "11th-hour request" to submit rebuttal testimony. The court also rejected claimant's argument that the panel arbitrarily applied evidentiary rules. The court explained that the panel's decision to apply the Federal Rules of Evidence occurred only after claimant's "attempt to essentially sandbag" respondent and the panel's warning, in its words, that the "full range of sanctions available to the panel may be imposed" for any "additional noncompliance" and in an effort to "stop trial by ambush." The court ruled that none of the panel's rulings rose to "the level of

misconduct demonstrating that the procedure was fundamentally unfair, and therefore vacatur is not warranted." *CRT Capital Group v. SLS Capital*, 2019 WL 1437159 (S.D.N.Y.).

Case Shorts:

- *Vantage Deepwater Co. v. Petrobras America*, 2019 WL 2161037 (S.D. Tex.) (dissenting arbitrator's claim that the proceeding denied respondent "the fundamental fairness and due process protections meant to be provided to arbitrating parties" not sufficient grounds to vacate award, particularly where the court found no support in the record for the claim that respondent was denied a fair arbitration or that the arbitration was fundamentally flawed).
- *Vantage Deepwater Co. v. Petrobras America*, 2019 WL 2161037 (S.D. Tex.) (refusal to order third-party depositions did not deprive party of a fair hearing).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Arbitrator Exceeded Authority by Ignoring Contract Terms. The court observed in this case that we have "become an arbitration nation." While the courts' role in reviewing arbitration awards is limited, "our duty remains an important one. When an arbitrator disregards the plain text of a contract without legal justification simply to reach a result that he believes is just, we must intervene." The subcontractor in this case worked in Afghanistan for a general contractor under an agreement with the U.S. government. As part of the subcontractor's agreement with the contractor, it agreed to abide by federal regulations, which were incorporated by reference, applicable to the work being performed. A dispute arose, and the subcontractor was awarded damages against the contractor. The district court vacated the award, and the Ninth Circuit affirmed. The appellate court acknowledged that an arbitrator may interpret an agreement but may not "disregard contract provisions to achieve a desired result." The arbitrator here recognized that the subcontractor was contractually bound to comply with applicable federal regulations, but instead excused the subcontractor's failure to do so because, in the arbitrator's estimation, it was complying with local practices common in Afghanistan. From this, the arbitrator concluded that there had not been a meeting of the minds between the contractor and subcontractor. The court found that the arbitrator, who had acknowledged the enforceability of the contractual terms requiring compliance with federal regulations, "disregarded" these plain terms of the agreement "in an effort to prevent what the Arbitrator deemed an unfair result. Such an award is 'irrational.'" On this basis, the court affirmed vacatur of the award. *Aspic Engineering and Construction v. ECC Centcom Constructors, LLC*, 913 F.3d 1162 (9th Cir. 2019). Cf. *MEMC II, LLC v. Cannon Storage Systems*, 763 F. App'x 698 (10th Cir. 2019) (arbitrator did not exceed authority where she "interpreted

the Contract and applied the law of the jurisdiction selected by the parties" and therefore did not dispense her own brand of industrial justice).

Award Vacated on Manifest Disregard Grounds. The panel awarded damages and pre-award interest in this case. Following a motion to modify the award, the panel issued an amended award reducing the interest by over $2 million based on what it represented to be "a computational error when calculating interest [by] compounding interest . . .." Upon review, the district court concluded that "the arbitration panel exceeded its powers when it modified the calculation made in the final award that did not contain any evident material miscalculation of figures to conform it to the calculation it 'intend[ed]' to perform that contained substantive changes in the calculation method." The court made clear that the panel's amendment of its final award was more than a modification based on a calculation error. Rather, the "arbitration panel acknowledged the well-defined, explicit and clearly applicable law prohibiting the arbitration panel from exercising jurisdiction over an issue of law already determined in the final award and raised for the first time after the final award issued, but decided to ignore it and proceeded: (a) to discuss the merits of the substantive argument raised by the claimants; (b) rejected the claimants' legal argument; and (c) reverse its determination made in the final award by subtracting the distribution payments from the principal." For these reasons, the court concluded that the arbitration panel acted in manifest disregard of the law. *Credit Agricole v. Black Diamond Capital*, 2019 WL 1426609 (S.D.N.Y.). See also *Arabian Motors Group v. Ford Motor Co.*, 2019 WL 2305313 (6th Cir.) (manifest disregard claim rejected when the legal issue decided "has not been clearly established by any existing legal principles" and the "arbitrator applied traditional tools of statutory interpretation without the aid of precedent that directly addressed the question"); *Business Credit & Capital II v. Neuronexus*, 2019 WL 1426609 (S.D.N.Y.) (manifest disregard challenge based on claim that arbitrator misapplied governing usery laws rejected where arbitrator cited "dozens of appropriate New York cases" supporting his decision).

Punitive Damages Award Reversed. A punitive damages award was reversed in an action between Twentieth Century Fox and certain actors, producers, and creators involved in the television series *Bones*. Fox was alleged to have breached their license agreements by licensing the television series to its affiliated networks for less than what an unaffiliated network might have paid, thereby negatively affecting plaintiffs' guaranteed contingent commissions. A California court ordered the parties to arbitration. The arbitrator ultimately ruled in favor of plaintiffs, awarding approximately $33 million in actual damages and $128 million in punitive damages. The parties returned to court, with plaintiffs moving to confirm the award and Fox moving to vacate or correct it. Fox argued that the arbitrator exceeded his authority because the agreements at issue expressly waived any right to punitive damages. Plaintiffs opposed, arguing that Fox waived its right to challenge the award by submitting the entire complaint to arbitration and agreeing that the causes of actions were "fully arbitrable." The court found in favor of Fox, holding that the agreement contained a clear and unambiguous provision waiving the right to seek or obtain punitive damages. The

court refused to imply an agreement concerning the arbitrator's authority when there was an express contractual provision limiting it. The court also found that the record of the arbitration proceedings showed that "Fox clearly and cogently raised its objections to the arbitrability" of punitive damages. Accordingly, Fox's motion to correct the award was granted and the punitive damages were stricken from the award. *Wark Entertainment, Inc. v. Twentieth Century Fox Film Corp.*, 2019 WL 2137607 (Cal. Super.).

Vacatur Ruling Overturned. Crop insurance policies for farmers are governed by federal regulation. An arbitration panel ruled in favor of a farmer's crop damage claim. The panel's award did not break down the damages award of over $1.4 million. The district court vacated the award, finding that the panel imperfectly executed its powers because it did not comply with federal regulations that require that the insurance claim have a "breakdown by claim." The Eighth Circuit reversed. The court found nothing in the regulations that required every claim to be particularized, noting that the farmer filed a single claim seeking damages for damage to both his corn and soybean crops. The panel only awarded damages on the corn crop claim. "Nothing in the regulations required the panel to segregate this claim into multiple separate claims." The court pointed out that the panel accepted the insurance company's approach of collapsing all acres and claims into one. "There is no requirement that the arbitrator's decision be particularly detailed; so long as it adequately explains the disposition of each claim at issue, it should be upheld." *Great American Insurance Co. v. Russel*, 914 F.3d 1147 (8th Cir. 2019).

Appearance of Bias Insufficient to Prove Evident Partiality. A member of an arbitration panel disclosed that his former law clerk from the Iran-United States Claims Tribunal was a partner in the law firm representing claimant. The former law clerk was not involved in the arbitration. Respondent objected to the continuing participation of the panelist, and this objection was rejected by the ICDR. An award was issued in favor of claimant and respondent moved to vacate, arguing evident partiality on the part of the panelist whose former law clerk was a partner in claimant's law firm. The court rejected respondent's claim. The court explained that the "standard for assessing evident partiality is not the mere appearance of bias". The court reasoned that even if the former law clerk was involved in the arbitration, which was not the case, "this would not be a significant compromising relationship that establishes clear bias in an arbitrator. It is common knowledge in the legal profession that former law clerks regularly practice before judges for whom they once clerked. The court also rejected respondent's claim that the arbitrator's "aggressive questioning" of a witness in the hearing and snide off-the-record comments constituted evident partiality. While respondent may feel that the alleged comments made by the arbitrator such as "ridiculous" and "asked and answered" were inappropriate, "these same comments can be viewed as [the arbitrator's] effort to move the proceeding along or an expression of his perception that the questions were repetitive or irrelevant." Finally, the court found no basis to vacate based on the arbitrator's aggressive questioning and alleged interference with the Chair's ability to run the hearing. The court concluded that in "light of

the strict standard of review of arbitration awards, a reasonable person would not have to conclude based on the facts before this Court that [the arbitrator] was evidently partial toward [respondent]." *Vantage Deepwater Co. v. Petrobras America*, 2019 WL 2161037 (S.D. Tex.).

Fifth Circuit Provides Contours for Reasoned Award. An accounting firm issued a final determination under an engagement letter and a sale and purchase agreement that required "reasoning supporting the determination." The accounting firm determined that $9.8 million was owed under the governing agreements but failed to provide its arithmetical calculations. The losing party moved to vacate, arguing that the accounting firm failed to provide its reasoning as required by the engagement letter and sale and purchase agreement. The Fifth Circuit, noting that it had never given a specific definition of a reasoned award, ruled that the determination in fact constitutes a reasoned award. The court explained that an arbitrator issues a reasoned award when the arbitrator has laid out the facts, described the parties' contentions, and decided who prevailed. In this case, the court found that the accounting firm "noted that it based its analysis on the parties' statements and accounting records, pointed to its finding on the accrual of liabilities, and explained what documentation it found relevant in evaluating the proper refund amount." The Fifth Circuit concluded that on this basis a reasoned award had been issued and confirmed the award. *YPF S.A. v. Apache Overseas*, 924 F.3d 815 (5th Cir. 2019).

Partial Final Award Ruled Not Subject to Review. The arbitration panel issued a partial final award in which it decided to hold the respondents' amended counterclaims for the later "phase II" proceeding. Plaintiff moved to confirm the partial final award. The district court concluded that it lacked subject matter jurisdiction because the partial final award was not final and ripe for review. The court noted that although the award had the word final in its title, it was "incomplete in the sense that it leaves unresolved significant portions of the parties' multifaceted dispute regarding their performance" under the applicable agreement. The court pointed out that the parties had expressly scheduled phase II of the arbitration proceedings, so the panel's assignment was not complete. The court concluded that "this matter is not ripe for adjudication because the Panel's arbitration award was not a complete determination of all the issues submitted to the Panel." *Standard Security Life Insurance Co. v. FCE Benefit Administrators*, 2019 WL 1168109 (N.D. Ill.).

Remand Ordered Where Arbitrator Failed to Issue Requisite Reasoned Award. The parties requested a reasoned award. Following a hearing, the arbitrator issued a six-page award but did not explain why the counterclaims were dismissed. The court, on a motion to vacate, concluded that the award "does not meet the standard for a reasoned award because it contains no rationale for rejecting" respondent's counterclaims. Rather, the court found that the arbitrator in a "conclusory" manner stated that the evidence did not support the counterclaims but did not provide any reason for this finding other than a negative credibility determination with respect to respondent's expert witness relating to damages.

"Although the arbitrator was not obligated to discuss each piece of evidence presented by [Defendant], he must at least provide some rationale for the rejection of [respondent's] overall argument" for liability. On this basis, the court concluded that the award was not reasoned. The court, however, rejected respondent's request that it vacate the award, a remedy the court concluded must be "strictly limited." Rather, the court determined that "the proper remedy is to remand to the arbitrator for clarification of his findings." The court added that, as the arbitrator exceeded his authority, the award could not be confirmed at this time. *Smarter Tools v. Chongqing Senci Import and Export Trade Co.*, 2019 WL 1349527 (S.D.N.Y.).

Case shorts:

- *Hamilton v. Navient Solutions*, 2019 WL 633066 (S.D.N.Y.) (ruling of AAA appellate panel overturning arbitrator's award upheld as appellate panel obeyed applicable law and did not manifestly disregard existing law).
- *Konoike Construction Co. v. Ministry of Works, Tanzania*, 2019 WL 1082337 (D.D.C.) (defendant's reason for defaulting on motion to confirm, that it believed settlement of dispute was probable, was willful and not good cause to set aside a default and therefore arbitration award against defendant was confirmed).

IX. ADR – GENERAL

Settlement Agreement in Mediation Enforced. The parties reached an agreement in a court-annexed mediation. The settlement terms were memorialized in a Mediation Agreement which listed in summary fashion nine terms and concluded by reciting that the parties have "reached a settlement, the terms of which appear above. A formal settlement agreement will be finalized by July 30, 2018." The parties never agreed on a formal settlement agreement because they could not agree on a cap for fees in the event of a litigation to enforce the parties' agreement. Defendant's motion to enforce the Mediation Agreement was granted. The court focused on the parties' intent in executing the Mediation Agreement. The court cited the parties' express acknowledgement that they "reached a settlement" and informed the court that they had done so. "The text of the Mediation Agreement thus supports the conclusion that the parties understood it to state the material terms of a settlement to which all of them had agreed." The court added that the agreement was reached with counsel and in a court-annexed mediation with a court-appointed mediator. Finally, the court emphasized that "the Mediation Agreement contained no reservation of the right not to be bound in the absence of the contemplated formal settlement agreement, and this factor accordingly weighs in favor of enforcement. There has also been partial performance, at least to the extent that the parties began drafting a final agreement and allow the Court's ADR Administrator to report that the case has settled without correction or comment for nearly seven weeks thereafter." For these

reasons, the court ruled that the Mediation Agreement constituted a binding settlement agreement. *Rivera v. The Crabby Shack, LLC*, 17-CV-4738 (SMG) (E.D.N.Y. May 1, 2019).

Auto Appraisal Process Constitutes Arbitration Under FAA. The FAA does not define arbitration. An insured disputed the amount that GEICO paid under an insurance policy, and the insured sued. GEICO sought to compel an appraisal as provided for under the applicable insurance policy. The trial court denied the motion, and the Second Circuit affirmed. But in doing so, the court analyzed whether an insurance appraisal process constitutes an "arbitration" under the FAA in determining whether it had appellate jurisdiction. The court made clear that the parties did not need to use the word arbitration for an arbitration under the FAA to exist. What is required, according to the court, is a clear manifestation of the parties' intent to submit a dispute to a specified third-party for a binding resolution. The court ruled that the appraisal process qualified as an arbitration under the FAA. "The appraisal provision identifies a category of disputes (disagreements between the parties over 'the amount of loss'), provides for submission of those disputes to specified third parties (namely, two appraisers and the jointly-selected umpire), and makes the resolution by those third parties of the dispute binding (by stating that '[a]n award in writing of any two *will determine* the amount of the loss')." These facts were enough, the court concluded, for the appraisal process to constitute an arbitration under the FAA. *Milligan v. CCC Information Services*, 920 F. 3d 146 (2d Cir.).

Court Orders Sealing of Arbitration Documents. Penn National and its reinsurer, Everest, entered into a series of loss reinsurance agreements, all of which contained arbitration provisions. The parties disputed whether an arbitration panel previously used by the parties should decide certain procedural issues or whether a newly-appointed panel should be formed. Both parties filed motions to compel with supporting documentation. Penn National also filed a motion to seal the reinsurance agreements and its arbitration demand, citing the commercially sensitive nature of the documents. The court began its analysis of the motion to seal by weighing certain factors set forth by the Third Circuit, including (1) whether disclosure will violate any privacy interests; (2) whether disclosure will cause embarrassment; (3) whether confidentiality is being sought over information important to public health and safety; (4) whether sharing information among litigants promotes fairness and efficiency; (5) whether the party seeking confidentiality is a public entity or official; and (6) whether the case involves issues important to the public. Weighing these factors, the court found that Penn National has a "significant privacy interest in [its] reinsurance contracts . . .. Because the various [reinsurance] agreements are likely similar but not necessarily identical, disclosure of the precise terms of any one agreement could reasonably have a significant impact on Penn National's ability to negotiate other agreements with different reinsurers." Therefore, the court concluded, the potential harm to Penn National "substantially outweighs" the public's minimal interest in having access to private commercial agreements concerning a private business relationship. The motion to seal was

granted. *Pennsylvania National Mutual Casualty Insurance Company v. Everest Reinsurance Company*, 2019 WL 1205297 (M.D. Pa.).

X. COLLECTIVE BARGAINING SETTING

Railway Labor Act Award Vacated. A union accused Southwest Airlines of improperly using contractors to clean aircraft and brought an arbitration under the Railway Labor Act. The collective bargaining agreement ("CBA") here provided that it took affect once ratified by the union. The CBA was ratified by the membership on February 19th and signed by the parties on March 16th. Under the CBA, grievances must be filed within 10 days after an issue arose. The grievance here was filed within 10 days after the CBA was signed, but not 10 days after it was ratified. The Fifth Circuit vacated the award, ruling that it "conflicts with the plain language of the CBA" which required that the grievance be filed within 10 days after the issue arose. Here, the grievance was filed 10 days after the CBA was signed (which occurred on March 16th), but more than 10 days after it was ratified (which was February 19th). The court acknowledged that the standard of review for awards under the Railway Labor Act is very deferential. The court concluded, however, that vacatur was warranted because the award conflicted with the plain language of the CBA and "it was not an arguable construction of the CBA and instead amounted to the arbitrator's own brand of industrial justice." *Southwest Airlines Co. v. Local 555*, 912 F. 3d 838 (5th Cir. 2019).

NLRB Rules Employer Can Seek to Enforce Arbitration Agreement. Matthew Brown agreed to submit any dispute to Anheuser-Busch's Dispute Resolution Program when he applied for employment. Once hired, Brown was represented by a union. Brown sued Anheuser-Busch for race discrimination following his termination, and Anheuser-Busch moved to compel. The employee filed an unfair labor practice charge with the NLRB, arguing that Anheuser-Busch's dispute resolution program had been unilaterally implemented without the union's consent. By a 2-1 vote, the Board ruled that Anheuser-Busch's motion to compel was a protected exercise of its First Amendment right to petition and concluded that employers may seek to enforce pre-hire arbitration agreements against former employees who are union members while employed. The Board rejected the employee's claim that Anheuser-Busch had an illegal objective in filing its motion since dispute resolution programs are legal. *Anheuser-Busch, LLC*, 367 NLRB 123 (May 22, 2019).