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AAA Panel Case Summaries
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I. JURISDICTIONAL ISSUES: GENERAL

"Complete Arbitration Rule" Precludes Confirmation of Award in Bifurcated Proceeding. A dispute arose between a coal company and the mine workers' union. An arbitrator ruled that a preferential hiring agreement was enforceable and, since the parties had agreed to bifurcate the proceeding, was prepared to move into the remedial phase of the proceeding. A motion to confirm the award was granted but the Fourth Circuit reversed. The court reasoned that the parties' agreement to bifurcate the arbitration "does not change the fact that they also agreed to submit the entire dispute - both the liability and remedies questions - to arbitration." The court acknowledged that the complete arbitration rule is "not a hard and fast jurisdictional limitation", but noted that federal courts are courts of limited jurisdiction and can only resolve those disputes over which they have authority. The Fourth Circuit concluded that invocation of the complete arbitration rule was prudent under these circumstances as it "insures that courts will not become incessantly dragooned into deciding narrow questions that form only a small part of a wider dispute otherwise entrusted to arbitration. And it mitigates the possibility of one party using an open courthouse door to delay the arbitration." *Peabody Holding Co. v. United Mine Workers*, 2016 WL 8782 (4th Cir.).

Amendment of Complaint Undoes Waiver of Right to Arbitrate. Close to the date of trial and after completion of discovery in a FLSA action, plaintiff's motion to amend the complaint to add a breach of contract and quantum meruit claim was granted. The defendant then moved for the first time to compel arbitration. The district court denied the motion, but the 11th Circuit overturned the lower court and compelled arbitration. The circuit court found that the amendment to the complaint "revived" defendant's right to compel arbitration. The court emphasized that the amendment here pled new claims and ruled that defendant "did not waive the right to arbitrate the state law claims raised in the second amended complaint because those claims were not in the case when it waived by litigation the right to arbitrate the FLSA claim." The court rejected the argument that defendant must have known that a state law claim was "lurking in the case", reasoning that a party "is not required to litigate against potential but unasserted claims." *Collado v. J&G Transport*, 2016 WL 1594591 (11th Cir.).

Motion to Compel Denied Where Website Actively Misled User. A customer purchased a credit score package from TransUnion to check his creditworthiness. The customer later brought suit and TransUnion moved to compel. The Seventh Circuit affirmed denial of the motion. The court found the on-line arbitration site misled customers as the relevant web pages related to the purchase made but made no mention of any further terms and conditions. The bolded text below the scroll box told the user that "clicking on the box

constituted his authorization for TransUnion to obtain his personal information. It says nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement." The court concluded that whatever notice TransUnion intended to give was undone by explicitly stating that a click permitted access to the purchaser's personal information and thereby distracted the purchaser from the fact that it purported to serve as acceptance of unrelated terms. *Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016).

Intervener EEOC Must Await Arbitration Proceeding. A transgender man brought a sex discrimination claim against his former employer and the EEOC intervened in the pending action. The employer's motion to compel was granted and the action was stayed. The EEOC objected, arguing that it was not party to the arbitration agreement. The court rejected the EEOC's position, finding that the stay applied to it as well. The court noted that the claims brought by the employee and the EEOC involve "identical operative facts" and the litigation would likely have a "critical impact" on the arbitration. "Because the arbitration and litigation involve common, likely identical, questions of law and fact, resolving the EEOC's claims would resolve issues that the arbitrator will decide in [the employee's] arbitration." The court also observed that the "outcome of the arbitration may benefit the parties to the litigation" and found that this also weighed in favor of staying the EEOC action. The court stayed the action for six months to permit the arbitration to proceed and presumably be concluded in that time period. *Broussard v. First Tower Loan*, 2016 WL 879995 (E.D. La.).

Subject Matter Jurisdiction Found to Confirm Arbitration Award. An award was issued and the amount awarded was paid. Nevertheless, the prevailing party sought to confirm the award, and this motion was opposed on the ground that the court lacked subject matter jurisdiction. Applying the "demand approach", the district court concluded that "the appropriate way to measure the amount in controversy during a Section 9 confirmation proceeding is by using the amount demanded in the underlying arbitration." The amount demanded here far exceeded the jurisdictional amount (although the amount awarded did not), and therefore on this basis the court found that the amount in controversy requirement was satisfied. The court also ruled that a "case or controversy" existed, even though the award was satisfied, because parties to an arbitration are statutorily entitled to confirmation of the award. The court found that the "parties retain an undisputed right to Section 9 confirmation whatever the nature of an award and the parties' degree of compliance with it." *National Casualty Co. v. Resolute Reinsurance Co.*, 2016 WL 1178779 (S.D.N.Y.). See also *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179 (5th Cir. 2016) ("The amount in controversy is measured the same way in federal court for litigation and for matters

submitted on petitions to compel arbitration: the plaintiff's pleading, not the ultimate result in the case, governs jurisdiction.").

E-Mail Notice of Arbitration Agreement Sufficient. A Toyota employee received notice of an arbitration agreement via e-mail, did not opt out of the agreement as was permitted, and continued to work for Toyota after receipt of the e-mail. The employee brought a lawsuit alleging discrimination, and Toyota successfully compelled arbitration. The court held that an implied-in-fact agreement existed between the employee and Toyota based on the e-mail notice of the arbitration agreement. In doing so, the court rejected the employee's subjective understanding that she had to sign something in order to be bound as being contrary to exist in California law. *Aquino v. Toyota Motor Sales USA*, 2016 WL 3055897 (N.D. Cal. 2016).

"Terse" Arbitration Provision Enforceable. The offer of employment here included one sentence submitting "to mandatory binding arbitration any and all claims arising out of or relating to your employment." The employee was terminated and opposed a motion to compel on the ground that the arbitration provision was too uncertain and indefinite to constitute a binding agreement. The court disagreed and compelled arbitration. The court held that the parties clearly agreed to be bound to the arbitration provision. The court also found that the lack of specific terms governing the procedures to be followed "does not invalidate the agreement, considering that the FAA provides an objective method to fill gaps in arbitration agreements." The court noted that once an arbitrator was selected "pursuant to those gap-filling methods, other aspect of the arbitrations' procedure, such as discovery and cost, can be decided by the arbitrator." *WeWork Companies, Inc. v. Zoumer*, 2016 WL 1337280 (S.D.N.Y.).

Later Agreements With Arbitration Provisions Did Not Supersede Underlying Agreement. The defendant encouraged the plaintiffs to provide interest-free loans for a project overseas. The loans were not repaid and plaintiffs sued. Respondent sought to compel arbitration because subsequent agreements between the parties included an arbitration clause. A New York appellate court declined to compel arbitration, finding that the alleged breach first occurred under the terms of the initial agreement which had a forum selection clause designating New York courts. In any event, the court noted that even if some of the disputes fell under the later agreements with arbitration clauses those disputes "are cut from the same cloth, and are, unquestionably, inextricably bound together and therefore should be litigated in court." *NNANB Garthon Bus. Inc. v. Stein*, 138 A.D.3d 587, 31 N.Y.S.3d 19 (1st Dep't 2016).

II. JURISDICTIONAL CHALLENGES: DELEGATION/GATEWAY ISSUES

Gateway Question of Class Arbitration for Court. The Carlsons signed a sales agreement, which included an arbitration clause, for the purchase of a house in Hilton Head. They filed a class action and the district court ruled that the gateway question of class arbitration was for the arbitrator to decide. The Fourth Circuit disagreed and joined the Third and Sixth Circuits in ruling that whether the parties have agreed to a class action arbitration is a gateway question for the court. The court reasoned that the benefits of arbitration are "dramatically upended in class arbitration." The Fourth Circuit noted that the risks for management in class arbitration are higher and that the certification action in court, unlike in arbitration, can be challenged on an interlocutory basis. The court added that the grounds to overturn an arbitration award are severely limited, and the procedural formality of class actions undercut one of the main benefits of arbitration - the efficiency that comes with the lack of formal procedural rules. The court concluded that unless the parties clearly and unmistakably provide otherwise, "whether an arbitration agreement permits class arbitration is a question of arbitrability for the Court." *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016). See also *Morgan v. Sanford Brown Institute*, 2016 WL 3248016 (N.J.) (challenge to clarity of delegation clause goes to formation of the arbitration agreement requiring the court, and not the arbitrator, to determine question of arbitrability).

Agreement Assigns Class Arbitration Determination to Arbitrators. The agreement here between the employer and the employee assigned to the arbitrator "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim." The employee sought to bring the arbitration as a class arbitration and moved to compel in court. The trial court granted the motion, and submitted the question of whether the action should proceed as a class arbitration to the arbitrator to decide. The Fifth Circuit affirmed that determination. The court, relying on prior Fifth Circuit precedent, concluded that where the arbitration language is broad the "parties' intent to submit arbitrability disputes to the arbitrator is unambiguous." *Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193 (5th Cir. 2016).

Arbitration Clause in Sham Contract Not Enforceable. The parties entered into a sham agreement, called the Commercial Contract, solely for the purpose of allowing a potential franchisee to obtain a visa. The Commercial Contract included an arbitration clause. A second agreement was signed the same day, providing that the Commercial Contract was not valid or effective and that the parties will sign a new contract at a later date. A new contract was never entered into, a dispute arose, and the case was sent to arbitration under the terms of the Commercial Contract by the district court. The Ninth Circuit reversed, finding that the parties did not mutually consent to be bound and that since the

Commercial Contract was a "sham, the arbitration clause is no more enforceable than any other provision in that document." *Casa del Caffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208 (9th Cir. 2016).

Fraudulent Inducement Claim for Court to Decide. Plaintiff purchased a manufactured home, completed the paperwork, and made the first of three payments. Soon after, the manufacturer told the plaintiff that they needed to complete some additional paperwork, which included an arbitration clause, "so we can move the home". Problems arose and the plaintiff sued. The manufacturer moved to compel and the plaintiff opposed on fraudulent inducement grounds. The parties agreed that the fraudulent inducement claim was for the court to decide, and it refused to compel arbitration. The court emphasized that the manufacturer admitted that it would have sold the house to plaintiffs even if they did not sign the arbitration agreement and told the plaintiffs that they had to sign the agreement "so we can move the house". The court reasoned that this statement was false and upheld plaintiff's fraudulent inducement claim. *Adams v. CMH Homes, Inc.*, 2016 WL 1719373 (Tenn. App. 2016).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Arbitration Clause Not Unconscionable Where Opportunity to Opt Out Provided. Within days of each other two district courts rejected unconscionability claims brought against Uber's arbitration provision based on the fact that the drivers had the option to opt out of arbitration when they joined the company. The relevant provision provided that arbitration is not a mandatory condition of the relationship between the company and the driver and gave the drivers 30 days within which to opt out. The provision also encouraged the drivers to consult with counsel. Both courts ruled that the opt out option precluded any finding of procedural unconscionability. The courts also rejected claims of substantive unconscionability, finding that the fee-splitting provision did not clearly require excessive or unreasonable costs be paid by the drivers or that the arbitration would necessarily be prohibitively expensive. Finally, the Maryland District Court ruled that the delegation clause was enforceable and that any disputes relating to the enforceability of the arbitration provision was for the arbitrator to decide. *Suarez v. Uber Technologies*, 2016 WL 2348706 (M.D. Fla.); *Varon v. Uber Technologies*, 2016 WL 1752835 (D. Md.).

Arbitration Agreement Providing for Injunctive Relief Not Substantively Unconscionable. The California Supreme Court rejected a claim of substantive unconscionability where the arbitration agreement provided that the parties could seek injunctive relief. Appellant, a former employee opposing the arbitration of a race and sex discrimination claim, argued that since the employer was more likely to seek injunctive relief the agreement was substantively unconscionable. The Court reasoned that this

contractual provision did no more than recite what California law otherwise provided during the pendency of an arbitration. "Thus, regardless of whether [the employer] is, practically speaking, more likely to seek provisional remedies than its employees, simply reciting the parties' rights under [California law] does not place [the employee] at an unfair disadvantage." The California Supreme Court also rejected the employee's argument that the arbitration provision was procedurally unconscionable because a copy of the applicable AAA Rules were not supplied. The Court noted that the employee was not complaining about the AAA Rules themselves and no argument was presented that failure to provide copies of the Rules prejudiced her. *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 367 P.3d 6 (2016).

Procedural Unconscionability Claim Rejected. An apartment manager brought a wage and hour class action. The employer moved to compel, citing two agreements signed by the apartment manager. A California appeals court, overturning the trial court, granted the motion to compel arbitration. The court found that the agreements were not contracts of adhesion because the employee was given ample time to question the terms of the agreements and was never told that there would be repercussions if she did not sign the agreement. The court added that the arbitration provisions were clearly marked and were not hidden or buried, for example, near the end of a long text. The court also rejected the claim that the failure to include copies of the AAA Rules was unconscionable. In this regard, the court found that the "failure to affix the AAA Rules, was insufficient to constitute procedural unconscionability." *J. K. Residential Services, Inc. v. Superior Court*, 2016 WL 1535702 (Cal. App.).

IV. CHALLENGES TO ARBITRATOR OR FORUM

NFL Commissioner's Award Upheld under LMRA. A divided Second Circuit overturned a district judge's vacatur of the decision of the NFL Commissioner Roger Goodell to suspend Tom Brady in the deflategate controversy. The majority emphasized the limited review afforded labor award under Labor Management Relations Act because "it is the arbitrator's view of the facts and meaning of the contract for which the parties bargained, courts are not permitted to substitute their own." The three grounds offered by the district judge, the lack of adequate notice of possible discipline, the exclusion of certain testimony, and the denial of access to the notes of counsel conducting the investigation, were found to be insufficient to require vacatur of the award. For example, the court rejected the notion that the Commissioner improperly punished Brady for destroying his cell phone just days before the arbitration hearing. "It is well established that the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence the party had an obligation to produce did so in order to conceal damaging information form the adjudicator." The majority also found no basis to overturn the award based on the Commission's exclusion of

testimony of the NFL's General Counsel, noting that evidentiary rulings are left to the sound discretion of the arbitrator. The majority concluded "that the Commissioner's decision to exclude the testimony fits comfortably within the broad discretion to admit or exclude evidence and raises no questions of fundamental fairness." Notably, the majority, in a footnote, observed that the courts often look to the FAA when reviewing challenges to awards under the LMRA, but passed on deciding whether the principles of "fundamental fairness" present in FAA jurisprudence applies to the LMRA. *National Football League Management Council v. National Football League Players Association,* 2016 WL 1619883 (2d Cir.).

Arbitral Forum Entitled to Absolute Immunity. The losing party in a domain name dispute sought to overturn an unfavorable arbitration award and named the arbitral forum, National Arbitration Forum (NAF), as a defendant. The claim against NAF was that it favored the prevailing party's law firm which had filed almost 400 arbitrations with NAF and lost only 11. The federal district court granted NAF arbitral immunity, finding that such immunity protects "arbitrators and the arbitral process" from reprisal by dissatisfied litigants. The court noted here that the complaint against NAF did not contend that NAF's processes or systems were corrupt but instead argued that it was biased in favor of a particular law firm. These allegations, the court concluded, did not serve to overcome the strong policy in favor of arbitral immunity. *VirtualPoint v. Poarch Band of Creek Indians and National Arbitration Forum*, No. SACV 15-02025-CJC, (C.D.Cal. 2016).

***Functus Officio* Bars Reopening of Arbitration Based on New Evidence.** A rabbi acting as an arbitrator in a rabbinical court issued an award in 2011 in favor of Pinkesz requiring Wertzberger to pay him $425,000. Two years later, the arbitrator reopened the matter and ordered Wertzberger to pay Pinkesz $3,750,000. The motion to vacate was granted on *functus officio* grounds. The New York appellate court ruled that the 2011 award was final and definite under the CPLR and the arbitrator exceeded his authority by reopening the arbitration two years later. *Pinkesz v. Wertzberger*, 139 A.D.3d 1071, 30 N.Y.S.3d 832 (2d Dep't 2016).

Arbitral Immunity Applied Even Where Award is Vacated. A rabbinical court reopened an award two years after its issuance and the award was vacated on *functus officio* grounds. Various claims were brought against the rabbinical court and the trial court ruled that the defendants were not entitled to arbitral immunity because the award had been vacated. The appellate court reversed this ruling, and applied arbitral immunity to the defendant's actions. The court noted that the factual allegations in the complaint merely asserted conduct by the defendants in their capacity as arbitrators. "As the plaintiffs failed to allege how any of the acts of the rabbinical court defendants were undertaken in the clear absence of all jurisdiction, these defendants enjoy arbitral immunity from civil liability." *Pinkesz Mut. Holdings, LLC v. Pinkesz, 139 A.D.3d 1032 (2d Dep't 2016).*

V. CLASS & COLLECTIVE ACTIONS

Seventh Circuit Rules Class Action Waiver Violates NLRA. The Seventh Circuit, diverging from the Fifth, Second, and Eighth Circuits, ruled that a class action waiver violates §7 of the National Labor Relations Act. The court noted that under §7 employees are permitted to engage in collective activities, and held that the class action waiver, which in this case was not part of the collective bargaining agreement, violated the NLRA. The court also pointed out that the employees impacted here were not provided the opportunity to opt out of the class action waiver. The court rejected the argument that under the FAA the agreement must be enforced. In doing so, the Seventh Circuit focused on the FAA's savings clause, which provides that arbitration provisions are generally enforceable except if the agreements themselves are unlawful. Since the agreement here was unlawful under the NLRA, the court concluded that there was no conflict between the NLRA and FAA. *Lewis v. Epic-Systems Corp.*, 2016 WL 3029464 (7th Cir.).

Separate Class Action Waiver Applied to Arbitration Agreement. The plaintiffs in this putative class action agreed to waive their right to file class actions in a merchant cash advance agreement. This agreement was separate from other agreements which contained arbitration provisions. The court concluded that this rendered the plaintiffs inadequate to serve as class representatives and compelled individual arbitration. The court rejected the notion that a class action waiver is substantively unconscionable when executed outside the context of an arbitration agreement as well as the argument that the United States Supreme Court decision in *Italian Colors* required a different result. *Korea Week v. Got Capital*, 2016 WL 3049490 (E.D. Pa.).

VI. HEARING-RELATED ISSUES

Arbitrator Did Not Exceed Powers By Adopting Proposed Findings. A dispute arose between a medical center and a vendor providing administrative services. An arbitration was initiated and an award was issued. A motion to vacate was filed, raising a variety of issues including the alleged bribing of witnesses at the arbitration. The court denied the motion. In doing so, the court rejected the argument that the arbitrator exceeded his authority by adopting one of the parties' proposed findings of fact and conclusions of law rather than those provided by the other party. The court reasoned that sufficient evidence was present in the record to support the proposed findings selected by the arbitrator. *Weirton Medical Center, Inc., v. QHR Intensive Resources, LLC,* 2016 WL 2766650 (N.D. W.Va. 2016).

VII. CHALLENGES TO AWARD

Claim for Manifest Disregard of Evidence Rejected. The district court confirmed an award and the losing party appealed to the Second Circuit on manifest disregard grounds. The Second Circuit rejected the challenge on such grounds. In doing so, the court reiterated that the Second Circuit does not recognize a claim for manifest disregard of the *evidence*. In also rejecting the manifest disregard of the law claim, the court relied on the arbitrator's finding that the request for adequate assurances, a key claim in the case, was not cognizable because it was not put in writing. The court reiterated that Circuit's established rule that the application of the manifest disregard of the law principle is severely limited and rejected the claim here. *ISMT, Ltd. v. Fremak Indus., Inc.*, 634 F. App'x 332 (2d Cir. 2016).

Award Vacated as Not Being Definite. The parties submitted the question of the enforceability of indemnity provisions to the arbitrator to decide. The arbitrator ruled that the indemnity provisions were against public policy and not enforceable. The Sixth Circuit, in an earlier ruling relating to the same award, also found that the award was not in manifest disregard of the law. The arbitrator did not rule upon the losing party's fraudulent inducement claim which flowed from the finding that the individual or the indemnity agreement violated public policy. The district court vacated the award so that the arbitrator could decide the fraudulent inducement claim. The court reasoned that by not finally resolving all legal and factual disputes presented, the award lacked fundamental fairness and should be remanded to the arbitrator to allow the party raising its fraudulent inducement claim an opportunity to present evidence to the arbitrator. *Schafer v. Multiband Corp.*, 2016 WL 1665153 (E.D.Mich.).

Disclosure of Conflict at Time of Selection Timely. The potential umpire in this case fully disclosed any possible conflicts at the time that he received notice that he was being considered for the position. Approximately ten months later, when actually selected as the umpire, he promptly disclosed his selection as a party-appointed arbitrator in an arguably related proceeding. The court rejected a motion to vacate on evident partiality grounds. The court commented that it had not found "a case holding an arbitrator's voluntary disclosure of a potential conflict after his or her selection, rather than before, to be grounds for vacatur." The court reasoned that to allow vacatur here would impose a duty of "continuous disclosure" that would be unreasonable. In any event, the court found that it "is not the nondisclosure itself but the materiality of the undisclosed facts that control the evident partiality inquiry." *Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 2016 WL 1030139 (S.D.N.Y.), amended, 2016 WL 3144057 (S.D.N.Y.).

Challenge to Damages Awarded Rejected. An employee retained a financial advisor to counsel her on the merits of a proposed retirement package. A dispute arose and the now retired employee initiated a FINRA arbitration against the financial advisor. The customer prevailed and the financial advisor moved to vacate, arguing that the panel awarded damages not awardable on the claims before it. The court denied the motion to vacate and confirmed the award. The court noted that the award did not provide any reasoning for the damages awarded, which "makes it difficult (if not impossible) to determine the reasons for the specific amount the panel awarded." In any event, various assumptions could reasonably be made which would have allowed for the amount awarded. The court also rejected the argument that the panel failed to reduce the damages to "present value" and to take into account the duty to mitigate. The court concluded that even if these complaints were meritorious "that error was not of the kind that would permit the Court to overturn the award." *Rogers v. AUSDAL Financial Partners*, 2016 WL 951078 (D. Mass.).

More Deferential Review Given to "Consensual" Arbitration. An inter-company arbitration was conducted between two insurance companies relating to an uninsured motorist claim. An award was issued and cross motions to confirm and vacate were filed. The New York appellate court affirmed the award. In doing so, the court noted that where the arbitration provision was compulsory "closer judicial scrutiny of the arbitrator's determination" is afforded. The court added that where, as here, "the arbitration was consensual, a more deferential standard of review applies." *Geico Indemnity Insurance Co. v. Global Liberty Insurance Co.*, 51 Misc. 3d. 138 (A) (2d Dep't 2016).

VIII. ADR – GENERAL

CFPB Issues Notice of Proposed Rulemaking. The Consumer Financial Protection Bureau issued a Notice of Rulemaking on May 5, 2016 soliciting comments on a proposed rule to prohibit certain consumer institutions from including pre-dispute arbitration agreements that contain class action waivers in their consumer contracts. The proposed rule would require that all covered entities submit records to the CFPB related to each arbitration including pleadings and related documents. The comment period will be for three months.

IX. COLLECTIVE BARGAINING SETTING

NLRB Continues to Rule Class Action Waivers Unlawful. The National Labor Relations Board has continued its consistent stand in finding class action waivers to be violative of the National Labor Relations Act, despite rejection of its position by various courts. *Victory II, LLC d/b/a Victory Casino Cruises II,* NLRB Case No. 12-CA-146110, and *Prime Healthcare Paradise Valley, LLC,* NLRB Case Nos. 21-CA-133781, 133783.

NLRB ALJ Rules "Voluntary" Arbitration Agreement Violative of NLRA. A hospitality company managing a Doubletree Hotel required employees to sign an arbitration agreement at the time of hire. Although the agreement expressly provided that signing it was "voluntary", a NLRB administrative law judge concluded that the word voluntary "has more than one possible meaning or definition" and concluded that the policy violated §7 of the NLRA. The ALJ also ruled that even though the agreement did not expressly waive class or collective actions, the employer sought to utilize it in court that way and therefore was also unlawful under prevailing NLRB authority. *Rim Hospitality v. Nelson Chico,* NLRB Case No. 21-CA-137250.

X. STATE LAW ISSUES

Agency Principles Applied to Compel Arbitration. Can arbitration be avoided by naming as defendants the decision-makers, the principals of a law firm, rather than the law firm itself? The Michigan Supreme Court answered that question in the negative, ruling that the dispute fell within the mandatory arbitration clause in the law firm operating agreement. Applying general agency principles, the Court concluded that the leaders of the law firm must be included within the scope of the arbitration clause. "A company can only act through its agents, the individual defendants are agents of the firm, and plaintiff's claims inextricably tie defendants' actions as agents to the alleged deprivation of plaintiff's rights under the Operating Agreement." *Altobelli v. Hartmann*, 2016 WL 3247615 (Mich.).

Ambiguous Waiver of Class Claims Unenforceable Under Pennsylvania Law. Mortgage loan officers for Banco Santander were required to sign a Mortgage Retail Development Agreement which contained a number of provisions. The fifth of the sixth sections is headed "Termination and Claims" within which was contained in arbitration agreement and a class action waiver. A federal district court refused to enforce the agreement to arbitrate and the class action waiver. In finding the Agreement to be ambiguous, the court noted that "the sentence located directly above the signature line, which states that the signature below serves as confirmation that Plaintiffs received the [agreement]" could be construed in more than one way. The court noted that the ambiguous language is to be construed against the drafter and the court concluded that it could not bind the plaintiffs where, as here, "the signature served to bind a party under such ambiguous circumstances." *Ranieri v. Banco Santander, S.A.*, 2016 WL 1306013 (D. N.J.).

Arbitration Provision Unenforceable Where Employer Can Alter Without Notice. The Fifth Circuit, applying Texas law, ruled that an arbitration agreement in an employee handbook was not enforceable because the employer could amend it without notice. The court reasoned that under Texas law an arbitration agreement is illusory in the absence of reasonable notice that it has been revised. The court rejected the claim that the arbitration

agreement here differed because any change only had prospective effect, finding no support in Texas law for this distinction. *Nelson v. Watch House International, LLC*, 815 F.3d 190 (5th Cir. 2016).

Handbook Waiver Precludes Arbitration. An employee signed a handbook which stated that its terms and conditions were "not promissory or contractual in nature and subject to change by the company." The employee sued and the employer moved to compel arbitration. The trial court denied the motion to compel and the New Jersey appellate court affirmed. The court observed that "it is simply inequitable for an employer to assert that, during its dealings with its employee, its written rules and regulations were not contractual and then argue, through reference to the same materials, that the employee contracted away a particular right." The court concluded that "in good conscience" it could not conclude that the employee clearly and unambiguously agreed to waive his right to sue. *Morgan v. Raymours Furniture Co.*, 443 N.J. Super. 338, 128 A.3d 1127 (App. Div. 2016).

XI. TABLE OF CASES

Cases