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I. JURISDICTIONAL ISSUES: GENERAL

Non-Signatory Bank Not Required to Arbitrate Receiver's Claims. The Receiver in the Stanford International Bank Ponzi scheme sought to recover funds from Stanford's related entities and employees. The employees against whom the Receiver was proceeding moved to compel arbitration of the Receiver's claims based on arbitration provisions in their employment agreements and related documents. The Fifth Circuit, in refusing to compel arbitration, reasoned that the Receiver was acting on behalf of the bank which received the investor's funds and which Stanford used to further its fraudulent activities including paying the employees. This the Receiver was permitted to do under Texas's Uniform Fraudulent Transfer Act. As the bank was neither a signatory to any agreement with the employees nor a FINRA member or associated person, it was not bound to arbitrate the employees' claims. The court explained that the "Receiver does not seek to enforce the various contracts containing the arbitration agreements; rather, he seeks to unwind them and reclaim the benefits fraudulently distributed to the defendants under the contracts." On this basis, the court rejected the equitable estoppel theory put forth by the employees. *Janvey v. Alguire*, 2017 WL 430078 (5th Cir.).

Litigating Separate Issue Does Not Constitute Waiver of Arbitration Right For Unrelated Claim. Citibank litigated a debt collection matter. After receiving an award, the debtor brought a class action under the Uniform Trade Practices Act alleging excessive attorneys' fees sought in debt collection matters by Citibank. Citibank moved to compel arbitration of the UTPA claim and the Alaska Supreme Court granted the motion. The Court reasoned that under Section Three of the FAA, waiver is to be narrowly construed and the decision to litigate one matter did not constitute waiver of the right to arbitrate unrelated disputes between the parties. Here, the claims and evidence between the debt collection and UTPA matters had little overlap. The Court explained "the claims did not arise out of the same transaction; one arose from the credit card contract and one arose from the bank's fee agreement with its lawyers and post-litigation attorney's fees motions." As two separate controversies are at issue, "and giving due regard to the strong federal policy resolving all doubts in favor of arbitration, we also conclude that Citibank's filing a state court action to recover its debt did not evidence a clear intent to waive its right to arbitrate a subsequent UTPA claim." *Hudson v. Citibank (South Dakota) N.A.*, 387 P. 3d 42 (Alaska 2016).

Foreign Arbitration Awards Need Not Be Confirmed to Be Enforceable in U.S. The Brazilian companies here obtained an arbitration award before the ICC in Paris for over $28,000,000. An original respondent was declared bankrupt and the Brazilian companies brought an action in Federal Court in Manhattan to enforce the award. The district court declined to enforce the award, ruling that under the New York Convention a party was required to confirm an award before it could be enforced in the U.S. The Second Circuit

reversed. The court ruled that "a federal district court sits in *primary* jurisdiction over a non-domestic arbitration award." As such, the court concluded that the New York Convention and the FAA required "only that the award-creditor of a foreign arbitral award file one action in a federal district court to enforce the foreign arbitral award against the award-debtor." *CBF Industria de GUSA v. AMCI Holdings*, 2017 WL 816878 (2d Cir.).

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.").

Court Can "Look Through" to Underlying Claims for Jurisdiction. The appellate courts have split on the question of whether a federal court may look to the underlying arbitration demand to establish jurisdiction under the FAA (Second Circuit) or must rely on the petition following the award (Third and Seventh Circuits). The district court in Utah here sided with the Second Circuit and found its analysis more persuasive. To rule otherwise would be to build an inconsistency into the FAA with respect to Sections Three and Four of the FAA, reasoned the court. The court concluded that it was most appropriate to apply the "look through" approach to the entire FAA and not merely to particular sections. Applying this principle, the court noted that the petition before it was not sufficient to establish federal jurisdiction but the underlying arbitration claim was since it asserted federal securities violations thereby creating federal jurisdiction. *Harman v. Wilson-Davis and Co.*, 2017 WL 74707 (D. Utah).

FAA Applies to Vacatur Question Even Where New York Law Otherwise Applied. The arbitrators applied New York law in rendering their award. A motion to vacate the award was filed. The court determined that the FAA applied to the vacatur question as the parties here "did not contractually agree to apply New York's vacatur standards to their arbitration."

On this basis, the court concluded that the FAA applied to the vacatur issue. *LGC Holdings v. Julius Klein Diamonds, LLC,* 2017 WL 782912 (S.D.N.Y. 2017).

II. JURISDICTIONAL CHALLENGES: DELEGATION ISSUES

Incorporation of AAA Rules Sufficient to Refer Arbitrability Issue to Arbitrators. Various pharmacies signed CVS's Provider Agreements. That Provider Agreement incorporated by reference a Provider Manual which included an arbitration agreement. The pharmacies sued CVS and related entities and CVS moved to compel. The West Virginia Supreme Court of Appeals, applying Arizona law, ruled that the pharmacies' court action was barred by the arbitration agreements. The arbitration provision in the Provider Manual, which was incorporated by reference, was clear and enforceable. The court further ruled that the issues relating to the scope of the arbitration clause were expressly delegated to the arbitrator in the arbitration agreement to determine. "We find that incorporation of the AAA rules into the arbitration agreements is sufficient evidence that the parties clearly and unmistakably agreed to arbitrate arbitrability." *West Virginia CVS Pharmacy v. McDowell Pharmacy, Inc.*, 2017 WL 562826 (W. Va. Sup. Ct. App.).

Clear and Unmistakable Delegation of Arbitrability Question to Arbitrator Found. The loan agreement here included a broad arbitration clause. A class action was brought alleging that the lender violated state usury laws. The lender's motion to compel was granted. The court explained that the question of arbitrability is for the court in the absence of a clear and unmistakable delegation of that question to the arbitrator. The broad language in the arbitration provision here, providing that all disputes relating to or arising out of the agreement, including "the validity or enforceability" of the arbitration provision, was just such a clause, the court reasoned. As a result, the court concluded that such questions as whether the dispute was arbitrable and whether non-signatories would be subject to arbitration are for the arbitrator to decide. *Bethune v. LendingClub Corp.*, 2017 WL 462287 (S.D.N.Y.). See also *HDI Global v. Lexington Insurance Co.*, 2017 WL 699818 (S.D.N.Y.) (challenge under reinsurance agreement on grounds that contract was void properly submitted to arbitrator as the challenge went to agreement itself and not arbitration clause).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Ninth Circuit Rejects Unconscionability Claim. An employee brought this putative class action alleging misclassification of employees as exempt. The employer moved to compel arbitration based on an arbitration provision in an incentive compensation agreement. The district court ruled the arbitration provision unconscionable; the Ninth Circuit reversed. The appellate court reasoned that "the adhesive nature of a contract, without more, would give rise to a low degree of procedural unconscionability at most." The court pointed out that

the arbitration agreement here related to the receipt of incentive compensation, and no evidence was presented that the employee would be terminated if he did not sign the agreement. The court rejected as substantively unconscionable the waiver of representative claims, venue for the arbitration out of state (the parties could agree or the arbitrator could select a different venue for good reason), confidentiality terms, the provision for sanctions, and the limits on discovery. With respect to the latter, the court noted that limited discovery is part of the balance that goes with arbitration and the desired simplicity of the proceeding. "In finding this balance, California courts look to the amount of discovery permitted, the standard for obtaining additional discovery, and the evidence presented by plaintiffs that the discovery limitations will prevent them from adequately arbitrating their statutory claims." The Ninth Circuit found sufficient discovery was allowed here to permit plaintiff to vindicate her claim. The court did rule unconscionable the employer's unilateral ability to seek injunctive relief but ruled that this term could be severed while still preserving the arbitration requirement. The court concluded that "the dispute resolution provision is valid and enforceable once the judicial carve-out clause is extirpated and the waiver of representative claims is limited" to those permitted under California law. *Poublon v. C. H. Robinson Co.*, 2017 WL 461099 (9th Cir.).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Hyperlink to Terms And Conditions of Relationship Sufficient Notice. Uber drivers, before they can register with the company, are asked to click a hyperlink to the terms and conditions of the relationship and are twice asked to confirm that they have reviewed those terms and conditions. After becoming registered, the terms and conditions, which include an arbitration provision, are uploaded to each driver's individual portal. The driver here filed a claim in court alleging that he was misclassified as an independent contractor. Uber moved to compel arbitration, and the motion was granted by a New Jersey district judge. The court found that the notice of arbitration provided to the driver was reasonable and enforceable. The court rejected the argument that the Uber drivers fall within the exception under the FAA for "transportation employees", noting that the prevailing authority finds that the exemption applies narrowly to transportation workers involving the transportation of goods and not people. *Singh v. Uber Technologies*, 2017 WL 396545 (D.N.J.). Cf. *Norcia v. Samsung Telecommunications America,* 845 F.3d 1279 (9th Cir. 2017) (notice of and agreement to arbitration lacking where arbitration provision was contained in product safety and warranty information brochure and no notice of arbitration provision contained therein was provided).

On-Line Acceptance of the Terms and Conditions Mandated Arbitration. The purchaser of a Dell computer brought a class action alleging deceptive practices and false advertising. Dell's motion to compel arbitration was granted. The court explained that the obligation to arbitrate appeared prominently in the computer's packaging and on-screen notice when the

computer was first used which the user accepted with an on-screen click. The court emphasized that the "on-screen notice also advised Plaintiff that 'the act of clicking [the] I accept' icon would signify his agreement with Dell's Terms." The court added that the Terms and Conditions themselves noted prominently that disputes would have to be arbitrated individually. "On these facts, the Court finds that Defendants have shown both that a contractually valid arbitration agreement exists, and that Plaintiff's claims fall within the scope of that agreement." *Anderson v. Walmart Stores*, 2017 WL 661188 (W.D.N.Y.).

Arbitration Not Required Under Customer's Expired Arbitration Clause. Plaintiff's lawn care agreement with TruGreen, which included an arbitration clause, expired. TruGreen continued to make telemarketing calls to plaintiff, who brought a class action against TruGreen under the Telephone Consumer Protection Act. TruGreen moved to compel arbitration under the expired service agreement. The district court compelled arbitration but the Sixth Circuit reversed. The appellate court focused on the lack of a "survival clause" in the service agreement. The court also interpreted the agreement against the drafter, TruGreen, when it refused to enforce the contractual term allowing TruGreen to contact plaintiff about possible future services as it did not indicate that this would occur after expiration of the agreement with no end date. *Stevens-Bratton v. TruGreen, Inc.*, 2017 WL 108032 (6th Cir.).

Arbitration Agreement Presented After Retail Purchase Made Ruled Enforceable. Can an arbitration provision be enforced if it is presented to a consumer after rather before a purchase? Or, as phrased by the court, can "a binding arbitration agreement [] be formed if the purchaser was not advised of the arbitration provision prior to the sale" in the retail context? The court in this case concluded that under New York law it could. The court reasoned that under UCC 2-207 it is only after the consumer has retained the goods for more than 30 days that the contract becomes enforceable. "Accordingly, while Plaintiff argues that the only agreement he had with [the manufacturer] was created when he paid for the [item] at the store, the law of New York state indicates otherwise." The court found that the agreement was actually formed when the consumer kept the item for 30 days and accepted the terms offered by the manufacturer. *Anderson v. Walmart Stores*, 2017 WL 661188 (W.D.N.Y.).

Patient Agreed to Arbitrate Malpractice Dispute. The patient here signed various forms before receiving medical treatment. The treatment went poorly and he brought a malpractice action. The medical center moved to compel arbitration, and the motion was granted. The court noted that the patient checked a box confirming that he was accepting the User Agreement on the medical center's web site and the User Agreement contained an arbitration clause. The medical center also noted that the Financial Agreement contained an arbitration clause. The court acknowledged that the Financial Agreement had a different medical practice name on it, but noted that the Financial Agreement was provided along

with other agreements applying to the medical practice. The court was satisfied that the medical practice was a party to the Financial Agreement, but concluded that even if it were not it would be able to invoke arbitration as a third-party beneficiary. "Where it is clear from terms of the contract that the agreement to arbitrate was entered into for the benefit of non-signatories, those non-signatory parties may compel arbitration." The court concluded that the dispute was encompassed within the arbitration agreement and compelled arbitration of those claims. *Athas Health v. Trevi Thick*, 2017 WL 655926 (Tex. App.).

Arbitration Provision Not Extended to Second Agreement. Business partners entered into a LLC agreement which required arbitration of disputes, and a Founders Agreement, which required disputes to go to court. After severing ties with one member, the remaining members of the LLC filed a demand for arbitration raising claims under both agreements, arguing that arbitration was appropriate because the two agreements were so intertwined. The New York court disagreed. In doing so, the court relied on the fact that the two agreements: were signed at different times; provided for different dispute resolution mechanisms, and; did not refer to the other. The court acknowledged that it would be "much more convenient for the parties to resolve all disputes surrounding petitioner's termination in one forum, [but] that is not what their agreements contemplate." On this basis, the court stayed the AAA arbitration under the LLC Agreement "to the extent that respondents seek to arbitrate any claims arising under the Founder Agreement." *Rubertone v. MMR Digital, LLC*, 2017 WL 543356 (Sup. Ct. N.Y. Cty.).

V. CHALLENGES TO ARBITRATOR OR FORUM

Arbitration Forum "Integral" to Contract Where Specifically Designated. Car purchasers filed a class action with the designated arbitration forum, the Better Business Bureau of North Alabama. The Better Business Bureau rejected the demands on the basis that it did not arbitrate class actions. The car buyers brought their class action to court, and the lower court ordered the class action to proceed before the American Arbitration Association. The Alabama Supreme Court reversed, and ordered the arbitration back to the Better Business Bureau. The court noted that there was no indication that the Better Business Bureau was unwilling to hear the claims, only that it was unable to arbitrate class actions. "The fact that the parties named a specific forum in which either party could initiate arbitration indicates that the specific forum was an underlying 'an integral and essential part' of their agreement to arbitrate, and the trial court was accordingly required to give effect to that intent when it compelled arbitration." The court saw no basis to conclude that the car buyers had a right to proceed on a class basis as the arbitration agreement did not authorize class actions. The court saw no basis to force the car buyers to engage in class action arbitration proceedings either before the Better Business Bureau or the AAA and therefore "the BBB's policy of not conducting class-action arbitrations accordingly in no way

renders" the Better Business Bureaus arbitration proceedings unavailable to the car buyers. *University Toyota v. Hardeman*, 2017 WL 382651 (Ala.).

VI. CLASS & COLLECTIVE ACTIONS

NLRB Continues to Rule Class Action Waivers Unlawful. The NLRB ruled in *D.R. Horton,* 357 NLRB No. 184, 2012 WL 36274 (2012), that Section 7 of the NLRA precludes enforcement of mandatory arbitration agreements. 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; *U.S. Xpress Enterprises,* 363 NLRB No. 46 (2015) and *Waffle House, Inc.,* 363 NLRB No. 104 (2016), and *Prime Healthcare Paradise Valley, LLC,* NLRB Case Nos. 21-CA-133781, 133783 (2016).

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.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted, 2017 WL 125664 (U.S. Jan. 13, 2017).

NLRA Precludes Concerted Action Waiver. Ernst & Young's arbitration agreement requires employees to pursue legal claims in arbitration and only as individuals in separate proceedings. The issue for the Ninth Circuit was – does this provision violate §7 rights of employees under the NLRA to engage in concerted activity. Rejecting the analysis of the Fifth Circuit in the *D. R. Horton* case, the Ninth Circuit joined the Seventh Circuit in holding that it did. The court reasoned that the "separate proceeding" clause was the antithesis of the right to concerted activity. The court emphasized that the illegality of the separate proceedings term was unrelated to arbitration. "The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims." The court ruled

that the illegal provision happened to be in an arbitration agreement but did not target arbitration and therefore violated the substantive rights of the employees. As stated by the court, "the issue is not whether any particular forum, including arbitration, is available but rather which substantive rights must be available within the chosen forum." As the FAA did not mandate the waiver of substantive rights, the court concluded that there was no conflict between the NLRA and the FAA. The court explained "nothing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym 'FAA' and receive protection for illegal contract terms any time the party suggests it will enjoy arbitration less without those illegal terms." *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, 2017 WL 125664 (U.S. Jan. 13, 2017). Cf. *Patterson v. Raymours Furniture Co., Inc.,* 2016 WL 4598542 (2d Cir. Sept. 2, 2016), as corrected (Sept. 7, 2016), as corrected (Sept. 14, 2016) (Second Circuit abides by its own precedent and rejects NLRA concerted activity, but in doing so opines "if we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the [company's] waiver of collective action is unenforceable"); *Singh v. Uber Technologies*, 2017 WL 396545 (D.N.J.) (no Section Seven issue where, as here, plaintiff had 30 days to opt out of the arbitration agreement as such "a provision can hardly be construed to interfere with, restrain, or coerce an employee into forfeiting the rights afforded by Section Seven of the NLRA.")

Class Arbitration Rejected. The Third Circuit had previously ruled in this case that the question whether class arbitration existed and was permitted was for a court and not for an arbitrator to decide. The district court ruled that class arbitration was not authorized and the plaintiffs must proceed with individual arbitration. On appeal, the Third Circuit affirmed. The Third Circuit agreed with the district court that "the absence of any explicit mention of class arbitration in the employment agreements weighed against a finding that it was authorized by the agreements." Even if class arbitration could be implied from the agreement, the court found no basis for doing so here. The Third Circuit was particularly persuaded by the fact that the "the agreement specifies that the dispute or claim must arise out of or relate to the *particular* employee's employment, not *any* employee's employment." The court added that the language in the arbitration agreement provided that "any dispute" could be arbitrated demonstrated merely that the parties intended to arbitrate their disputes and from that the court could not "infer an intent to arbitrate class claims on this basis." The court also rejected plaintiff's argument that the statutes subject to arbitration allow class actions. The court noted that the statutes listed provided for both class and individual claims and therefore this provision shed no more light on the parties' intent with respect to class arbitration than had otherwise been provided. *Opalinski v. Robert Half International*, 2017 WL 395968 (3d Cir.). See also *Shore and Coinabul, LLC v. Johnson and Bell*, 2017 WL 714123 (N.D. Ill.) ("plain language of the client engagement letter is silent as to class arbitration and cannot be construed to provide class arbitration was intended").

VII. HEARING-RELATED ISSUES

Award Overturned Where Arbitrators Weighed Credibility in Summary Judgment Context. The arbitration panel granted summary judgment. In doing so, the panel accepted extrinsic evidence relating to the meaning of a contractual term. In reaching its conclusion that a key contractual term was not reasonably susceptible to the interpretation of one of the parties, "the panel weighed the parties' conflicting evidence, and made determinations of credibility regarding their competing declarations. We hold that such fact-finding at summary judgment by the panel is legal error." On this basis, the Ninth Circuit reversed the district court's confirmation of the award and remanded the case "for determination by the finder of facts." The court provided no basis for doing so under existing arbitration law. *Burton Way Hotels v. Four Seasons Hotels, Ltd.*, 2016 WL 6081390 (9th Cir.).

VIII. CHALLENGES TO AWARD

Second Circuit Rejects Evident Partiality Claim. The neutral arbitrator on a three-person panel was selected by one of the parties, NICO, as a party-appointed arbitrator for an arguably related entity to a party in the pending arbitration. The arbitrator refused to withdraw from the first arbitration and the award was issued. The award was confirmed and the Second Circuit declined to vacate the award on evident partiality grounds. The court reasoned that even if the party in the second arbitration was related to NICO, there was no allegation that the arbitrator "had any familial, business, or employment relationship with NICO [or its related entity], or that he had any financial interest in the outcome of his arbitrations." Rather, the court emphasized that the arbitrator's relationship to NICO was "professional." The court noted that the arbitrator voted against NICO in the second arbitration and had accepted other appointments as a party appointed arbitrator against NICO. *National Indemnity Company v. IR Brasil Reseguros*, 2017 WL 421944 (2d Cir.).

Evident Partiality and Corruption Claim Rejected. The parties sought to unwind joint ventures in the diamond industry and each selected an arbitrator, with those arbitrators selecting the Chair. The Chair disclosed that he knew one party's principal, Leviev, and saw him occasionally while traveling on business. He also disclosed that he had done business with the other arbitrators and would continue to do so. No objection was made by the other party, Julius Klein Diamonds. The arbitration went poorly for Klein and at one point it filed a court action accusing the Chair, Leviev, and Leviev's party-appointed arbitrator of racketeering and money laundering. The action was withdrawn. Among the evidence uncovered by Klein was that the party-appointed arbitrator and the Chair were partners in two active businesses. The Klein's party-appointed arbitrator resigned alleging that information was being concealed from him by the Chair and stating that he no longer wanted to part of a "biased, unfair process." A new arbitrator was appointed and a hearing

was held, and before an award was issued, it was disclosed that the Chair had been convicted of tax fraud in Belgium. An award unfavorable to Klein was issued, and Klein moved to vacate. The court denied the motion. Acknowledging that it was troubled by the facts and may "well not have reached the same conclusions if it were deciding the matter *de novo*", the court found that Klein had failed to carry its high burden in proving evident partiality and corruption. The court emphasized that the Chair did disclose his relationship with the arbitrators, adding that one of the attractions of arbitration is that the parties can require familiarity with an industry. With that, however, comes arbitrators drawn from a tight knit community who are known to each other. On this basis, the court found that the attack on the Chair's disclosures "misses its mark." The court noted that the Chair had provided enough information to "put [Klein] on inquiry notice" and yet no investigation into the disclosures or objection was made at the time. Klein's belated cry of bias was rejected and the court found its silence constituted a waiver to any challenge to the Chair's continued participation. The court also rejected Klein's claim that the Chair's failure to timely disclose his indictment and conviction warranted vacatur on corruption grounds. The reasoned that "federal courts have been unreceptive to the argument that undisclosed legal trouble of an arbitrator requires vacatur under the FAA absent a showing that the legal trouble affected the outcome of the arbitration in some demonstrable way" which was not shown here. *LGC Holdings v. Julius Klein Diamonds, LLC,* 2017 WL 782912 (S.D.N.Y. 2017).

Manifest Disregard Challenge Rejected. The parties to a merger disagreed about the amount owed to shareholders under the merger agreement and an arbitration ensued. The panel issued a 46-page award in favor of the petitioners and awarded over seven million dollars in damages plus one million dollars in attorneys' fees. The court rejected the motion to vacate on manifest disregard grounds. In doing so, the court noted that the panel interpreted the earn out terms of the merger agreement and was within its jurisdiction to do so. The court explained that the arbitration panel construed the terms of the agreement in light of the respondents' conduct and for this reason the "Tribunal's factual findings and contractual interpretation are not subject to judicial challenge." The court also rejected the claim that the panel manifestly disregarded Delaware law regarding the calculation of damages relating to new companies and technology. The court emphasized that Delaware law did not prohibit damages in these contexts and that "the Tribunal reached its decision on the basis of historical and expert information about sales projections and actual past sales, and provided a lengthy explanation of the variables and models it used to determine damages." For these reasons, the manifest disregard challenge was rejected and the award was confirmed. *Bergheim v. Sirona Dental Systems*, 2017 WL 354182 (S.D.N.Y.).

Arbitrators Exceeded Authority in Interpreting Tobacco Industry Settlement. The state of Missouri brought an action challenging the award of an arbitration panel under the Master Settlement Agreement reached by the tobacco manufacturers on a multi-state basis. Within that Agreement certain adjustments could be made and Missouri disputed the terms

of a partial settlement of a dispute relating to adjustments entered into by more than 20 states. The Master Agreement did not specify how disputes over adjustments should be handled when the states disagreed among themselves. In the absence of express provisions in the Agreement, the arbitration panel looked to "common law judgment reduction" methods to address the partial settlement at issue here. The arbitration panel noted that *pro rata* reallocation was permitted under the Master Agreement and the panel selected a common law *pro rata* judgment reduction method to reach its determination. The Supreme Court of Missouri, sitting *en banc*, faulted the panel for seeking to "fill the gap" in the agreement without first considering whether the silence in the Agreement created an ambiguity requiring the panel to resort to default legal rules to construe the contract. The Court found that the terms were not ambiguous and did not prevent the panel from applying the adjustment provisions in the Master Agreement. In doing so, the Court concluded that the arbitration panel substituted "its own notions of economic justice for the clear provisions" of the master agreement. The Court concluded that the arbitration panel's amendment of the Master Agreement significantly altered the rights and expectations of the parties and materially affected the rights of the state of Missouri under the Master Agreement. *Eric Greitens v. American Tobacco Co.*, 2017 WL 587296 (Mo.) (*en banc*).

Public Policy Exception Challenge Rejected. The Supreme Court in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), ruled that a court may refuse to enforce an arbitration award where the agreement violated an explicit, well defined, and dominant public policy. Plaintiff here alleged spoliation of evidence, an issue presented to the arbitration panel which rejected plaintiff's claims without expressly ruling on the spoliation claim. The court here rejected the public policy challenge, reasoning that by rejecting plaintiff's underlying claim plaintiff's public policy violation amounts to no more than "a general consideration of supposed public interests in preventing fraud, rather than an explicit public policy that is grounded in legal precedents." As such, the court concluded that the plaintiffs had failed to present a dominant and well-defined public policy that would require vacatur of the award here. *Harman v. Wilson-Davis and Co.*, 2017 WL 74707 (D. Utah).

IX. ADR – GENERAL

Partner's Service as Mediator Disqualifies Firm. The partner in a 20-lawyer firm was retained by the parties to mediate a dispute. The partner, Welby, was provided with a party's mediation statement that was circulated to the other parties and one of the parties' counsel had two conversations with the mediator in which counsel's confidential thoughts concerning the claims were discussed. Before an in-person mediation session could be scheduled, the mediation was adjourned. Soon thereafter, one of the parties retained the mediator's firm to represent it. An order to show cause was brought to disqualify Welby's law firm as counsel in the underlying arbitration. The motion was granted. The court did so even in the absence of proof that confidential information was provided to Welby by the

moving party. The court reasoned that "although petitioner's participation in the mediation before Welby was brief and, for the sake of argument, inconsequential, and even though it may not have divulged any confidential information to Welby, his service as mediator implicates [Rules of Professional Conduct Rule 1.12(b)] for purposes of [Welby's law firm's] representation of respondent in the underlying arbitration." The court also relied on the fact that there was a delay in implementing a screen to remove Welby from any contact with the litigation. The court noted that the firm was small and that Welby chaired the firm's periodic lawyers' meetings. The court pointed out that the law firm failed to provide any written proof that its screening procedures were implemented in a timely fashion. The size of the firm, the fact that Welby ran lawyer meetings, and that a formal written screening procedure was not established in a timely fashion made the court conclude that "the danger of a possible breach of the screen and the appearance of impropriety are too substantial to permit [the law firm] to continue to represent respondent in the arbitration." *CDM Smith v. Mutual Redevelopment Houses*, 54 Misc. 3d. 1211(A) (Sup. Ct. N.Y. Cty. 2016).

X. COLLECTIVE BARGAINING SETTING

Arbitrator Exceeded Authority in Awarding Tenure. The arbitrator found that the university failed to follow the terms of a collective bargaining agreement in denying an assistant professor tenure. Rather than apply established criteria, the arbitrator found that the university applied new criteria to the professor's detriment. The arbitrator ordered the university to grant tenure to the professor. The lower court vacated the award, and granted the professor an additional year of employment and permission to reapply for tenure. The appellate court ruled that the arbitrator exceeded his authority in requiring the university to grant tenure. The court reasoned that the issue before the arbitrator was whether the appropriate criteria was applied and, if not, to direct that the university review the professor's application anew and apply the correct criteria. *Nash v. Florida Atlantic University Board of Trustees*, 2017 WL 697748 (Fla. App.).

XI. STATE LAWS

Doctor Had Fiduciary Duty Under North Carolina Law to Alert Patient of Arbitration Provision. The patient here signed several forms, including an arbitration agreement, before meeting with the doctor about a hernia operation. The operation went badly and the patient sued. The North Carolina Supreme Court, upholding the lower courts, refused to enforce the arbitration agreement signed by the patient. The Court reasoned that under North Carolina law, the patient and doctor had a fiduciary relationship, even before a doctor-patient relationship was consummated, as reflected in the patient's disclosure of confidential medical information. The record was clear that no one reviewed the arbitration provision or its implications with the patient and that he would not have signed the

agreement if it were optional. Instead, the Court noted that the doctor's office presented the patient "with the arbitration agreement, which, at a minimum, could have been worded more clearly, in a collection of documents, thereby creating the understandable impression that the arbitration agreement was simply another routine document that [the patient] needed to sign in order to become a patient." On this basis, the Court ruled that the breach of fiduciary duty here barred the enforcement of the arbitration agreement. *King v. Bryant*, 2017 WL 382910 (N. C.).

Award Vacated Under Rhode Island Law. A dispute arose between property owners and contractor. The owners invoked the arbitration clause which gave them the discretion to issue a stop order. Ultimately, the contractor terminated the agreement. An arbitration ensued in which the arbitrator faulted both parties and concluded that the best way to bring the "combative, contentious, and dysfunctional relationship" between the parties to an end was to apply a provision that allowed the owners to terminate the agreement for their convenience. The problem is that the owners never invoked that provision and never sought to terminate the relationship. The Rhode Island Supreme Court overturned the lower court and vacated the award. The Court observed that under Rhode Island law an arbitrator may misconstrue an agreement, but may not manifestly disregard or ignore a clear contractual provision. The Court concluded that the arbitrator here exceeded his authority by creating the fiction that the owners terminated the agreement for their convenience. "By employing this contractual provision to resolve the parties' contractual dispute, the arbitrator has interpreted the contract in a manner that fails to draw its essence from the parties' agreement and manifestly disregards a provision of the agreement. Indeed, the arbitrator's interpretation is in direct contravention of the contractual language." The court, applying established Rhode Island law, ruled that an arbitrator's authority is not unfettered and may not reach beyond the terms of the agreement to render a result he or she believes is more desirable. *Nappa Construction Management v. Flynn*, 2017 WL 281812 (R.I.).

Fraud in Inception Claim Precludes Arbitration. A party to a contract invoked the fraud-in-the-inception doctrine under California law. Defendants moved to compel arbitration under the applicable agreement and the district court denied the motion. The Ninth Circuit affirmed. Under the fraud-in-the-inception doctrine, a contract is void if the party resisting arbitration can show that the alleged fraud applied to the inception or execution of the agreement. Under these circumstances, the promisor did not voluntarily assent to the agreement which contained the arbitration clause. In the complaint, the plaintiff alleged that it would not have signed the agreement if it knew that it would be the target of defendants' alleged fraud. The alleged fraud here included the forging of financial documents, the destroying of plaintiff's relationship with its clients and creditors, and the payment of paychecks to a phantom employee. The Ninth Circuit concluded that if these allegations are true then plaintiff's "claim that there was never a meeting of the minds

despite both parties having signed the contract" would be credible. *DKS, Inc. v. Corporate Business Solutions, Inc.*, 2017 WL 167475 (9th Cir.).

Florida Law Did Not Permit Non-Signatory to Compel Arbitration of Unrelated Claim. The Kardashians were sued for trademark infringement relating to a cosmetic line. The Kardashians moved to compel arbitration under an arbitration clause in the plaintiff's disagreement with the developer of the cosmetic line. The 11th Circuit rejected the motion under Florida law. The court noted that under Florida equitable estoppel law a non-signatory may be able to compel arbitration when the signatory must rely on the terms of the agreement with the arbitration clause in bringing their claim against the non-signatory. "What this means is that in order to establish that they are entitled to compel arbitration under Florida's doctrine of equitable estoppel, the Kardashians must show both that [the plaintiff] is relying on the agreement to assert its claims against them and that the scope of the arbitration clause covers the dispute." The court concluded that the arbitration clause did not apply here as it was limited to disputes between the plaintiff and the developer of the cosmetic line. The court observed that to require arbitration here "would be, well, inequitable." As the court reasoned, plaintiff "never consented to arbitrate any disputes between it and the Kardashians or any other non-signatory. All it consented to arbitrate were disputes between it and the other party, which was [the developer of the cosmetics]." *Kroma Makeup EU v. Boldface Licensing & Branding, Inc.*, 845 F. 3d 1351 (11th Cir. 2017). See also *Jones v. Singing River Health Services Foundation*, 2017 WL 65384 (5th Cir. 2017) (under Mississippi law, non-signatory may not compel arbitration where claims against non-signatories are torts unrelated to the agreement with the arbitration provision).

Florida Public Policy Violated by Arbitration Terms Less Favorable Than Statute. The Florida legislature enacted a comprehensive medical malpractice statute that provided for arbitration of malpractice disputes. Plaintiff brought a malpractice action after her baby was delivered stillborn and the hospital and doctor moved to compel arbitration. The arbitration agreement signed by the mother had terms that varied from those set forth in the Florida malpractice statute. For example, the agreement required that the costs of arbitration be shared instead of being born by the hospital and doctor. It also did not insure the selection of independent arbitrators. The court concluded that "arbitration agreements which change the cost, award, and fairness incentives of the [Medical Malpractice Act's] statutory provisions contravene the Legislature's intent and are therefore void as against public policy. If the Legislature had intended for parties to pick and choose which of the [statute's] provisions to include in their arbitration agreements, the [statute's] statutory scheme would be meaningless." *Hernandez v. Crespo*, 2016 WL 7406537 (Fla. 2016), reh'g denied, 2017 WL 786846 (Fla.) (2017).

XII. NEWS AND DEVELOPMENTS

NLRB Office of General Counsel Issues Memorandum Regarding Class Action Waiver.
On Jan. 26, 2017, the Board's Office of General Counsel issued Memorandum DM 17-11 declaring that: "In light of the grant of certiorari and the fact that this significant issue is now before the Supreme Court, the general counsel has re-evaluated his prior position of proceeding on these matters. Thus, in cases alleging that the employer is either maintaining and/or enforcing an agreement prohibited by *Murphy Oil*, Regions, after determining the case has merit, are directed to propose that the parties enter informal settlement agreements conditioned on the agency prevailing before the Supreme Court in *Murphy/Epic/Ernst & Young*." The Board seems confident of the outcome of the pending cases. But, agreements with opt-in/opt-out clauses are not included. As to those agreements, the Memorandum provides: "In situations involving opt-in/opt-out clauses in mandatory arbitration agreements or where it is argued that some other feature of these agreements renders them distinguishable from *Murphy Oil*, Regions are directed to hold such cases in abeyance."

XIII. TABLE OF CASES

Federal Cases