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Feliu Case Summaries:

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Contents

I. JURISDICTIONAL ISSUES: GENERAL

Litigation Stayed Pending Appeal of Denial of Motion to Compel. The Supreme Court, resolving a question that had divided the courts of appeal, ruled that litigation must be stayed pending an interlocutory appeal of the denial of a motion to compel. Prior to this decision, six circuit courts imposed an automatic stay while three left the question to the discretion of the district judge. In an exception to the general rule that appeals may only be taken from a final judgment, the FAA permits immediate interlocutory appeals where a motion to compel is denied. The majority in this five-four decision concluded that while a matter is appealed, as was the case here, the district court is divested of its control over the case. "If the district court could move forward with pre-trial and trial proceedings while the appeal on arbitrability was ongoing, then many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost – even if the court of appeals later concluded that the case actually had belonged in arbitration all along." The majority saw potential coercion if a party that had bargained for arbitration was required to proceed through discovery and trial while awaiting determination of its motion to compel. Further, the majority opined, from "the Judiciary's institutional perspective, moreover, allowing a case to proceed simultaneously in a district court and the court of appeals creates the possibility that the district court will waste scarce judicial resources – which could be devoted to other pressing criminal or civil matters – on a dispute that will ultimately head to arbitration in any event." The majority viewed this as the "worst possible outcome" and concluded that an automatic stay was required while the question of arbitrability was being decided on appeal. *Coin Base, Inc v. Bielski*, 599 U.S. 736 (2023).

RICO May be Invoked to Enforce Foreign Arbitration Award. Smagin, who resides in Russia, obtained an arbitration award of over $84,000,000 against a joint venturer who resides in California. A California district court affirmed the award and post-judgment orders to enforce the award. Smagin brought a civil RICO suit, alleging, with good cause, that the joint venturer was hiding assets to avoid creditors, including Smagin. In particular, the suit alleged that the joint venturer in conjunction with others engaged in a pattern of wire fraud and other predicate racketeering acts, including witness tampering and obstruction of justice. The question for the United States Supreme Court was whether Smagin suffered a "domestic injury" in United States sufficient to invoke RICO. The majority, applying a contextual approach, emphasized that Smagin obtained "a judgment in California because that is where [the joint venturer] lives, and thus where Smagin hoped to collect. The rights that the California judgement provides to Smagin exists only as in California, including the right to obtain post-judgment discovery, the right to seize assets in California, and the right to seek other appropriate relief from the California District Court." The alleged RICO scheme, the majority explained, thwarted and undercut the orders of the California District Court and Smagin's efforts to enforce rights. "On the Court's contextual

approach, those allegations suffice to state a domestic injury in this suit." *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023).

EFAA Applies Even if Claim Not Styled as Sexual Harassment. Plaintiff alleged that she faced sex-based animus from defendant dance company's executive director. This included criticism for bringing her child to work while not criticizing men, including plaintiff's husband, for doing the same and for reaching across her body for a phone while she was pumping milk while at her desk, even though open phones were available elsewhere. Plaintiff's complaint alleged gender, caregiver, and familial status discrimination but did not identify the offensive acts as specifically sexual harassment. The dance company moved to compel arbitration. The question for the court was whether the End Forced Arbitration Act, which bars the arbitration of sexual harassment disputes, applies. The court, applying the lenient standard for stating sexual harassment claims under the New York City Human Rights Law, concluded that it did and denied the motion to compel. The court emphasized that EFAA defines sexual harassment broadly as relating to conduct that, as alleged, constitutes sexual harassment. The court acknowledged that some of the allegations were conclusory and could not be given weight but concluded that other factual allegations plausibly stated unwanted gender-based conduct. *Delo v. Paul Taylor Dance Foundation*, 2023 WL 4883337 (S.D.N.Y.). See also *Watson v Blaze Media,* 2023 WL 5004144 (N.D. Tex.) (EFAA applies to sexual harassment claims which occurred principally prior to statute's effective date, even though statute did not apply retroactively, where certain acts occurred after and sexual harassment claims may be based on cumulative effect of individual acts); *Barnes v. Festival Fun Parks*, 2023 WL 4209745 (W.D. Pa.) (plaintiff's sexual harassment "dispute" arose before the effective date of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act but her "claim" in form of court action was filed after and therefore her claims were subject to enforceable arbitration agreement).

Wage Claims Not Barred by EFAA. The End Forced Arbitration Act prohibits the arbitration of claims related to sex harassment and assault. The question raised here was whether claims of wage and hour violations that apply to all employees working at defendant restaurant are similarly barred if those claims are coupled with a sexual harassment claim. The court ruled that sexual orientation harassment claims brought under the New York State and New York City Human Rights Laws were covered by EFAA and could not be arbitrated. However, the court concluded that plaintiff's wage and hour claims were not covered by EFAA and granted defendant's motion to compel specifically with respect to those claims. The court emphasized that EFAA applies only to claims that "relate to" sexual harassment and sexual assault. The court pointed out that while the sexual orientation discrimination and harassment claims applied specifically to plaintiff, the wage and hour claims apply to all employees working at the restaurant. "Since Plaintiff's wage and hour claims under the FLSA and the [New York Labor Law] do not relate in any way to the sexual

harassment dispute, they must be arbitrated." *Mera v. SA Hospitality Group*, 2023 WL 3791712 (S.D.N.Y.).

Commercial Carrier Does Not Fall Under FAA Transportation Exemption. Amazon contracted with Kirk Delivery to make deliveries on its behalf to online retail customers. Kirk brought claims against Amazon which in turn moved to compel arbitration. The district court granted Amazon's motion. On appeal, Kirk argued that the FAA transportation exemption applied and barred arbitration of its claims against Amazon. The Fourth Circuit rejected Kirk's claim, finding that Kirk's contract with Amazon was not a contract of employment for purposes of the FAA even though it impacted approximately 450 of Kirk's drivers. The court emphasized that the agreement between Amazon and Kirk addressed business services provided by one business to another and "does not promise work and compensation to an individual employee, and it contains none of the hallmarks of a traditional employment contract, such as provisions regarding salary, benefits, and leave time." The court pointed out that the result might have been different if the agreement at issue was with the "roughly 450 delivery drivers, i.e., *workers* performing *work* - but not the Agreement between Kirk Delivery and Amazon." In addition, the court ruled that Kirk was not among the class of workers covered by the FAA. "Sizable corporate entities are not 'similar in nature' to the actual human workers enumerated by the text of the 'transportation worker' exemption, and so the arbitration clause at issue here is once again unaffected by the exemption." The Fourth Circuit therefore affirmed the district court's granting of the motion to compel. *Amos v. Amazon Logistics*, 74 F.4th 591 (4th Cir. 2023). Cf. *Miller v. Amazon.com*, 2023 WL 5665771 (9th Cir.) (delivery drivers making last mile and tip producing deliveries are exempt under the FAA transportation exemption); *Carmona v. Domino's Pizza*, 73 F.4th 1135 (9th Cir. 2023) (following remand from Supreme Court, the Ninth Circuit reaffirms that "last leg" delivery drivers are a class of workers engaged in interstate commerce covered by the FAA transportation exemption which precludes enforcement of arbitration agreement).

Time to Move to Vacate under FAA Subject to Equitable Tolling. Nuvasive moved to vacate an award in its favor which limited the damages it could recover, contending that the award was obtained by fraud. In particular, Nuvasive discovered belatedly in a subsequent litigation that respondent Absolute's owner texted a witness while testifying by video before the arbitration panel and the testimony tracked the tests. Nuvasive's application was beyond the 90-day limit under the FAA for motions to vacate. In a ruling of first impression, the Fourth Circuit ruled that the 90-day filing deadline was not jurisdictional and was subject to equitable tolling in appropriate circumstances. The appeal court agreed with the district court, which had equitably tolled the filing deadline, citing the extraordinary circumstances presented here, and that the witness's testimony comported with the real time texts he was receiving. The court also agreed that Absolute was seeking "to run out the clock" to extend

the time beyond the FAA filing deadline. The court also rejected Absolute's attempt to blame Nuvasive's lawyer's alleged failure to exercise due diligence "which attempts to blame Nuvasive for failing to investigate fraud when there was no reason to suspect fraud." Rather, once Nuvasive's lawyers received the text messages, they promptly moved to vacate. In sum, the court concluded that appropriate circumstances were demonstrated to toll on equitable grounds the time to file Nuvasive's application. *Nuvasive, Inc. v. Absolute Medical*, 71 F. 4th 861 (11th Cir. 2023). See also *Law Finance Group v. Key*, 14 Cal.5th 932 (2023) (deadline for filing petition to vacate under California law subject to equitable tolling principles).

Piggyback Rule Allowing Untimely Discrimination Claims Does Not Apply in Arbitration. A group of former IBM employees failed to file their age discrimination claims in arbitration in a timely fashion, and all those claims were dismissed. These plaintiffs sued, alleging that the arbitration timeliness requirement was unenforceable because it did not incorporate the court-created "piggyback" rule, also known as the single-filing rule, which allows subsequent charging parties before the EEOC to submit otherwise untimely claims by joining a pending related matter that was timely filed. The district court rejected application of the piggyback rule in arbitration, and the Second Circuit affirmed. The court emphasized that the piggyback rule was court-created and is not jurisdictional. Rather, it is an exception to the filing requirements of an administrative agency, here the EEOC. The court added that "in any event, the piggybacking rule is not a substantive right under the ADEA". For these reasons, the court concluded that IBM's timeliness requirements in its dispute resolution process were enforceable, and the district court's dismissal of the action was affirmed. *In re: IBM Arbitration Agreement Litigation*, 76 F.4th 74 (2d Cir. 2023).

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- *Rabinowitz v. Kelman*, 75 F.4th 73 (2d Cir. 2023) (foreign selection clause in arbitration agreement that provides that parties submit themselves to personal jurisdiction to the courts of the states of New Jersey and New York did not strip federal court of personal jurisdiction "over an unconsenting party so long as its contacts with the forum satisfy statutory and constitutional requirements").
- *Terwilliger v. Resource America, Inc.*, 2023 WL 3582342 (S.D.N.Y.) (clock for purposes of FAA three-month deadline for filing motion to vacate runs from the date the award is issued and not the date of service of the petition).
- *Olin Holdings, Ltd. v. State of Libya*, 73 F.4th 92 (2d Cir. 2023) (Libya, by agreeing to bilateral investment treaty under which it assented to submit disputes to International Chamber of Commerce, empowered tribunal to decide questions of arbitrability as ICC Rules provide that such questions are for the arbitration panel to decide).

- *Combs v. Same Day Delivery, Inc.*, 2023 WL 6162196 (S.D.N.Y.) (court has subject matter jurisdiction to resolve motion to vacate arbitration award where court had previously compelled arbitration of that dispute, which had originally been filed with it and dismissed it without prejudice).
- *Wallrich v. Samsung Electronics America, Inc.*, 2023 WL 5934842 (N.D. Ill.) (venue for motion to compel arbitration of suit against smartphone manufacturer appropriate in state where over 35,000 claimants reside as smartphone users are likely to use and buy their phones in home state).
- *Henry v. Wilmington Trust*, 72 F.4th 499 (3d Cir. 2023) (appellate court had jurisdiction under the FAA to review denial of motion which was styled motion to dismiss but substantively was motion to compel).
- *Prospect Funding Holdings v. Palagi*, 76 F.4th 785 (8th Cir. 2023), reh'g denied, 2023 WL 5920138 (September 12, 2023) (district court's order vacating arbitration award is itself vacated with order to dismiss action for lack of jurisdiction as no federal question was presented and diversity of parties is not evidenced in the pleadings).
- *Baker Use Services International v. Joshi Technologies International*, 73 F.4th 1139 (10th Cir. 2023) (failure to comply with procedural requirements of New York Convention did not strip court of subject matter jurisdiction but rather raises question of whether foreign arbitration can be enforced).
- *Branch of Citibank, N.A. v. de Nevares*, 74 F.4th 8 (2d Cir. 2023) (bank branch could not move to compel arbitration and enjoin enforceability of judgment of Argentinian Court ruling against it where under Argentinian law a bank branch has no independent legal standing and suit was brought by branch and not bank itself).
- *JPay, LLC v. Burton Owen*, 2023 WL 5253041 (N.D. Tex.) ("look through" approach permitting a court to consider amount in controversy in underlying dispute is appropriate when compelling arbitration under the FAA but not where, as here, the moving party is seeking to stay arbitration proceedings).
- *Green Enterprises v. Hiscox Syndicates*, 68 F. 4th 662 (1st Cir. 2023) (Puerto Rican law prohibiting insurance provisions did not deprive insured of court access and is preempted by the New York Convention which is a treaty and self-executing and obligates signatory nations to enforce agreements to submit disputes to foreign arbitration).
- *Amberson v. Argyle*, 73 F. 4th 348 (5th Cir. 2023) (collateral estoppel applies to 53-page single-spaced award despite representation in award that it was merely a "reasoned award" and not "formal findings of fact and law").
- *Telecom Business Solution v. Terra Towers Corp.*, 2023 WL 5748199 (S.D.N.Y.) (anti-suit injunction issued to terminate arbitrations brought in Peru and Guatemala as real parties-in-interest were already arbitrating dispute in New York).

- *AJZ's Hauling v. Trunorth Warranty Programs*, 2023 WL 5728973 (Ohio) (trial court order compelling arbitration given issue preclusion effect, even if not appealed, where same two parties and contract with arbitration provision at issue).
- *Thumbs Up Race Six v. Independent Specialty Insurance Co.*, 2023 WL 4235565 (E.D. La.) (arbitration under New York Convention compelled against foreign and domestic insurers even though domestic insurers had a higher percentage of participation in the policy and Louisiana's reverse-preemption law preempts the New York Convention).
- *Kilpatrick v. Lansing Community College*, 2023 WL 5417963 (Mich. App.) (Michigan's Department of Labor had exclusive jurisdiction over statutory wage claims and therefore arbitrator lacked jurisdiction to hear and decide those claims).
- *Hodges v. Walinga USA, Inc.*, 532 P. 3d 440 (Kan.) (plaintiff who prevailed in arbitration against one set of tortfeasors may proceed with court action against second set of tortfeasors despite Kansas law rules against splitting causes of action as the confirmation of an arbitration award "does not constitute an independent judicial proceeding establishing liability of the parties or comparative fault").

II. JURISDICTIONAL CHALLENGES: DELEGATION, ESTOPPEL, AND WAIVER ISSUES

No Clear and Unmistakable Agreement when Delegation is Ambiguous. Company's Terms of Service ("TOS") contains a delegation clause providing that the arbitrator "shall have exclusive authority to resolve all disputes" relating to the "enforceability . . . of these Terms," including "any claim that all or any part of these Terms are void or voidable." But another provision contemplates that "a court" may decide the enforceability of the subsection of the arbitration provision that requires arbitration to "be conducted only on an individual basis and not in a class, representative or private attorney general action." The appellate court observed that "where one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that [a] *court* might also find provisions in the contract unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator." Finding that the agreement here "points in two directions," it creates uncertainty concerning "whether a court or an arbitrator is to decide the enforceability of the agreement to arbitrate." Accordingly, the court concluded, "because of this uncertainty, we cannot conclude the parties clearly and unmistakably delegated to the arbitrator exclusive authority to decide whether the arbitration provision is valid." *Jack v. Ring LLC*, 91 Cal. App.5th 1186 (2023), review denied (September 13, 2023). See also *Burnett v. National Association of Realtors*, 75 F.4th 975 (8th Cir. 2023) (narrow, party-specific language did not constitute clear and unmistakable delegation to arbitrator of threshold question whether non-party franchiser was third-party beneficiary to agreement with arbitration provision between homebuyer

and national real estate broker). But see *TotalEnergies E&P USA v. MP Gulf of Mexico*, 667 S.W. 3d 694 (Tex.), reh'g denied (June 9, 2023) (question whether dispute fell within two agreements between the parties with arbitration provisions of different scope is for arbitrator to decide where clear and unmistakable delegation provision present and otherwise delegation would be rendered "essentially meaningless" if "the court first determines that the claim is subject" to arbitration).

Waiver Found by Failure to Move to Compel Before Class Certified. Plaintiffs brought a wage and hour class action under Washington State law. Certain of the putative class members were subject to arbitration agreements. The district court granted provisional class certification and various questions were certified and resolved by the Washington Supreme Court. A class of 5,771 members were identified at which time the employer moved to compel individual arbitrations for 2,927 of the class members. The district court denied the motion and the Ninth Circuit affirmed. The court rejected the employer's argument that it could not move to compel before the individual class members were identified. The court emphasized that waiver is a "unilateral concept" and looks only to the employer's actions and "does not reach out to affect the rights of as then-unnamed class members and does not depend upon when the law requires or authorizes such a right to be asserted." The court observed that waiver does not necessarily require that a party expressly reject arbitration. "Thus, under our implicit waiver analysis, we are tasked with evaluating a party's actions and asking whether those actions, even if seemingly commonplace and not an express disavowal of arbitral forums, evinced the party's partiality for a judicial resolution of the claims." Here, the court concluded that the employer made the "tactical choice to resolve the claims judicially" and chose to pursue arbitration only when "its judicial strategy failed." By way of example, the employer earlier moved to compel arbitration under a plan that barred group arbitration claims and only moved to compel under a plan that lacked a class waiver after its merits-based challenge failed and class members were identified. The court made clear that it was not requiring that a motion to compel necessarily be made before class certification but rather only that the party seeking arbitration "set the record straight by dispelling the notion that it was waiving its rights" under any applicable arbitration agreement. *Hill v. Xerox Business Services*, 59 F. 4th 457 (9th Cir. 2023). Cf. *Kashkeesh v. Microsoft Corp.*, 2023 WL 4181226 (N.D. Ill.) (no implicit waiver of right to arbitrate where company's "lack of diligence, removal, and (limited) participation in litigation" is outweighed by its prompt invocation of right to arbitrate after confirmation of its availability); *Shake Out, LLC v. Clearwater Construction*, 2023 WL 5808580 (Idaho) (participation in initial discovery and the stipulation of a scheduling order does not constitute waiver of the right to arbitrate where party seeking arbitration continually expressed interest in arbitrating the dispute).

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- *JMA Painters v. McDonnel Group*, 2023 WL 4530114 (La. App.) (party waives objection to timely issuance of arbitration award under Louisiana law by failing to object to the delay of its issuance and only objecting after the award is issued).
- *Wallrich v. Samsung Electronics America, Inc.*, 2023 WL 5934842 (N.D. Ill.) (failure by plaintiffs in mass arbitration to advance fees owed by employer does not constitute waiver of right to compel employer to comply with arbitration agreement).
- *Holly-Gallegly v. TA Operating, LLC*, 2023 WL 4674374 (9th Cir.) (unenforceable pre-dispute jury trial waiver did not negate valid delegation clause empowering arbitrator to decide questions of arbitrability as jury trial waiver rules applied if agreement were found by arbitrator to be unenforceable).
- *Sanders v. Savannah Highway Automotive Co.*, 2023 WL 4752347 (S. Car.), reh'g denied (September 27, 2023) (question whether arbitration agreement was enforceable after assignment of the agreement was for arbitrator to decide as challenge was to the agreement as a whole rather than to the arbitration provision specifically).
- *Sauer Brands v. Polytrade International*, 2023 WL 4938074 (E.D. Va.) (e-mail stating that industry standard terms apply including arbitration requirement does not constitute clear and unmistakable delegation of arbitrability questions to arbitrator).
- *Morningstar v. Amazon.com*, 2023 WL 4380047 (S.D. Miss.) (claim that agreement containing arbitration clause was induced by fraud for arbitrator to decide as no claim made that plaintiff was fraudulently induced to sign arbitration provision itself).
- *Mousebelt Labs PTE. Ltd. v. Armstrong*, 2023 WL 3735997 (N.D. Cal.) (waiver claim rejected as executive who signed arbitration agreement did not disclose agreement because it was confidential and once produced in discovery promptly acted to compel arbitration).
- *Mrinalini, Inc. v. Valentino S.P.A.*, 2023 WL 3847292 (S.D.N.Y.) (arbitrator's ruling following referral of matter based on delegation provision in arbitration agreement did not constitute "new evidence" warranting court to reconsider earlier ruling).
- *Fujitsu Semiconductor, Ltd. v. Cypress Semiconductor Corp.*, 2023 WL 3852701 (N.D. Cal.) (incorporation of the Commercial Arbitration Rules of the Japanese Commercial Arbitration Association constitutes clear and unmistakable evidence of delegation of arbitrability issues to the arbitrator).
- *Wallrich v. Samsung Electronics America, Inc.*, 2023 WL 5934842 (N.D. Ill.) (question whether 50,000 complaints are within scope of arbitration agreement is for arbitrator to decide where applicable AAA rules clearly and unmistakably delegate arbitrability to arbitrator).

- *Hooper v. Jerry Insurance Agency*, 2023 WL 3992130 (N.D. Cal.) (incorporation of AAA Rules by themselves insufficient to constitute delegation of arbitrability questions to arbitrator where plaintiff was unsophisticated consumer).
- *Seifert v. United Built Homes*, 2023 WL 4826206 (N.D. Tex.) (unconscionability claims for arbitrator to decide where parties incorporated AAA's Home Construction Arbitration Rules which provide that arbitrability questions are for arbitrator to address).
- *Fong v. U.S. Bancorp.*, 2023 WL 5311229 (E.D. Cal.) (advising plaintiff to seek court subpoena to obtain video relevant to dispute between bank and customer did not constitute waiver of bank's right to arbitrate).
- *Stiffler v. Hydroblend, Inc.*, 2023 WL 5809721 (Idaho) (answering complaint and filing summary judgment motion on single claim not subject to arbitration did not constitute waiver of arbitration as moving party never sought judicial relief on arbitrable claims).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Unconscionability Standard under Georgia Law Not Met. Plaintiff filed a race discrimination action in court despite being informed that he had agreed to arbitrate disputes with his employer. Plaintiff countered that the arbitration agreement was unconscionable for, among other reasons, that he might bear substantial arbitration costs in the event he did not prevail. The district court rejected plaintiff's arguments and compelled arbitration. The Eleventh Circuit affirmed. The court emphasized that to successfully challenge arbitration as being prohibitively expensive, the party making that challenge must "demonstrate that they are *likely* to bear prohibitive costs (i.e., that their costs are not merely speculative)." The court noted that the arbitration agreement here provided that the employer advance the costs of arbitration and plaintiff would only be responsible if he did not prevail. Since plaintiff could prevail, the court concluded that he had failed to carry his burden of demonstrating that he was likely to incur prohibitive expenses. The court explained that "appellant conflates the likelihood that there will be arbitration costs (not a factor under our precedent) with the likelihood that *he will incur those costs* (the touchstone of our analysis)." *Payne v. Savanna College of Art and Design*, 81 F.4th 1187 (11th Cir. 2023). See also *Faith v. Khosrowshahi*, 2023 WL 5278126 (E.D.N.Y.) (substantive unconscionability claim rejected where plaintiff merely points to arbitration's anticipated expenses without making affirmative showing of his inability to pay those expenses).

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- *Payne v. Savanna College of Art and Design*, 81 F.4th 1187 (11th Cir. 2023) (no authority cited that arbitration selection process was substantively unconscionable in this race discrimination case even if the questionable contention that the pool of arbitrators was limited to two white men was true).
- *Netzel v. American Express Co.*, 2023 WL 4959587 (D. Ariz.) (claim of procedural unconscionability rejected where offer letter made clear that applicant was subject to arbitration policy and even if "arbitration agreement was layered into a stack of onboarding documents, [plaintiffs'] had prior notice that their employment was conditional on their assent to the arbitration agreement").
- *Schnellecke Logistics v. Lucid USA*, 2023 WL 5432321 (D. Ariz.) (various limitations on damages in contract between manufacturer and third-party logistics company did not shock the conscience and is therefore not substantively unconscionable).
- *Mart v. Great Southern Homes*, 2023 WL 5944268 (S. Car. App.) (motion to compel granted where unconscionable terms were not in the applicable arbitration provision in sales agreement but in separate warranty document).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Non-Signatory Cannot Enforce Arbitration Provision in Vehicle Sales Contract. The central issue on appeal of the denial of Ford's motion to compel arbitration was "whether Ford as the manufacturer of the vehicle can enforce an arbitration provision in the sales contract between [plaintiffs] and AutoNation to which Ford was not a party under the doctrine of equitable estoppel or as a third-party beneficiary of the contract." Noting that California courts in the Third and Eighth District Courts of Appeal disagreed on the application of equitable estoppel and came to contrary conclusions on Ford's ability to enforce arbitration provisions in similar sales contracts, the Second District Court of Appeal disagreed with the Third District's decision in *Felisilda v. FCA US LLC*, 53 Cal. App.5th 486 (2020) and instead adopted the reasoning of the Eighth District's decision in *Ford Motor Warranty Cases*, 89 Cal. App.5th 1324 (2023) in determining that "[plaintiff's] claims against Ford are founded on Ford's express warranty for the vehicle, not any obligation imposed on Ford by the sales contract". As such, "[plaintiff's] claims are not inextricably intertwined with any obligations under the sales contract" and equitable estoppel does not apply. In addition, the court found that the sales contract between plaintiffs and AutoNation was not intended to benefit Ford and therefore Ford could not enforce the arbitration provision as a third-party beneficiary. *Montemayor v. Ford Motor Company*, 92 Cal. App.5th 958 (2023). See also *Kielar v. Superior Court of Placer County*, 94 Cal. App.5th 614 (2023), review filed (September 21, 2023) (non-signatory car manufacturer could not invoke arbitration

provision in sales agreement between car purchaser and dealership as plaintiff's claims against manufacturer were not intertwined with underlying sales agreement with dealer).

Non-Signatory Can Enforce Arbitration Agreements as Third-Party Beneficiary. Uber drivers sued Microsoft for privacy violations relating to the use of facial recognition software. Microsoft moved to compel to enforce the arbitration clause contained in an agreement between Uber and its drivers. In doing so, the court noted that, under Illinois law, in order to confer contractual benefits on a noncontracting third party "the contract must have been made for the direct benefit of the third party, an intention which 'must be shown by an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the third party belongs.'" The contract between Uber and its drivers included a provision requiring them to arbitrate "any dispute between themselves and 'any entity [other than Uber] . . . arising out of or related to your application for and use of an account to use [Uber's] Platform and Driver App as a driver.'" While this provision did not specifically mention Microsoft, the court found that it sufficiently described a class to which Microsoft belonged because it is "an entity" with whom the drivers are engaged in a dispute "arising out of or related to [their] application for and use of an account to use [Uber's] Platform and Driver App as a driver." *Kashkeesh v. Microsoft Corp.*, 2023 WL 4181226 (N.D. Ill.). Cf. *Rogers v. Tug Hill Operating*, 76 F.4th 279 (4th Cir. 2023) (drilling company is not third-party beneficiary of agreement containing arbitration provision between staffing company and rig worker and therefore may not compel the arbitration of wage and hour action brought against it, and not staffing company, by rig worker); *Burnett v. National Association of Realtors*, 75 F.4th 975 (8th Cir. 2023) (non-party real estate brokers not third-party beneficiaries under Missouri law where underlying agreement used narrow, party-specific language to define contractual parties and non-party had no contact with plaintiff home purchasers); *Fairfield v. DCD Automotive Holdings*, 2023 WL 4186191 (D. Mass.) (non-signatory holding company which owns and operates signatory car dealership can enforce delegation clause in plaintiff's car purchase agreements with dealership and compel arbitration of claims against it); *Barnes v. Festival Fun Parks*, 2023 WL 4209745 (W.D. Pa.) (plaintiff's unsupported claim that she had no recollection of ever seeing arbitration agreement which she did not sign but electronically dated "are naked assertions insufficient to place in issue the question of assent" to terms of arbitration agreement for purposes of summary judgment).

Trial is Necessary to Resolve Conflicting Testimony about Existence of Arbitration Agreement. Papa John's and its employee's conflicting testimony concerning whether the Employee signed an arbitration agreement was enough to create a genuine issue of material fact requiring a trial to determine whether the agreement existed. In support of its motion to compel arbitration, Papa John's submitted a declaration signed by its "Senior Director of People Services" stating that all new Papa John's employees are required to sign

an arbitration agreement as a condition of employment. The declaration also described the multi-step process employees must follow to electronically sign their onboarding documents and provided that the arbitration agreement at issue bears the employee's unique User ID and was signed in October 2019. The employee, however, submitted his own declaration stating he "had never seen" the agreement, "had never heard about it," and that his login credentials "were clearly made up of demographic information" available from his application. The employee's declaration also stated that he had seen his manager login on behalf of himself and other employees "to complete training materials" for them. The Sixth Circuit found this conflicting testimony sufficient to create a genuine issue of material fact as to whether the employee signed the agreement. As such, the district court's order directing the parties to arbitrate was reversed and the matter was remanded for proceedings consistent with the appellate court's opinion. *Bazemore v. Papa John's U.S.A., Inc.*, 74 F.4th 795 (6th Cir. 2023). Cf. *Barrows v. Brinker Restaurant Corp.*, 2023 WL 4744788 (N.D.N.Y.) (motion to compel granted after trial on issue of whether plaintiff electronically signed arbitration agreement, as court found credible the restaurant general manager's testimony that he did not complete plaintiff's on-boarding paperwork nor did he order anyone else to do so and that he did not have access to employee's passwords); *Kass v. PayPal*, 75 F.4th 693 (7th Cir. 2023) (account holder's bare assertion that she did not receive e-mail containing amended user agreement which included an arbitration provision rebutted presumption that e-mail was received and therefore must be resolved by the trier of fact); *Faith v. Khosrowshahi*, 2023 WL 5278126 (E.D.N.Y.) ("unsworn statements and unsubstantiated allegations" insufficient to overcome employer's evidence that plaintiff agreed to arbitration provision); *Netzel v. American Express Co.*, 2023 WL 4959587 (D. Ariz.) (HR employee's declaration that she was familiar with employer's record-keeping and onboarding process combined with presumption that notice was received where communication was properly addressed is sufficient to defeat plaintiff's mere denial of receiving notice of arbitration agreement).

Meeting of Minds Lacking for Settlement Purposes in E-Mail Exchange. The party in the Surrogate's Court proceeding reached a tentative settlement in a court-ordered mediation. Petitioner sent an e-mail "to follow up [on] the settlement reached at mediation", noting the settlement amount of $515,000, and outlining the settlement terms as well as promising to prepare a draft settlement agreement. Respondent answered by asking that the "timing of payment" be left open. A week later petitioner's counsel forwarded the draft settlement agreement to which respondent's counsel replied that the client could not settle on the proposed terms because it would have enormous tax consequences for her. Petitioner moved to enforce the settlement terms, but the court rejected the application. The court emphasized that to be enforceable, a stipulation of settlement of a pending litigation must include a written agreement subscribed to by the parties. The court explained that to the extent that petitioner "asserts that the initial e-mail

set out an overview of the material terms to which the parties agreed during the ADR session, we note that such verbal out-of-court agreements are insufficient to form the basis for a stipulation of settlement." The court made clear that silence did not necessarily constitute assent. "Indeed, the record is devoid of any indication that the wife's counsel assented to the terms outlined in the initial e-mail or in the subsequent draft settlement agreement." As there was no meeting of the minds the court concluded no settlement had been reached by the parties. *In the Matter of Estate of James Eckert*, 217 A.D.3d 1151 (N.Y. App. Div. 2023).

Email Notice about Updated Subscriber Agreement Sufficient to Constitute Inquiry Notice. The Disney webpage was found to have failed to provide consumers reasonably conspicuous notice of Disney's Subscriber Agreement (and the arbitration provision contained therein). Nonetheless, the subsequent emails that Disney sent to the plaintiff about its *updated* Subscriber Agreement were ruled sufficient to establish inquiry notice. The California district court analyzed the email notice under the "conventional inquiry notice" test articulated by the Ninth Circuit in *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (2022): "(1) does the email provide reasonably conspicuous notice of the terms to which the user will be bound; and (2) does the consumer take some action . . . that unambiguously manifests his or her assent to those terms." The court found that both elements of the test were met here. First, the emails gave the consumer reasonably conspicuous notice of the Subscriber Agreement. Among other things, the subject line provided "We're updating our Subscriber Agreement;" and the email began with a large header repeating that message: "WE'RE UPDATING OUR SUBSCRIBER AGREEMENT." The email also contained a hyperlink to the updated agreement and "encouraged [the consumer] to review the updated Subscriber Agreement in full and save a copy for [his] files." Finally, the email "took the time to call out specific changes of note to the Subscriber Agreement – only four total – and one of those was an *express update to the arbitration agreement*." The court then found that the consumer's continued use of Disney's service after receiving notice of the changes being made to the Subscriber Agreement was sufficient to establish that "[the consumer] unambiguously manifested assent to the terms of the Subscriber Agreement." The court concluded that "[the consumer] did enter into the Subscription Agreement with Disney, and that agreement included an arbitration provision." *Sadlock v. Walt Disney Company*, 2023 WL 4869245 (N.D. Cal.). See also *Graham v. Bloomberg*, 2023 WL 6037974 (S.D.N.Y.) (online customer put on "inquiry notice" where, as here, the "language alerting a user to the Arbitration Agreement is a clear prompt to read the terms and conditions and signals to a user that purchase will bind them to those terms"); *Lojewskia v. Group Solar USA*, 2023 WL 5301423 (S.D.N.Y.) (consumer was on "inquiry notice" where she signed agreement with arbitration provision on iPad using Docusign website in presence of salesperson.); *Graham v. Bloomberg*, 2023 WL 6037974 (S.D.N.Y.) (online customer put on "inquiry notice" where, as here, the "language alerting a

user to the Arbitration Agreement is a clear prompt to read the terms and conditions and signals to a user that purchase will bind them to those terms"); *Platt v. Sodexo*, 2023 WL 4832660 (C.D. Cal.) (e-mail which notified healthcare plan participants that plan had been updated but failed to note mandatory arbitration of claims provision in the update did not put plan participants on notice and therefore motion to compel denied).

Pennsylvania Raises the Standard for Enforcement of Browse-Wrap Agreement. Noting that the constitutional right to a jury trial in Pennsylvania "should be afforded the greatest protection under the courts of this Commonwealth," a Pennsylvania appellate court held that the mandatory arbitration provision contained in the "terms and conditions" of Uber's browse-wrap agreement did not clearly inform consumers they were waiving their constitutional right to a jury trial and therefore no valid agreement to arbitrate was formed. In so holding, the court expressly found the widely followed "Berman standard," articulated by the Ninth Circuit in *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (2022), "is insufficient under Pennsylvania law, and a stricter burden of proof is necessary to demonstrate a party's unambiguous manifestation of assent to arbitration." Thus, the court pronounced that when a website operator seeks to enforce a browse-wrap agreement in Pennsylvania it must establish unambiguous manifestation of assent to arbitration by "(1) explicitly stating on the registration websites and application screens that a consumer is waiving a right to a jury trial when they agree to the company's 'terms and conditions,' and the registration process cannot be completed until the consumer is fully informed of that waiver; and (2) when the agreements are available for viewing after a user has clicked on the hyperlink, the waiver should not be hidden in the 'terms and conditions' provision but should appear at the top of the first page in bold, capitalized text." Uber's browse-wrap agreement failed to meet these requirements because the consumers "did not click on or access the terms and conditions before their registration process was completed" and "were not informed in an explicit and upfront manner that they were giving up a constitutional right to seek damages through a jury trial proceeding." As such, no valid agreement to arbitrate was formed and the trial court's order granting Uber's motion to compel arbitration was reversed. *Chilutti v. Uber Technologies, Inc.*, 300 A.3d 430 (Pa. Super. Ct. 2023).

Ticket Purchaser's Consent to Arbitrate Binds Companion. Plaintiff's nephew purchased the tickets he and plaintiff used to attend a WWE event. There is no evidence plaintiff viewed or had physical possession of his ticket. Nevertheless, in granting WWE's motion to compel arbitration, a Texas district court found that while "it is true that in most contexts, arbitration agreements rarely bind non-signatories, . . . it is well established that [a ticket user] has accepted a ticket and received notice of its contents even though a companion receives and holds the [user's] ticket." As such, the court held that plaintiff's nephew "acted as [plaintiff's] agent in acquiring the ticket to WrestleMania, and by attending the event

using the ticket, [plaintiff] is legally chargeable with notice of the Arbitration Agreement." *Jackson v. World Wrestling Entertainment, Inc.*, 2023 WL 3326115 (N.D. Tex.).

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- *Racioppi v. AirBnB, Inc.*, 2023 WL 4552596 (N.J. App.) (customer of AirBnB had proper notice of arbitration provision where online signup screen required no scrolling, clearly stated that by signing up the customer was agreeing to the terms of service which included arbitration agreement, and red hyperlinks to the terms of service were immediately below the disclosure).
- *Hooper v. Jerry Insurance Agency*, 2023 WL 3992130 (N.D. Cal.) (on-line terms of use "in bright pink font in contrast to the surrounding gray font" is sufficient to set hyperlink apart from rest of text and therefore constituted reasonably sufficient notice of arbitration).
- *Shepherd v. Belkin International*, 2023 WL 4745681 (E.D.N.Y.) (on-line license terms "could hardly be more conspicuous" and if consumer did not see the agreement "then he made a conscious choice not to see it" and therefore arbitration provision is ruled binding on the consumer).
- *Stephenson v. Rackspace Technology*, 2023 WL 3551016 (W.D. Tex.) (consumers are bound by arbitration provision inserted into online Master Service Agreement where Agreement expressly provided that user would be bound by subsequent modifications and those modifications were not retroactive as consumers continued to use service after arbitration requirement instituted).
- *Travelers Indemnity Co. v. Ebner Industrieoffenbau GMBW*, 2023 WL 3615241 (D. N.J.) (both contract and tort claims based on alleged negligence in performing agreement are encompassed by broad arbitration clause which applies to any claim arising out of or relating to the agreement with the arbitration provision).
- *Faes & Co. v. Blockware Solutions, LLC*, 2023 WL 3737801 (N.D. Ill.) (silence reasonably construed as acceptance of agreement with arbitration provision where party had opportunity to reject the agreement, discussed it with the other side, and continued to use the services provided).
- *Stiffler v. Hydroblend, Inc.*, 2023 WL 5809721 (Idaho) (subsequent employment agreement with arbitration provision expressly succeeded prior agreement and dispute over differing severance pay provisions in two agreements is subject to arbitration as dispute arose when arbitration provision was in effect).
- *El Jen Medical Hospital v. Tyler*, 2023 WL 6167077 (Nev.) (statutory heirs under Nevada wrongful death statute not bound by arbitration agreement signed by wife of decedent nursing home resident).
- *H&T Fair Hills v. Alliance Pipeline*, 76 F.4th 1093(8th Cir. 2023) (motion to compel granted with respect to issues not expressly provided for in arbitration agreement

but which are "integral to the issues subject to arbitration", otherwise court would be deciding merits of claims intended for arbitrator to decide).

- *Bailey v. Mercury Financial*, 2023 WL 6244591 (D. Md.) (an arbitration provision in a credit loan agreement lacks consideration where "Agreement's change-in-terms provision allows for unilateral modification without notice, thus providing no consideration to support a legally enforceable arbitration agreement").
- *Naizgi v. HSS, Inc.*, 2023 WL 4933183 (D. Colo.) (arbitration compelled where obligation to arbitrate was mutual, even if process for employer to initiate arbitration differs from that applicable to employee).
- *Faith v. Khosrowshahi*, 2023 WL 5278126 (E.D.N.Y.) (claim that plaintiff opted out of 2019 arbitration agreement irrelevant to whether he agreed to 2020 arbitration agreement which was the operative agreement).
- *Barnes v. Festival Fun Parks*, 2023 WL 4209745 (W.D. Pa.) (while opportunity to review arbitration agreement with counsel "may lessen the inequality of bargaining power between employers and employees, a lack of opportunity to review an arbitration agreement with counsel does not render such an agreement *per se* procedurally unconscionable").
- *Calicdan v. MD Nigeria, LLC*, 2023 WL 3946400 (5th Cir.) (document which included arbitration requirement was properly incorporated into seafarer's agreement even though it was not attached to the agreement or signed, and therefore arbitration of employment dispute is compelled).
- *Faes & Co. v. Blockware Solutions, LLC*, 2023 WL 3737801 (N.D. Ill.) (arbitration agreement deemed accepted where terms of services provided, plaintiff questioned two clauses in the agreement, and plaintiff performed under the terms of the agreement).
- *Shepherd v. Belkin International*, 2023 WL 4745681 (E.D.N.Y.) (retailer may invoke arbitration clause between manufacturer and consumer where consumer's claims are not merely intertwined but are identical against both the manufacturer and retailer).
- *Perez v. Discover Bank*, 74 F.4th 1003 (9th Cir. 2023) (arbitration provision which applied to disputes arising out of student loan agreement did not govern discrimination claim related to consolidation agreement entered into eight years later).
- *Maldonado v. National Football League*, 2023 WL 4580417 (S.D.N.Y.) (popup virtual keyboard on a mobile device did not obscure terms of service sufficiently so to support finding that purchaser of merchandise online lacked notice of obligation to arbitrate disputes).
- *American Paint Building v. Independent Specialty Insurance Co.*, 2023 WL 5608012 (E.D. La.) (carve out for punitive damages in arbitration provision in insurance

agreement did not serve to bar the arbitration of a bad faith claim against the insurance company).

- *Grayson v. BMW of North America*, 2023 WL 4864311 (D.N.J.) (BMW arbitration provision in subscriber agreement cannot be said with positive assurance to provide for arbitration of disputes regarding equipment connected to internet which became defunct and not functional).
- *United States v. Water Quality Insurance Syndicate*, 2023 WL 5625488 (M.D. Fla.) (non-signatory bound under federal maritime law to arbitrate dispute where it seeks direct benefits under insurance agreement with arbitration provision).
- *Sapp v. Industrial Action Services*, 75 F. 4th 205 (3d Cir. 2023) (provision in purchase agreement relating to sale of business requiring disputes to be resolved by independent accounting firm constituted agreement for expert determination rather than to arbitrate as issues for the accounting firm were narrowly defined and no arbitration procedural rules were referenced).
- *Clanton v. Oak Brook Healthcare Centre*, 2023 IL 129067 (S. Ct.) (nursing home cannot compel arbitration of wrongful death claim where agreement provided that it would terminate immediately upon resident's death).

V. CHALLENGES TO ARBITRATOR OR FORUM

Claim of Prohibitive Cost of Arbitration Not Ripe. The general manager of a car dealership sued his employer for discrimination and the employer moved to compel arbitration. The general manager challenged the arbitration agreement, which was silent on the allocation of costs, on unconscionability grounds. In particular, he alleged that the costs of arbitration were excessive and would likely preclude him from effectively vindicating his statutory rights. The trial and appellate courts denied the motion to compel, but the Texas Supreme Court reversed. The Supreme Court explained that a party challenging arbitration on excessive cost grounds must present "some evidence" that the costs likely incurred would deter enforcement of statutory rights. Evidence of a risk that such costs would likely be incurred is not enough; rather, specific evidence that those excessive costs will actually be incurred must be demonstrated. The general manager presented evidence that in an unrelated case the AAA charged a party in a discrimination case over $34,000. The Court noted, however, that the AAA's Employment Rules generally require employers to pay all but filing fee costs and found that the general manager offered only vague and conclusory statements regarding his ability to pay anticipated arbitration costs. The Court reasoned that the general manager "cannot leverage the contractual silence about who would pay to summarily avoid the arbitration agreement he made." In sum, the Court concluded that it was "premature" to assess unconscionability claims and added that upon remand " perhaps [the employer] will decide to pay for the arbitration itself, thus eliminating any dispute

about payment terms and, in turn, foreclosing unconscionability as a ground for avoiding arbitration." *Houston ANUSA v. Shattenkirk*, 669 S.W.3d 392 (Tex. 2023).

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- *Flora v. Prisma Labs*, 2023 WL 5061955 (N.D. Cal.) (forum selection clause in arbitration agreement which would require Illinois consumer to arbitrate in California violates JAMS minimum due process standards and is severable).
- *Cvejic v. Skyview Capital, LLC*, 92 Cal. App.5th 1073 (2023) (trial court, not arbitrator, decides whether employer complied with California law requiring timely payment of arbitration fees and dispute was properly removed from arbitration here where employer failed to make scheduled payment).
- *Doe v. Superior Court of San Francisco*, 95 Cal. App.5th 346 (2023), as modified (September 28, 2023) (employer failed to make timely payment of requisite arbitration fees even though check was mailed in a timely fashion but not received by the AAA on the date it was due and therefore right to arbitrate was waived).
- *Stephenson v. Rackspace Technology*, 2023 WL 3551016 (W.D. Tex.) (claim that arbitration would be prohibitively expensive rejected where AAA filing fee for individual claim is $200 and applicable court filing fee is $402).

VI. CLASS, COLLECTIVE, MASS FILINGS, AND REPRESENTATIVE ACTIONS

New Era ADR Mass Arbitration Process Ruled Unconscionable. In the midst of an antitrust class action Live Nation sought to impose retroactively standardized proceedings for the administration of mass arbitrations under the rules promulgated by a new ADR provider, New Era ADR. New Era ADR's Rules ("Rules") were challenged in California district court and found to be procedurally and substantively unconscionable. The court held that plaintiffs had established procedural unconscionability as the rules were unilaterally imposed in the midst of ongoing litigation and purported to apply retroactively. The court concluded that the Rules were also substantively unconscionable in numerous ways. The court focused on due process concerns which posed the risk of being "fundamentally unfair to claimants." The court found the bellwether process adopted by the Rules to be "uniquely problematic" as bellwether rulings could be applied to thousands of claims with few procedural safeguards. "[F]or instance, the Rules do not provide notice to interested parties (the arbitrations are private) or an opportunity for them to be heard. There is no process for appointing leadership or impartial making determinations as to adequacy of counsel. And critically, there is no opportunity for claimants to opt out, as is required for class actions maintained" under the Federal Rules of Civil Procedure. Further, no formal discovery was provided for, and a claimant would have to upgrade to "standard arbitration", only with the consent of defendant, and pay a fee to obtain discovery. The court also rejected the Rules

as violating California's Arbitrator Disqualification Rules by limiting plaintiffs' ability to disqualify an arbitrator, a non-waivable right under California law. As unconscionability permeated the Rules, the court declined to sever the offending provisions and denied defendant's motion to compel. *Heckman v. Live Nation Entertainment*, 2023 WL 5505999 (C.D. Cal.).

Employer Ordered to Pay Fees in Mass Arbitration. A class action was brought by 50,000 smartphone purchasers against Samsung. The AAA billed Samsung $4.125 million in filing fees which Samsung refused to pay. The question for the court was whether Samsung's failure to pay the fees constituted a breach of its own arbitration agreement. The district court ruled that it was and ordered Samsung to pay the filing fees. The court rejected Samsung's position that while declining to pay the requisite fees it nonetheless stood ready to arbitrate, which the court characterized as "contradictory." The court was not persuaded by Samsung's argument that since the applicable AAA Consumer Rules allowed for the plaintiffs to advance the fees, its position was tenable. The court observed that a "rule's mere anticipation of violations thereof does not render violations permissible." The court concluded that plaintiff's "refusal to meet Samsung's financial obligations does not constitute a waiver to compel arbitration." The court ordered Samsung to pay the outstanding fees. In doing so, the court noted that "commonsensically" the AAA can require payment for its services and to "expect it to perform its arbitral services without payment places undue burden on a non-breaching party, either the AAA or the claimants, to front the costs." The court also rejected the contention that the fee question was merely procedural as "fees are bound up in the right to arbitrate that the ADR tribunal governs" which the court noted that it could not "jigger." The court concluded that Samsung was hoisted "with its own petard" and "for better or for worse, the time calls for Samsung to pay for "its business decision to waive class actions in favor of individual arbitrations." *Wallrich v. Samsung Electronics America, Inc.*, 2023 WL 5934842 (N.D. Ill.).

Class Action Waiver Barred by ERISA. Plaintiff brought a class action alleging that his employer breached its fiduciary duty under ERISA to the participants in an employee stock ownership plan. The employer sought to dismiss the claim based on an arbitration provision that barred class claims. The district court denied the motion and the Third Circuit affirmed. The court pointed out that the class action waiver purports to waive plan participants' rights to seek remedies authorized by ERISA. "Such relief necessarily has plan-wide effect: it is impossible for a court or arbitrator to order a plan's fiduciary removed only for the litigant, while leaving the plan's fiduciary in place for all other participants." As the class action waiver and the terms of ERISA could not be reconciled, the court concluded that the class action waiver constituted a prohibited prospective waiver of statutory rights. The court rejected defendant's claim that since the Department of Labor could pursue claims that plaintiff was barred from pursuing, plan-wide equitable relief was still possible. While

true, the court concluded that as ERISA authorized individual participants to pursue plan-wide relief, the class action waiver violated the statute and was not severable even if the Department of Labor possessed similar authority to seek the same relief. *Henry v. Wilmington Trust*, 72 F.4th 499 (3d Cir. 2023). See also *Parker v. Tenneco, Inc.*, 2023 WL 5350565 (E.D. Mich.) (class action waiver cannot alter relief expressly provided by statute and therefore ERISA litigation brought in a representative capacity on behalf of plan participants generally not subject to arbitration); *Coleman v. Brozen*, 2023 WL 4498506 (N.D. Tex.) (class action waiver in arbitration agreement serves to deny ERISA participants opportunity to effectively vindicate statutory rights to seek class-wide relief and is not enforceable); *Henry v. Wilmington Trust*, 72 F.4th 499 (3d Cir. 2023) (class action waiver which purports to waive statutory rights under ERISA, which are enforced on a representative basis, may not be enforced).

PAGA Claimant Subject to Arbitrate Individual Claim Can Pursue Representative Claims. California's Private Attorneys General Act provides broad standing to individuals who experience Labor Code violations, however minor, to bring representative claims on behalf of others. The United States Supreme Court in *Viking River Cruises v. Moriana* required PAGA claimants subject to arbitration provisions to arbitrate their individual claims and then opined that PAGA provided "no mechanism" to pursue representative claims." The California Supreme Court differed, noting that it is the "final arbiter of what is state law" and concluded that "an order compelling arbitration of the individual claims did not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA." The Court emphasized standing under PAGA is not rooted in the "promise of economic recovery" but rather on "plaintiff's status as an aggrieved employee, not the redressability of any injury the plaintiff may have suffered." The Court did add, however, that if an arbitrator were to find an individual claimant was not an aggrieved employee the representative action brought by that individual claimant may not proceed on a representative basis." *Adolph v. Uber Technologies*, 14 Cal. 5th 1104 (2023). See also *Barrera v. Apple American Group*, 95 Cal. App.5th 63 (2023) (PAGA claimant can pursue claims on individual basis in face of class action waiver).

Derivative ERISA Claims Subject to Plan's Arbitration Agreement. Retirement plan participants brought a derivative suit against investment portfolio manager NFP Retirement on behalf of plan participants. The plan had agreed to arbitrate claims with NFP. The district court granted NFP's motion to compel, and the Third Circuit affirmed. The court noted that ERISA empowered plan participants to bring civil actions against fiduciaries on behalf of the plan and if they succeed the plan takes legal title to any recovery. The court concluded that plaintiffs' action was subject to the plan's agreement to arbitrate with NFP as "the Plan's agreement to arbitrate is what matters, and that agreement applies to

Appellants' claims on the Plan's behalf." *Berkelhammer v. ADP Totalsource Group*, 74 F.4th 115 (3d Cir. 2023).

Case Shorts

- *In re: Marriott International v. Accenture, LLP*, 78 F.4th 677 (4th Cir. 2023) (ruling on enforceability of class action waiver in arbitration agreement must be made before class action is certified).

VII. HEARING-RELATED ISSUES

Arbitration Subpoena Improper When Issued for Purpose of Pre-Hearing Discovery. Section 1282.6 (a) of the California Arbitration Act ("CAA") confers upon an arbitrator the power to issue "[a] subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents and other evidence, at an arbitration proceeding". Interpreting this section of the CAA, as a matter of first impression, the California Court of Appeal in *Aixtron, Inc. v. Veeco Instruments, Inc*. 52 Cal. App.5th 360, 370 (2020) concluded that the subpoena provisions of the CAA did not give an arbitrator the power to issue "*prehearing* discovery subpoenas." In this case, an arbitrator issued subpoenas to compel two nonparties to appear and produce documents at a hearing specially set "for the limited purpose of receiving documents" from them, or to download the documents to a website controlled by counsel for the party requesting the subpoenas. The subpoenas provided that after the production of documents, the "hearing" would be adjourned to a later date, at which time the subpoenaed nonparties would be summoned to appear and testify. The subpoenas directed the nonparties to comply with the subpoenas on a date that was approximately 12 months before the hearing on the merits was scheduled to occur. After the nonparties refused to comply, the arbitrator issued an order compelling compliance. The trial court denied the nonparties' petition to vacate the arbitration discovery order, but the California Court of Appeal reversed that decision. "Because discovery is not a permissible purpose of an arbitration hearing subpoena," the Court of Appeal explained, "the arbitrator abused his discretion by overstepping his statutory authority under § 1282.6. Accordingly, under the specific facts presented here, we conclude the trial court erred when it denied Appellants' petition to vacate the arbitration discovery order." The trial court judgment was reversed, and the trial court was directed to vacate the arbitration discovery order. *McConnell v. Advantest America, Inc.,* 2023 WL 4181226 (Cal. App.).

Case Shorts

- *George v. Rushmore Service Center*, 2023 WL 3735977 (D.N.J.) (plaintiff failed to demonstrate that arbitrator did not consider evidence presented or inappropriately accepted "problematically vague" testimony).

- *AFSCME Council 25 v. Wayne County Airport Authority*, 2023 WL 4282888 (Mich. App.) (arbitrator did not violate court order on remand to permit "further arbitration" when he allowed additional legal briefing but not submission of additional evidence as arbitrator had discretion to refuse to admit such additional evidence).
- *Petruss Media Group v. Advantage Sales and Marketing*, 2023 WL 5507306 (D.D.C.) (arbitrator's rejection of spoliation claim did not constitute failure to hear evidence as he in fact did hear and consider all evidence related to spoliation arguments).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Vacatur Upheld Where Award Procured by Fraud. Nuvasive prevailed on its breach of contract claim against Absolute Medical before an arbitration panel but was denied the lost profits it sought. Following issuance of the award, Nuvasive learned that the owner of Absolute was texting its witness who was testifying before the panel and the testimony tracked the texts. The district court granted Nuvasive's motion to vacate, and the Fourth Circuit affirmed. The appellate court agreed with the district court that Nuvasive demonstrated fraud by clear and convincing evidence. The court rejected Absolute's contention that Nuvasive could have discovered the remote coaching as the behavior was not noticeable to the panel or counsel when it was occurring. The court further affirmed the finding that the testimony was materially related to the issues in the arbitration. In doing so, the court rejected Absolute's contention that the testimony did not relate in particular to the lost profits issue. The court concluded that Nuvasive was not required to "prove that it would have succeeded in proving causation and damages absent the unlawful coaching, nor was it required to prove that the subject matter on which [the witness] was coached concerned causation and damages specifically." It was sufficient that the fraudulent testimony impacted issues material to the arbitration. For these reasons, the Fourth Circuit concluded that vacatur of the award was warranted. *Nuvasive, Inc. v. Absolute Medical*, 71 F. 4th 861 (11th Cir. 2023).

Vacatur Based on Alleged Misrepresentation in Arbitrator's CV Rejected. The JAMS arbitrator in this case represented in his on-line biography that he was a fulltime arbitrator and mediator since 2004. After issuing an award, the losing party, Seaker & Sons, moved to vacate alleging that the arbitrator lied about his experience and qualifications. In particular, Seaker referenced an unverified 2015 court complaint by a plaintiff with the same name as the arbitrator which contradicted the representations made in the arbitrator's on-line biography. For example, the court complaint, involving the denial of disability benefits, alleged that plaintiff: became totally disabled due to clinical depression; in 2011 volunteered 3 to 4 hours a week as a court mediator; in January 2015 plaintiff missed three mediations because of his condition and thereafter could not work more than 3 or 4 hours a day and not on consecutive days, and; struggled to work 10 hours a week and could not "hold

fulltime, or even regular part time, employment." The trial court denied Seaker's motion, and the appellate court affirmed. The court emphasized that Seaker never established that the plaintiff in the litigation was in fact the arbitrator in the case. "While [Seaker] provided unverified information that might certainly lead reasonable minds to question whether the plaintiff had been working full time as an arbitrator, it did not present evidence that compelled a finding in its favor." The court highlighted that the allegations in the complaint are "wholly unrelated to the subject matter of the litigation." Further, the court reasoned that even "assuming the arbitrator and the plaintiff are the same person, the complaint mostly summarizes the time periods when the plaintiff was in contact with his insurance provider and does not read as a complete summary of his entire work history, though it does mention work as an arbitrator." The appellate court affirmed the trial court's confirmation of the award for these reasons. *App Annie, Inc. v. Seaker & Sons*, 2023 WL 4571124 (Cal. App.).

Professional Interactions Between Arbitrator and Counsel Not Grounds for Vacatur. The arbitrator disclosed that he had prior cases with a newly-added counsel, Paul Sun, and this disclosure was timely made. An award was issued in favor of Sun's client, and the losing side, Affordable Care, moved to vacate claiming bias and partiality on the arbitrator's part. Affordable Care, relying on publicly available information, cited two undisclosed connections between Sun and the arbitrator. First, they both taught at Duke's law school, the arbitrator full-time and Sun as an adjunct. Second, the arbitrator served as the Director of Duke's Civil Justice Clinic and Suns's law firm partnered with the Clinic. The district court denied the motion to vacate, and the Fifth Circuit affirmed. The court emphasized that the professional interaction between Sun and the arbitrator did not cast the arbitrator's "impartiality into doubt. It does not follow that Sun and [the arbitrator] had any kind of personal, professional, or financial relationship." The court concluded that Affordable Care's arguments were just another example of "the unsuccessful party to an arbitration identify[ing] an unremarkable professional intersection between a party or attorney and the arbitrator, then us[ing] speculation and conjecture in an attempt to parlay that innocuous connection into a conflict of interest." *Affordable Care v. McIntyre*, 2023 WL 3620755 (5th Cir.).

Failure to Disclose Other Appointments with Sitting Arbitrators Not Grounds for Vacatur. The arbitration panel for this major dispute involving the Panama Canal was described by the Eleventh Circuit as "elite". The court observed that "it is little wonder, and of little concern, that elite members of the small international arbitration community crossed paths in their work." The court refused to vacate an award because the three arbitrators sitting together in the Panama Canal case failed to initially disclose (and did so only after prompting by one of the parties) that one of the arbitrators nominated a second to chair a different arbitration panel and two of the arbitrators were selected to serve as co-

arbitrators with attorneys for one of the parties in the Panama Canal case. The court pointed out that "the presumption against vacatur applies with even greater force when a federal court reviews an award rendered during an international arbitration." While agreeing that "arbitrators should err on the side of greater, not lesser, disclosure" the court concluded that the appointments to unrelated matters "falls far short of meeting the exacting standards for vacatur" under the New York Convention. The court found that "appointment of one arbitrator by another in a separate case standing alone" is not enough to support vacatur. The court noted that there were many sound and impartial reasons to appoint well-qualified arbitrators to other matters. Even where the arbitrators served with a lawyer in the Panama Canal case, the court reasoned that the fact that "an experienced and sought-after arbitrator in this field, and the fact that these individuals overlapped in unrelated, prior arbitrations was hardly a conflict at all, let alone a conflict that requires vacatur." The court held that no evidence of partiality was demonstrated and affirmed the district court denial of the petition to vacate the award. *Grupo Unidos por el Canal v. Autoridad del Canal de Panama*, 78 F.4th 1252 (11th Cir. 2023).

Arbitrator Nondisclosure Not Sufficiently Material to Warrant Vacatur. The arbitrator selected by Occidental Exploration ["OEPC"] disclosed that he had a prior professional relationship with counsel for the opposing party, Andes Petroleum, from a prior arbitration. The panel was confirmed, and an award was issued in favor of Andes. During the arbitration, OEPC's arbitrator and counsel for Andes were both selected as panelists in an unrelated arbitration. Neither disclosed this new connection. OEPC moved to vacate the award on evident partiality grounds. The district court denied the motion and the Second Circuit affirmed. The court reaffirmed its prior holding that arbitrator may only be disqualified if a reasonable person would have to conclude that the arbitrator was not impartial. OEPC argued that counsel for Andes had "real-time behind-the-scenes access" to the arbitrator but, as the Second Circuit put it, "speculation did not establish evident partiality." The court could find no material relationship between counsel and arbitrator based on their joint service in an unrelated arbitration. For example, the Second Circuit emphasized that there was no family connections or business relationship between the arbitrator and counsel from which bias could be inferred based on this undisclosed, outside relationship. For these reasons, the court affirmed the denial of the motion to vacate and confirmed the award. *Andes Petroleum Ecuador, Ltd. v. Occidental Exploration and Production Co.*, 2023 WL 4004686 (2d Cir.).

Arbitration Panel's Misplaced Finding of Liability Not Ground to Vacate. The Delaware Vice Chancellor concluded that he "would not hesitate to send" an arbitration panel's award back were he reviewing a lower court ruling because it imposed joint and several liability on an individual respondent with no legal grounds to do so. "Perhaps this was oversight, perhaps it was error, perhaps it occurred because all Parties' counsel failed adequately to

alert the Panel to the difference among the Defendants. The latter oversight itself could have been strategic, or merely sloppy." But the Vice Chancellor concluded that the parties bargained for a determination of an arbitration panel and the "value of such a submission lies in the reduced cost to resolve disputes subject to arbitration; that value would be lost if the decision were subject to substantive review. To protect this value, the applicable law here – the Federal Arbitration Act – limits review of arbitrations under its aegis as the most narrow of considerations." As no legal ground to vacate was present, the Vice Chancellor denied the motion to vacate on manifest disregard grounds and confirmed the award. In doing so, the Vice Chancellor noted that the individual respondent "failed to raise as a defense lack of contractual liability" and that he should have known that to be the case. The court concluded that under existing law "so long as there is a basis for liability discernible from the arbitration record, the arbitration must be confirmed." *Evolve Growth Initiatives v. Equilibrium Health Solutions*, 2023 WL 4760547 (Del. Chanc.). See also *Kilpatrick v. Lansing Community College*, 2023 WL 5417963 (Mich. App.) (arbitrator's legal errors were not material enough to call into question the arbitration award and therefore motion to vacate denied); *Thomas Builders, Inc. v. CKF Excavating, LLC*, 2023 WL 3792712 (Tenn. App.) (arbitrator cannot exceed authority by "not doing enough", and here adequately set forth damages sufficient to satisfy the contract's requirement of "concise written financial breakdown" of damages).

Arbitrator's Plain Mistake Warrants Vacatur. An arbitral award may be vacated for a plain mistake of law if the arbitrator "clearly misapplied the law to the facts." New Hampshire courts have defined "plain mistake" as "an error that is apparent on the face of the record and which would have been corrected had it been called to the arbitrators' attention." To demonstrate plain mistake, it "must be shown that the arbitrators manifestly fell into such error concerning the facts or law, and that the error prevented their free and fair exercise of judgment on the subject." Relying on this principle, the Supreme Court of New Hampshire found that an arbitrator's failure to correctly apply the after-acquired evidence doctrine in determining the amount of backpay to award constituted a "plain mistake of law". The court vacated the superior court's confirmation of the award and remanded the matter with instructions for the superior court to remand it to the arbitrator for reconsideration of the backpay award in light of the court's opinion. *City of Portsmouth v. Portsmouth Ranking Officers Assoc.,* 2023 WL 3855572 (N.H.). Cf. *Baker Use Services International v. Joshi Technologies International*, 73 F.4th 1139 (10th Cir. 2023) (district court's award of pre-judgment interest relating to motion to confirm arbitration award vacated and remanded for recalculation where both parties tendered incorrect rates and no basis to infer that district court intended to deviate from established statutory rate without explanation); *Credit One Bank v. Lieberman*, 2023 WL 4014471 (3d Cir.) (district court's award of attorneys' fees based on party's successful confirmation of award vacated as the Third Circuit, applying the abuse of discretion standard rather than the deferential standard under the FAA,

concluded that agreement's indemnification language did not apply to losing party in arbitration); *JMA Painters v. The McDonnel Group*, 2023 WL 4530114 (La. App.) (claim that arbitration panel misinterpreted the underlying agreement not grounds under Louisiana law to vacate award).

Case Shorts

- *Housing Authority of the City of Calexico v. Multi-Housing Tax Credit Partners*, 94 Cal. App.5th 1103 (2023) (California Arbitration Act permits parties to expand judicial review of arbitration awards and trial court's failure to conduct such a review in accordance with terms of the parties' agreement is in error and the matter is referred to the trial court to conduct such a review).
- *Combs v. Same Day Delivery, Inc.*, 2023 WL 6162196 (S.D.N.Y.) (arbitrator did not violate public policy by enforcing shortened six-month statute of limitations agreed to by the parties for New York State wage and hour claims which by statute would have had a six-year limitation).
- *Wallrich v. Samsung Electronics America, Inc.*, 2023 WL 5934842 (N.D. Ill.) (AAA administrative decision to terminate mass arbitration for lack of payment by defendant is not a merits-based decision and is not entitled to deference as no arbitrator addressed the issue and remanding the matter back to the AAA simply allows it to issue a merits-ruling).
- *Combs v. Same Day Delivery, Inc.*, 2023 WL 6162196 (S.D.N.Y.) (award granting motion to dismiss with respect to six of seven claims is "final" with regard to those claims and can be confirmed despite arbitrator's reference to "interim relief" by which he was referring to the party's stated intent to seek judicial remedies).
- *Olin Holdings, Ltd. v. State of Libya*, 73 F.4th 92 (2d Cir. 2023) (arbitration award under New York Convention must be confirmed if a barely colorable justification for outcome is present).
- *Petruss Media Group v. Advantage Sales and Marketing*, 2023 WL 5507306 (D.D.C.) (reimbursement of witnesses' substantial legal fees related to their testimony in arbitration did not support claim that award was procured by fraud).
- *Petruss Media Group v. Advantage Sales and Marketing*, 2023 WL 5507306 (D.D.C.) (sanctions motion related to motion to vacate rejected where challenged representations "amount to fairly run-of-the-mill attempts by zealous lawyers to construe the record in the light most favorable to their clients, not objectively unreasonable falsehoods").
- *Stafford v. International Business Machines Corp.*, 78 F.4th 62 (2d Cir. 2023) (application to confirm award is moot once full payment has been made as required by the unconfirmed award).

- *Stafford v. International Business Machines Corp.*, 78 F.4th 62 (2d Cir. 2023) (unsealing of arbitration award in confirmation proceeding rejected where award had been fully satisfied and petition to confirm was moot).
- *Flores v. National Football League*, 2023 WL 4744191 (S.D.N.Y.) (speculation regarding arbitrator's partiality before award is issued rejected under the FAA which "contemplates protection against bias by permitting courts to overturn arbitration awards that are marred by evident partiality of the arbitrator").
- *JMA Painters v. The McDonnel Group*, 2023 WL 4530114 (La. App.) (time to move to vacate award under Louisiana law runs from issuance of final award and not from issuance of interim award and therefore motion to vacate filed within three months of issuance of the final award was timely).
- *Office Create Corp. v. Planet Entertainment*, 2023 WL 5918017 (S.D.N.Y.) (manifest disregard claim rejected where court found "that the tribunal meticulously outlined and considered the applicable legal provisions under New York law, and it explained its rationales for finding jurisdiction over [respondent] and piercing the corporate veil as to him").
- *George v. Rushmore Service Center*, 2023 WL 3735977 (D. N.J.) (arbitrator's failure to reference "least sophisticated debtor standard" in context of Fair Debt Collection Practices Act case did not constitute manifest disregard of the law as arbitrator made separate findings on the issue without having made reference to the standard).
- *Kora Pack Private Ltd. v. Motivating Graphics*, 2023 WL 4826222 (N.D. Tex.) (appointment of arbitrator by court in India which was contrary to parties' agreement and Indian law not grounds for vacatur under the New York Convention where party for whom arbitrator was appointed did not object for over 20 months after appointment).
- *Zhongzhi Hi-Tech Overseas Investment v. Wenyong Shi*, 2023 WL 4561812 (S.D.N.Y.) (court refuses to confirm arbitration award entered by panel in Hong Kong applying Hong Kong law where parties were not domiciled in U.S.).
- *Hennepin Healthcare System v. AFSCME Minnesota Counsel 5*, 990 N.W. 2d 454 (Minn. 2023), as amended (May 26, 2023) (arbitrator did not clearly exceed his authority under Minnesota's Uniform Arbitration Act when he concluded employer violated collective bargaining agreement even if he arguably ignored factual distinction made in stipulation of issue to be decided as ruling drew its essence from the agreement).

IX. ADR – GENERAL

Request to Unseal Confidential Arbitration Documents Denied. Counsel to a group of IBM employees filed an action challenging the dismissal of their claims and arbitration on timeliness grounds. Counsel then filed an early summary judgment motion, which contained confidential documents, submitted under seal, obtained in arbitration proceedings for other IBM employee clients of this counsel. Plaintiffs moved to unseal those documents, and IBM objected and moved to keep those documents under seal. The district court granted IBM's application, and the Second Circuit affirmed. The court acknowledged that the presumption of public access attaches to court filings. Here, however, the court determined that that presumption was weak, in part, because the plaintiffs' underlying claim relating to timeliness was rejected. "Protecting this confidentiality interest is particularly important when the stated objective of Plaintiffs' motion to unseal is to circumvent the Confidentiality Provision to assist plaintiffs in other proceedings -- including Plaintiffs' counsel's other clients." The court weighed the competing interest between public access to court filed documents and the FAA's "strong policy protecting the confidentiality of arbitral proceedings." The court pointed out "allowing unsealing under such circumstances would create a legal loophole allowing parties to evade confidentiality agreements simply by attaching documents to court filings." The court concluded that the district court correctly ruled that the confidential documents must remain sealed. *In re: IBM Arbitration Agreement Litigation*, 76 F.4th 74 (2d Cir. 2023). See also *Stafford v. International Business Machines Corp.*, 2023 WL 5183546 (2d Cir.) (confidentiality provision in arbitration agreement may not be evaded and award unsealed in confirmation proceeding where the purpose was to permit counsel to use confidential arbitration award in pursuing related litigations on behalf of other clients of counsel).

Referral to Independent Accounting Firm Not Arbitration. The purchase agreement relating to the sale of a business required certain disputes to be referred to an independent accounting firm for resolution. The question for the Third Circuit was whether this provision constituted an agreement to arbitrate such disputes. The court concluded that it did not. Rather, the court reasoned that the parties were seeking an "expert determination" of the dispute. The court emphasized that arbitration agreements tend to seek to dispose of the entire controversy between the parties. In contrast, expert determinations tend to address specific issues in dispute. The court concluded that the "language in the contract narrows the dispute procedure to only accounting-related factual matters. This narrowing resembles an expert's determination more than arbitration." Moreover, the issues in dispute "are all factual disputes within the normal expertise of an accountant, and that technical expertise weighs in favor of expert determination." The court also found persuasive the fact that the dispute was required to be resolved within 30 days, which did not suggest the broad-based inquiry typical of arbitration and did not cite any procedural rules. For these reasons, the

court vacated the district court's granting of the motion to compel the arbitration of the underlying dispute. *Sapp v. Industrial Action Services*, 75 F.4th 205 (3d Cir. 2023).

Case Shorts

- *Barnes v. Festival Fun Parks*, 2023 WL 4209745 (W.D. Pa.) (provision in arbitration agreement stating that employee can file with EEOC, but relief can only be obtained before an arbitrator, did not restrict plaintiff's ability to proceed with claim before the EEOC but merely "requires submission of the amount of recovery of relief to individualized arbitration between the parties").
- *Eletson Holdings v. Levona Holdings*, 2023 WL 5956144 (S.D.N.Y.) (motion to permit redactions when opposing confirmation of arbitration award denied because award itself is indispensable to court's review).

X. COLLECTIVE BARGAINING SETTING

Award Under Labor Management Relations Act Vacated. The collective bargaining agreement required an arbitrator in disciplinary cases to determine whether the employer had a "reasonable basis for concluding that the employee engaged in the conduct" for which she was disciplined. The arbitrator here, based on the two witnesses testifying at the one-day hearing, concluded that the employer failed to provide the requisite strong and convincing evidence supporting the discipline. The district court confirmed the award, but the Fourth Circuit reversed. The court acknowledged that arbitration decisions are entitled to great deference but held that the arbitrator must act "consistent with the agreement's contractually defined scope of authority." Here, in the court's view, the collective bargaining agreement limited the arbitrator's authority and required a reasonable basis determination by the arbitrator that the discipline was warranted at the time the decision was made, and not at the arbitration hearing solely. The court found that the arbitrator failed to do so here. "In fact, rather than looking backward to the information [the employer] had at the time of its discharge decision, the arbitrator considered the evidence presented at the time of the hearing." As the collective bargaining agreement "premises the legitimacy of an arbitration award on the arbitrator's complying with that directive", the court concluded that the award did not draw its essence from the collective bargaining agreement and therefore vacatur of the arbitration award was warranted. *Advantage Veterans Services of Walterboro v. United Steel Local 7898*, 70 F. 4th 751 (4th Cir. 2023).

Case Shorts

- *Teamsters Local 20 v. Johns Manville Corp.*, 2023 WL 3868637 (6th Cir.) (whether employer violated "recognition clause" in collective bargaining agreement is for arbitrator to decide under the Labor Management Relations Act where arbitration

agreement provides that "any dispute involving interpretation or violation" of the collective bargaining agreement is subject to arbitration).

- *National Nurses Organization Committee v. Midwest Division MMC*, 70 F.4th 1315 (10th Cir. 2023) (grievance challenging hospital's plans for staffing of nurses not arbitrable as collective bargaining agreement gave management unfettered right to address staffing needs).

XI. NEWS AND DEVELOPMENTS

Supreme Court to clarify FAA Transportation Exemption. The Supreme Court agreed to review a Second Circuit ruling in *Bissonnette v LePage Bakeries Park St., LLC* (Case No. 23-51), holding that the FAA Transportation Exemption did not apply to workers who distributed baked goods but who were not in the transportation industry. The Second Circuit focused on the source of the revenue in determining whether the Exemption applied. As the revenue was derived by the sale of baked goods, the Second Circuit concluded that the distributor of the baked goods was not in the transportation industry and was therefore bound to arbitrate claims that it brought. The Eleventh Circuit agrees with the Second Circuit approach, but the First and Seventh Circuits have rejected the industry-based analysis.

Draft Guidelines for Artificial Intelligence Issued. The Silicon Valley Arbitration and Mediation Center issued proposed guidelines for the use of so-called artificial intelligence tools in domestic and international arbitration in an effort to introduce a principle-based framework for the use of AI tools in arbitration. Under the Guidelines, all participants in an arbitration process are expected to understand and be able to explain how a generative system arrives at its outputs. The Guidelines also provide that: confidential information should be safeguarded and offers suggestions on proper disclosures; arbitrators are barred from delegating their personal mandates, most notably the arbitrator's decision-making responsibilities, and; arbitrators are directed not to rely on information generated by tools outside of the record without making proper disclosures.

New Code of Conduct for Arbitrators in Investment Arbitration. The UN Commission on International Trade Law (UNCITRAL) adopted a code of conduct for arbitrators in international investment dispute resolution. Of note, the Code reinforces the duty of confidentiality, addresses the importance of arbitrator disclosures, and imposes new regulations on the practice of double-hatting. The rules require that arbitrators "disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality" and makes clear that an arbitrator's duty to disclose is continuing and arbitrators are directed to take "all reasonable efforts" to discover disclosable information and to "err in favour of disclosure." The Code instructs that an arbitrator shall not act

concurrently as a legal representative or an expert witness in any other proceedings involving the same measures, parties, or investment treaty.

California Prohibits Stays from Appeals of Arbitration Denials. California has enacted a statute that requires litigation to proceed pending the appeal of the denial to arbitrate. This is in contrast to the Supreme Court's decision under the FAA in *Coinbase, Inc v. Bielski* that requires that litigation be stayed pending resolution of the appeal of the denial to arbitrate. The goal of the statute, according to its sponsors, was to limit the ability of employers to delay employment and consumer lawsuits during the appeal process where motions to compel arbitration were denied.

XII. TABLE OF CASES

Cases