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I. JURISDICTIONAL ISSUES: GENERAL

Court Cannot Order Party to Initiate Arbitration. The trial court agreed with defendant and ruled that the pending dispute was subject to arbitration. Plaintiff countered by arguing, among other things, that the action should be stayed pending arbitration and defendant "should be required to initiate arbitration under the American Arbitration Association (AAA) Construction Industry Rules by filing a demand for arbitration with the AAA, paying the administrative filing fee, and filing a copy of the applicable arbitration agreement, because defendant was the party seeking to enforce the mandatory arbitration provision in the contract." The court agreed and ordered defendant to initiate the arbitration. When defendant did not initiate the arbitration in a timely fashion the trial court granted a default judgment in plaintiff's favor. The Vermont Supreme Court reversed, finding that the order to initiate the arbitration was improper and could not result in a default judgment. The Court emphasized that under the AAA rules it is the plaintiff that had the obligation to initiate the arbitration. For example, the Court noted that the filing fee depended on the size of the claim and these "responsibilities fall naturally and logically to plaintiff as the party seeking relief." The Court also rejected plaintiff's claim that it waived its right to arbitration by filing the lawsuit. "This argument is based on plaintiff's view that it had a right to initiate arbitration but no duty to do so. This argument is fundamentally at odds with the effect of arbitration contracts." *Hermitage Inn Real Estate Holding Co., LLC v. Extreme Contracting, LLC,* 2017 VT 44, 170 A.3d 604 (Vt. 2017).

SOX Action Not Stayed While Dodd-Frank Whistleblower Claim Arbitrated. The claims under Sarbanes-Oxley ("SOX") are, under the express terms of the statute, not subject to arbitration. Dodd-Frank did not similarly bar arbitration of claims brought under it. The plaintiff here brought both SOX and Dodd-Frank claims and the employer moved to compel. The court recognized the weight of authority which favored the arbitrability of Dodd-Frank claims. The district court concluded that the Dodd-Frank claims must be arbitrated but declined to stay the SOX claims in court. By granting a stay of the SOX claims in the court proceeding, "this court would be effectively denying plaintiff the right to a federal forum in substantial part (if not entirely) should the court defer to arbitration of Dodd-Frank claim." In any event, the court found any inefficiency largely illusory and could find no authority for the proposition that a SOX claim may be stayed pending the arbitration of a Dodd-Frank claim. *Wussow v. Bruker Corp.*, 2017 WL 2805016 (W.D. Wisc.).

Employer May Not Compel Arbitration Based on Employee's Arbitration Agreement with a Temporary Agency. A temporary agency worker brought a Title VII claim against the employer to which she was assigned, but not against the temporary employment agency itself. The worker's agreement with the temporary agency included an arbitration provision. The employer moved to compel on equitable estoppel and third-party

beneficiary grounds. The Seventh Circuit ruled, applying Wisconsin law, that the employer failed to show detrimental reliance as there was no showing that it relied on, or even knew, of the arbitration agreement. The court declined to consider the third-party beneficiary claim as it was raised for the first time on appeal. *Scheurer v. Fromm Family Foods*, 863 F. 3d 748 (7th Cir. 2017). Cf. *Garcia v. Pexco, LLC,* 11 Cal. App.5th 782 (4th Dist. 2017), review denied (August 23, 2017) (temporary worker employed by staffing agency must arbitrate his claims against both staffing agency and its client as claims against both were found to be "intimately founded in and intertwined with" employment relationship with staffing agency).

"Look Through" Approach Does Not Apply to Federal Diversity Jurisdiction. Plaintiff sued the employer, Hermes, and his manager for discrimination under New York law. Hermes moved to compel arbitration under the FAA in federal court, and plaintiff disputed the presence of complete diversity. The motion to compel had complete diversity as Hermes was based in New York and plaintiff in New Jersey, but plaintiff argued that the court must look through the petition to the underlying claim. Here, the underlying claim included the manager, who was a New Jersey resident, which defeated diversity jurisdiction, if applicable. The district court compelled arbitration, and the Second Circuit affirmed. The court emphasized that, unlike with federal question jurisdiction, federal diversity jurisdiction does not permit the court to look through the petition seeking arbitration as to do so would allow a party to defeat federal jurisdiction by simply adding a non-diverse party to the underlying action. The Second Circuit concluded that "complete diversity is measured by reference to the parties to the petition to compel arbitration." The court added that "all of our sister Circuits to have addressed the issue have likewise rejected a look-through approach to assessing complete diversity for the purposes of evaluating whether a district court has diversity jurisdiction over an FAA petition." *Hermes of Paris v. Swain*, 867 F.3d 321 (2d Cir. 2017).

Equitable Estoppel Doctrine Not Applied to Non-Signatory: Waymo, Google's self-driving car spinoff, sued Uber over claims that Uber stole its proprietary design used in self-driving cars after it hired Google's former executive, Levandowski, who worked on the autonomous vehicle program. Uber filed a motion to compel arbitration based upon the arbitration clause found in the employment agreement between Levandowski and Waymo, arguing that the agreement should equitably apply since the complaint alleges that the misappropriation was conducted "by virtue of [Levandowski's] job at Waymo." The district court denied the motion and the appellate court affirmed. The court recognized that while the general rule is that a contract applies only to the parties to the contract, equitable doctrines can permit departure from this principle when necessary to avoid inequity. In this case, however, the issues of the complaint were not intimately intertwined with the employment agreement containing the arbitration clause and therefore equitable principles did not apply requiring the compelling of arbitration. *Waymo v. Uber Techs.*, 870 F.3d 1342 (Fed. Cir. 2017).

Non-Signatory Family Members Not Bound by Arbitration Provision: Plaintiff purchased a manufactured home from defendants CMH Homes pursuant to a retail installment contract. The contract contained an arbitration provision stating that it covered "all co-signors and guarantors who sign this Contract and any occupants of the manufactured home (as intended beneficiaries of this Arbitration Agreement)." Plaintiff was the only buyer to sign the contract. She moved into the manufactured home with her husband and their children. Five years later, plaintiff, along with her husband and children, sued in state court against CMH Homes and CMH Manufacturing alleging that the home was negligently installed, unreasonably dangerous, and unfit for habitation. The CMH defendants moved to compel arbitration. The court granted the motion as to the buyer's claims but refused to compel the husband and children to arbitrate their claims since they did not sign the contract. On appeal, the Tenth Circuit upheld the ruling, finding that even though the contract claimed to cover occupants of the home, the non-signatory husband and children could not be forced to arbitrate their claims since they did not sign the agreement and therefore did not agree to its terms. *Jacks v. CMH Homes, Inc.*, 856 F.3d 1301 (10th Cir. 2017).

Non-Signatory Not Bound by Arbitration Agreement: Verizon customers brought a putative class action against a contractor that provided internet-based advertisements to the subscribers' wireless service provider. In particular, the class accused the contractor of deceptive business practices and trespass through its use of "cookies" to collect subscribers' web-browsing and usage data. The contractor moved to compel arbitration pursuant to the customer agreement between subscribers and Verizon. The lower court granted the motion on equitable estoppel grounds, and the subscribers petitioned for a writ of mandamus to vacate the order. The Ninth Circuit vacated the order compelling arbitration, finding that equitable estoppel did not apply because the claims against the contractor were not based on the Verizon customer agreement and that the contractor was independent from Verizon and there were no allegations of collusion between them. *In Re Henson,* 869 F.3d 1052 (9th Cir. 2017). See also *Nissan North America v. Scott*, 2017 WL 3446129 (Ala.) (motion to compel brought by car dealership granted against purchaser but denied against non-signatory manufacturer where arbitration provision was limited to parties to the car purchase agreement); *Daphne Automotive v. Eastern Shore Neurology Clinic*, 2017 WL 3446127 (Ala.) (car dealer may not compel arbitration against non-signatory – the employer of the purchaser of the car – as arbitration provision was limited to disputes that may arise between dealership and purchaser of car); *White v. Sunoco, Inc.*, 870 F. 3d 257 (3rd Cir. 2017) (credit card holder not required to arbitrate class action against Sonoco on equitable estoppel grounds where Citibank, the credit card issuer, in its cardholder agreement made no provision for the ability of a third party to arbitrate claims under the agreement). But see *Bluestem Brands, Inc. v. Shade,* 805 S.E.2d 805 (W. Va. 2017) (motion to compel brought by non-signatory retailer granted upon equitable estoppel grounds where claim against credit card company would not exist without agreement between retailer and customer).

Arbitration Agreement Enforced in the Face of Fraud Claim: The employment agreement between plaintiff Doller and defendant Integra Optics, Inc., set forth the terms of Doller's employment as Intergra's Executive Vice President and Chief Financial Officer. The employment relationship eventually broke down and Doller sued Integra and its co-owner, Prescott, alleging that defendants breached the employment agreement and fraudulently induced him to enter into it. Defendants moved to compel arbitration of these claims. The court first addressed the threshold issue of whether the parties made a valid agreement to arbitrate and noted that absent proof of a grand scheme to defraud which permeates the entire agreement, including the arbitration provision, a broadly worded arbitration provision will be deemed separate from the substantive contractual provisions and the agreement to arbitrate may be valid despite an underlying allegation of fraud. The court found that the agreement here was the result of arms-length negotiations. It also found that there was no evidence that the arbitration provision was inserted in the agreement to accomplish a fraudulent scheme or was otherwise the product of fraud. On this basis, the court held that the agreement to arbitrate was valid, and directed the parties to arbitrate the claims. The court also ruled that "the claim of fraudulent inducement is one for the arbitrator" to decide. *Doller v. Prescott*, 56 Misc.3d 1204(A) (Sup. Ct. Albany Cty. 2017).

FAA Limitation Period Jurisdictional. The FAA provides that a motion to vacate an arbitration award must be submitted within three months of issuance of the award. Notice must be provided to opposing counsel which, the Nebraska Supreme Court noted, is "the only procedure governing movement of the case from the arbitral forum to the judicial forum" within the statute. On this basis, the court concluded that the limitations period was jurisdictional. The court reasoned that the notice requirements that govern judicial review under the FAA are "more than a simple 'claim-processing rule' like notices of appeal, the notice requirements for judicial review under the FAA play a critical role in the orderly movement of the case between forums in a multi-forum system." Because the limitation period delineates the classes of cases that a court may review, the Court concluded "it is properly considered jurisdictional." *Karo v. Nau Country Ins. Co.,* 297 Neb. 798, 901 N.W.2d 689 (2017).

II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Determination of Waiver Not Subject to Bright-Line Rule. A County Board brought suit against its securities broker while it determined whether arbitration on the claim was available. The broker removed the case to federal court and moved to dismiss. Before the court could rule, the Board voluntarily dismissed the case and filed for arbitration. The broker sought to enjoin the arbitration, arguing that the Board waived its right to arbitrate by initially filing a court action. The trial court disagreed and instead compelled arbitration. The Tenth Circuit affirmed. The broker urged the court to "adopt a bright-line rule that plaintiffs who later seek arbitration on the same issues have necessarily waived their right to

arbitrate." The Tenth Circuit declined to do so "primarily because the circumstances of this case demonstrate how such a rule would not be wise." The court found that in this case the Board "was not improperly manipulating the judicial process. Had it attempted to submit its claims to a court for decision and only sought arbitration after being unhappy with the results, we might feel differently. But as things stand, we do not find that litigation has proceeded too far, that significant inefficiencies would result, or that [the Plaintiffs] were prejudiced by the delay." *BOSC, Inc v. Board of County Commissioners*, 853 F. 3d 1165 (10th Cir. 2017).

Waiver Claim Rejected: Plaintiff suffered injury in a car accident and sued the other driver involved. She notified her underinsurance carrier, Arbella Mutual Insurance, of the accident and it confirmed her underinsurance coverage limits under the policy. Thereafter, plaintiff sued the other driver, notified Arbella, and Arbella requested that it be kept apprised of the matter so it could determine if an underinsurance claim would be forthcoming. After a lengthy civil action involving two jury trials, plaintiff obtained a favorable judgment, which was appealed by the other driver. While on appeal, plaintiff reached a settlement with the driver and his insurance company. Arbella was not a party to this action, but it consented to the settlement. Plaintiff then sought underinsured motorist coverage from Arbella, which invoked arbitration under the terms of the policy. On cross motions for summary judgment, the court held that Arbella waived its right to arbitrate the claims because it had waited for the first action to be concluded before asserting its right to arbitrate. On appeal of that decision, a Massachusetts appeals court reversed, finding that despite the significant amount of time that passed before Arbella demanded arbitration, Arbella did not act inconsistently with the arbitration agreement, and was within its contractual rights to follow the course that it did because the policy permitted either party to demand arbitration at any time if they were unable to reach agreement on liability and/or damages. "As such, Arbella did not act with undue delay and cannot be penalized for doing what it was entitled to do." *Chamberland v. Arbella Mut. Ins. Co.*, 91 Mass. App. Ct. 680, 78 N.E.3d 84, review denied, 477 Mass. 1109 (2017).

Delegation Provision Ruled Unenforceable. The federal McCarran-Ferguson Act grants to states plenary authority over the regulation of insurance. It also authorizes reverse preemption, that is, it allows state laws enacted in accordance with the Act to preempt generally applicable federal statutes. Virginia law bars any provision in an insurance contract from depriving its courts of jurisdiction. The insurance agreement here had a clear delegation provision assigning to the arbitrator gateway issues. The Fourth Circuit ruled that the delegation provision was void under Virginia law. In doing so, the court reasoned that the Virginia insurance statute "reflects a state policy choice that insureds should have the option to seek enforcement of Virginia's insurance laws and regulations in court, rather than through arbitration." The question in dispute in this case – what constitutes a contract of insurance – is "a core question of Virginia insurance law" and the court concluded that

Virginia law would be undermined if arbitrators were permitted to resolve the question. *Minnieland Private Day School v. Applied Underwriters*, 867 F. 3d 449 (4th Cir. 2017).

Delegation Provision Enforced. Jones applied for a job with Waffle House and his application was denied. He brought a class action alleging that Waffle House had violated the Fair Credit Reporting Act. He then applied to another Waffle House restaurant and was hired. In doing so, he agreed to arbitrate all "past, present, or future" controversies with Waffle House. The arbitration provision contained a clear delegation provision directing that issues as to the arbitrability of a dispute was for the arbitrator to decide. Waffle House's motion to compel was denied before the district court, but the Eleventh Circuit reversed. The appellate court rejected Jones' claims under Georgia law that the delegation provision was unconscionable. The court emphasized that the delegation terms were clearly stated and "more importantly, at the time he signed the agreement containing the delegation provision, Jones knew that he had a pending lawsuit against Waffle House. Indeed, he was the only person present that day who was aware of this critical fact." The court declined to adopt the "wholly groundless" exception which, in its view, would have violated the Supreme Court's mandate that courts not delve into the merits of a dispute properly before an arbitrator. The court reasoned that the "district court was not free to pass judgment on the wisdom or efficacy of the provision in the first instance and should have compelled arbitration." Finally, the Eleventh Circuit found "not the slimmest shred of evidence" that Waffle House improperly communicated with a represented party in the pending class action. "Rather, it was Jones who initiated the communication with the defendant by seeking employment" and did so "without informing his attorneys and without telling his new employers about his pending lawsuit." *Jones v. Waffle House*, 866 F.3d 1257 (11th Cir. 2017). See also *Kilgore v. Mullenax*, 2017 Ark. 204, 520 S.W.3d 670 (2017) (arbitrator's finding that FAA applies is conclusive where parties delegated arbitrability issues to the arbitrator to decide); *Pincaro v. Glassdoor Inc.*, 2017 WL 4046317 (S.D.N.Y.) (incorporation of AAA rules, coupled with broad arbitration language, leaves to arbitrator to rule whether the parties entered into a valid and enforceable arbitration agreement); *Network Capital Funding v. Papke*, 2017 WL 3097873 (Cal. App.) (class claim determination for arbitrator to decide where arbitration provision required arbitration of "any claim, dispute and/or controversy" between the employer and employee and applied to all claims "arising from, related to, or having any relationship or connection whatsoever" with the employer and employee); *Bamberger Rosenheim v. OA Development, Inc.*, 862 F. 3d 1284 (11th Cir. 2017) (arbitrator did not exceed authority in determining venue as disputes over interpretation of forum selection provision is for arbitrator to decide); *System4, LLC, v. Ribeiro*, 2017 WL 3461292 (D. Mass.) (arbitrator did not exceed authority warranting vacatur in applying AAA Employment Rules rather than Commercial Rules as designated in the arbitration agreement because claimant prevailed on wage claim and was entitled to an award of fees under statute no matter what AAA rules were applied).

Delegation of Arbitrability Questions to Arbitrator Lapses with Agreement's Expiration. The collective bargaining agreement here applied the AAA's Labor Arbitration Rules to arbitrations under it and clearly and unmistakably delegated arbitrability questions to the arbitrator. But the collective bargaining agreement expired. Does the delegation clause allow the arbitrator to decide whether that dispute ripened after expiration of the collective bargaining agreement? The district court ruled that it did not and permanently enjoined the pending arbitration. The court reasoned "where the underlying contract has itself expired, the issue of whether the agreement to arbitrate has likewise expired is a pure question of the continued operation vel non of the contract itself (as opposed to the scope of the arbitration clause) and hence a question of contract law left to the courts." The court found that the pending "dispute was too inchoate" when the collective bargaining agreement was in force and that the "bulk of the dispute" occurred after expiration. Under these circumstances, the court concluded that the dispute was not arbitrable and permanently enjoined the arbitration. *New York Dialysis Services v. New York State Nurses Association*, 2017 WL 2334996 (S.D.N.Y.).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Substantively Unconscionable Provision Severed. The Eleventh Circuit reversed a lower court's refusal to compel arbitration in a consumer putative class action against Citibank, finding the sole substantive unconscionable provision to be severable. The appeals court rejected the consumer's claim that provisions limiting discovery to that provided under the AAA or JAMS rules was unconscionable. The court found that "nothing in the record suggests that an arbitrator applying AAA or JAMS rules would be empowered to limit discovery in a manner that would render the Provision unconscionable." The Eleventh Circuit similarly rejected substantive unconscionability claims based on Citibank's unilateral right to amend the arbitration provision and with respect to the arbitration costs provisions. The court ruled, however, that the provision requiring that the parties keep any arbitration decision confidential to be unconscionable. The court reasoned that "where the outcomes of prior arbitration proceedings themselves remain concealed, as the arbitration agreement requires, prospective claimants have little context in which to assess the value of discovered documents or work product from prior disputes." The court found, however, that the "confidentiality clause in this case is limited in scope: it purports only to shield arbitrators' decisions from disclosure, while other information concerning the arbitral process may be disclosed." On this basis, the court concluded that severing the offensive provision will not significantly alter the arbitration clause and it compelled arbitration after severing the offensive confidentiality provision from the arbitration agreement. *Larsen v. Citibank FSB*, 871 F.3d 1295 (11th Cir 2017).

Arbitration Agreement Ruled Unconscionable. The employer's arbitration agreement here required employees, as a condition of continued employment, to agree to arbitrate disputes with it. Baxter brought a wrongful discharge claim, and the employer moved to compel. The California trial court denied the motion, and the appellate court affirmed. The court found the arbitration procedures to be both procedurally and substantively unconscionable. As Baxter had no chance to negotiate the terms of the arbitration agreement, the court found it was procedurally unconscionable under California law. The court also ruled that the agreement was substantively unconscionable because the agreement: prohibited employees (but not the employer) from contacting coworkers regarding claims outside of the formal arbitration process; imposed discovery limitations, in the absence of a showing of substantial need, to ten interrogatories, five document requests, and two depositions; shortened the statutory statutes of limitation periods which, among other things, would force Baxter and employees to forgo an investigation by the relevant state human rights agency, and; requires the arbitration to begin within 120 days after the arbitrator's appointment, in the absence of good cause shown. The court did reject, however, Baxter's claim that the $50.00 filing fee and the fact that the employer's pre-arbitration steps gave it an alleged unfair early look into her case were substantively unconscionable terms. The appellate court agreed with the trial court that the offensive provisions were not subject to severance and found the agreement to be unconscionable and unenforceable. *Baxter v. Genworth North America Corp.*, 16 Cal. App. 5th 713 (1st Dist. 2017). See also *Capili v. The Finish Line, Inc.*, 699 F. App'x 620 (9th Cir. 2017) (cost-sharing provision in arbitration agreement requiring a retail employee, making $15.00 an hour, to advance up to $10,000 at outset of arbitration is substantively unconscionable and so permeates the agreement that severance of the offensive term may not be permitted). But see *Micocina, Ltd. v. Balderas-Villanueva*, 2017 WL 4857017 (Tex. App.) (inability to speak English does not render arbitration agreement, written in English, unconscionable).

Substantively Unconscionable Provisions Bar Arbitration of California Labor Law Claims. Plaintiffs filed a class action against their former employer alleging various violations of the California Labor Laws. The employer's motion to compel arbitration of those claims was granted by the trial court, but the appellate court reversed on substantive unconscionability grounds. The appellate court focused on three provisions. The first required cost-sharing of the unwaivable Labor Law claims asserted here. The court rejected the employer's argument that its after-the-fact offer to pay the fees and reliance on the AAA's rule limiting the employees' obligation to pay to merely a $200 filing fee cured any unconscionability argument. With respect to the latter, the court reasoned that the AAA rule did not "cure the problem because the face of an agreement requiring cost-sharing is likely to discourage an employee from asserting his or her rights, and is therefore unconscionable." The court also found substantively unconscionable the provision that allowed the employer to go to court for alleged violations of restrictive covenants, but required the employees "to arbitrate the claims they would most likely assert, namely, labor

law violations. This is a classic case of substantive unconscionability." *Khaligh v. Superior Court*, 2017 WL 3327977 (Cal. App. 2d Dist.).

Unconscionability Claim Reaffirmed after Supreme Court Remand. The Hawaiian Supreme Court refused to enforce a demand for arbitration, finding that the parties had not clearly agreed to arbitrate the claims and that the arbitration agreement was unconscionable. The United States Supreme Court vacated an earlier decision and remanded the matter following the issuance of its *DirecTV, Inc. v. Imburgia* decision. The Hawaiian Supreme Court reaffirmed its prior decision solely on unconscionability grounds. The Court found the arbitration provision to be procedurally unconscionable as the party seeking to impose arbitration had superior bargaining power and "buried" the arbitration clause on page 32 of a 34-page declaration and provided inconsistent statements as to whether claims were subject to arbitration. The Court also found the arbitration provision to be substantively unconscionable because it prevented the award of punitive and consequential damages and severely limited discovery while at the same time imposing broad confidentiality restrictions on the parties. "As written, the arbitration clause goes beyond designating a forum for dispute resolution by depriving the Homeowners of a meaningful ability to assert rights that they might legitimately hold. Because unconscionability so pervades the arbitration clause, it is unenforceable." *Narayan v. The Ritz-Carlton Dev. Co., Inc.*, 140 Haw. 343, 400 P.3d 544, reconsideration denied, 140 Haw. 380, 400 P.3d 581 (2017).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Arbitration Compelled Under "Reasonably Prudent Smart Phone User" Standard. An Uber customer located and downloaded the Uber application, signed up for an account, and entered his credit card information. The Second Circuit, applying a reasonably prudent smart phone user standard, concluded that the customer had reasonable notice of, and manifested his consent to, Uber's arbitration agreement. The court noted that the payment screen was "uncluttered" and warned the user that by creating the account the user was consenting to the terms and conditions of the application. "The entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service." Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined." The court added that in addition to being "spatially coupled" the notice is "temporally coupled" as the notice of the terms of service "is provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they apply. We think that a reasonably prudent smart phone user would understand that the terms were connected to the creation of a user account." The court was disturbed by the fact that the terms of service was available only by hyperlink. The court found, however, that "the arbitration clause heading was bolded and conspicuous and the instructions were not misleading and were clear and

reasonably conspicuous." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017). See also *Nevarez v. Forty-Niners Football Co.*, 2017 WL 3492110 (N.D. Cal.) (arbitration agreement in Ticketmaster's and LiveNation's on-line terms of use found to be a hybrid clickwrap and browsewrap agreement ruled enforceable where customers were informed when placing order that they were accepting terms of use and hyperlink was provided and arbitration terms were clear); *Hoover v. Sears Holding Corp.*, 2017 WL 2577572 (D.N.J.), reconsideration denied, 2017 WL 3923295 (D.N.J.) (reasonable notice present where arbitration provision in on-line terms and conditions found under "a separate subtitle clearly indicated in bold font, and the waiver of a right to trial is in bold and all caps").

Arbitration Clause in Multi-Layered Set of Hyperlinks Precludes Arbitration. A mobile credit card reader customer was required to electronically check that he had read the terms and conditions for this service. Those terms and conditions were available via an adjacent hyperlink, and within the linked terms and conditions was a second hyperlink containing a user agreement. The arbitration clause was contained within the user agreement. The court refused to compel arbitration, finding that the customer did not consent to the arbitration provision contained in the user agreement – which was linked to the hyperlink to which the customer did consent. "It stretches credulity to assert that the actual page that is linked to the application [the customer] filled out does not govern that application, but rather another page linked to the page that is linked to the application does." *McGhee v. North American Bancard*, 2017 WL 3118799 (S.D. Cal.). See also *Starke v. SquareTrade, Inc.*, 2017 WL 3328236 (E.D.N.Y.) (reasonable notice of arbitration provision in electronics protection plan absent where Amazon purchase page terms and conditions were offered post-sale and the "hyper-link was inconspicuously placed in small font at the very bottom of the e-mail" and, therefore, customer "did not have a meaningful opportunity to review them").

New Employer Cannot Compel Arbitration Based on Arbitration Agreement Former Employer Had with Employees. Medidata Solutions brought a misappropriation of trade secrets action against its former employees and their new employer, Veeva Systems. Veeva sought to compel arbitration based on the arbitration provision in the agreements its new employees had the with their former employer, Medidata. In denying the motion, the court reasoned that the two entities "have no contractual or other relationship that would lead to the conclusion that Plaintiffs should be compelled to arbitrate their dispute with [Veeva]." The district court noted that the Second Circuit has repeatedly disavowed "the finding of a sufficient relationship to compel arbitration under the FAA in similar circumstances." The court concluded "In short, where a relationship between the parties is formed as a result of alleged wrongdoing by the non-signatory, that relationship does not justify a finding of equitable estoppel that would warrant a non-signatory enforcing an arbitration clause against a signatory." *Medidata Solutions v. Veeva Systems*, 2017 WL 3503375 (S.D.N.Y.).

Failure to Return Opt-Out Form Did Not Constitute Acceptance of Agreement to Arbitrate. Macy's in 2003 mailed to plaintiff information regarding its dispute resolution program which ended in arbitration. The materials included an election form which the employee was to execute and return "only if you choose not to be covered by the benefits of Arbitration". Plaintiff brought an ADA claim and opposed Macy's motion to compel arbitration by arguing he never received the materials. The court denied the motion to compel, finding that even if plaintiff did receive the election form it was "a remarkably counterintuitive, ambiguous, and misleading document" and did not constitute an enforceable offer and acceptance. The court emphasized that by not signing the form the employee forgoes an existing right to litigate in court. "The Election Form thus obfuscates the fact that by doing nothing, the employee is giving up that right. A document this ambiguous and misleading cannot constitute an offer to enter into a binding arbitration agreement." The court distinguished prior precedent, including a Second Circuit unpublished decision, by reasoning that unlike those other decisions Macy's never indicated that arbitration was a term and condition of employment which would announce to employees that continued employment constituted acceptance of the agreement to arbitrate. *Weiss v. Macy's Retail Holdings*, 2017 WL 2992502 (S.D.N.Y.). But see *Olivares v. Uber Technologies*, 2017 WL 3008278 (N.D. Ill.) (Uber drivers proposed misclassification class action subject to arbitration where drivers did not opt out and clear and unmistakable delegation of arbitrability issue to arbitrator is evident); *Chamberlain v. LG Electronics*, 2017 WL 3084270 (D.C. Cal.) (arbitration agreement found inside a cell phone box which provided 30 days to return the product or opt out of arbitration ruled enforceable where purchaser neither returned the phone nor opted out of the agreement).

Arbitration Rejected as Harassment Did Not Arise Out of Employment Agreement. The parties here agreed to arbitrate any claim that "arises out of or relates to" the agreement between them. Dr. Saunders was hired under the relevant agreement to serve as Managing Doctor of Veterinary Medicine for Pet Docs. Dr. Saunders filed a sex discrimination claim and Pet Docs motion to compel was granted by the Florida trial court. The appellate court reversed, finding that under Florida law even where the arbitration provision is broad in scope the agreement that contains the arbitration provision must still have a significant relationship to the dispute at hand. The appellate court noted that the dispute here arose under statutory rights and the common law, not the terms of the agreement. "Importantly, an employer-employee relationship may exist even without the execution of an employment agreement. Even without entering this agreement, Saunders could have raised the identical claims." The court concluded that arbitration was not required because Dr. Saunders' claims related generally to the employment relationship and did "not demand consideration of the underlying employment agreement." *Saunders v. St. Cloud 192 Pet Doc Hosp., LLC,* 224 So. 3d 336 (Fla. Dist. Ct. App. 2017). See also *Doe v. Hallmark Partners*, 227 So. 3d 1052 (Miss. 2017), reh'g denied (Aug. 10, 2017) (tenant's kidnapping, assault, and rape claims not encompassed by arbitration provision in lease

covering occupancy and leasing claims "arising" out of the lease); *Evans v. Building Materials Corp.*, 858 F. 3d 1377 (Fed. Cir. 2017) (patent infringement claims do not "arise under" promotion agreement and therefore was not subject to arbitration). But see *Cooper v. Ruane Cunniff & Goldfarb*, 2017 WL 3524682 (S.D.N.Y.) (arbitration provision covering all claims "arising out of or relating to" employment included ERISA claims against employer relating to alleged mismanagement of assets under the employer's 401k plan); *Family Security Credit Union v. Etheredge*, 2017 WL 2200364 (Ala.) (under Alabama law arbitration provisions encompassing claims "arising out of or relating to" the applicable agreement renders torts claims arbitrable).

V. CHALLENGES TO ARBITRATOR OR FORUM

Remand to Different Panel Before Same Arbitration Forum After Vacatur Ordered. An award was vacated on evident partiality grounds. The trial court rejected the request that a new arbitration be heard before an arbitration forum unaffiliated with the one that issued the award, here Major League Baseball. By a 3 to 2 decision, the appellate court affirmed that ruling, finding that the parties knowingly agreed to the procedure that permitted less than fully impartial arbitrators to decide disputes. Here the parties' clause expressly chose "an industry-insider committee with specialized knowledge on the complex issue of how to calculate the appropriate fees that television networks should pay to teams for broadcast rights." At the time they agreed to this panel, the parties knew that the "MLB staff would provide administrative, organizational and legal support, including analyzing financial information and preparing draft decisions in accordance with the instructions of the [arbitration panel] who would then make the final determinations." The parties also rejected mediation before the American Arbitration Association or JAMS, and elected to proceed immediately before an industry panel. The court opined that the only thing that changed was the losing party's unhappiness with the final result. The court noted that the new panel selected has "not demonstrated any bias in the matter and there has been no showing of an impermissible conflict between them" and the parties. *TCR Sports Broad. Holding, LLP v. WN Partner, LLC,* 153 A.D.3d 140, 59 N.Y.S.3d 672 (App. Div. 2017), appeal dismissed, 2017 WL 5492980 (N.Y.). See *Thompson v. Lithia ND Next Acquisition Corp. #1*, 896 N.W. 2d 230 (N. Dak.) (objection to process for selection of arbitrator waived when first raised after the award was issued).

VI. CLASS & COLLECTIVE ACTIONS

Second Circuit Requires District Court to Reconsider Class Arbitration Ruling. The arbitrator in this long running dispute certified a class of tens of thousands of sex discrimination class members. The district court confirmed the award. The Second Circuit vacated the district court's order and remanded the case for further consideration. "The narrow question presented here is whether the arbitrator had the authority to certify a class

that included absent class members, i.e., employees other than the named plaintiffs and those who have opted into the class." The Second Circuit distinguished its earlier ruling, finding that it did not conclusively determine whether an arbitrator had the power to bind absent class members. The court also distinguished the Supreme Court ruling in *Oxford Health*, finding that the issue in that case was solely "whether an arbitrator to whom the parties had submitted the issue acted within his authority in finding that a contract provided for class arbitration." The Second Circuit directed the district court to determine whether the arbitrator exceeded her authority by certifying a class containing absent class members. *Jock v. Sterling Jewelers*, 2017 WL 3127243 (2d Cir.).

Determination of Class Arbitration for Court to Decide Despite Incorporation of AAA Rules. Most courts have ruled that incorporation of the AAA Rules constitute clear and unmistaken referral of the arbitrability question to the arbitrator to decide. But what if the question relates to class arbitration? The Eighth Circuit ruled that the differences between class and bilateral arbitration are significant and require more than silence with respect to assignment of the question of substantive arbitrability to an arbitrator. "The risks incurred by defendants in class arbitration (bet-the-company stakes without effective judicial review, loss of confidentiality) and the difficulties presented by class arbitration (due process rights of absent class members, loss of speed and efficiency, increasing costs) all demand a more particular delegation of the issue than we may otherwise deem sufficient in bilateral disputes." On this basis, the Eighth Circuit concluded that incorporation of the AAA Rules was not sufficient to delegate the question of arbitrability to the arbitrator. *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017).

Class Arbitration Ordered Where Waiver Language Ambiguous. Employees at Lamps Plus were required to sign an arbitration agreement waiving the right to bring claims in court. A class arbitration was filed against Lamps Plus after employees' personal information was publicly disclosed, and Lamps Plus moved to compel bilateral arbitration. The district court refused to order bilateral arbitration and the Ninth Circuit affirmed. The court found that the terms of the arbitration agreement were ambiguous and construed it against the drafter, Lamps Plus. The arbitration provision sought to preclude court actions and required arbitration "in lieu of any and all lawsuits or other civil proceedings relating to my employment." The Ninth Circuit reasoned that "[c]lass actions are certainly one of the means to resolve employment disputes in court" and that the provision "can be a reasonably read to allow for class arbitration." The court also pointed out that "claims against the company include those that could be brought as part of a class." The court also noted that the agreement authorized the arbitrator to award any remedy allowed by law and those "remedies include class-wide relief." The court affirmed the district court's conclusion that any ambiguity is to be construed against the drafter and authorized class arbitration of this dispute. *Varela v. Lamps Plus*, 2017 WL 3309944 (9th Cir.).

VII. HEARING-RELATED ISSUES

Court Action for Pre-Arbitration Discovery Denied. The dispute resolution provision here required the parties to attempt to first negotiate a good faith resolution of the dispute. No discovery was permitted during the negotiation and, even if submitted to arbitration, discovery was only permitted upon a showing of "substantial, demonstrable need." One party brought a pre-arbitration court action seeking discovery related to an arbitrable dispute. The defendant moved to dismiss or, in the alternative, to stay the proceeding pending arbitration. The trial court ordered that discovery be produced and refused to stay the pending arbitration. The appellate court reversed. The court reasoned that "according to the plain language of the underlying contract, the discovery complaint arises out of a potential breach of contract, and the dispute resolution clause in the contract is triggered." The court emphasized that the dispute resolution provision precluded discovery during negotiations, i.e., pre-litigation, and required any discovery dispute to be submitted to the arbitrator. The appellate court concluded that the "complaint for discovery is an attempt to circumvent what the parties clearly bargained for, i.e., to have discovery in a potential breach-of-contract claim conducted in arbitration." *Bright Future Partners v. Proctor & Gamble Distributing,* 2017 WL 2464625 (Ohio App.). See *Allied World Surplus Lines Ins. Co. v. Blue Cross & Blue Shield of S.C.*, 2017 WL 3328230 (D.S.C.), reconsideration denied, 2017 WL 3671172 (D.S.C.) (court lacks jurisdiction where completion of mediation was a pre-requisite and evidence presented that mediation had not been terminated).

Sanctions for Opposing Arbitration Awarded. An independent contractor agreement included an arbitration clause. Counsel for the contractor filed a multi-count federal court complaint and followed it up with a number of frivolous motions and arguments. The district court issued sanctions of $7,500 reflecting the cost of opposing counsel's frivolous motion seeking to bar arbitration. The Seventh Circuit affirmed. The court noted that this "simple commercial dispute" was blown "up beyond all rational proportion." The court added that counsel's "complaint was a disaster, and her efforts to avoid arbitration were meritless." The court concluded that the district court was within its discretion "in light of all the circumstances of this case, to impose a calibrated sanction on [counsel] for conduct of the litigation, culminating in the objectively baseless motion she filed in opposition to arbitration." *Hunt v. Moore Bros., Inc.*, 861 F.3d 655 (7th Cir. 2017), reh'g denied (July 31, 2017).

VIII. CHALLENGES TO AWARD

Proskauer's Extensive Relationship with Major League Baseball Supports Finding of Evident Partiality. The Baltimore Orioles and the Washington Nationals disputed the fair market value of television rights with respect to their regional sports network. They agreed to arbitrate the dispute before the Major League Baseball's Revenue Sharing Definition Committee and a panel of three arbitrators, comprised of representatives from the Tampa Bay Rays, the Pittsburgh Pirates, and the New York Mets, was selected. The law firm of Proskauer Rose represented the Nationals. The Orioles objected, and Major League Baseball determined that it did not have the authority to disqualify the arbitrators. An award was issued, and the Orioles moved to vacate. The trial court granted the motion on evident partiality grounds and the appellate court affirmed. To vacate an award on evident partiality grounds, the court explained that the "movant bears the burden of showing that a reasonable person, considering all the circumstances, would have to conclude that an arbitrator was partial to one party to the arbitration." In doing so, the court reviewed the extensive relationship that Proskauer had and has with Major League Baseball, including representation of the clubs and their owners which comprised the arbitration panel. "The evidence that the same lawyers and the same firm were representing interests of the arbitrators and MLB at the same time as they represented the Nationals in the arbitration is an objective fact inconsistent with impartiality." The court also found that "MLB and the arbitrators undisputably failed to provide full disclosure or seek to conduct the proceeding with arbitrators who had no prior relationship with Proskauer." For these reasons, vacatur on evident partiality grounds was affirmed. *TCR Sports Broadcasting v. WN Partner, LLC,* 153 A.D.3d 140, 59 N.Y.S.3d 672 (App. Div. 2017), appeal dismissed, 2017 WL 5492980 (N.Y.).

"Inference of Empathy" Does Not Constitute Arbitrator Bias. An arbitration panel awarded $2.3 million in damages to a UBS trader. The trader moved to confirm the award, and UBS cross-moved to vacate the award. In confirming the award, the New York trial court rejected the claim that the panel's expression of "sympathy" constituted partiality or bias. Among the statements cited were by one arbitrator who said to claimant that it must be "difficult" for claimant to "listen to all the testimony, this testimony about you personally" and characterized UBS's actions as out of proportion to the dispute. The court reasoned that "though these comments may give rise to an inference of empathy, without more solid evidence of a concrete personal or business link between the arbitrator and [trader], they do not meet the heavy burden on a party attempting to prove partiality." *Passaretta v. UBS Securities*, N.Y. Sup. Ct. Index No. 653340/2016, October 20, 2017).

Evident Partiality Claim Under Nevada Law Rejected. The arbitrator here disclosed that he had a couple of mediations where plaintiff's counsel in the pending case represented parties in the mediations and had worked with a paralegal in that same firm approximately 15 years before. A motion to disqualify the arbitrator was filed in court by the defendant

and was denied. An award was issued and defendant – now the losing party – moved to vacate the award under Nevada law on evident partiality and bias grounds. The Nevada Supreme Court rejected the motion and confirmed the award. The Court reasoned that the relationship between the arbitrator and plaintiff's counsel's firm and its paralegal was not likely to affect partiality or create an appearance of impartiality. The Court also rejected the claim of actual bias, finding that the alleged relationships were not so intimate – personally, socially, professionally, or financially – to cast serious doubt on the arbitrator's impartiality. *Eagle Jet Aviation Inc. v. Woods*, 403 P.3d 684 (Nev. 2017). See also *Law Offices of Herssein and Herssein v. United Services Automobile Ass'n*, 2017 WL 3611661 (Fla. App.) (appellate court denies motion to disqualify a judge merely because he is a Facebook friend with a counsel in a pending case, reasoning the "assumption that all Facebook 'friends' rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking").

Clarification of Award Does Not Violate *Functus Officio* Doctrine. The award in this reinsurance dispute was issued but both parties disagreed on the interpretation of a provision in the award. The arbitrators, upon request of a party, agreed to clarify the award and in so doing increased the damages awarded by over $17,000,000. Both parties moved to confirm, one side to confirm the original award and the second to confirm the clarified award. The court ruled that the clarification did not violate the doctrine of *functus officio* and confirmed the clarified award. To be enforceable, the clarified award "must merely clarify the ambiguity and not substantively change the Final Award." In finding the award ambiguous, the court gave weight to the parties' "inability to agree as to the meaning of the original award" and the arbitrator's belief "that an award is ambiguous and requires clarification." The court noted that although a provision in the award may appear clearly written it may be ambiguous when read in the context of the dispute. The court, while acknowledging that the clarified award increased damages dramatically, emphasized the fact that the damages increased did not necessarily mean that the intent or spirit of the original award was modified. The court noted "that the vast majority of cases holding that a clarification was legitimate under an exception to *functus officio* doctrine were similar to this case in that the clarifications generally concerned relief that was awarded, rather than the substance of the underlying dispute that led the parties to seek arbitration." *General Re Life Corp. v. Lincoln National Life Ins. Co.*, 2017 WL 1230844 (D. Conn.).

Fraud Must be Material to Award to Require Vacatur. A broker brought a number of claims to arbitration and prevailed on a wage claim for which he was awarded $1.1 million in damages. The employer sought vacatur, arguing that the broker defrauded the FINRA panel by offering perjured testimony. The Second Circuit rejected this claim, finding that the alleged perjury was not material to the award. In so finding, the court noted that the broker only prevailed on his wage claim and the alleged perjury was collateral to that claim. The court reasoned that the broker's alleged perjury was not "so significant that it would have

caused the arbitrators to disregard his testimony in the entirety." The court found that under the FAA vacatur based on fraud is only wanted where "the alleged fraud was material to the arbitration." As that was not the case here, vacatur on fraud grounds was not warranted. *Odeon Capital Grp. LLC v. Ackerman*, 864 F.3d 191 (2d Cir. 2017).

Federal Rate Governs Post-Judgment Interest. The arbitrator awarded interest at the New York statutory rate of 9% for both the pre- and post-award periods. In confirming the award, the district court affirmed the New York statutory rate for pre-award and post-award interest but only to the date of the court's judgment. The court ruled that while an arbitrator's determination with respect to pre-award interest is entitled to deference, post-award pre-judgment interest is within the discretion of the federal court. The court found that the 9% state interest rate was reasonable for the pre-award and post-award periods up to the point of judgment. However, the court concluded that 29 U.S.C. § 1961 governs post-judgment interest rates in the absence of a clear designation by the parties, which was not the case here. Consequently, the court applied as the post-judgment rate the "rate of interest the government pays on money it borrows by means of Treasury bills." *Maersk Line. Ltd. v. National Air Cargo Group*, 2017 WL 4444941 (S.D.N.Y.).

Judgment Enforcing an Award Vacated Where Award Itself was Later Vacated. Petitioners submitted a commercial dispute against Laos to an arbitration panel in Malaysia. An award was issued in the petitioner's favor and the award was enforced by a U.S. district court. The award was then vacated by a Malaysian Court, and Laos moved to vacate the district court's judgment enforcing the now vacated arbitration award. The district court vacated its earlier enforcement ruling and the Second Circuit affirmed. The court determined that Rule 60(b)(5) of the Federal Rules of Civil Procedure, which governs the analysis here, required that the full range of interests should be considered, including "whether the motion was made within a reasonable time, whether the movant acted equitably, and whether vacatur would strike an appropriate balance between serving the ends of justice and preserving the finality of judgments, as well as to prudential concern for international comity." The Second Circuit found that the district court "did not exceed the permissible bounds of its discretion in vacating" its earlier judgment. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 864 F.3d 172 (2d Cir. 2017).

Bifurcated Liability Award Subject to Confirmation Under New York Convention. The parties agreed to bifurcate the liability and damages phases of this construction dispute. The arbitrator circulated a draft of his ruling, received comments from the parties, and then issued a final "determination". The prevailing party moved to confirm the award and attach assets sufficient to satisfy the anticipated damages award. The district court confirmed the award and attached the assets as requested and the First Circuit, in an opinion written by former Justice David Souter, affirmed. According to the appellate court, confirmation of an arbitrator's liability determination under the New York Convention "encompasses both legal

and factual components: the rule stating the necessary condition for judicial cognizance and the sufficiency of the record to show that the standard is satisfied by the arbitrator's liability judgment at this point in the present case." The court concluded that, just as it is under domestic law, liability findings under the Convention satisfy the finality requirement "when, as here, the parties have agreed to submit the issue of liability to the arbitrator for a distinct determination prior to a separate proceeding to assess damages." *University of Notre Dame (USA) in England v. TJAC Waterloo*, 861 F. 3d 287 (1st Cir. 2017).

IX. ADR – GENERAL

AAA Appellate Panel Must Rule on Jurisdictional Question. The parties' arbitration clause provided for appellate review by an AAA panel under the AAA's optional Appellate Arbitration Rules. The arbitrator ruled that claimant prevailed under his Telephone Consumer Protection Act claim. Respondent appealed under the Appellate Rules and the AAA acknowledged that the filing requirements had been met. Claimant moved to confirm the award in court, and respondent moved to dismiss the court action, arguing that it was premature as the matter was before the AAA Appellate Panel. The district court granted the motion to dismiss, ruling that it was for the Appellate Arbitration Panel to determine whether the appeal was permissible. In doing so, the court noted that the AAA had accepted the appellate filing and the AAA Appellate Rules provided that the appellate tribunal shall interpret its rules relating to its powers and duties. *Demuth v. Navient Solutions*, 2017 WL 3492541 (W.D. Pa.).

Board Review Deemed "Voluntary Arbitration Proceeding" Compliant With New York Public Policy: American Steamship Owners Mutual Protection and Indemnity Association is a non-profit, mutual protection and indemnity insurance association providing marine insurance. Plaintiff, TransAtlantic Lines LLC, is a member of American Steamship and sought insurance coverage for losses arising out of a shipping accident. American Steamship's claims processing arm paid some of plaintiff's claims but denied others. As permitted under American Steamship's membership rules, plaintiff appealed the partial denial of insurance coverage to the Board of Directors of American Steamship which upheld the denial of coverage. Plaintiff then filed suit in federal district court challenging the Board's decision and claiming that it should be reviewed de novo because the decision violated a fundamental public policy of New York. The court first held that American Steamship's hearings bear all the hallmarks of a voluntary ADR proceeding and was subject to a deferential standard of review. Turning to the public policy argument, the court noted that the issue is governed by state law, specifically, as the parties agreed, New York law and under New York law, "the scope of the public policy exception to an arbitrator's power to resolve disputes is extremely narrow." The court then set forth the two-prong test that must be met to find a public policy violation: (1) a law prohibits, in an absolute sense, the matters to be decided by arbitration; and (2) an award violates a well-defined constitutional,

statutory or common law of the state. The court rejected each of the grounds raised by plaintiff, finding that plaintiff failed to satisfy either element of the two-prong test. Specifically, plaintiff did not set forth any statute prohibiting the use of ADR for disputes of this nature and did not prove that the award violated a "well-defined constitutional, statutory, or common law" of New York state. *TransAtlantic Lines LLC v. Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc.*, 253 F. Supp. 3d 725 (S.D.N.Y. 2017).

X. COLLECTIVE BARGAINING SETTING

New NLRB Standard for Deferring to Arbitration Award Upheld: The NLRB in 2014 adopted a less deferential standard for determining whether to abide by an arbitration award. Under that new standard, the Board will defer to an arbitration award where (1) the arbitrator was explicitly authorized to decide the unfair labor practice at issue, (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the opposing party, and (3) Board law reasonably permits the award. In this case, where the standard was first announced, the Board declined to apply the new standard "because of its impact on settled expectations of employers and unions, who bargained for dispute resolution mechanisms under the old NLRB standard." The Ninth Circuit ruled that the Board did not abuse its discretion in adopting its new deferral policy and in deciding only to apply its new policy prospectively. The court reasoned that retroactive application would severely burden the parties as the new policy was "an abrupt departure" from prior policy and the balance of statutory interest favored a prospective application rule. *Beneli v. Nat'l Labor Relations Bd.,* 873 F.3d 1094 (9th Cir. 2017).

Confirmation of Labor Awards, Allowing Future Contempt Proceeding, Does Not Undermine Grievance Process. The Hyatt Hotels and Local 1 had, and have, an ongoing dispute regarding management personnel doing union work. Two awards were issued in favor of the union, and were confirmed by the district court. Hyatt challenged the confirmation of the awards, arguing that the possibility of court contempt proceedings based on the confirmation of these awards served to undermine the parties' grievance process. The Seventh Circuit disagreed. The court emphasized the union concession that any prospective contempt proceedings would be based on a future arbitration award in its favor on the same issue. As a result of this concession, "the court's role will be limited to deciding whether the union is entitled to the additional remedy of contempt sanctions based on the arbitrator's (or arbitrators') findings." In answering the question what benefit is therefore derived from confirming these awards, the court explained that confirmation "gives teeth to these awards by exposing Hyatt to the prospect of contempt sanctions if it does not comply under circumstances sufficiently similar to those resolved by the two arbitrations." As the court found no attempt to bypass the parties' collectively bargained arbitration process, the court concluded that "we can discern no concrete impact that

confirmation of these two awards will have on the outcome of that process." *Unite Here Local 1 v. Hyatt Corp.*, 862 F. 3d 588 (7th Cir. 2017).

Labor Award Confirmed Under LMRA Deferential Standard. The employer appealed from the district court's ruling which confirmed a labor arbitration award permitting a benefit fund to increase the employer's contribution rate. The Second Circuit affirmed. In doing so, the court emphasized that the standard of review for labor arbitration awards under the LMRA is very deferential. Under this highly deferential standard, the Second Circuit rejected the employer's contention that the arbitrator misunderstood the collective bargaining agreement, finding that the arbitrator's determination "neither ignored the plain language of the contract nor exceeded the scope of his authority." The court reasoned that it could not "reweigh the merits of the grievance submitted to the arbitrator" and could not conclude that the arbitrator's reasoning was insufficiently "colorable" to "withstand judicial scrutiny." Finally, the court rejected the employer's argument that the award should be overturned because the arbitrator deviated from his own reasoning in another case. The court explained that even if it were to agree with the defendant's understanding of the other arbitration, but emphasized that prior precedent rejected the notion that an arbitrator was duty bound to follow arbitral precedent and therefore there was no reason to vacate the award. *RiteAid of New York, v. 1199 SEIU*, 2017 WL 3601240 (2d Cir.).

New York Appellate Court Applies NLRA to Bar Class Waiver. Class waiver and mandatory arbitration provisions between New York Life and its former agents were ruled unenforceable under Section 7 of the NLRA by the Appellate Division, First Department, in New York. In doing so, the appellate court adopted the reasoning of the Seventh Circuit in *Lewis v. Epic Systems*. The court explained that it could "divine no reason that the FAA policy favoring arbitration should trump the NLRA policy prohibiting employers from preventing collective action by employees." The court acknowledged that the Supreme Court "will resolve this circuit split in due course", but the court decided to "choose" to follow the Seventh Circuit analysis in the *Lewis* matter. *Gold v. New York Life Ins. Co.,* 153 A.D.3d 216, 59 N.Y.S.3d 316 (App. Div.), judgment entered, 62 N.Y.S.3d 260 (App. Div. 2017).

Award Vacated Under Railway Labor Act on Public Policy Grounds. An Amtrak police officer was found by the Office of the Inspector General to have lied during an investigation into the claim that she was living with her supervisor and that she had falsified an affidavit relating to a tax matter. The police officer was terminated, but was reinstated by an arbitrator who found that the inspector general had failed to comply with a procedural rule in the collective bargaining agreement between Amtrak and its police force. The award was vacated, and the D.C. Circuit affirmed by a 2 to 1 vote. The majority ruled that the Railway Labor Act recognized the public policy exception to the enforcement of arbitration awards. Here, the arbitrator purported to apply to the inspector general's office a procedural requirement in the collective bargaining agreement to which the inspector general was not

bound. As noted by the majority, "collective bargaining agreements may not regulate an inspector general's investigatory authority has been the law for decades." And on this basis the court concluded that the award violated public policy. The dissenting judge argued that the Railway Labor Act did not permit the application of the public policy exception, and concluded that in the decade since the Supreme Court had framed the public policy exception "neither that court nor this one has yet to encounter a case in which it found reason to invoke it - until now. This case does not come close to meriting such an extraordinary step." *National Railroad Passenger Corp. v. Fraternal Order of Police*, 855 F. 3d 335 (D.C. Cir. 2017). Cf. *Kilgore v. Mullenax*, 2017 Ark. 204, 520 S.W.3d 670 (2017) (public policy exception permitting vacatur of award not recognized under FAA).

XI. STATE LAWS

Statutory Wage and Hour Claim Not Subject to Arbitration. An exotic dancer brought statutory wage and hour claims arguing that she was misclassified as an employee. The dance club moved to compel arbitration, and the trial court granted the motion. The Third Circuit reversed. The court found that under New Jersey law the arbitration provision must specifically reference that it covers statutory claims and must explain the difference between arbitration and litigation, neither of which was included in the arbitration provision here. The Third Circuit rejected the club's contention that the issue was whether the dancer was an employee or a contractor and to find that the wage and hour statute applies is to prejudge the dispute. The court reasoned that the lower court "could find that the arbitration clause does not cover the plaintiff's wage-and-hour claims without deciding that claim's merits." The court also rejected the club's argument that since the dancer asked to be treated as an employee her claim must be subject to arbitration since it would be encompassed under the relevant arbitration provision. The court rejected this argument by noting that the dancer's "claims still *arise under* the FLSA and New Jersey statutes, not the agreement itself." The court concluded that the dancer's "claim here is that she should receive certain wage and benefits as an employee under the FLSA despite her agreement stating otherwise" and as her claim is statutory in nature she may proceed with those claims without first seeking arbitration. *Moon v. Breathless Inc*, 868 F.3d 209 (3d Cir. 2017).

Absence of Waiver Language Defeats Claim to Arbitration: Plaintiff filed a class action complaint alleging that defendants engaged in consumer fraud in connection with the service agreements she purchased for certain appliances. Defendants moved to dismiss the complaint**,** contending that the arbitration provision in the parties' agreements required arbitration. The court denied the motion and defendants appealed. On appeal, the New Jersey Superior Court upheld the lower court decision, noting the principle set forth by the New Jersey Supreme Court in *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014) that in order for consumers to effectively waive their right to sue in court, the arbitration provision must clearly and unmistakably inform them that they are waiving their right to sue

in court. Examining the purported arbitration provision, which was actually titled "Mediation," the court found that it did not provide any waiver language at all and therefore there was no notice to plaintiff that she was waiving her right to file an action in court, rendering the arbitration provision unenforceable. *Kernahan v. Home Warranty Administrator of Florida, Inc.*, 2017 WL 2705414 (N.J. App.).

XII. NEWS AND DEVELOPMENTS

Consumer Financial Protection Bureau's Arbitration Rule Rejected. President Trump signed the Joint Congressional Resolution voiding the CFPB rule precluding the use of class action waivers and arbitration provisions in a variety of consumer financial products. The new rule was set to take effect in early 2018. The CFPB rule was designed to protect consumers from the unknowing waiver of their right to pursue class action relief in court.

Amendments to NYS Commercial Division Rules Emphasize ADR. Two New York State Commercial Division Rules have been amended, requiring attorneys to discuss ADR with their clients. Rule 10 requires attorneys for each party to certify at the preliminary conference and each compliance or status conference that they had discussed ADR options with their clients and state whether their clients are open to pursuing mediation at some stage of the litigation. Rule 11 requires that a preliminary conference order include, in appropriate cases, a date for identifying a mediator. The purpose of the amendments is to resolve cases more quickly and less expensively and to signal to the court which parties are open to mediation, since willingness to participate is a strong factor in effective mediation. The amended rules will take effect on January 1, 2018.

California Bill Bans Arbitration in Fraudulent Bank Contracts. California Governor Jerry Brown has signed into law a bill aimed at stopping banks from using arbitration clauses to shield themselves from lawsuits over sham accounts, a direct response to the Wells Fargo scandal. The legislation was designed to counter Wells Fargo's success in compelling disputes over unauthorized accounts into arbitration and out of public court proceedings. Financial institutions unsuccessfully challenged the rule, arguing it stands in opposition to a federal law that favors arbitration and has been used to prevent states from weakening or disregarding arbitration agreements. The new law will take effect on January 1, 2018.

FINRA Tightens Expungement Guidance. FINRA provided further clarity on the expungement process in September 2017 when it issued its Notice to Arbitrators and Parties on Expanded Expungement Guidelines, making it clear that that a broker may not file a request for expungement of customer dispute information arising from a customer arbitration until the underlying customer arbitration has been concluded. The Notice provides that, to this end, the Director will deny the forum for the second expungement-only request unless the customer arbitration is resolved. FINRA's expanded guidance is

intended to prevent inconsistent results, ensure that the forum operates efficiently, and protect the accuracy of information disseminated about brokers**.**

XIII. TABLE OF CASES