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Feliu Case Summaries:

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Contents

I. JURISDICTIONAL ISSUES: GENERAL

FAA Transportation Exemption Applied to Intrastate Delivery Drivers. The delivery drivers in this case purchased distribution routes by which they buy baked goods and resell and deliver those goods to stores along their routes. Plaintiffs sued alleging that they were misclassified as independent contractors, and the defendants moved to compel arbitration. The district court denied the motion, and the First Circuit affirmed, finding that the drivers fell within the scope of the FAA's transportation exemption. In determining whether plaintiffs are in the transportation industry, the court focused on the work the employees performs rather than on what the employer does generally. The court emphasized that plaintiffs alleged that they drove 50 or more hours a week and rejected defendants' argument that the drivers should be viewed as independent franchise owners. "Workers who frequently perform transportation work do not have their transportation-worker status revoked merely because they also have other responsibilities." The court concluded that by frequently delivering goods to stores qualified plaintiffs as transportation workers. The court relied heavily on the Supreme Court's ruling in *Saxon v. Southwest Airlines* in which an airline ramp supervisor who had multiple responsibilities was found to fall within the transportation exemption. The First Circuit pointed out that "plaintiffs' additional membership in a class of workers who own companies that distribute products for defendants does not remove them from the class of workers who deliver goods – just as the *Saxon* plaintiff's membership in a class of workers who supervise cargo loading did not remove her from the class of workers who physically load cargo." For these reasons, the court declined to compel arbitration. *Canales v. CK Sales Co.*, 67 F.4th 38 (1st Cir. 2023). Cf. *Saxon v. Southwest Airlines*, 2023 WL 2456382 (N.D. Ill.) (airline ramp supervisor's wage and hour claim subject to arbitration under Illinois law despite fact that plaintiff qualified under the FAA transportation worker exemption as Illinois law lacked comparable exemption).

Limitation on Remedies in Arbitration in ERISA Context Invalid. Plaintiff, an ESOP participant, brought a class action against his employer and sought plan-wide relief on behalf of plan participants. Plaintiff was subject to an arbitration agreement that prohibited him from seeking remedies on behalf of others or acting in a representative capacity, specifically citing ERISA claims. The Tenth Circuit denied the motion to compel, holding that the limitation on remedies violated ERISA. The court explained that the arbitration provision is problematic not because it requires plaintiff to arbitrate his claim but rather "because it purports to foreclose a number of remedies that were specifically authorized by Congress" in ERISA. This, the court concludes, prevented plaintiff from effectively vindicating his rights. The court rejected the argument that as a result of the court's ruling an ERISA claim can never be subject to arbitration, noting that "both the nature of the claims and the specific relief sought by the complainant matter. Thus, an ERISA complainant who is asserting a claim unique to himself or herself could not, simply by citing to the same ERISA provision cited by [plaintiff here], avoid arbitration and reliance on the effective vindication exception." The court also ruled that because the arbitration provision prevented plaintiff

from effectively vindicating his rights and recover his statutory remedies, the offensive terms could not be severed, and the entire arbitration procedure was invalid and unenforceable. *Harrison v. Envision Management Holding*, 59 F.4th 1090 (10th Cir. 2023).

Case Shorts

- *Ribadeneira v. New Balance Athletics*, 65 F.4th 1 (1st Cir. 2023) (corporate entity assumed obligation to arbitrate as continuity of operations, assets, and personnel demonstrated).
- *P.S. Finance v. Eureka Woodworks*, 214 A.D.3d 1 (N.Y. App. Div. 2023) (trial court's *sua sponte* referral of case to arbitration where neither party sought arbitration reversed as neither the FAA nor New York law authorizes court to direct arbitration "absent a request from one of the parties to arbitrate").
- *Ribadeneira v. New Balance Athletics*, 65 F.4th 1 (1st Cir. 2023) (generic choice-of-law provision did not displace FAA in favor of state law referenced).
- *Corporacion Aic v. Hidroelectrica Santa Rita*, 66 F.4th 876 (11th Cir. 2023) (under New York Convention only courts in the primary jurisdiction – jurisdiction where the arbitration is seated – can vacate an arbitration award).
- *Baxter v. Miscavige*, 2023 WL 2743144 (M.D. Fla.) (First Amendment precludes court from considering whether former Scientology members would receive a fair hearing from arbitrators who view them as enemies of the Church and therefore substantive unconscionability argument rejected).
- *Green Enterprises v. Hiscox Syndicates*, 2023 WL 3557919 (1st Cir.) (Convention on the Recognition and Enforcement of Foreign Arbitral Awards is self-executing and preempts Puerto Rico's Insurance Code provision which proscribed insurance policy provisions depriving insureds of their right to access to courts).
- *Citrangola v. Citrangola*, 2023 WL 2948638 (N.Y. Sup. Ct.) (arbitrators in New York may not rule on motion to disqualify counsel which "has been placed beyond the reach of an arbitrator's discretion" due to public policy considerations).
- *Wilson v. Kemper Corporate Services*, 2023 WL 1997792 (S.D. Miss.) (plaintiff's contention that she was entitled to pursue in court claims subject to an enforceable arbitration agreement once the limitations period set for filing claims expired ruled "untenable").
- *Ipsen Biopharm v. Galderma Laboratories*, 2023 WL 2412838 (N.D. Tex.) (forum selection provision in arbitration clause designating Brussels as the arbitral forum was properly enforced as under Belgium law forum selection clause in arbitration agreements are mandatory and barred conducting arbitration proceedings outside Belgium).
- *Terrell v. Paradis De Golf Holding*, 527 P.3d 480 (Idaho 2023) (only court can award attorneys' fees pre- and post-arbitration unless the parties have agreed otherwise).

- *Khreshi v. Concierge Auctions*, 2023 WL 2432049 (Sup. Ct. N.Y. Cty.) (arbitration against party in individual capacity who signed agreement containing an arbitration provision in his representative and not personal capacity is enjoined).
- *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093 (9th Cir. 2023) (order denying arbitration immediately appealable under Ninth Circuit law where motion to compel was brought under state law and prior precedent supported appealability of such orders).
- *Foresight Energy v. Ace American Insurance Co.*, 2023 WL 2585931 (E.D. Mo.) (Missouri's prohibition against mandatory arbitration clauses in insurance agreements cannot bar enforcement of arbitration provisions in foreign insurers' contracts as the McCarran-Ferguson Act "applies only to domestic legislation and simply did not contemplate the preemption of international treaties").
- *Silent Gliss Inc. v. Silent Gliss Int'l*, 2023 WL 1863362 (E.D.N.Y.) (fraud in inducement, a voidability issue, did not preclude arbitration where, as here, the alleged inducement was in entering the agreement as a whole and not to the arbitration clause itself).
- *Forrest v. Spizzirri*, 62 F.4th 1201 (9th Cir. 2023) (district court has discretion under the FAA to dismiss rather than stay proceeding where all, rather than just some, claims are subject to arbitration).
- *Polk v. Amtrak*, 66 F.4th 500 (4th Cir. 2023) (Title VII discrimination claims constitute "minor" disputes under the Railway Labor Act and are subject to arbitration).
- *Hammond v. United States Fire Insurance Co.*, 2023 WL 2142979 (S.D. Tex.) (motion to compel denied were defendants failed to comply with requirements in AAA rules for filing of consumer arbitration).

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

Equitable Claims Subject to Arbitration Despite Carve Out. Plaintiff corporation sued a former employee and its business partner seeking various remedies including injunctive relief. The defendants moved to compel arbitration; plaintiff opposed the motion as the relevant arbitration provision carved out "specific performance of this agreement or any other equitable relief" which was to be heard by a court. The court denied the motion. The court acknowledged that, while the arbitration clause was broad, the equitable relief carve out "brings up the breadth of the agreement into question." Nonetheless, the court concluded that the carve out did not limit the claims that could be heard in arbitration "but rather permits parties to seek equitable relief in aid of arbitration" or to enforce an award in court. The court reasoned that to read the carve out language as broadly as plaintiffs urged "would create a carveout so broad that it would render the rest of the arbitration agreement void, as it would permit parties to bring any and all claims before a court so long as they included a request for equitable relief." The court rejected this reading of the agreement which would allow parties to circumvent arbitration, adding that it would be "contrary to

princip[les] of contract interpretation and to the parties' evidenced intent to send disputes to arbitration." For these reasons, defendants' motion to compel was granted. *Continental Materials v. Veer Plastics Private Ltd.*, 2023 WL 2795345 (E.D. Pa.).

No Waiver of Right to Arbitrate. The Ninth Circuit rejected the claim that Michaels Stores waived its right to arbitrate by waiting 10 months to file its motion to compel. The court acknowledged that there is no "concrete test" for assessing whether parties act inconsistently with their right to compel arbitration. The court found that the record was unequivocal that "Michaels did not make an intentional decision not to move to compel arbitration." The court also emphasized that Michaels did not actively litigate the merits of the dispute. Finally, "Michaels repeatedly reserved its right to arbitration, did not ask the district court to weigh in on the merits, and did not engage in any meaningful discovery." As such, the order compelling arbitration was affirmed. *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011 (9th Cir. 2023). Cf. *Worbes Corp. v. Sebrow*, 78 Misc.3d 1212(A) (N.Y. Sup. Ct. 2023) (parties that avail themselves of the court's ability to decide the action, for example by filing five motions including a motion for summary judgment, waive their right to arbitrate); *P.S. Finance v. Eureka Woodworks*, 214 A.D.3d 1 (N.Y. App. Div. 2023) (right to arbitrate waived where parties engaged in motion practice and failed to demand arbitration during the eight months it took for court to decide motions); *Konstantynovska v. Friendly Home Care*, 2023 WL 2186397 (N.Y. Sup. Ct. King's Cty.) (right to arbitrate waived where employer waited over three years beyond time the action was stayed and during this period "engaged in motion practice, attended court conferences, conducted discovery, attended mediation, and deposed" plaintiff); *White v. Samsung Electronics America*, 61 F. 4th 334 (3d Cir. 2023) (right to arbitrate waived where manufacturer was on notice from outset of litigation that claims were arbitrable yet pursued multiple motions to dismiss on the merits and only moved to arbitrate after it was clear only one claim would have to be litigated).

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- *Gordon v. Wilson Elser*, 2023 WL 2138693 (S.D.N.Y.) (delegation to arbitrator to resolve questions of arbitrability not rendered ambiguous by parties' failure to engage in informal negotiation or mediation).
- *Roe v. Ford Motor*, 2023 WL 2449453 (E.D. Mich.) (dispute as to whether an arbitration provision in an expired contract is enforceable goes to the scope and enforceability of the arbitration provision and is for the arbitrator to decide where, as here, there is a delegation provision that applies to the dispute).
- *Various Insurers, Reinsurers, and Retrocessionaires v. General Electric International*, 2023 WL 2976605 (N.D. Ga.) (the challenge to arbitration filed by non-signatories delegated to arbitrators to decide where arbitration provision mandated that disputes "shall be definitively resolved on the basis of the Conciliation and Arbitration Rules of the International Chamber of Commerce").

- *Lyman v. Ford Motor Co.*, 2023 WL 2667736 (E.D. Mich.) (waiver issue goes to the enforceability of an existing arbitration agreement and is for the arbitrator to decide where, as here, arbitrability issues have been delegated to the arbitrator).
- *DotC United v. Google Asia Pacific*, 2023 WL 2838108 (N.D. Cal.) (preliminary injunction issued where arbitration agreement did not delegate question whether non-signatory was bound to arbitrate disputes and, in any event, the question was for court and not arbitrator to decide).
- *Continental Materials v. Veer Plastics Private Ltd.*, 2023 WL 2795345 (E.D. Pa.) (carve out for equitable relief creates ambiguity requiring court to decide question of arbitrability despite evidence that parties delegated question to arbitrator).
- *Gordon v. Wilson Elser*, 2023 WL 2138693 (S.D.N.Y.) (whether failure to provide written notice of termination constitutes material breach of agreement is "the exact sort of question that would be referred to an arbitrator when a valid arbitration clause exists in the agreement" as is the case here).
- *Worbes Corp. v. Sebrow*, 78 Misc.3d 1212(A) (N.Y. Sup. Ct. 2023) (plaintiffs' delay in waiting "almost a year from the time they were granted the exigent relief that they could not get via arbitration to seek arbitration" sufficient to establish waiver).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Gulfstream Dispute Resolution Policy Unconscionable. Rice, the plaintiff here, was required to agree to Gulfstream's Dispute Resolution Policy when he was hired but was not provided with a copy of that Policy. The trial court found the Policy unconscionable, and the California appellate court affirmed. The court concluded that the agreement to arbitrate "involved a high degree of surprise." The court explained that "Rice's agreement to comply with the dispute resolution policy involved a higher-than-average degree of oppression because Gulfstream did not provide Rice with a copy of the dispute resolution policy, did not use the word 'arbitration' in the employment application, and did not explain to Rice that he was agreeing to arbitrate by signing the application." The court also found various provisions of the Policy substantively unconscionable. For example, discovery was limited to document production in the absence of agreement by the parties or an order by the arbitrator. The court ruled that the arbitrator's authority to order additional depositions was an "inadequate safety valve" as "Gulfstream is likely to employ and have access to many of the relevant witnesses and thus would not need to take their depositions." The court also found unconscionable the Policy's requirement that employees, but not Gulfstream, follow strict 30-day limits for pursuing their claims through the four-step process. In doing so, the court noted that the statutory claims that Rice was raising had three- and four-year statutes of limitation. The court also held substantively unconscionable the requirement that Rice keep all aspects of his claim confidential to the extent permitted by law. "The restriction

would preclude an employee, for example, from talking to his or her colleagues about assertions made by the employee's supervisor in the Level 1 meetings to determine the veracity of the statements. It would hamper an employee's ability to determine whether his or her colleagues support the employee's version of events or to gather evidence showing a pattern of discrimination." The court rejected Gulfstream's claim that the limitation on confidentiality "as permitted by law" made it enforceable as "a lay person without legal training would not know the provision could not be enforced." For these reasons, the court affirmed the finding of unconscionability and concluded that Rice would not have a fair opportunity to vindicate his rights. *Rice v. Gulfstream Aerospace Corp.*, 2023 WL 3314990 (Cal. App.).

Procedural Unconscionability Insufficient to Defeat Arbitration Agreement. The arbitration agreement in this case, involving a car dealership employee, was clearly procedurally unconscionable. The font size was extremely small and the print on the written contract was "blurry". Plaintiff was required to execute the agreement on a take-it-or-leave-it basis. In the California appellate court's view, "tiny font size and unreadability go to the *process* of contract formation, however, and not the substance of the outcome. Font size and readability thus are logically pertinent to procedural unconscionability and not to substantive unconscionability." Since font size is "irrelevant to fairness", the court then focused on whether the agreement was substantively unconscionable as California requires both procedural and substantive unconscionability to invalidate an agreement. Focusing on "the words of the contract", the court concluded that the arbitration agreement was not substantively unconscionable. The court noted that the obligation to arbitrate was mutual, and the requirement that the arbitration agreement could only be modified by a writing signed by both parties protected plaintiffs against a later agreement favoring the employer. The court made clear that procedural and substantive unconscionability are distinct, and a single problematic feature should not qualify under both categories. "Just as it would be momentous to nullify the element of substantive unconscionability, so too would it be unwise to dilute or trivialize it by smuggling in procedural objections masked as substantive points." The court acknowledged that a contract that is impossible to read would be difficult to understand. "Is it strange that a contract can be enforced when it is nearly impossible to read? Contract law enforces contracts you cannot read at all, if you are blind, or illiterate, or the contract language is foreign to you." For these reasons, the court reversed the lower court's denial of the motion to compel and ordered arbitration of the dispute here. *Fuentes v. Empire Nissan*, 90 Cal. App.5th 919 (2023). See also *Basith v. Lithia Motors*, 2023 3032099 (Cal. App.) (confusing legalese language in arbitration agreement goes to procedural and not substantive unconscionability of an arbitration agreement; "if the substance of a contract is fair, how the contract is expressed cannot change that").

Forum Selection Clause and Shortened Statute of Limitations Clause Substantively Unconscionable. An arbitration provision in the user agreement for an online video game platform was found unconscionable and unenforceable. On appeal of that determination, the California Court of Appeal found that the forum selection clause "requiring all users of a mobile app to arbitrate their claims in San Francisco regardless of where the users are located strikes us as unreasonable." The court also ruled that the shortened limitations period was unreasonable because it limited all claims to a one-year statute of limitation which was considerably shorter than the three- and four-year limitations periods for the plaintiff's claims here. Factoring these findings into its overall analysis of the arbitration provision, the court determined that it was "one-sided, unfair, and designed to discourage users from bringing claims." Accordingly, the lower court's denial of the operator's petition to compel arbitration was affirmed. *Gostev v. Skillz Platform, Inc.,* 88 Ca. App.5th 1035 (Cal. App. 2023), review filed (April 10, 2023).

Unconscionability Challenge to Delegation Clause Rejected. A California district court rejected plaintiff's attempt to challenge a "clear and unmistakable" delegation clause as unconscionable. While observing "a minimal degree of procedural unconscionability arising from the adhesive nature of the delegation clause" that was presented "on a take it or leave it nature," the court found that "plaintiffs have not met their burden of demonstrating substantive unconscionability." Plaintiffs' challenges were to the agreement as a whole and they made no showing that the delegation clause itself "imposes unfair terms and shocks the conscience." As such, the court held that the delegation clause was enforceable and the challenges to the agreement were for the arbitrator to decide. *Donovan v. Coinbase Global, Inc.*, 2023 WL 2124776 (N.D. Cal.).

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- *Alberto v. Cambrian Homecare*, 2023 WL 3373522 (Cal. App.) (arbitration agreement and confidentiality agreement signed simultaneously are part of the same transaction and substantive unconscionabile terms in the confidentiality agreement affects the arbitration agreement and as a result motion to compel denied on unconscionability grounds).
- *Gordon v. Wilson Elser*, 2023 WL 2138693 (S.D.N.Y.) (employer's waiver of potentially unconscionable provision can serve to preserve arbitration agreement under New York law).
- *Gostev v. Skillz Platform, Inc.*, 88 Ca. App.5th 1035 (Cal. App. 2023), review filed (April 10, 2023) (severance of unconscionable terms not an option where arbitration provision found to be "one-sided, unfair, and designed to discourage users from bringing claims").
- *Fuentes v. Empire Nissan*, 90 Cal. App.5th 919 (2023) (employer's failure to sign arbitration agreement does not render contract substantively unconscionable as

"missing signature is irrelevant to whether the substance of the contract is fair. A missing signature cannot make a fair deal unfair").

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

"Infinite" Arbitration Clause Rejected. Broad arbitration provisions that require any claims between the parties to be arbitrated, even those without any nexus to the agreement containing the arbitration clause, have been recently styled as "infinite arbitration clauses." The court here refused to enforce such an arbitration clause with respect to claims with no nexus to the web platform whose terms of service contained the arbitration provision. In particular, the defendants here are the online ordering platforms Grubhub, Uber Eats, and Postmates who are accused of antitrust violations by prohibiting restaurants from charging prices lower than those charged to the defendants. The court emphasized that the defendants were invoking their arbitration provision for claims not related to use of their platforms, that is, interactions between restaurants and non-parties. The court reasoned that New York contract law would not allow interpretations that are "absurd, commercially unreasonable or contrary to the reasonable expectation of the parties." Alternatively, the court found that "it would be unconscionable to enforce defendants' arbitration clauses with respect to claims untethered to defendants' respective terms of use." The court concluded that "as a matter of either contract formation or unconscionability, the Court holds that defendants' arbitration clauses do not apply to plaintiffs' claims to the extent that they lack any nexus to the underlying contracts – i.e., to the extent they are not brought by plaintiffs in their capacities as a current or former user of defendants' platforms." *Davitashvili v. Grubhub*, 2023 WL 2537777 (S.D.N.Y.).

Tort Claims Non-Arbitrable as Not Arising Under Agreement. The physicians here sued an independent practice association which moved to compel arbitration under two separate arbitration provisions. The first arbitration clause, which applied to Dr. Hayden, covered claims "arising out of or relating to" the agreement; the second clause, which bound Dr. Corsi, was limited to claims "arising under" the agreement. The Rhode Island Supreme Court concluded that all of Dr. Hayden's claims either arose under or were related to the agreement and therefore were subject to arbitration. In contrast, while Dr. Corsi's breach of contract claim arose under the agreement and therefore was subject to arbitration, his tort claims of conversion and unjust dismissal did not "arise" under the agreement and therefore were not arbitrable. In doing so, the Court acknowledged that these claims may relate to the agreement and the relationship between the parties, but they did not arise under the agreement within the limited scope of arbitration to which Dr. Corsi was subject. The Court therefore granted the motion to compel with respect to both physicians except with respect to the tort claims raised by Dr. Corsi. *Hayden v. Integra Community Care Network*, 291 A.3d 557 (R.I. 2023). See also *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093 (9th Cir. 2023) (broad

arbitration clause in Amazon's terms of service for its drivers did not cover claims under wiretapping statutes and invasion of privacy as claims do not depend on any term in the agreement and the harm suffered was not dependent on those terms).

Arbitration Based on Website Terms of Use Rejected. Plaintiffs brought a class action under the Sherman Act alleging that Grubhub, Uber Eats, and Postmates unlawfully fixed prices for restaurant meals by precluding those restaurants from charging lower prices to others. Defendants' motion to compel arbitration based on provisions in their respective terms of use on their apps was denied by the district court. The court found that in each case the defendants failed to provide inquiry notice to the user or failed to provide sufficient evidence of assent to the terms of use. For example, the court found that Uber "failed to provide sufficient information about what its app or web page looked like when the Platform Plaintiffs initially signed up or at any other relevant time." Similarly, the court rejected Grubhub's claim that its webpage constituted a clickwrap agreement. In doing so, the court noted that Grubhub's checkout page "does not require users to check a box or take any affirmative action indicating that they have assented to, let alone read, the Grubhub terms of use." Rather, the user was notified that by placing an order it was agreeing to the terms of use, which the court concluded did not constitute a clickwrap agreement which is generally favored in these circumstances. Finally, the court rejected Grubhub's claim that the plaintiffs agreed to the terms of service because it failed to produce any evidence that the e-mail notice was sent to or opened by plaintiffs, or that plaintiffs assented to any prior agreement with an arbitration provision. For all these reasons, the court concluded that defendants failed to demonstrate that an agreement to arbitrate was entered into by plaintiffs. *Davitashvili v. Grubhub*, 2023 WL 2537777 (S.D.N.Y.).

Consent to On-Line Arbitration Agreement Found. Plaintiff accused her employer of race discrimination. When the employer moved to compel arbitration, plaintiff denied that she ever saw the arbitration agreement contained in the online onboarding documents that the employer claimed she reviewed and accepted. In particular, plaintiff confirmed that "she received a link to register with the HR portal; the only way to register in the HR portal was by possessing her personal information, which no one else had; she was not rushed in reviewing the agreement; and she had no technical difficulties accessing the HR portal." The court concluded that these admissions, coupled with an HR director's certification confirming that all employees receive the onboarding documents and that plaintiff acknowledged receipt of her documentation constituted "clear and unambiguous proof plaintiff assented to binding arbitration." The court was further persuaded by the fact that plaintiff clicked the box online confirming receipt and approval of the online terms. For these reasons, the court concluded that a signature was not required to show plaintiff's consent to the arbitration provision. *Powell v. Prime Comms Retail*, 2023 WL 2375918 (N.J. Sup. Ct.). Cf. *Jackson v. Amazon.com, Inc.*, 65 F.4th 1093 (9th Cir. 2023) (arbitration denied

where no evidence presented drivers were provided actual notice of modification of terms of service containing arbitration provision).

Case Shorts

- *Donovan v. Coinbase Global, Inc.*, 2023 WL 2124776 (N.D. Calif.) (non-signatory cannot invoke arbitration where agreement contains clear-cut language of intent to arbitrate disputes only between the signatories).
- *Ribadeneira v. New Balance Athletics*, 65 F.4th 1 (1st Cir. 2023) (non-signatory individual owner of corporate entity who sought and obtained injunctive relief in Peru received direct benefit under agreement and was therefore subject to its arbitration requirement).
- *JLR Global v. PayPal Holding Co.*, 2023 WL 2527158 (E.D. Tex.) (non-signatory entities operated by plaintiff who are suing PayPal for termination of an account -- which was being used to collect funds for defense following conviction for actions in the Capitol on January 6, 2020 -- bound to arbitrate claims versus PayPal).
- *Silent Gliss Inc. v. Silent Gliss Int'l*, 2023 WL 1863362 (E.D.N.Y.) (non-signatory affiliate acting as agent of the affiliated signatory defendant may compel arbitration of claims against them).
- *Silent Gliss Inc. v. Silent Gliss Int'l*, 2023 WL 1863362 (E.D.N.Y.) (plaintiff, which treats multiple related defendants as a single unit in the complaint, cannot later object to invocation of arbitration agreement by non-signatory defendants).
- *Lennar Homes of Texas v. Whiteley*, 2023 WL 3398584 (Tex.) (direct benefits estoppel applies and binds non-signatory to arbitrate where liability arises from the contract with the arbitration clause and not from general obligations imposed by law).
- *Ford Motor Warranty Cases v. Ford Motor Co.*, 89 Cal. App.5th 1324 (2023), review filed (May 12, 2023) (non-signatory car manufacturer may not invoke arbitration in car dealership's retail installment sales agreement as breach of warranty claims are not founded in, or intertwined with, sales agreement).
- *LaRubint Corp. v. Joint Stock Co. Studio*, 2023 WL 3020564 (E.D.N.Y.) (motion to compel denied where licensing agreement translated into English and Russian was ambiguous; Russian version used the term "arbitrazh" which means civil court in Russian and English version used phrase "arbitration court in New York" which the court admitted it was "not aware of").
- *Belhaven Senior Care v. Smith*, 2023 WL 2803554 (Miss.) (daughter of deceased nursing home resident not bound to arbitrate under direct benefit-estoppel doctrine where daughter was not suing to enforce the admission agreement containing the arbitration provision and the claims sounded in tort).

- *Alabama Somerby v L.D., as Next Friend of E.D.,* 2023 WL 3401877 (Ala.) (daughter of nursing home resident had apparent authority to execute residency agreement on behalf of mother and bind her to agreement's arbitration provision).
- *Kinder v. Capistrano Beach Care Center*, 2023 WL 3531821 (Cal. App.) (adult children's signatures certifying that they were acting as mother's agent when they signed nursing home's arbitration agreement not sufficient to mandate arbitration; defendant presented no evidence that children had actual authority to serve as mother's agent).
- *Galvez v. Arandas Bakery*, 2023 WL 2652249 (S.D. Tex.) (arbitration agreement which names as employer the "Company" or "Legal Entity" and did not name the actual employer does not defeat arbitration as parol evidence readily establishes that employee signed the agreement and was employed by defendant).
- *Palumbo v. AT&T Services*, 2023 WL 2531488 (N.D. Tex.) (customer's inability to recall agreeing to on-line agreement did not negate internet provider's business records evidencing customer's assent to agreement).
- *Gordon v. Wilson Elser*, 2023 WL 2138693 (S.D.N.Y.) (arbitration agreement will not be invalidated on effective vindication grounds based on mere risk of bearing prohibitive costs rather than the likelihood that that would be the case).
- *Algo-Heyres v. Oxnard Manor*, 88 Cal. App.5th 1064 (2023), reh'd denied (March 17, 2023), review filed (April 10, 2023) (court finding that nursing home resident lacked mental capacity to enter into arbitration agreement based on hospital's own reports upheld on appeal).
- *Elara Foodservice Disposables v. Heze Ju Xin Yuan Food Co.*, 2023 WL 2710880 (E.D.N.Y.) (motion to compel denied where arbitration provision ended in an "unfinished sentence" and the "missing clause could change the meaning of the agreement dramatically").
- *Konstantynovska v. Friendly Home Care*, 2023 WL 2186397 (N.Y. Sup. Ct. King's Cty.) (arbitration provision in employee handbook that also provided that it did not constitute an employment agreement rejected as no mutual assent to arbitrate present).
- *Brito v. LG Electronics, USA*, 2023 WL 2675132 (D. N.J.) (reasonable notice of presence of arbitration clause in limited warranty found where consumer acknowledged receipt of the owner's manual containing the limited warranty and sought service under it and is seeking to enforce that same warranty).
- *Petrolex II v. Bailey Group, LLC*, 290 A.3d 1288 (R.I. 2023) (arbitration provision in contract between owner and general contractor enforceable even if "pay-if-paid" provision was found to be void as challenge to underlying agreement did not negate arbitration provision contained therein).

- *Soni v. Cartograph*, 90 Cal. App.5th 1 (2023) (statutory provision, allowing for attorneys' fees awardable to prevailing party as part of court provided non-binding arbitration, controls over parties' contractual attorneys' fees term).
- *Ashi Houma Hotels v. Independent Specialty Insurance Co.*, 2023 WL 2263822 (E.D. La.) (New York Convention's requirement that the arbitration agreement be in writing is satisfied where via e-mail parties exchanged insurance policy quotes, requested and received a binder, and a copy of the insurance policy that contained the arbitration agreement was exchanged).
- *Wilmington Trust National Ass'n v. 700 Hennepin Holdings*, 988 N.W.2d 895 (Minn. 2023) (receiver in property dispute succeeds to the landlord's rights and is bound by arbitration provision in lease).
- *Dixon v. Dollar Tree Stores*, 2023 WL 2388504 (W.D.N.Y.) (plaintiff bound by arbitration agreement, despite verbally objecting to it, where she signed acknowledgment form, failed to opt out of dispute resolution program, and continued to work for defendant-employer).

V. CHALLENGES TO ARBITRATOR OR FORUM

MLB Decision-Making Committee Ruled Impartial. The Baltimore Orioles and the Washington Nationals had a dispute over broadcasting rights. Major League Baseball (MLB) has a Revenue Sharing Definitions Committee (RSDC) established for these kinds of disputes. The RSDC consists of representatives from three major baseball league teams with rotating membership. The RSDC's determination is final and binding. The parties attempted to negotiate a settlement of the dispute in 2013 and the MLB advanced $25,000,000 in an effort to facilitate resolution. Negotiations failed and the dispute was heard and decided by the RSDC. That ruling, however, was vacated on evident partiality grounds because the Proskauer law firm represented both the MLB and the Nationals. The dispute was returned to the RSDC in accordance with a settlement agreement but with different team representatives and with new counsel. The RSDC issued a second ruling, which was again challenged. The award was confirmed, and the New York Court of Appeals affirmed. The Court rejected the claim that the $25,000,000 advance by the MLB demonstrated that the RSDC was biased, finding "no evidence that MLB or [the commissioner of baseball] had any undisclosed influence on the panel members beyond that which the parties had bargained for in the settlement agreement". The Court reasoned that the Federal Arbitration Act's purpose was furthered by having the RSDC rule on the issue "ensuring that arbitration contracts are enforced according to their terms." The Court made clear that the "parties also specifically agreed to arbitrate before the RSDC because it possessed specialized knowledge concerning the complex telecast rights valuations at issue here and an understanding of the ramifications of its decision. The parties agreed to an

industry insider controlled process with a full understanding of the commissioner's involvement." *TCR Sports Broadcasting v. WN Partner, LLC*, 2023 WL 3061481 (N.Y.).

Court Can Appoint Arbitrator Where Lapse in Appointment Process Occurs. The parties here each appointed an arbitrator for a three-person panel, but the two selected arbitrators could not agree on an umpire for the panel. One party moved under Section 5 of the FAA to have the court appoint the umpire. In agreeing to do so, the court noted that "the party arbitrators have failed to agree on an umpire despite exchanging a half dozen names." The court pointed out that under Section 5 a court could appoint an arbitrator where there is a "lapse in the naming of an arbitrator." The court noted that a lapse can occur even where, as here, the arbitrators are still exchanging names of possible umpires. Each party presented to the court three names of possible arbitrators for the court to consider. "While the FAA limits courts' authority to examine the qualifications of an umpire once he or she is selected, the Second Circuit has expressly held that Section 5 of the FAA grants courts the authority to examine candidates' qualifications in exercising their authority to appoint an umpire." The court selected a former federal judge with significant experience with the issues raised by the parties and who was based in the jurisdiction which, the court noted, reduced the costs to the parties. *Certain Underwriters at Lloyd's London v. The Falls of Inverrary Condominiums*, 2023 WL 2784513 (S.D.N.Y.).

Variations in the Consumer Rules of JAMS and AAA Determinative. JAMS will not administer consumer arbitrations that did not meet its minimum standards of fairness. The AAA will only decline to administer consumer arbitrations which materially violate its consumer due process protocol. This difference was sufficient for the court to compel arbitration before the AAA rather than JAMS. The terms of service of defendant cryptocurrency exchange required arbitration before JAMS unless the matter could not be heard by JAMS in which case the arbitration would be conducted before the AAA. Plaintiffs brought a putative class action and argued that the arbitration clause was unconscionable. The court noted both that under the applicable JAMS and AAA rules, issues of arbitrability were delegated to the arbitrator to decide. Plaintiffs argued that various provisions of the arbitration clause were unconscionable, including terms requiring the sharing of costs in the absence of the option to file in small claims court. Because it appeared that an arbitration before the AAA "did not appear impossible" as the question whether the protocol was materially violated was for the arbitrator, the court granted the motion to compel. In doing so, the court held that the delegation clause itself was not unconscionable and explained that the arbitrator would have to rule on the question of whether the class action was subject to arbitration. *Nguyen v. OKCOIN USA, Inc.*, 2023 WL 2095926 (N.D. Cal.).

Case Shorts

- *Oppenheimer & Co. v. Mitchell*, 2023 WL 2428404 (W.D. Wash.) (FINRA arbitration enjoined where insufficient evidence produced that claimant was customer of FINRA member and defendant's inability to recover cost of arbitration constitutes irreparable injury).

VI. CLASS, COLLECTIVE, AND MASS FILINGS

Verizon Limits on Mass Arbitration Ruled Unconscionable. Verizon's Customer Agreement sought to manage the filing of multiple arbitrations by employing a bellwether process. In particular, 25 or more cases raising similar claims brought by the same counsel or in a coordinated manner would be heard in groups of ten, five selected by each side. The remaining cases may not be filed until the first ten bellwether cases are arbitrated. If the parties are not able to reach a global resolution after the bellwether cases are resolved, a second round of ten bellwether cases would be heard. This process would continue until all the outstanding cases are heard. A class action was filed by Verizon customers, and the trial court granted Verizon's motion to compel, only striking the Plan's limitation on damages as being unconscionable. The New Jersey Appellate Division ruled Verizon's entire plan to be unconscionable. The court pointed out, as noted by plaintiffs' counsel, that it was estimated that it would take 145 years to arbitrate all 2,537 claims. In the absence of a global resolution, the court, relying heavily on a recent California federal district court ruling rejecting the same Verizon arbitration scheme, explained that "The bellwether provision is unconscionable on its face because it gives all decision-making power to defendants as to how long the 'batching process' would continue and leaves plaintiffs without any protection to ensure that their claims would be heard in a timely manner." The court was also troubled by the fact that "The agreement prejudices plaintiffs by failing to toll the statute of limitations while the bellwether process is underway." The court also found unreasonable and substantively unconscionable the limitations on discovery contained in Verizon's plan that would bar customers from using evidence not memorialized in the agreement itself. Finally, the court found unenforceable as violative of public policy a requirement in the Verizon plan that customers give defendants notice of a claim within 180 days of receiving a bill. The court concluded that the "cumulative effect" of the various unconscionable terms rendered the arbitration plan unconscionable due to a lack of mutual assent. *Achey v. Cellco Partnership*, 2023 WL 3160849 (N.J. App. Div.).

Class Action Waiver May Not Preclude PAGA Representative Action. Plaintiff, a driver for Lyft, brought an action under PAGA alleging various wage and hour violations. Lyft moved to compel arbitration based on the arbitration provision in its terms of service. Based on the Supreme Court's recent ruling in *Viking River Cruises v. Moriana*, plaintiff conceded that his personal claim for damages under PAGA was subject to arbitration. The

question for the California appellate court was whether plaintiff could proceed with his representative action under PAGA despite having his personal claim adjudicated in arbitration. The court ruled that he could. The court concluded that the question of standing under PAGA was for California courts and consequently it was not bound by the United States Supreme Court's interpretation of California law. The court ruled that PAGA was a remedial statute that was required to be broadly applied. The court found that plaintiff was aggrieved under the statute as the alleged violation was committed against him as well as others. The court added "the requirement that [plaintiff] resolve his individual PAGA claim in a different forum – arbitration – does not strip him of his standing." The court reasoned that to revoke plaintiff's standing would severely limit PAGA's remedial purpose of policing labor law violations. *Seifu v. Lyft, Inc.*, 89 Cal. App.5th 1129 (2023), review filed (May 9, 2023). See also *Gregg v. Uber Technologies*, 89 Cal. App.5th 786 (2023) (same); *Nickson v Shemran, Inc.*, 90 Cal. App.5th 121 (2023) (same); *Galarsa v. Dolgen California*, 88 Cal. App.5th 639 (2023), as modified on denial of reh'g (Feb. 24, 2023) (California rule against splitting causes of action did not bar PAGA Claimant, whose individual PAGA claim is being heard in arbitration, from pursuing PAGA claims in court on behalf of other PAGA plaintiffs).

Case Shorts

- *Work v. Intertek Resource Solutions*, 2023 WL 2574987 (S.D. Tex.) (availability of class arbitration is for arbitrator to decide as applicable JAMS Employment Arbitration Rules confer on arbitrator clear and unmistakable authority to rule on questions of arbitrability).
- *Westmoreland v. Kindercare Education*, 90 Cal. App.5th 967 (2023) (motion to compel denied where arbitration agreement expressly provided that it would not be enforceable if class action waiver was ruled invalid which was the case here as PAGA waiver violated California law).

VII. HEARING-RELATED ISSUES

Arbitrator to Decide Admissibility of Evidence Precluded in Court. A court ruled that defendant's dashcam video of a car accident could not be entered into evidence in court. The parties agreed to arbitrate the dispute, and the arbitrator let the parties know that he was prepared to view the dashcam video but, as that issue was in dispute, would give parties the opportunity to seek judicial relief if so inclined. Plaintiff moved in court for appointment of a new arbitrator and for preclusion in arbitration of the video evidence. The court agreed to order that a new arbitrator be appointed but declined to preclude the video evidence. The court criticized the arbitrator as having "relinquished his responsibility to rule on the admissibility of the evidence." The court noted that while the arbitrator was sensitive to the fact that introduction of the video was in contention, "oftentimes such evidentiary disputes do arise in arbitration. The arbitrator should not have avoided making a

determination" and "punting" on the evidentiary issue. In the court's view, this "contravened how arbitration is intended to work – to serve as a forum for expeditiously resolving disputes in a more informal process." The court noted that "if either party wished to pursue the matter in court, review of the arbitrator's decision could have taken place in a post-arbitration" court proceeding to vacate the award. The court concluded that the application seeking preclusion of the video evidence constituted an improper attempt to file an "in limine motion to determine what evidence an arbitrator may consider." As defendant consented to proceed with a new arbitrator, the court ordered the case back to arbitration with a new arbitrator who "shall determine whether or not to admit and consider the subject dashcam video and audio recordings and, if they are admitted, said arbitrator shall determine their probative value." *Graci v Chen,* 77 Misc.3d 1236(A) (N.Y. Sup. Ct. 2023).

Case Shorts

- *Work v. Intertek Resource Solutions*, 2023 WL 2574987 (S.D. Tex.) (availability of class arbitration is for arbitrator to decide as applicable JAMS Employment Arbitration Rules confer on arbitrator clear and unmistakable authority to rule on questions of arbitrability).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Failure to Disclose Creates Reasonable Impression of Impartiality Requiring Vacatur. A panelist failed to disclose that he and his firm had been represented by the respondent's counsel five years earlier in a legal malpractice action. Respondent's counsel did disclose the relationship to the American Arbitration Association, but the AAA failed to share this with the parties. The panel ruled that respondent violated the agreement at issue but found insufficient evidence of damages and in doing so rejected an auditor's determination that $1.9 million was owed. Claimant discovered after the award was issued that respondent's counsel had previously represented the panelist and moved to vacate the award. The court granted the motion, noting that under existing Ninth Circuit precedent, vacatur is proper if there is a "reasonable impression of partiality", even "if the arbitrator in question could ultimately be found fair and impartial." The court noted that "neither party seriously disputes that [the arbitrator in question had] prior attorney-client relationship with a party's counsel [that] should have been disclosed." The arbitrator's "failure to conduct an adequate investigation in the first instance breaches the independent duty of arbitrators to investigate for potential conflicts." The court reasoned that the nondisclosure impaired the parties' "ability to intelligently select arbitrators and judge the arbitrators' partiality". The court rejected respondent's argument that its "purported ignorance of the conflict" was excusable, finding that the process by which the arbitrators were selected had been compromised. The court concluded that it "does not relish unwinding a hard-fought resolution that both parties have invested significantly into but, given the controlling Ninth Circuit law and the

nature of [the arbitrator's] undisclosed relationship to a party's counsel, the Court cannot allow the award to stand." *Equicare Health, Inc. v. Varian Medical Systems*, 2023 WL 3089093 (N.D. Cal.).

Vacatur Denied Where Arbitrator Disclosed He Would Accept Subsequent Appointment. The California Arbitration Act requires arbitrators to make disclosure required by the Ethical Standards for Neutral Arbitrators in Contractual Arbitration. The JAMS arbitrator in this case disclosed that he would accept matters involving the same parties and/or counsel and would not make a disclosure regarding any such retention. One month before the hearing in this case the arbitrator was retained for an unrelated arbitration by one of the parties and the law firm representing that party. The arbitrator did not disclose that fact, but JAMS did two weeks before the hearing was to begin. The other party, Vivera, moved to disqualify the arbitrator and that application was denied by JAMS. The hearing proceeded and Vivera did not appear. An award was issued, and Vivera moved to vacate the award based on the arbitrator's inadequate disclosure. The trial court denied the motion and the California appellate court agreed, finding that the arbitrator's initial disclosure satisfied the Ethical Standards. The arbitrator both indicated that he would accept additional assignments from the same parties or counsel and that no further disclosure would be forthcoming in that circumstance. "As a result, [the arbitrator] was under no obligation to make any further disclosures because, as required by the Ethics Standards, he had specifically informed the parties that he was not required to do so in the initial disclosure checklist." In any event, the court reasoned that a "disclosure that is not required cannot be the basis for vacating an arbitration award" whether that disclosure is made late or at all. For these reasons, the motion to vacate was denied. *Sitrick Group v. Vivera Pharmaceuticals*, 89 Cal. App.5th 1059 (2023).

California Statute Does Not Require Disclosure of Results of Pending Arbitrations. California requires arbitrators to make extensive disclosures which may impact the perception that they are impartial decision makers, including the results of all prior or pending arbitrations with a party to the proceeding. The arbitrator in this proceeding disclosed prior and pending cases with respondent Kaiser Health, and during the arbitration disclosed that he had agreed to arbitrate additional Kaiser cases. Certain of those new and pending Kaiser cases were decided during the arbitration, but the arbitrator did not disclose the results of those cases which were all in Kaiser's favor. Plaintiff moved to vacate on bias grounds, but the trial court denied the motion, which was affirmed on appeal. The appeals court concluded that "the arbitrator did not have a duty to disclose the post-appointment results of arbitration cases that were pending at the time of his appointment." The court reasoned that the requisite disclosure of the results of arbitrations was limited to cases completed when the arbitrator was appointed, not cases pending during the arbitration itself. The court noted that the "proposed arbitrator cannot disclose the results of a

pending case – those cases are unresolved prior to the date of appointment." The court rejected the contention that an arbitrator's continuing obligation to make disclosures requires the disclosure of the results of post-appointment cases. "None of the cases that [plaintiffs'] cite involve disclosing the later *results* of arbitrations that were pending – and disclosed – at the time the proposed nomination or appointment." *Perez v. Kaiser Foundation Health Plan*, 2023 WL 3473765 (Cal. App.).

Case Shorts

- *First Kuwaiti General Trading v. Kellogg Brown & Root*, 2023 WL 3437813 (E.D. Va.) (motion to correct award after final award was issued did not extend three-month deadline under the FAA to challenge an award and consequently motion filed after statutory time period is untimely and dismissed).
- *Perenco Ecuador Ltd. v. Republic of Ecuador*, 2023 WL 2536368 (D.D.C.) (Ecuador's claim that prospective tax debts should be set off against award in investors' favor where the "parties dispute the finality, validity, or amount of the underlying debt" rejected).
- *Sun Knowledge v. Osborne*, 2023 WL 3147167 (N.Y. Sup. Ct.) (arbitrator's decision to consolidate various claims with common facts into one arbitration is not grounds for, or subject to, vacatur under New York arbitration law).
- *Hale v. Morgan Stanley*, 2023 WL 2972572 (6th Cir.) (arbitrator's "nearly 10-page opinion" satisfied agreement's requirement for a "reasoned and detailed stating of the reasons upon which it is based and supported by essential facts and conclusions of law").
- *Herskovic v. Verizon Wireless*, 2023 WL 2760491 (E.D.N.Y.) (fact that arbitrator considered plaintiff's financial recovery in small claims court when assessing damages did not support motion to vacate).
- *Martinique Properties v. Certain Underwriters at Lloyd's of London*, 60 F.4th 1206 (8th Cir. 2023) (arbitration award issued by panel of appraisers evaluating property damage not subject to vacatur even if award was based on factual errors).
- *Escapes! to the Shores Condo. Ass'n v. Hoar Construction*, 2023 WL 2053895 (Ala.) (panel's refusal to open discovery after completion of hearing to admit relevant photographs which might exist did not establish claim of misconduct by panel sufficient to vacate award).
- *Ribadeneira v. New Balance Athletics*, 65 F.4th 1 (1st Cir. 2023) (time to file motion to vacate under FAA runs from issuance of final award, not partial final award, where parties did not formally agree to bifurcate proceeding into separate, independent stages).
- *Green Bay Professional Police Association v. City of Green Bay*, 988 N.W.2d 664 (Wisc. 2023) (arbitrator did not exceed his powers under Wisconsin law by manifestly

disregarding the law by finding union employee was provided due process under grievance procedures).

- *Redmond v. Polunsky*, 2023 WL 2143600 (E.D. Tex.) (motion to confirm award based on conclusory allegations of complete diversity denied particularly where plaintiffs' own filing indicates that some of the defendants reside in the same state as plaintiffs).
- *Corporacion Aic v. Hidroelectrica Santa Rita*, 66 F.4th 876 (11th Cir. 2023) (as New York Convention did not set forth grounds for vacatur, the law of the primary jurisdiction – the FAA in the U.S. – provides grounds for vacatur of the arbitral award governed by the Convention).
- *Castelo v. Xceed Financial Credit Union*, 2023 WL 3515225 (Cal. App.) (arbitrator's ruling that release of statutory claim, even if it had not yet vested, was not subject to vacatur under California law as no unwaivable statutory rights were contravened).
- *Michalow v. D.E. Shaw and Co.*, 2023 WL 3456628 (N.Y. Sup. Ct.) (court cannot conclude that party who convinced panel to issue award without reasoning met his "burden by clear and convincing evidence that the arbitrators manifestly disregarded the law").

IX. ADR – GENERAL

Exhibits to Vacatur Motion Not Entitled to Confidential Treatment. The Delaware Court of Chancery framed the issue before it as highlighting "the tension between the public policy that judicial proceedings are open to the public and the general expectation of privacy between litigants that chose alternative dispute resolution." The parties disagreed whether exhibits attached to the motion to vacate should include redactions. The court noted that "nothing in the FAA requires confidentiality." The court observed that while arbitration is inherently a private process, it is not necessarily confidential. The court rejected the argument that confidential treatment of the exhibits in the arbitration carried over to the court "where, as here, the court is asked to decide a challenge to an arbitration award, the proceeding is public and any party seeking to keep any portion of the record confidential must comply" with the court's rules. The court explained that a party seeking confidential treatment must demonstrate particularized and concrete damages that will result in the absence of confidential treatment. The court denied the request for confidential treatment here as the requesting party failed to "offer tangible evidence of concrete damage or particularized harm that would befall" it. *Soligenix v. Emergent Product Development*, 289 A. 3d 667 (Del. Ch. 2023).

Failure to Memorialize Settlement in Mediation Fatal. The litigating parties here voluntarily agreed to mediate their dispute. The mediation occurred, and the mediator proposed a draft settlement agreement which was not signed. A few hours later one of the

parties made clear that she was not going to agree to the settlement. The trial court rejected the effort to enforce the settlement, and the New Jersey appellate court affirmed. The New Jersey Supreme Court, in a case involving a court-ordered mediation, had previously ruled that to be enforceable a settlement in mediation must be reduced to writing. The appellate court here rejected the argument that the Supreme Court decision was limited to court-ordered mediation, although recognizing that there are different settings for mediation. The court reasoned that the "differences are irrelevant when considering the policy" behind requiring a written settlement. "In deciding this appeal, whether the mediation is court-ordered or voluntary is a distinction without a difference." On this basis, the court declined to enforce the purported mediated settlement. *Gold Tree Spa v. PD Nail Corp.*, 475 N.J. Super. 240 (App. Div. 2023).

Case Shorts

- *Next Level Ventures v. Avid Holdings*, 2023 WL 3382539 (W.D. Wash.) (motion to seal exhibits which were attached to motion to vacate which includes patent application denied, but court permitted filing of redacted version of the exhibits).

X. COLLECTIVE BARGAINING SETTING

Presumption of Arbitrability Limited. The Second Circuit took the opportunity in this case to "clarify the law of this Circuit regarding disputes about the interpretation of arbitration clauses in collective bargaining agreements." The underlying question in this case was whether a dispute related to retired union members was arbitrable. The court pointed out that the Supreme Court cautioned that to "presume that a dispute is arbitrable because an arbitration clause is framed broadly runs the risk of requiring parties to arbitrate disputes they did not consent to arbitrate." Here, even though the retired employees were not members of the bargaining unit, the court made clear that an employer, as here, can contractually agree to include retirees within the collective bargaining agreement. The court concluded that the collective bargaining agreement's grievance and arbitration provision unambiguously covered the retirees' grievance in this case. The court took the opportunity, however, to point out that while the district court reached the correct result, its approach was faulty. "Rather than finding the Agreement's arbitration clause is ambiguous in scope before applying the presumption of arbitrability, the district court started by characterizing the arbitration clause itself and held that the presumption of arbitrability applied, without determining whether the Agreement covered the parties' dispute." Instead, the Second Circuit emphasized that general contract principles must be applied, and courts should determine first "whether, under ordinary principles of contract interpretation, a particular dispute is covered by the language to which the parties agreed." Once that is established, the presumption of arbitrability may be applied as a "court's last, rather than first, resort." *Local Union 97 v. Niagara Mohawk Power Corp.*, 67 F.4th 107 (2d Cir. 2023).

Case Shorts

- *Teamsters Local 445 v. Town of Monroe*, 2023 WL 3587526 (N.Y.) (arbitration provision in public sector collective bargaining agreement which purports to cover exempt civil service positions may not be enforced as a "dispute under a collective bargaining agreement is not arbitrable if granting the relief sought would violate a statute, decisional law, or public policy. The relief sought in this case would violate all three").
- *Allegiant Air v. International Brotherhood of Teamsters*, 2023 WL 2707186 (9th Cir.) (Fifth Amendment due process rights do not apply to arbitration between airline and union members as arbitrators are private, not state, actors even though obligation to arbitrate was imposed by a federal statute).

XI. NEWS AND DEVELOPMENTS

Bill Introduced Barring Arbitration of Race Claims. A bill mimicking the recently enacted Ending Forced Arbitration of Sexual Assault and Sexual Harassment was introduced into Congress seeking to ban the arbitration of race discrimination claims. The bill would amend the FAA to preclude the arbitration of race claims.

AAA Signs Diversity Pledge. The American Arbitration Association has signed the Ray Corollary Initiative pledge which endeavors to increase diversity in arbitration. The Initiative seeks to do so by relying on "measurable results." The AAA reports that 35% of its selected arbitrators are diverse and 41% of new additions to the AAA roster are women or ethnically diverse professionals.

Tennessee Adopts Revised Uniform Arbitration Act. Governor Bill Lee signed into law the Tennessee Revised Uniform Arbitration Act which will go into effect on July 1, 2023. The new statute modifies Tennessee arbitration law in a variety of ways, including by requiring potential arbitrators to make disclosure that might impact their impartiality, clarifying arbitrators' authority to rule on summary dispositions, limiting class proceedings in the absence of the agreement of the parties, and clarifying an arbitrator's authority to order provisional remedies.

XII. TABLE OF CASES

Cases