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# AAA Case Summaries:
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# I. JURISDICTIONAL ISSUES: GENERAL

**California Statute Criminalizing Mandatory Arbitration Enjoined**. A recent California statute making it, among other things, a misdemeanor for employers to condition jobs on workers' agreement to arbitrate employment claims was enjoined indefinitely by a California district judge. The judge, applying Supreme Court jurisprudence under the FAA, concluded that the California law placed arbitration on an unequal footing with other contracts. The judge reasoned that the statute "singles out the requirement of entering into arbitration agreements and thus subjects these kinds of agreements to unequal treatment." The court added that "even if the law itself is artfully crafted to support the argument that it only regulates the behavior of employers, it cannot avoid being construed as law that in effect discriminates against arbitration agreements." In granting the injunction, the court determined that employers would suffer irreparable harm if the law was not enjoined. In the court's view, the employers "provided sufficient evidence to show California businesses that rely on arbitration agreements as a condition of employment will be forced to choose between risking criminal or civil penalties, or both, based on the uncertainties surrounding [the law's] implementation, and foregoing the use of arbitration agreements altogether to avoid penalties." The court noted that employers, in the absence of an injunction, could not recover their damages if found liable as the state of California "is immune from suit under sovereign immunity, as are the defendant state actors acting within their lawful capacity." If employers were not able to arbitrate claims, the court found that they would "be deterred from participating in contractual behavior governed by the FAA and likely protected under the Supremacy Clause." The court concluded that the balance of equities fell in favor of the employers. "In the unlikely event [the law] is later found compatible with the FAA and not pre-empted, defendants will have suffered the minimal harm of delayed enforcement, whereas plaintiffs are likely to have suffered harm that cannot be remedied." *Chamber of Commerce of the United States v. Becerra*, 2020 WL 605877 (E. D. Cal.).

**Employer Ordered to Arbitrate 5010 Individual Claims.** Doordash included a class action waiver in its mandatory arbitration agreement for its couriers. Over 5000 arbitration demands were filed by the couriers alleging that they were misclassified as independent contractors. The couriers paid over $1.2 million in filing fees to the AAA, but Doordash failed to tender its requisite fees of over $12 million. The couriers moved to compel arbitration; Doordash opposed the motion on various grounds, including that claimants' counsel was not authorized to act on behalf of all the claimants and that the action should be stayed pending completion of the settlement of a related class action case which might disqualify certain of the claimants here from pursuing their claims. The court granted claimants' motion and ordered Doordash "to immediately commence AAA arbitration" with the claimants. In doing so, the court noted that employers have for years "forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action

waivers upon them too, thus taking away their ability to join collectively to vindicate common rights." The court found "irony" in the fact that the couriers in this case were seeking to enforce the arbitration provision imposed on them by Doordash, and that Doordash is "faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay" having never expected its workers would pursue their rights en masse. "Instead, in irony upon irony, Doordash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order." *Abernathy v. Doordash, Inc.*, 2020 WL 619785 (N.D. Cal.). Accord: *Adams v. Postmates,* 2020 WL 1066980 (N.D. Cal.).

**Equitable Estoppel Rejected Where Claim Based on Federal Law and Not Contract**. Plaintiffs brought a class action against Uber arguing that its failure to provide wheelchair accessible vehicles violated the Americans with Disabilities Act. Plaintiffs never created an Uber account or downloaded the Uber app or otherwise agreed to the terms of service. In fact, they never booked an Uber ride. Nonetheless, Uber sought to compel arbitration, arguing that plaintiffs' claims implicated the terms of service because they could not have utilized Uber vehicles without doing so. On this basis, Uber argued that plaintiffs were equitably estopped from litigating their claims. The court rejected Uber's argument, reasoning that Uber "elected to offer goods and/or services and in doing so [was] required to comply with any applicable Federal regulations, including the ADA; thus [it] can be charged with violation of Federal disability laws." The liability here, the court emphasized, was measured against federal law, that is, Uber's failure to comply with the ADA. The court rejected the argument that plaintiffs sought to stand in the shoes of Uber subscribers on the ground that they lacked standing because they did not join the service. The court concluded that "an individual's standing to bring a claim for disability discrimination under the ADA is not dependent on his/her undertaking futile gestures. To the contrary, such plaintiffs have their own standing; their deterrence-based injury is actual, cognizable and their own." *O'Hanlon v. Uber Technologies, Inc.*, 2019 WL 5895425 (W.D. Pa.).

**FAA Applies to Award Where Arbitration is Prerequisite to Litigation**. The insurance agreement here provided that the insured "may not bring a suit against us unless you have complied with all terms of this policy, including arbitration." A dispute arose and the matter was submitted to arbitration. The arbitrator ruled in favor of the insurance company and the insured sued seeking recovery on his insurance claim. The district court denied the insured's claim and the Sixth Circuit affirmed. In the court's view, the insured was asking the court to overturn the arbitration award, relying on the provision allowing suit after arbitration. The court reasoned that the insured "is largely mistaken: we can review only the arbitrator's award, and our review of the award is necessarily limited to the grounds set forth in the [FAA]." The court noted that the insurance agreement authorized the arbitrator to exercise power granted under the FAA and the award was confirmed as the insured provided no basis for vacating the award under applicable law. *Capone v. Atlantic Specialty Insurance Co.*, 791 F. App'x 595 (6th Cir. 2020).

**Claim Preclusion Based on Failed Settlement Rejected**. The parties reached a tentative settlement following mediation and the court issued a 60-day order of dismissal which gave the parties that period of time to finalize the settlement. Hearing nothing from the parties after 60 days the court dismissed the action without prejudice. Four months after the filing, plaintiffs contacted the court regarding the "future status of the litigation" as the settlement had fallen through. Notice of the failed settlement had not been provided to the court. The court indicated that it no longer had jurisdiction over the matter. Plaintiffs then initiated a new case which was assigned to the same judge who then granted defendants' summary judgment motion on claim preclusion grounds. The Third Circuit reversed. In doing so, the court emphasized that voluntary dismissals are presumed to be without prejudice. "When we are uncertain what kind of dismissal the district court entered, we construe ambiguities against claimed preclusion." The court reasoned that initial voluntary dismissals are best construed as being without prejudice so as not to preclude relitigation of those claims. "Only a clear and explicit statement will suffice to make a dismissal involuntary, or voluntary with prejudice." Here, the appellate court found that the district court order did not clearly or explicitly indicate that the dismissal was involuntary or with prejudice and interpreted that ambiguity as a basis for refusing to apply the claim preclusion doctrine here. *Papera v. Pennsylvania Quarried Bluestone Co.*, 948 F.3d 607 (3rd Cir. 2020).

## *Case Shorts*:

- *Heller v. Rasier*, 2020 WL 413243 (C.D. Cal.) (FAA exemption for transportation workers not applied to Uber drivers who "transport only persons within a metro area, even if sometimes to and from an airport").
- *In the Matter of Henry*, 944 F. 3d 587 (5th Cir. 2019) (bankruptcy courts have discretion to refuse to enforce arbitration agreement and to compel arbitration when seeking to enforce discharge injunction).
- *Soaring Wind Energy v. Catic USA, Inc.*, 946 F.3d 742 (5th Cir. 2020) (arbitration award is not entitled to "inherent legal effect" in the absence of court confirmation even where the arbitration agreement specifies that an arbitration award "*may* be filed in any court of competent jurisdiction and *may* be enforced" by the prevailing party).
- *Psara Energy v. Advantage Arrow Shipping*, 946 F.3d 803 (5th Cir. 2020) (district court's order compelling arbitration and administratively closing the case did not constitute a final appealable order subject to review).
- *Yam Export and Import, LLC v. Nicaragua Tobacco Imports*, 2020 WL 465015 (Fla. Dist. Ct. App.) (question of whether financial default constitutes waiver of arbitration is condition precedent for arbitration panel, as gatekeepers, to resolve).
- *TIG Insurance Company v American Home Assurance Company,* 2020 WL 605974 (S. D.N.Y.) (whether non-party to arbitration agreement is bound to arbitrate is question of contract interpretation for the arbitrator to decide).

- *OI European Group B.V. v. Bolivarian Republic of Venezuela*, 2019 WL 5800005 (D.D.C.) (political uncertainty in Venezuela not sufficient grounds to deny attachment of assets in U.S. to secure recovery from 2015 arbitration award).
- *Philadelphia Indem. Ins. Co. v. SMG Holdings, Inc.*, 44 Cal. App. 5th 834 (2019), reh'g denied (Jan. 29, 2020) (third-party beneficiary under commercial general liability insurance policy bound to arbitrate dispute where it sued for coverage under policy as application constitutes knowing claim for benefits under contract).

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

**Enforceable Arbitration Agreement Must Exist Before Delegation Term Applied**. The court agreed that the arbitration agreement here included a valid delegation clause, and plaintiffs sought to compel arbitration on that basis. Affirming the district court, the Sixth Circuit ruled that no agreement to arbitrate was present and therefore the delegation clause, while valid, could not be invoked. Here, a buying group of distributors agreed to make available a manufacturer's limited warranty to their customers. The limited warranty mandated arbitration which would be brought only by an "individual retail purchaser" and not the distributors. On this basis, the Sixth Circuit concluded that no arbitration agreement existed between the manufacturer and the distributors. The court agreed with the distributors that under the Supreme Court decision in *Rent-A-Center*, delegation clauses are independent from the arbitration agreement itself but recognized that a valid agreement to arbitrate was required before the delegation provision could be applied. "We therefore refuse defendants' invitation for us to merge challenges to the validity of an agreement ('whether it is legally binding') with challenges to the existence of an agreement in the first instance ('whether it was in fact agreed to' or 'was ever concluded')." *In Re Automotive Parts Antitrust Litigation*, 2020 WL 881263 (6th Cir. 2020).

**Arbitrator to Rule on Inconsistencies Between Two Applicable Arbitration Agreements**. Plaintiff signed a loan agreement and an insurance agreement at the same time when he borrowed money from a loan company. Each agreement had arbitration provisions, but those provisions differed. For example, the two arbitration clauses differed in: the number of arbitrators to be selected; the manner of selecting the arbitrators; the location for the arbitration, and; who pays. The bankruptcy court and the district court denied defendants' motion to compel but the Fifth Circuit reversed. The majority instead emphasized that both arbitration provisions had valid delegation clauses, and therefore the gateway procedural issues were for the arbitrator to decide. The court noted that while "the agreements differ over procedural details, they speak with one voice about *whether to arbitrate*." The court found the procedural differences between the two agreements to involve "nonessential" terms of the agreements. The panel made clear that it would "not shut our eyes to an agreement that demonstrates a baseline intent to arbitrate just because it contains inconsistent terms about procedural minutiae." As the delegation clauses in both

arbitration agreements were enforceable, the majority concluded that it was "the arbitrator's province to resolve the inconsistent procedural terms." *In the Matter of Chuck Willis*, 944 F. 3d 577 (5th Cir. 2019).

***Case Shorts***:

- *Oliveira v. New Prime, Inc.*, 2019 WL 6699453 (D. Mass.) (claims under Missouri Uniform Arbitration Act waived where defendant pursued and appealed FAA claims for two years before invoking Missouri law).
- *Solo v. UPS*, 947 F.3d 968 (6th Cir. 2020) (actual prejudice and waiver found where motion to compel "was filed over two years into the suit, after the plaintiffs incurred the expenses of defending against a merits-based motion to dismiss, appealing that decision, and then engaging in many months of discovery").
- *Iraq Middle Market Development Foundation v. Harmoosh*, 947 F.3d 234 (4th Cir. 2020) (right to arbitrate waived by failing to assert it in legal proceedings before Iraqi court).
- *Willis v. FitBit, Inc.*, 2020 WL 417943 (S.D. Cal.) (delegation provision enforced where unconscionability challenge directed at arbitration provision itself and not specifically to delegation term).
- *Solo v. UPS*, 947 F.3d 968 (6th Cir. 2020) (waiver found where "motion to dismiss was thoroughly enmeshed in the merits" and sought "immediate and total victory" and motion to compel only filed after motion to dismiss was denied).
- *Marbaker v. Statoil USA Onshore Properties*, 2020 WL 733049 (3rd Cir.) (waiver claim not ripe for declaratory judgment determination before arbitration sought or evaded and before motion to compel made).

## III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

**Unconscionability Finding Overturned**. The trial court ruled that the arbitration agreement here was an unconscionable adhesion agreement based on plaintiff's representation that he had only a high school education and did not even know what an arbitrator or arbitration was. The Florida appellate court vacated the lower court's ruling. The appellate court found no procedural unconscionability where: the employer did not pressure, rush, or coerce the plaintiff into signing the agreement; plaintiff did not ask questions or express confusion when he signed; the operative terms were not hidden, and; employer did not make any false or deceptive statements. The court also rejected the claim of substantive unconscionability based, for example, on the waiver of a jury trial and a truncated statute of limitations. The court noted that all arbitration agreements require waiver of jury trials and the one-year limitation period at issue only applied if no statutory limitation period was present. The court noted that plaintiff was given the option of

applying AAA arbitration rules or the rules of The Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation. The appellate court concluded that the agreement was binding and not unconscionable and remanded the case with instruction to grant the motion to compel. *Hobby Lobby Stores v. Cole*, 2020 WL 34288 (Fla. Dist. Ct. App.). Cf. *Thomas v. Hyundai of Bedford*, 2020 WL 374385 (Ohio App.) (arbitration agreement found unconscionable where it purports to include claims outside the employment relationship).

**Substantive Unconscionability Challenge Rejected**. Plaintiffs' offer letters included an arbitration agreement that carved out claims related to an accompanying confidentiality agreement. Plaintiffs brought wage and hour claims against their employer and the employer moved to compel arbitration. Plaintiffs opposed the motion, arguing that the lack of mutuality precluded enforcement of the arbitration agreement under California law. The court agreed that when terms are so one-sided as to be unfair California courts may find the arbitration agreement to be unconscionable. Here, the court found that the arbitration agreement did not reflect a systematic effort to impose an inferior forum on the employee. The court noted that in almost all other respects the arbitration agreement was mutual. The court also rejected the plaintiffs' substantive unconscionability claim based on the application of the JAMS Comprehensive Arbitration Rules which require parties to pay pro rata shares of the arbitration costs. While acknowledging that the provision was substantively unconscionable as was the carve out for the confidentiality agreement as applied in this case, the court concluded that these provisions could be severed. Overall, the court determined that the agreement was "not permeated with unconscionability" and by severing the two offensive provisions the arbitration agreement was not unconscionable and was enforceable. *Brown v. Quantcast Corp.*, 2019 WL 6727503 (N.D. Cal.).

**Retroactive Application of Arbitration Agreement Not Unconscionable**. The arbitration agreement contained an amended licensing agreement for the video game Fortnite entered into after the account was opened. Plaintiff, in seeking to avoid arbitration, argued that it was unconscionable to impose arbitration after the alleged injuries occurred. In rejecting this argument, the court noted that "arbitration agreements applied retroactively against claims that have already accrued are enforceable if the clause's language is broad enough." The court pointed out that the underlying agreement provided that it could be amended upon notice which the court found to be in these circumstances reasonable. The court also was persuaded that "meaningful choice" was provided because the plaintiff was provided with a 30-day period to opt-out of the amendment to the licensing agreement. The court reasoned that if plaintiff objected to the arbitration provision contained in the amended licensing agreement he could have opted out or stopped using Fortnite but did neither. For this reason, the court rejected plaintiff's unconscionability claim and compelled arbitration. *Heidbreder v. Epic Games, Inc.*, 2020 WL 548408 (E.D. N. C.).

*Case Shorts*:

- *UBS Securities v. Prowse*, 2020 WL 433859 (S.D.N.Y.) (unconscionability claim based on "take it or leave it" nature of offer rejected where the party "is a lawyer, licensed in Australia and registered in New York" and is not "unsophisticated").

## IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

**Delay in Paying Arbitration Fees Ruled Not Material Breach of Contract**. Over 100 Lyft drivers initiated arbitrations with the AAA against the ride sharing service alleging that they were misclassified as independent contractors. The AAA split the claimants into five categories. Plaintiff here, Brunner, was in Group 3. Six months after Brunner's demand was filed the AAA issued a revised invoice to Lyft for category three cases which Lyft promptly paid. Brunner, however, withdrew his demand seven days before the AAA issued its revised invoice and filed a putative class action against Lyft alleging that Lyft had defaulted by not paying the requisite arbitration fees. The court granted Lyft's motion to dismiss Brunner's action. The court found that Lyft was not in default and cited the AAA's issuance of a revised invoice. The court noted "the arbitrator – or, in this case, the AAA itself – is well positioned to decide in the first instance whether the non-payment of fees justifies the termination of arbitral proceedings." The court added that Lyft promptly paid the fees for Group 2 and yet by the time Brunner withdrew his arbitration claim no preliminary hearing had been held in those cases and "Brunner thus did not suffer delay from the alleged breach." In addition, Lyft was "actively cooperating" with the AAA and never refused to pay the requisite arbitration fees. The court, in rejecting Brunner's material breach of contract claim, concluded that "the six-month delay between Brunner's filing and withdrawal of his arbitral claim is attributable to the AAA's administrative timeline for the 107 claims pending against Lyft, not to Lyft's late payment of the fees for Group 3." *Brunner v. Lyft*, 2019 WL 6001945 (N.D. Cal.).

**Minor Child Authorized to Enter Arbitration Agreement**. A father brought a putative class action against the maker of the video game Fortnite for breach of data security based on hackers accessing his account information. The father opened an account that his minor son used exclusively every day for over year. During that time Fortnite amended its licensing agreement to include an arbitration provision. The minor son, not the father, agreed to its terms. The father argued that his son was a minor who lacked the capacity to enter into an enforceable agreement. The court disagreed, finding that the son had the apparent and implied actual authority to do so. The court emphasized that the son had used the account login credentials and was authorized to do so and that it was unreasonable for the son to believe he lacked authority to agree to the amended terms. "Put another way, the evidence demonstrates that plaintiff created [a Fortnite] account and then gave [his son] free rein over the account for over a year." On this basis, the court found that the son had actual authority to agree to the licensing agreement. The court also

found that Fortnite had demonstrated implied apparent authority as it "was justified in believing that the user of plaintiff's [Fortnite] account possessed the authority to agree to the [licensing agreement]. Defendant had no reason to believe that the user of plaintiff's account was anyone other than plaintiff – or someone to whom plaintiff give authority over his account." For these reasons, the court compelled arbitration of the father's claims. *Heidbreder v. Epic Games, Inc.*, 2020 WL 548408 (E.D.N.C.). Cf. *Jones v. Allenbrooke Nursing and Rehabilitation Center*, 2019 WL 6842372 (Tenn. App.) (daughter's execution of nursing home admission agreement with arbitration clause did not constitute acceptance on behalf of her mother where power of attorney specifically excluded healthcare decisions and signing of agreement was deemed to be a healthcare decision).

**Website Failed to Provide Actual or Constructive Notice of Arbitration**. Huuuge operates a mobile gaming site. A class action was brought by a user who signed up for the service on Huuuge's website. Huuuge moved to compel arbitration and the district court denied the motion. The Ninth Circuit affirmed. The appellate court noted that Huuuge's browsewrap agreement would require the user to have "Sherlock Holmes' instincts to discover" the terms of service. The court noted that Huuuge's claim that plaintiff "likely" viewed the terms of use failed to form a basis for actual notice. The burden is on the website or app owner to demonstrate that users were put on notice of the terms of use. Here the court found that the "Terms are not just submerged – they are buried 20,000 leagues under the sea." Notice is only provided if the user clicks on "an ambiguous button to see the app's full profile page and scroll through multiple screen-lengths of similar-looking paragraphs." The website urges the user at that point to read the terms but fails to provide a hyperlink to those terms. The court concluded that Huuuge failed to provide constructive notice of the terms of service and the arbitration provision and affirmed the denial of the motion to compel. *Wilson v. Huuuge, Inc.*, 944 F.3d 1212 (9th Cir. 2019). Cf. *Heller v. Rasier*, 2020 WL 413243 (C.D. Cal.) (Uber customer properly put on notice of obligation to arbitrate despite terms being in small gray font against black background as "a reasonably prudent smartphone user would recognize that a box with the text 'Terms of Service' is clickable and would lead to a display of those terms").

**Non-Signatories Who Benefit from Agreement Found Subject to Arbitration**. Multiple class actions were brought against the fantasy sports services FanDuel and DraftKings and consolidated in the District of Massachusetts. The defendants moved to compel arbitration of the claims by both the signatories and the non-signatories to their services. The court found little trouble compelling arbitration of the signatories claims, despite the fact that FanDuel's website did not require registrants to acknowledge acceptance by clicking on the terms of service. The court reasoned that access to the terms of service containing the arbitration clause was sufficient. The court commented that "on the cusp of the third decade of the twenty-first century it can fairly be said that following a hyperlink is like turning a page in a printed document. Any reasonable viewer would realize that access to the text of the terms would be simple and immediate." The court also compelled arbitration

of the civil conspiracy claims brought by the non-signatories which the court concluded was "the very same claim" being arbitrated by the signatories. The court reasoned that "it would be inequitable to allow the party not contractually bound to arbitrate to avoid participation in an arbitration in which the issues and interests of both the bound and unbound parties are affected." The court saw no reason "to split the prosecution" of the same civil conspiracy claims and likely risk "inconsistent outcomes." The court also compelled the arbitration of claims against the payment processing services, who were working with the defendants and who were also sued, which the court ruled were intertwined with the arbitrable claims. The court noted that both the First and Second Circuits have applied equitable estoppel principles where the non-contracting parties' claims were closely related, both factually and legally, with claims bound to be arbitrated against contractual partners. Finally, the court declined to compel the arbitration of claims brought by family members of registrants alleging state law claims by which a gambler's family may recover gambler's losses. The court noted that the family members derived no direct benefit from the agreement containing the arbitration clause. The court emphasized that defendants did not allege that the family members benefited from the agreement, for example, by receiving winnings from the signatories' gambling. The court held that these claims could not be arbitrated because "no plausible arbitration agreement binds the family member plaintiffs, and because there are no specific allegations tending to show that they derived any substantial benefit from any arbitration agreement." *In Re: Daily Fantasy Sports Litigation*, 2019 WL 6337762 (D. Mass.). See also *Jamieson v. Securities America, Inc.*, 2019 WL 6977126 (S.D.N.Y.) (non-signatory may enforce arbitration agreement against signatory where issue raised by non-signatory is "intertwined with the subjects giving rise" to signatories' claims).

**Motion to Compel Denied Where Electronic Signature Not Authenticated**. Fabian, a homeowner, brought suit against Renovate America regarding the installation of solar energy panels in her home. Renovate America moved to compel arbitration relying on Fabian's electronic signature on the agreement containing the arbitration provision. Fabian denied ever signing the agreement, electronically or otherwise. The trial court denied the motion to compel, and the California appeals court affirmed. In doing so, the court emphasized that Renovate America "offered no evidence about the process used to verify Fabian's electronic signature . . ., including who sent Fabian the Contract, how the Contract was sent to her, how Fabian's electronic signature was placed on the Contract, who received the signed Contract, how the signed Contract was returned to Renovate, and how Fabian's identification was verified as the person who actually signed the Contract." The court found that the declaration offered in support of Renovate America's position was also wanting. In particular, the court noted that the declarant "did not explain, for instance, who presented Fabian with a physical or electronic copy of the Contract, the specific location where the Contract was signed, the time when the Contract was signed, or how [the declarant] ascertained that Fabian was present when the Contract was signed." For these reasons, the appellate court affirmed the lower court's denial of the motion to compel arbitration.

*Fabian v. Renovate America, Inc.*, 42 Cal. App. 5th 1062 (4th Dist. 2019). See also *Hobbs v. Apollo Interactive*, 2019 WL 6878863 (M.D. Ga.) (motion to compel denied where website user produced evidence that he was driving when website was accessed and none of his devices used the version of Word that was used to access the website).

**Unilateral Right to Prospectively Modify Arbitration Agreement Ruled Enforceable**. Comcast's Subscriber Agreement reserved to the company its right to unilaterally modify the terms of the Agreement, including its arbitration provision. The question here was whether that provision was enforceable under Massachusetts law and the FAA. The federal district court ruled that it was. The court acknowledged that a contracting party's unilateral right to modify an agreement may be ruled illusory and unenforceable under Massachusetts law. Here, however, the court emphasized that Comcast's right to modify the Subscriber Agreement was only prospective, that is, the language did not "give Comcast unfettered ability to modify the Arbitration Provision as applied to a pending matter; a consumer can lock in the then-current arbitration terms simply by giving notice of a dispute." The court rejected the argument that a subscriber could still be prejudiced where he or she only learns of a dispute after the Subscriber Agreement was modified. The court explained that the Subscriber Agreement here afforded the subscriber the opportunity to reject changes to the Agreement for up to 30 days after the changes are proposed. Therefore, "a subscriber who had accrued – but not commenced – a claim could reject an unfavorable amendment and preserve the terms of the contract as they were at the time of claim accrual." *Wainblat v. Comcast Cable Communications*, 2019 WL 5698446 (D. Mass.). Cf. *Solo v. UPS*, 947 F.3d 968 (6th Cir. 2020) (arbitration clause added to amended agreement after events at issue occurred not applied retroactively where not contemplated in contractual language).

**Joinder and Forum Selection Clauses Distinguished**. A general contractor ("Contractor") was sued by a subcontractor in Pennsylvania federal court and by the property developer in Pennsylvania state court. The Contractor moved to dismiss the federal lawsuit and compel the subcontractor to join in the state court action, arguing that the terms of the subcontract required this result. The provision at issue provided, in part: "Subcontractor agrees . . . Contractor shall have the exclusive right to join Subcontractor in any dispute resolution procedure (including without limitation ADR procedures, binding arbitration or other judicial or non-judicial proceeding) in which Contractor may be involved arising out of or in connection with the Project." The district court rejected the Contractor's argument and held that the provision relied on was a joinder provision, not a forum selection clause. The court concluded that while the joinder provision allows the Contractor to join the subcontractor in any proceeding where it believes the subcontractor's work is at issue, it "does not mandate litigation in any particular forum nor does it restrict the subcontractor's right to bring its own claims in any jurisdiction." *Madison Construction Co. v. Turner Construction Co.*, 2019 WL 5997360 (E.D. Pa.).

**Claims Not Encompassed by Narrow Scope of Arbitration Clause**. A Chapter 7 Trustee filed an adversary action against officers and directors of a bankrupt law firm. Officers and directors sought to move the action to arbitration, arguing that the firm's by-laws, which covered any "controversy or claim arising out of the Corporate Documents," required arbitration of the action. The district court disagreed, holding that the scope of the arbitration clause was narrow and applied only to the interpretation of the corporate documents. Finding that the allegations turn "entirely on the substantive truth and legal effect of the Trustee's allegations, not on any question about the meaning of the Certificate of Incorporation or the By-Laws," the court concluded that the arbitration clause at issue did not encompass the Trustee's claims. *In re Fiddler Gonzalez & Rodriguez, P.S.C.*, 415 F. Supp.3d 272 (D.P.R. 2019).

## *Case Shorts*:

- *Hudson v. P.I.P., Inc.*, 793 F. App'x 935 (11th Cir. 2019) (provision in arbitration agreement requiring parties to share costs of arbitration and bear own attorneys' fees contravened the FLSA and ruled unenforceable).
- *Integrand Assurance Co. v. Everest Reinsurance Co.*, Case No 3:19-CV-01111 (D. P. Rico, December 4, 2019) (doctrine of *rebus sic stantibus* which applies equity principles due to changed circumstances rejected as basis for invalidating otherwise valid arbitration agreement in the face of the devastation caused by Hurricane Maria where hurricanes in the Caribbean are a "common occurrence" and could be foreseen).
- *Carnival Corp.*, 941 F. 3d 487 (11th Cir. 2019) (foreign arbitration award not vacated despite arbitrator's refusal to consider Jones Act claim under Panamanian law; 11th Circuit rules that award did not violate the U.S.'s "most basic notions of morality and justice").
- *Cordoba v. Direct TV, LLC*, 2020 WL 820940 (11th Cir.) (motion to compel granted as the putative class claims of DirecTV customers derived solely from their role as subscribers and encompassed by the arbitration provision in the subscriber agreement).
- *Stamato v. Morgan Stanley Smith Barney*, 2020 WL 729733 (N.J. App.) ("clearly worded" arbitration provision in bonus agreement applied to all employment disputes and not merely disputes related to plaintiff's bonus).

## V. CHALLENGES TO ARBITRATOR OR FORUM

**Imbalanced Arbitration Panel Not Improper**. The limited liability company agreement allowed each member to select an arbitrator when arbitrating a claim. A dispute arose and a group of members brought claims against two members. The minority members brought an action arguing that the arbitration panel was improperly constituted, noting that one side selected five arbitrators while they were only able to select two arbitrators. The Fifth Circuit rejected the minority members' arguments that this result was "absurd." The court emphasized that "the risk of such an occurrence is precisely within the plain terms to which" the minority members agreed. The court explained that it was not in a position "to discard the plain text of the Agreement out of so-called fairness." While the court acknowledged that the minority members did not expect to be "outnumbered in any dispute falling under the agreement; that its expectations were frustrated does not render the agreement absurd or unfair." *Soaring Wind Energy v. Catic USA, Inc.*, 946 F.3d 742 (5th Cir. 2020).

**New Arbitration Panel to Rule on Consolidation Question**. An arbitration panel issued an award in a reinsurance dispute. A second dispute arose involving the same parties. One party argued that the new dispute was the same as the prior dispute and should be heard by the prior arbitration panel; the other party disagreed and argued that a new panel should be constituted to rule on the consolidation issue. The district court sent the dispute to a new arbitration panel, and the Third Circuit, in a non-precedential ruling, affirmed. The Third Circuit noted that to send the dispute to the prior arbitration panel would be to prejudge the issue, that is, to determine that the dispute is the same as the prior dispute. Further supporting the court's conclusion was the applicable agreement which only allowed consolidation if the disputes were the same and the prior panel was extant, a decision to be made by a newly constituted panel in the Third Circuit's view. *Pennsylvania National Mutual Casualty Insurance Co. v. New England Reinsurance Corp.*, 2019 WL 6652507 (3rd Cir.).

### *Case Shorts*:

- *WN Partner, LLC v. Baltimore Orioles Limited Partnership*, 179 A.D. 3d 14 (N.Y. App. Div. 1st Dep't 2019) (arbitrator to decide gateway issue whether alleged financial conflict precludes Commissioner of Baseball from adjudicating contractual dispute where AAA rules govern disputes).
- *Integrand Assurance Co. v. Everest Reinsurance Co.*, Case No 3:19-CV-01111 (D. P. Rico, December 4, 2019) (arbitration agreement not null and void due to lack of mechanism to resolve disputes regarding selection of arbitrator as the FAA has scheme for designating arbitrator where impasse exists).

## VI. CLASS & COLLECTIVE ACTIONS

**Signatories to Employer Arbitration Program Included in Sex Bias Class Arbitration**. The parties here submitted a sex bias class arbitration to an arbitrator who issued a class action determination certifying a class of 44,000 individuals, including those who did not opt into the proceeding. The Second Circuit, reversing the district court, ruled that the arbitrator was within her authority to do so. The Second Circuit reasoned that the absent class members consented to the arbitrator's authority to decide the threshold class arbitration question by agreeing to the employer's arbitration program. The court noted that the designated AAA arbitration rules provide that they apply to class actions and the arbitrator had authority to rule on whether arbitration clauses permit class arbitration. The court added that the employer's program provided that the question of arbitrability was for the arbitrator to decide. Because absent class members bargained for the arbitrator's construction of the agreement "with respect to class arbitrability, the arbitrator acted within her authority in purporting to bind the absent class members to class procedures." As a result, the Second Circuit concluded that it was "not for us, as a court, to decide whether the arbitrator's class certification decision was correct on the merits of issues such as commonality and typicality. We merely decide that the arbitrator had the authority to reach such issues even with respect to the absent class members." The court further rejected the argument that the class members did not submit to this particular arbitrator's authority, noting that "[c]lass actions that bind absent class members as part of mandatory or opt-out classes are routinely adjudicated by arbitrators and in our courts." The court did, however, remand to the district court the question of whether the "the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief." *Jock v. Sterling Jewelers, Inc.*, 942 F. 3d 617 (2d Cir. 2019).

**Proposal to Have Arbitrator Rule on Class Action Fees' Application Rejected**. The parties moved for preliminary approval of a class action settlement. Included in the settlement terms was a proposal that an arbitrator rule on the fees to be awarded to plaintiffs' counsel. The court rejected that proposal as "contrary to law." The court noted that in analyzing the settlement agreement for final approval it would be reviewing the fees' application, taking into account the interests of the class. "That leaves this Court to wonder why the parties would go through the rigamarole of an arbitration to determine appropriate attorneys' fees when that responsibility rests with the court." The court added that the proposal had the arbitrator ruling on the fees to be awarded before the claims process was complete. The court questioned how "could an arbitrator decide the reasonableness of attorneys' fees without knowing the total recovery of the class?" The court concluded that "it makes little sense to engage an arbitrator to render a decision that will carry no weight" and rejected the parties' proposal that the class action attorneys' fees award be made by an arbitrator. *Hart v. BHH, LLC*, 2020 WL 254779 (S.D.N.Y.).

**Texas Supreme Court Rules Class Arbitration Gateway Issue for Court**. The Texas Supreme Court, recognizing that the "jurisdictional landscape has evolved to provide a clearer, and distinctly different, perspective" overturned a prior ruling and concluded that class arbitration is a gateway issue for a court rather than an arbitrator to decide. The Court, adopting the United States Supreme Court analysis in this regard, recognized that "class arbitration radically alters the dispute-resolution bargain, changing the very nature of the arbitral proceeding and undermining its principal benefits." Class arbitration "is a high stakes endeavor" that sacrifices the principal advantage of the informality of arbitration." Due process rights of absent class members, loss of speed and efficiency, increased costs, and confidentiality concerns are among the unique difficulties class arbitration presents." Because the distinctions between bilateral and class arbitration implicate what type of controversy is to be arbitrated rather than merely a procedural question generally reserved for the arbitrator, the court concluded that the class arbitration question was a gateway question for courts to decide. In this case, the Court found no agreement or factual basis to find that the parties consented or acquiesced in having their dispute be subject to class arbitration. For these reasons, the Court concluded that class arbitration was prohibited here. *Robinson v. Home Owners Management Enterprises*, 590 S.W.3d 518 (Tex. 2019). Cf. *Rickenbaugh v. Power Home Solar*, 2019 WL 701897 (N. Car. Super. Ct.) (incorporation of AAA rules deemed clear and unmistakable evidence that parties delegated class arbitration question to arbitrator to decide); *Marbaker v. Statoil USA Onshore Properties*, 2020 WL 733049 (3rd Cir.) (general reference to AAA rules not sufficient basis to mandate class action, particularly where AAA's Supplementary Rules for Class Arbitration provide that parties "shall not consider the existence of these Supplementary Rules" in deciding whether the arbitration clause permits class arbitration).

*Case Shorts*:

- *In re American Express Anti-Steering Rules Antitrust Litigation*, 2020 WL 227425 (E.D.N.Y.) (merchants were not denied effective vindication of their statutory rights by denial of class-wide injunctive relief where such relief was not available when the Clayton Act was first enacted).
- *Catamaran Corp. v. Towncrest Pharmacy*, 946 F. 3d 1020 (8th Cir. 2020) (fact that two agreements with plaintiff involving four pharmacies had broad arbitration clauses and referred to the pharmacies as a single entity not sufficient to support class arbitration where arbitration agreements were silent with respect to class treatment).
- *Marbaker v. Statoil USA Onshore Properties*, 2020 WL 733049 (3rd Cir.) (class arbitration denied where agreement did not refer to class arbitration even though landowners' contracts were negotiated together, royalties were paid by percentage of land owned by the landowners, and class arbitration had been used by parties raising similar claims in another proceeding).

## VII. HEARING-RELATED ISSUES

**Refusal to Admit Hearsay Evidence Does Not Warrant Vacatur**. In an attorneys' fee dispute, the arbitrator declined to admit hearsay testimony from a paralegal regarding the necessity and reasonableness of the fees. The arbitrator found in favor of the client and the New York trial court and appellate court upheld the award. The appellate court acknowledged that an arbitrator's unreasonable exclusion of relevant evidence may justify vacating an award. The court noted that while an arbitrator is not bound by the rules of evidence it does not follow that "an arbitrator is precluded from excluding hearsay evidence and that such conclusion constitutes misconduct." Here, the court noted that the responding attorney could have testified and there was no good reason to rely on hearsay evidence as the paralegal's testimony was not competent evidence in these circumstances. Further, "the hearsay nature of the evidence sought to be adduced would have been unfairly prejudicial to petitioner because it would have deprived her of effective cross examination." For these reasons, the appellate court found no abuse of discretion and confirmed the arbitration award. *Prasad v. Spodek*, 65 Misc. 3d 154(A) (N.Y. App. Div. 2019).

*Case Shorts*:

- *Credit Suisse Sec. (USA) LLC v. Carlson*, 2020 WL 32339 (S.D. Tex.), reconsideration denied, 2020 WL 837428 (S.D. Tex.) (panel's denial of motion to compel production of documents did not deprive requesting party fair hearing where ruling was within discretion of the panel and the same party examined the adversary's CEO at hearing on the same topics).
- *Chamber of Commerce of the United States v. Becerra*, 2020 WL 605877 (E. D. Cal.) (President of the California New Car Dealers Association is qualified to offer lay opinion testimony, rather than expert testimony, based on his knowledge and experience with the organization's membership and the membership's reliance on arbitration agreements).

## VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

**Award Enforcing Trump Campaign NDA Vacated.** Plaintiff, the Trump presidential campaign's Director of Hispanic Engagement, sued the campaign for sexual harassment. The campaign brought an arbitration alleging that plaintiff violated the non-disclosure agreement ("NDA") that she had signed when she joined the campaign. Plaintiff did not participate in the arbitration other than submitting a letter to the arbitrator. The arbitrator ruled, in a standard award, that the NDA was enforceable, and that plaintiff violated it by making certain disparaging comments in the litigation and on her Twitter account thereafter. Plaintiff moved to vacate the award. The trial court denied the motion, but New York's First Department reversed and vacated the award. First, the appellate court ruled that the arbitrator violated New York public policy when he found that plaintiff breached the

NDA "by making disparaging statements" about the campaign in the court action. The court emphasized that there is "a deep-rooted, long-standing public policy in favor of a person's right to make statements during the course of court proceedings without penalty." The arbitrator, by finding the statements made in the court action to be violative of the NDA, "improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider." The court also found that the arbitrator exceeded his authority in finding that tweets made after the Demand was filed also violated the NDA "since the award takes into account events occurring after the Demand, which could not have been legitimately considered at arbitration, [and therefore] the award was made in excess of the arbitrator's enumerated authority." Seeing no basis to modify the award, the appellate court vacated it in its entirety. *Denson v. Donald J. Trump for President*, 2020 WL 573113 (N.Y. App. 1st Dep't).

**Partiality Claim Rejected**. The arbitrator disclosed that his law student son was seeking employment as a summer associate with law firms, including Respondent O'Melveny & Myers and its counsel, Gibson Dunn. Plaintiff objected and asked the arbitrator to recuse himself. O'Melveny and Gibson announced that they would not offer employment to the arbitrator's son. Plaintiff then complained that the termination of the arbitrator's son's employment prospects "was a tactical maneuver to negatively inflame" the arbitrator's passions against plaintiff. The arbitrator declined to recuse himself, finding that the law firms' decision not to consider his son for employment mooted any basis for recusal. The arbitrator further confirmed that he did not hold a "grudge" against plaintiff for raising these issues. The arbitrator issued orders relating to various motions, including two summary disposition motions and a motion to disqualify the arbitrator because he and the expert witness were on a government commission together years before. The arbitrator also notified the parties that he had been selected in an unrelated arbitration in which Gibson Dunn represented a party. The arbitrator ruled in favor of O'Melveny and plaintiff moved to vacate the award on evident partiality grounds. The California district court denied the motion. The court rejected the argument that challenging the arbitrator and then claiming that those same attacks caused the arbitrator to be biased. Even had the arbitrator's son been hired by one of the law firms, the court concluded that that was not enough for recusal. The court also ruled that plaintiff's "mere allegation of bias, based on the selection of the Arbitrator as arbitrator in an unrelated matter involving Gibson Dunn, O'Melveny's counsel, which the arbitrator disclosed, does not require vacatur." The court concluded that the mere fact that the arbitrator issued a number of rulings against plaintiff was insufficient to establish bias. In doing so, the court noted that plaintiff "provided no evidence of improper motivation, and as identification of various adverse rulings, is insufficient to require vacatur." Finally, the court declined to second guess the arbitrator's evidentiary rulings noting that arbitrators are afforded wide discretion in deciding whether to admit or exclude evidence." *Golden v. O'Melveny & Myers*, 2019 WL 5693760 (C.D. Cal.).

**Evident Partiality Claim Based on Arbitrator's Failure to Disclose Rejected**. Claimant's lawyer joined a new law firm just prior to the hearing commencing. At that time, the Chair of the arbitration panel was counsel in a pending litigation against claimant's counsel's new firm. The Chair failed to disclose this fact despite being actively engaged in the unrelated litigation. The panel made various rulings against claimant and issued an award in respondent's favor. Claimant moved to vacate the award on evident partiality grounds based on the Chair's failure to disclose his ongoing representation of a party adverse to a party represented by Claimant's law firm. The court denied the motion and confirmed the award. Under applicable Fifth Circuit law, evident partiality in a failure to disclose case requires a showing that the undisclosed connection was a "significant compromising connection" that created a "concrete, not speculative, impression of bias." Here, the "arbitrator had a professional relationship as an adversary with the firm representing one of the parties while the arbitration was ongoing." The court emphasized that claimant's "allegations of partiality are remote and speculative." The court noted that the arbitrator updated his disclosures four times during the proceedings and that the panel issued a unanimous award against claimant. "The court cannot conclude that a reasonable person would *have to* conclude that the arbitration panel was partial. While a reasonable person *could* conclude that [the Chair] was partial and that he somehow influenced the other two arbitrators, a reasonable person could also conclude that the fact that his adversary in a lawsuit that [the Chair] had recently been pulled into was at the same firm that [claimant's] counsel had recently joined is inconsequential, and the fact that the award was unanimous from all three arbitrators supports the opposite conclusion." While the court found the "nondisclosure troubling", it noted that "the standard for overturning an arbitral award for evident partiality is more stringent than appearance of bias" and that claimant has failed to meet that standard. *Credit Suisse Sec. (USA) LLC v. Carlson*, 2020 WL 32339 (S.D. Tex.), reconsideration denied, 2020 WL 837428 (S.D. Tex.).

**Arbitrator Bias Claim Rejected**. A California superior court granted defendant CTC's motion to vacate a $2.2 million arbitration award issued in favor of IBU. The superior court found that the arbitrator's rulings were biased and allowed a potentially impartial witness to participate in the hearing. In particular, the arbitrator allowed a witness testifying as an expert on Mexican law to also serve as co-counsel with the party calling him as a witness. The California Court of Appeal reversed, finding that the credibility of expert witness testimony and the evidentiary weight given to it was within the arbitrator's discretion. The court held that the arbitrator's decisions limiting testimony and allowing "[e]ach party" to argue at the hearing "through one or more attorneys, including the one who acted as expert witness" were neutral on their face. Concluding that CTC failed to show any specific prejudice suffered by the rulings, the court reversed and instructed the Superior Court to enter judgment in favor of IBU. *Inmobiliaria Buenaventuras S.A. de C.V. v. Chicago Title Co.*, 2019 WL 6167404 (Cal. App.).

**Panel Did Not Exceed Authority in Ordering Divestiture of Interests in LLC**. The arbitration panel ruled that Catic USA breached its agreement with Tang Energy that established an LLC, Soaring Wind Energy. The panel awarded lost profits of $62.9 million and the divestiture of Catic's interest in Soaring Wind Energy. Catic challenged the award, arguing that the panel's order that it divest its membership interests constituted impermissible punitive damages which the contract expressly precluded. The Fifth Circuit rejected this argument. "Although the panel did not have the authority to issue punitive damages, it did possess powers to grant court-enforced injunctive relief." The court concluded that the panel in fact exercised its authority to order injunctive relief. The court found that the panel's divestiture ruling was to prevent Catic "from receiving incidental benefits for breaching their duties, duties owed not only to the other members of the LLC but also to the LLC itself. Unlike punitive damages, which are based on a perceived reprehensibility of the breaching party's actions or flow from a desire to make examples of them . . . , the divestiture operates to achieve what the panel considered a fair result." The court concluded that the divestiture order was more equitable than punitive in nature and was entitled to deference and confirmed the award. *Soaring Wind Energy v. Catic USA, Inc.*, 946 F.3d 742 (5th Cir. 2020).

**Manifest Disregard Claim Rejected**. The Seneca Nation of Indians (the "Nation") challenged an arbitration award directing it to pay over $250 million in casino revenue sharing funds with the state of New York. The Nation argued that the panel "manifestly disregarded" governing law in reaching its determination. The district court applied the Second Circuit's recent articulation of the manifest disregard standard: "First, the court must consider whether the governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable . . .. Second, the court must determine whether the arbitrators knew of the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it." Noting that the burden of proof to avoid confirmation of an arbitration award is "very high," the court explained that "an arbitration award should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached." After considering the parties' arguments, the court concluded that the Nation "failed to carry its heavy burden of demonstrating that the panel acted in manifest disregard of the law" where it failed to show "that the arbitrators intentionally defied governing law, engaged in egregious impropriety, or dispensed their own of industrial justice." *Seneca Nation of Indians v. State of New York*, 2019 WL 5865450 (W.D.N.Y.). See also *Dynacolor v. Razberi Technologies*, 2020 WL 115978 (5th Cir.) (Fifth Circuit declines to rule as to whether manifest disregard standard survives in that Circuit as the party challenging the award failed to show that the arbitrator understood and ignored applicable law).

*Case Shorts*:

- *PNY Technologies, Inc. v. Netac Technology Co.*, 2020 WL 618534 (3rd Cir.) (vacatur denied where arbitrator used alternative method for calculating damages or even if wrong data used; all "that matters is that the arbitrator's decision had some basis in the record.").

## IX. ADR – GENERAL

**EEOC Rescinds Its Policy Opposing Mandatory Arbitration**. On December 17, 2019, the EEOC voted 2-1 to rescind its 22-year-old position opposing mandatory arbitration agreements that cover employment discrimination claims. The EEOC's 1997 Policy Statement (Policy No. 915.000), titled "Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" claimed that using these agreements as a condition of employment "harms both the individual civil rights claimant and the public interest in eradicating discrimination." The EEOC explained that the rescission of the 1997 statement is consistent with U.S. Supreme Court rulings enforcing such arrangements. Accordingly, the Commission directed its staff to no longer rely on the 1997 Policy Statement but noted that "nothing in this rescission should be construed to limit the ability of the Commission or any other party to challenge the enforceability of a particular arbitration agreement."

**Butt-Shaking at Mediation At Issue.** A BakerHostetler partner was accused of shaking his butt at his opposition while representing Chevron in a discrimination case. Chevron argued that the incident should not have been presented to the court under the confidentiality provision of Texas's Alternative Dispute Resolution Act. Plaintiff's counsel argued that this was a matter of principle and sought sanctions. Chevron informed the court that the BakerHostetler partner had withdrawn from the case and asked the court to put this matter behind it, so to speak. No word yet as to whether the court has ruled on plaintiff's motion. *White v. Chevron Phillips Chemical Co.*, No. 4:19-cv-00187 (S.D. Tex.).

## X. COLLECTIVE BARGAINING SETTING

**Award Vacated Where Arbitrator Added Contract Term**. The collective bargaining agreement (CBA) in this case provided that vacation requests by employees were to be granted "so far as possible" as "most desired by employees" but the "final right to allow vacations . . . exclusively is reserved" to the employer's discretion. The union brought a grievance when a member's vacation request for Christmas week was denied because her manager also requested that week and both manager and employee could not be out at the same time. The arbitrator ruled in favor of the union and the district court vacated the award. The Third Circuit affirmed, finding that the award "in no rational way draws its essence from the CBA." The court found that the applicable CBA language was not

susceptible to more than one reasonable interpretation as the employer had the "final" and "exclusive" right to rule on vacation requests. The arbitrator's emphasis on the "so far as possible" language was at the expense of the clear language of the CBA leaving the decision in the hands of the employer. The court noted that the arbitrator determined that in the absence of "operating need" or "special circumstances" the employee's vacation requests prevailed. "Rather than acknowledge the CBA's rule that the [employer] makes the ultimate determination over vacation scheduling, this decision flips the CBA on its head and grants the Union a near-categorical preference. Accordingly, notwithstanding a standard of review tilted much in favor of arbitrators, we cannot affirm this award that manifestly disregards the plain language of the CBA." The court added that by inserting an "operating need" restriction into the CBA's vacation provision, the arbitrator exceeded his authority. "Where an arbitrator injects a restriction into a contract to which the [employer] did not agree and to which the bargaining unit employees are not entitled, he dispenses his own brand of industrial justice and should be overturned." The court concluded that while the bar is low for upholding an arbitrator's award, the courts "are not an amen corner for arbitrators' rulings." *Monongahela Valley Hospital v. United Steel Paper and Forestry*, 946 F.3d 195 (3rd Cir. 2019).

**NLRB Expands Deferral Standard for Arbitration**. Under the long-standing *Spielberg-Olin* rule the NLRB deferred to the finding of an arbitrator when determining an unfair labor practice where the contractual issue paralleled the pending Board charge and the arbitrator was provided with the facts relevant to the unfair labor practice. The burden was placed on the party challenging deferral to demonstrate these requirements or show that the award was palpably wrong, that is, not susceptible to an interpretation consistent with the National Labor Relations Act. The Board in its 2014 decision in *Babcock* overruled *Spielberg-Olin* and only permitted deferral where the arbitrator was expressly authorized to decide an unfair labor practice, expressly considered the statutory issue, and the Board law reasonably permitted the award. The burden of proof was shifted to the party seeking deferral. The Board in this case overturned *Babcock* as representing "a drastic contraction of deferral practices that had existed for decades." The Board found that the *Babcock* decision "did not rely on any empirical evidence in support of its new deferral standard" and failed to see that the *Spielberg-Olin* decisions represented "a cohesive policy choice that is far more commensurate with the role contemplated by Congress for arbitration of statutory claims and for Board deference to the grievance arbitration process and its results." The Board found *Babcock's* distrust of arbitration to be "untenable in the face of the principles expressed in Section 1 and Section 203(d) of the Act, in the Federal Arbitration Act, and in the overwhelming body of judicial precedent voicing confidence in, and strong preference for, resolution of discharge and discipline cases through collectively bargained grievance arbitration procedures." The Board noted that the individual statutory rights may be waived in the collective bargaining context and that as a result "it would seem obvious that the parties' grievance arbitration machinery, rather than the Board, becomes the primary

mechanism for resolving everyday employment disputes, even when those disputes may arguably present issues of statutory protection." The Board concluded that the long-standing deferral rule "best serves the national policy imbedded in the Act by limiting review of the arbitral process and result." *United Parcel Service, Inc. and Robert Atkinson, Jr.*, NLRB Case 06-CA-143062 (December 23, 2019).

**NLRB Guidance Regarding Arbitration of Unilateral Change Claims**. A NLRB Associate General Counsel issued a Guidance Letter to the agency's regional offices modifying the setting in which charges alleging unilateral changes to collectively bargained rights are handled. The Guidance counsels that charges related to unilateral change claims should be referred to arbitration where the charges have merit and a grievance was filed by either side. Charges without merit should be dismissed. The charges may be referred to arbitration even if the union has not filed a grievance under the Board's established *Collyer* doctrine. This Guidance clarified the agency's treatment of unilateral change charges.

**NLRB Revises Advice on Confidentiality of Investigations**. The NLRB's General Counsel issued an Advice Memorandum modifying Board policy with regard to the confidentiality of employer investigations. Under the new standard, as reflected in the Board's recent decision in *Boeing*, "an employer may only restrict disclosure of employee investigations if it can demonstrate, on a case by case basis, objectively reasonable grounds for believing that the integrity of the particular investigation will be compromised without confidentiality. Therefore, because the Employer's rule is a blanket restriction on disclosure of information concerning employee investigations, it violates an extant Board law." The General Counsel reasoned that the Board's new standard gives "appropriate weight to the shared employee and national interests furthered by the maintenance of confidentiality in the course of sensitive workplace investigations, and it elevates to a controlling status the comparatively slight and speculative Section 7 interests related to investigations concerning sensitive matters." 12-CA-225371, 12-CA-230301, May 7, 2019.

**Implied Collective Bargaining Agreement Found Following Its Expiration**. The collective bargaining agreement expired and after management and the union reached an impasse the employer sought to impose its final offer. Management informed the union by letter that it would "decide its obligation to arbitrate grievances on a case-by-case basis." The union filed a grievance, and when management refused to process the grievance the union filed a court complaint seeking to enforce the grievance and arbitration provision of the expired collective bargaining agreement. The court began its analysis by explaining that under Section 301 of the Labor Management Relations Act the employer was required to express a "clear and particularized intent" to disavow the collective bargaining agreement. The court rejected management's contention that it did disavow the expired collective bargaining agreement. The court noted that the employees continued to work in accordance with the terms of the expired agreement and management continued to comply with the union check-off provision. Moreover, rather than seek to distance itself from the

grievance procedure the union filed a grievance. On this record, the court ruled that an "implied-in-fact collective bargaining agreement exists" which contained a grievance and arbitration provision with which the employer was required to comply. The court concluded that this "dispute is covered by the grievance provision and is subject to arbitration at the request of either party." *Newspaper, Newsprint, Magazine and Film Delivery Drivers v. PG Publishing Co.*, 2019 WL 6338466 (W.D. Pa.).

*Case Shorts*:

- *Atlas Air v. International Brotherhood of Teamsters*, 943 F.3d 568 (2d Cir. 2019) (dispute following merger of airlines is a "minor dispute" under the Railway Labor Act and consequently is subject to arbitration).
- *Burling Board of Education v. City of Burling Education Association*, 2019 WL 6341036 (N.J. Sup. Ct.) (school board's implementation of a sick leave policy is not arbitrable but application of that policy when applied to the denial of sick pay on the day the Philadelphia Eagles conducted its Super Bowl parade is arbitrable).

## XI. NEWS AND DEVELOPMENTS

**NALP Will Disclose Use of Arbitration and Non-Disclosure Agreements in Law Firm Directory**. The National Association of Law Placement, a career advancement organization, will start including data about legal employers' use of arbitration and non-disclosure agreements in its 2020 Directory of Legal Employers. NALP's decision to add this information was in response to lobbying efforts made by the People's Parity Project, a national organization of law students that began at Harvard Law School. The organization seeks to end the use of mandatory arbitration in the legal field and elsewhere.

**Wells Fargo Eliminates Arbitration for Sexual Harassment Claims.** Wells Fargo has stricken sexual harassment claims from those that must be arbitrated under its mandatory arbitration program. In doing so, Wells Fargo has joined Microsoft, Facebook, Uber and a growing number of major employers in eliminating sexual harassment claims from those that otherwise are subject to arbitration. Wells Fargo's mandatory arbitration policy for workplace disputes applies to employees who were hired after December 11, 2015.

**PBGC Approves AAA's Request for Alternative Arbitration Procedure**. The Pension Benefit Guaranty Corporation (PBGC) approved changes to the rules governing many multiemployer pension plan arbitrations. The modifications went into effect on January 1, 2020 and benefit many employers by reducing the cost to challenge a withdrawal liability claim asserted by a multi-employer pension plan. The principal changes to the rules include (1) a reduction in filing fees for initiating arbitration; (2) a modification of the allocation of costs between the parties; and (3) an amended process for resolving arbitrator selection disputes.

## XII. TABLE OF CASES