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I. JURISDICTIONAL ISSUES: GENERAL

Supreme Court Rules FAA Preempts Application of Kentucky's Clear-Statement Rule. The Kentucky Supreme Court concluded that under that state's clear-statement rule relatives who had power of attorney and who exercised that power when signing nursing home agreements on behalf of their now-deceased relatives were not required to arbitrate their disputes with the nursing homes. That Court reasoned that the underlying power of attorney agreements did not specifically grant to the relatives' authority to enter into an arbitration agreement with the nursing home where the "sacred" constitutional right to a jury trial was implicated. The United States Supreme Court reversed, finding that the Kentucky ruling "fails to put arbitration agreements on an equal plane with other contracts." The Court emphasized that no Kentucky court "has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees." The Court viewed the Kentucky Supreme Court decision as evidence of the kind of hostility to arbitration that resulted in passage of the FAA almost a century ago. The Court also rejected the argument that the FAA only applied to the enforcement of contracts, not to their formation. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made" and cited its discussion of the doctrine of duress in the *Concepcion* decision in support. If this were allowed, the Court concluded, the "FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration." *Kindred Nursing Centers v. Clark,* 137 S. Ct. 1421 (2017). See also *Coventry Health Care v. Nevils,* 137 S. Ct. 1190 (2017) (in dicta, the Court noted that the FAA is the kind of federal statute that preempts state law "leaving the context-specific scope of preemption to contractual terms", that is, that state laws that interfere with enforcement of arbitration agreements are preempted).

Arbitration Agreement Waiving Statutes Providing Public Injunctive Relief Not Enforceable in California. The California Supreme Court, in a unanimous decision, ruled that claims brought under statutes providing for public injunctive relief may not be forced into arbitration. Plaintiff brought class claims again Citibank under California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act relating to the bank's "credit protector" plan. Citibank moved to compel, and the appellate court ruled that the cited statutes were subject to arbitration under prevailing federal law. The California Supreme Court overruled that determination. In doing so, the Court found that plaintiff asserted cognizable claims under those statutes providing for injunctive relief. The Court reasoned that while individuals may waive rights benefiting them, they may not by private agreement waive laws established to benefit the public. "Accordingly, the waiver in a pre-dispute arbitration agreement of the right to seek public injunctive relief under these statutes would seriously compromise the public purposes the statues were intended to

serve." The Court also rejected Citibank's federal preemption argument, finding that the contract defense here -- "a law established for a public reason cannot be contravened by a private agreement" – is a defense applicable to all agreements. "The FAA does not require enforcement of such a provision, in derogation of this generally applicable contract defense, merely because the provision has been inserted into an arbitration agreement." The Court reasoned that class actions are procedural rights subject to waiver, but the statues at issue here invoke substantive rights created by California legislation and are not subject to waiver. *McGill v. Citibank, N.A.,* 2 Cal. 5th 945, 393 P.3d 85 (2017). But see *Valdez v. Terminex International Co.,* 2017 WL 836085 (9th Cir.) ("an individual employee, acting as an agent for the government, can agree to pursue a PAGA claim in arbitration"); *Foti v. Toyota Motor Sales*, 2017 WL 1436253 (N.J. App. Div.) (waiver of right to bring private attorney general claim enforceable and motion to compel arbitration of individual claim granted).

FAA Exemption Applies to Contract Between Trucking Company and Driver. The FAA exempts contracts of employment of transportation workers from the Act's coverage. The dispute here was between a former truck driver and the trucking company that he drove for under the terms of an "Independent Contractor Operating Agreement." The driver brought a class action alleging violations of the FLSA, and the trucking company moved to compel arbitration under the arbitration provision in the Agreement. The First Circuit framed the question before it as whether the FAA exemption "extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships." Here, the trucking company conceded that the driver was a transportation worker. This concession, along with the legislative history and giving the phrase "contract of employment" its ordinary meaning led the First Circuit to conclude that "the contract in this case is excluded from the FAA's reach." The court emphasized that its holding was limited to situations in which the "arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.,* 857 F.3d 7 (1st Cir. 2017).

Equitable Estoppel Denied Where Claims Not Inextricably Intertwined. Solemates Marine employed plaintiff as a sous chef aboard a yacht. The sous chef was injured on the job and did not receive proper medical treatment. Solemates sold the vessel to SeaVisions which was notified by plaintiff of her injury, but as well failed to provide proper medical care, which served to exacerbate her injury. Solemates's agreement with plaintiff did not have an arbitration clause; SeaVisions's did. Solemates belatedly sought to compel arbitration, arguing that plaintiff's claims were inextricably intertwined with claims against SeaVisions and therefore those claims should be compelled to arbitration on equitable estoppel grounds. The court rejected this claim, concluding that the equitable estoppel claim had not been properly raised. The court also emphasized that Cayman Island law applied and Solemates did not demonstrate the viability of equitable estoppel claims under Cayman law. Moreover, the court ruled that the claims against Solemates and SeaVisions

were not interdependent, as the claims against Solemates related to plaintiff's original injury and the claims again SeaVisions related to its failure to provide appropriate medical care thereafter. For this reason, only plaintiff's claims against SeaVisions were arbitrable. *Wexler v. SeaVisions, Ltd.*, 2017 WL 979212 (S.D. Fla.).

Exxon Bound by Arbitration Clause in Contractor's Agreement with Insurance Company. A fire occurred at an Exxon oil refinery, killing and injuring several workers. Exxon demanded payment under an insurance policy it required for the contractor at issue to obtain which named Exxon as an additional insured. The insurance company moved to compel arbitration under an arbitration clause in the policy, which Exxon opposed. A Texas appeals court, reversing the lower court, rejected Exxon's arguments and compelled arbitration. The court reasoned that Exxon could not seek the benefit of the insurance agreement while trying to avoid that provision of the agreement it disfavored. "Under the doctrine of direct benefits estoppel, non-signatories to arbitration agreements may be bound to the underlying arbitration clause of a contract when the plaintiff is suing seeking to enforce all of the other terms of a written agreement." The appellate court referred the merits of the dispute to the arbitrator, reasoning that once the parties entered into an arbitration agreement that required disputes over coverage to be arbitrated, then that matter needed to be submitted to the arbitrator for resolution. *Lexington Insurance v. Exxon Mobil*, 2017 WL 1532271 (Tex. App.). Cf. *In Re Volkswagen Timing Chain Product Liability Litigation,* 2017 WL 1902160 (D. N.J.) (motion to compel brought by Volkswagen denied where court finds Volkswagen was not party to purchase or lease agreements between dealer and customers which contained arbitration provision); *Rudzinski v. Glashow,* 55 Misc.3d 1215(A) (N.Y. Sup. Ct. Kings Cty.) (employer may not enforce provision in agreement between its employee and a co-employer professional employer organization which provided certain services to employer as arbitration provision bound only employee and professional employer organization to disputes between them); *LiquidX Inc. V. Brooklawn Capital,* 2017 WL 2266879 (S.D.N.Y.) (successor who used its domination and influence to structure foreclosure and evade liability may be joined to arbitration under New York's alter-ego doctrine).

Court Lacks Jurisdiction to Reverse Prior Order Granting Motion to Compel. The district court granted the employer's motion to compel. The parties did not proceed with arbitration, with both parties blaming the other. Upon application, the same court withdrew its earlier order compelling arbitration. On appeal, the Fifth Circuit vacated the district court's latest order. In doing so, the court explained that the FAA provides very limited jurisdiction to intervene into the arbitration process prior to the arbitration hearing. Here, the appellate court ruled that the district court lacked ancillary jurisdiction to withdraw its earlier order. "The court neither determined whether the parties' agreement to arbitrate was valid nor enforced that agreement. Instead, the court found that the parties had 'failed' to arbitrate and withdrew its prior order compelling arbitration. This was not permitted

under the FAA." *Salas v. GE Oil & Gas*, 857 F.3d 278 (5th Cir. 2017). See also *Bordelon Marine v. Bibby Subsea ROV*, 2017 WL 1379451 (5th Cir.) (appellate court lacks jurisdiction under FAA to hear interlocutory appeal from decision of district court relating to selection of arbitrator); *Celltrace Communications v. Acacia Research*, 2017 WL 1476600 (2d Cir.) (once matter is referred to arbitration, court proceeding must be stayed, not dismissed, under the FAA).

Minor Can Be Bound to Arbitrate Dispute. Plaintiffs, minor children, sued alleging that defendant, through its Steam Marketplace video game and entertainment platform, supported "illegal gambling" in violation of the Washington Consumer Protection Act, and the Washington Gambling Act of 1973. Plaintiffs claimed that defendants violated these laws by allowing subscribers to link their individual Steam accounts to third-party websites to buy and sell video game items. At issue here was whether the minor children who signed the Steam Subscriber Agreement (SSA), which contained an arbitration clause, could be bound to arbitrate the dispute. The court held that, under Washington law, contracts with minors are valid unless the minor disaffirms the contract. In order to disaffirm a contract, "the statute requires the minor to restore to the other party all money and other property received by him by virtue of the contract and remaining within his control." The court noted that it was indisputable that the minors at issue here continued to use defendant's content and services and therefore found that the arbitration agreement with the minor plaintiffs to be valid since they have only disaffirmed the SSA in name, but not in practice. *G.G. v. Valve Corp.*, 2017 WL 1210220 (W.D. Wash.).

Question of Validity, Rather than Formation, of Contract for Arbitrator to Decide. Plaintiff had engaged defendant to provide auditing services. Contracts containing arbitration provisions were signed in 2009, 2010, and 2012. However, only the 2009 agreement was reflected in the hospital Board's minutes. In 2014, the hospital filed for bankruptcy and its trustee sued the auditor for professional malpractice. The auditor moved to compel arbitration. Issues regarding validity of a contract can be decided by an arbitrator but issues of formation generally cannot. Therefore, the court had to first decide whether the dispute was arbitrable. In doing so, the court examined Mississippi's "minutes rule" which provides that, in order for a contract to be enforceable with a public board, the agreement to contract must be reflected in its minutes. The court noted that it was a close call whether the "minutes rule" raised an issue of validity or formation, but concluded that it was one of formation. As such, the court held that the 2010 and 2012 contracts were not validly formed and therefore the trustee was not required to arbitrate issues under those contracts. In contrast, because the hospital board recorded the auditing contract in its 2009 minutes and, therefore, the dispute involving the validity of that contract was arbitrable. Moreover, the court concluded that the issue "whether and how the minutes rule applies to the 2009 engagement letter and the scope of the arbitration clause" should be decided by

the arbitrator. *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Trust v. Horne, L.L.P.*, 853 F.3d 804 (5th Cir. 2017), as revised (Apr. 12, 2017).

II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Prospective Waiver Doctrine Precludes Enforcement of Arbitration Agreement. A borrower of an on-line payday loan electronically signed a loan agreement that required the arbitration of any dispute relating to the agreement and that Otoe-Missouria tribal law be applied to the exclusion of any other state or federal law or regulation. The interest rate on the loan was 440.18%. The borrower brought a putative class action alleging, among other claims, violation of the RICO Act. Defendants sought to compel arbitration and the district court denied the motion. The Fourth Circuit affirmed, ruling that under the prospective waiver doctrine "courts will not enforce an arbitration agreement if doing so would prevent a litigant from vindicating federal substantive statutory rights." The court found no ambiguity in the agreement in finding that "the arbitration agreement functions as a prospective waiver of federal statutory rights and, therefore, is unenforceable as a matter of law." The court declined the invitation to sever the offensive provisions which it viewed as requiring it to rewrite the agreement. The court concluded that "when a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract." *Dillon v. BMO Harris Bank, N.A.,* 856 F.3d 330 (4th Cir. 2017). Accord: *Eisen v. Venulum*, 2017 WL 1136136 (W.D.N.Y.) (arbitration clauses found to be substantively unconscionable where, by requiring application of British Virgin Islands law, protections and remedies available under U.S. Securities laws were precluded).

Incorporation of AAA's Commercial Rules Clear and Unmistaken Referral of Arbitrability Issues to Arbitrator. A dispute between the parties to an operating agreement relating to a dialysis clinic in Puerto Rico arose after the sale of the clinic. The arbitration provision here provided that all unresolved disputes are subject to arbitration under the AAA's Commercial Rules. A question arose whether the dispute was subject to arbitration. The court concluded that the incorporation of the AAA's Commercial Rules constituted a clear and unmistaken referral of questions of arbitrability to the arbitrator. The court explained that the party seeking arbitration is "entitled to have the claims in dispute between the parties submitted to the arbitrators to decide whether such claims fall within the scope of the Operating Agreement's arbitration provision and then to resolve those claims by arbitration if the decision is that they are." *Ambulatory Services of Puerto Rico v. Sankar Nephrology,* 2017 WL 1954932 (N.D. Tex.). See also *GreenStar IH Rep v. Tutor Perini Corp.*, 2017 WL 715922 (Del. Chanc. Ct.) (court lacks subject matter jurisdiction to decide arbitrability question where arbitration clause is broad and applicable JAMS rules authorize arbitrator to rule on arbitrability issue); *Mumin v. Uber Techs., Inc.,* 2017 WL 934703 (E.D.N.Y.), reconsideration denied sub nom. *Ortega v. Uber Techs. Inc.,* 2017 WL

1737636 (E.D.N.Y.) (clear and unambiguous clause delegating questions of arbitrability to the arbitrator not defeated by venue clause providing "exclusive jurisdiction" over disputes to the courts); *Rimel v. Uber Technologies,* 2017 WL 1191384 (M.D. Fla.) (question of whether waiver of PAGA claim is enforceable for arbitrator to decide where parties clearly and unmistakably delegated question to arbitrator). But see *Oliveira v. New Prime, Inc.,* 857 F.3d 7 (1st Cir. 2017) (question of court's authority to act under the FAA is for the court, not arbitrator, to decide).

Litigation of Collection Action Constituted Waiver of Arbitration. A collection agency sued and won a judgment against the debtor in 2009. In 2013, the debtor filed a class action for unlawful collection practices and the collection agency moved to compel arbitration. The Maryland Supreme Court, overturning lower court decisions, ruled that the collection agency had waived its right to arbitration by litigating the collection action in 2009. The Court found that the two actions were sufficiently related and rejected the claim that the debtor was required to show prejudice. Here, the collection agency had a choice in 2009 whether to litigate or arbitrate its claim against the debtor, and chose the former. By doing so, the collection agency waived its right to arbitrate the debtor's later-filed "related" claim. *Cain v. Midland Funding, LLC*, 452 Md. 141, 156 A.3d 807 (2017). See also *Lucinda Vine v. PLS Financial Services,* 2017 WL 2241812 (5th Cir.) (filing of "worthless check affidavits" with district attorney's office by payday loan company sufficiently invoked litigation process to constitute waiver of right to arbitrate); *NV Petrus SA v. LPG Trading Corp.*, 2017 WL 1905820 (E.D.N.Y.) (right to arbitrate waived where defendants participated in litigation for three years, engaged in extensive discovery, took two depositions, and moved to compel additional discovery).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Right to Opt Out of Arbitration Provision Precludes Finding of Unconscionability. Uber drivers have the right to opt out of the arbitration provision in their service agreements with the company within 30 days of executing the agreement. The right is absolute and, according to the court here, "the opt-out clause was prominently displayed in bold typeface." Under these circumstances, a claim of procedural unconscionability was rejected. The court reasoned that the opt-out clause underlying the argument that the provision was not one of adhesion, a necessary precondition for a finding or procedural unconscionability under California law. *Rimel v. Uber Technologies,* 2017 WL 1191384 (M.D. Fla.). Accord: *Mumin v. Uber Techs., Inc.,* 2017 WL 934703 (E.D.N.Y.), reconsideration denied sub nom. *Ortega v. Uber Techs. Inc.,* 2017 WL 1737636 (E.D.N.Y.), and *Carey v. Uber Technologies,* 2017 WL 1133936 (N.D. Ohio) (ability to opt out of arbitration defeats claim of procedural unconscionability).

Discovery Permitted to Support Procedural Unconscionability Claim. The trial court granted the motion to compel and in doing so rejected appellant's unconscionability claim. Appellant appealed and the Arizona appeals court reversed the trial court so as to allow limited discovery on appellant's procedural unconscionability argument. Here the estate of the deceased brought a claim of abuse against a nursing home following his death. The estate argued that it needed discovery to be able to pursue a procedural unconscionability claim since the resident, who signed the relevant agreement, was deceased. The appellate court relied on the fact that only the nursing home representative and the deceased were present when the arbitration agreement was signed and therefore the estate "cannot oppose arbitration on the basis of procedural unconscionability without being permitted limited discovery on that issue." *Gullett on behalf of Estate of Gullett v. Kindred Nursing Centers W., L.L.C.*, 241 Ariz. 532, 390 P.3d 378 (Ct. App. 2017).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Non-Payment of Arbitration Fees Constitutes Material Breach Rendering Arbitration Agreement Unenforceable. Purchasers of used vehicles invoked the arbitration clause in their purchase agreement and filed a demand against the dealership that sold them their cars. The dealership refused to participate in the arbitration or to pay the requisite arbitration fees, and the AAA declined to administer the case. Plaintiffs moved to compel, which was opposed by the dealership. The New Jersey Supreme Court ruled that the dealership's failure to pay the requisite arbitration fees constituted a material breach of the agreement which precluded arbitration. The Court made it clear that "the benefit expected under an arbitration agreement is the ability to arbitrate claims." The failure to advance the requisite fees that results in the dismissal of arbitration, the court reasoned, goes to the essence of the agreement and deprives a party of the benefit of that agreement. Here, the dealership both failed to participate in the arbitration in any way and to pay its fees. The court concluded that the dealership, in addition to breaching the agreement, breached its duty of good faith and fair dealing rendering the arbitration agreement unenforceable. The Court noted, however, that it was not establishing a "bright-line rule." Rather, the Court declared that the refusal or failure to participate in the arbitration, while a material breach of the agreement, will not necessarily preclude enforcement by the breaching party; rather, the Court explained that that determination "must be made on a case-by-case basis after considering the agreement's terms and the conduct of the parties." *Roach v. BM Motoring*, 228 N.J. 163 (2017). Accord: *Nadeau v. Equity Residential Properties,* 2017 WL 1842686 (S.D.N.Y.) (failure of employer to pay AAA arbitration fees constitutes material breach of agreement precluding arbitration).

Arbitration Clause Buried in Warranty Guide Unenforceable. Page 97 of the "Health and Safety and Warranty Guide" provided to purchasers of Samsung's Smartwatch gave notice that disputes would be subject to individual arbitration and that class arbitration was barred.

Five pages' later consumers were informed that they may opt out of the arbitration procedure. Samsung moved to compel arbitration of a consumer class action. The Third Circuit concluded that Samsung had failed to provide reasonable notice of its arbitration program and affirmed denial of the motion to compel. The court acknowledged that while "it may sometimes be presumed that consumers agree to contractual provisions of which they are on notice, that presumption is warranted only where there is a reasonable basis to conclude that consumers will have understood the document contained a bilateral agreement." Here, no notice was provided that a waiver of legal rights was contained on page 97 of a Health and Safety and Warranty Guide. Under these circumstances, the court concluded that "we will not presume that consumers read or had notice of that purportedly binding agreement." *Noble v. Samsung Electronics America*, 2017 WL 838269 (3rd Cir.). Accord: *Norcia v. Samsung Telecommunications America*, 845 F.3d 1279 (9th Cir. 2017) (101-page product safety and warranty information brochure failed to provide inquiry notice of applicable arbitration provision).

No Agreement to Arbitrate Where Assent Was by Phone and Terms of Use on Internet. Global Tel*Link provided communications services to inmates in New Jersey's correctional institutions. Accounts were set up by some subscribers through use of interactive voice responses. When opening an account that way, notice was provided that the Terms of Use could be found on a designated website. A putative class action was brought against Global Tel*Link, which then moved to compel arbitration. The Third Circuit compelled arbitration for those who opened accounts through the website and denied the motion with respect to those who did it telephonically. The court analogized the latter to use of "browse wrap agreements" where "a company's terms and conditions are generally posted on a website via hyperlink at the bottom of the screen. Unlike online agreements where users must click on an acceptance after being presented with terms and conditions (known as 'click wrap' agreements), browse wrap agreements do not require users to expressly manifest assent." The court found no evidence here of manifest assent by those opening accounts by phone. The transactions with telephone subscribers "occurred entirely through an automated telephone system, a medium that adverted to the terms of use without stating them. To access the terms of use, Appellees would have needed to connect to the internet, visit (Global Tel*Link's] website, and then click on a hyperlink. No Appellee took those extra steps." The court concluded that the telephone subscribers were not put on notice that their use of the service would be interpreted as assent to the agreement and under the facts presented did not agree to the arbitration provision. In contrast, the Third Circuit affirmed the lower court's granting of the motion to compel arbitration for subscribers who were presented with a click wrap agreement on the internet where subscribers were presented with the Terms of Use and were required to click acceptance in order to create an account. *James v. Glob. Tel*Link Corp.,* 852 F.3d 262 (3d Cir. 2017). See *Aliments Krispy Kernels v. Nichols Farms*, 851 F. 3d 283 (3d Cir.) (New Jersey Supreme Court confirms that parties are not required to prove "an express, unequivocal agreement" to arbitrate; rather, normal

contract principles for formation of contract apply); *Johnson v. Uber Technologies*, 2017 WL 1155384 (N.D. Ill.) (notice and assent to arbitration terms in Uber rider registration process is fact intensive inquiry that cannot be decided in absence of suitable discovery and therefore motion to compel is denied without prejudice).

Reference to Terms of Use Not Sufficient Notice. The purchaser of cosmetics sued and defendant moved to compel arbitration based on an arbitration provision found on a hyperlink on the internet site. Users of the website were told that by using the website they were binding themselves to the Terms of Use which could be accessed from a hyperlink at the bottom of the page. The court denied the motion to compel, finding the users of the website did not have reasonable notice of the Terms of Use which were not sufficiently conspicuous. The court emphasized that the defendant "could easily have alerted the user to the important rights that the user is being asked to waive in summary form, and urged the user to examine the detailed Terms via hyperlink, but it did not do so. It could have structured the transaction so that the user manifests acceptance by clicking 'I accept' after the Terms are displayed, but it did not do that either." The court added that there was also no evidence that the user accepted the Terms of Use. "Absent knowledge and assent to the Terms of Use, Plaintiff cannot be bound by the provisions, including the mandatory arbitration clause." *Hite v. Lush Internet*, 2017 WL 1080906 (D.N.J.).

Motion to Compel Denied Where Employee Affirmatively Rejected Arbitration Agreement. Tiffany notified employees via e-mail that they had been enrolled in the company's dispute resolution program and asked that they participate in the accompanying online learning module. A marketing manager did not respond and 10 days later she filed an EEOC Charge alleging religious discrimination. She later responded to a subsequent inquiry by stating that she would not be signing the arbitration agreement or access the learning module as she did not want to interfere with the EEOC's enforcement process. Tiffany moved to compel arbitration and the motion was denied. The court rejected Tiffany's argument that by remaining employed after receiving notice of the arbitration program plaintiff became bound to arbitrate her claims. In doing so, the court noted that plaintiff did not click through the online module. In any event, the court emphasized that plaintiff was not put on notice that the learning module contained the arbitration agreement or that she would become bound by remaining employed. On this basis, the court concluded there was no evidence that plaintiff intended to be bound. The court emphasized here that the plaintiff, with a pending EEOC charge, affirmatively notified Tiffany's that she rejected its dispute resolution program and that this constituted objective manifestation of her intent not to be bound by the arbitration agreement. *Rightnour v. Tiffany and Co.*, 2017 WL 878448 (S.D.N.Y.).

Arbitration Agreement Held Unenforceable Where Wording Is Unclear. Plaintiff purchased two vans from defendants, along with service contracts entitling it to certain repairs on the vans. The vans were used for commercial use, and plaintiff claimed that defendant was aware of that at the time of purchase. However, the service contracts, which contained an arbitration clause, specifically excluded any cars used for commercial use from the services. Plaintiff filed a complaint alleging violation of the New Jersey Consumer Fraud Act. Defendant moved to compel arbitration. The trial court denied defendant's motion and an appeal was taken. The New Jersey appellate court affirmed, finding that the arbitration agreement was inconsistent and confusing in light of the agreement as a whole. The court specifically found that the parties agreed to arbitrate all claims and to waive all rights to judicial proceedings; that they waived the right "to pursue any claims arising under this agreement . . . as a class action arbitration;" and that it was "the intention and agreement of the parties not to arbitrate class actions or in consolidated proceedings." Holding that the agreement did not explicitly bar class actions altogether, the court concluded the "class action arbitration" waivers were not stated with sufficient clarity to constitute a complete abandonment of court proceedings to pursue a class action. *Snap Parking, LLC v. Morris Auto Enterprises, LLC*, 2017 WL 1131068 (N.J. App. Div.). See also *Peichuang v. OD Expense*, 2017 WL 1095026 (D. Del.) (arbitration provision rejected as not being clear and unequivocal where qualifying language, "except as otherwise provided in this agreement", created ambiguity which must be construed against the drafter – here seeking arbitration of dispute).

Motion to Compel Arbitration Affirmed Where Arbitration Clause Is Clear And Parties Are Sophisticated. The parties entered into a contract for defendant to construct a $2 million home on bayfront property in New Jersey owned by Plaintiff, an LLC ("LLC"). The contract instructed the parties to choose whether their "method of binding dispute resolution" would be "Arbitration" or "Litigation in a court of competent jurisdiction." LLC selected "Arbitration," the agreement was negotiated and ultimately signed. During construction, disagreements arose and the parties both terminated the agreement. Thereafter, pursuant to their contract, they agreed to mediate their disputes, but were unsuccessful. Defendant then filed a demand for arbitration and LLC filed a complaint in court. Defendant moved to dismiss LLC's claim, pointing to the arbitration agreement. The court granted the motion finding that "LLC understood the method chosen to be arbitration as opposed to litigation and agreed to the same by executing the Contract." The appellate court affirmed, finding that the agreement was clear and LLC was "sophisticated enough to operate in the form of an LLC, to hire an owner's representative, and to engage in a two-million-dollar transaction." *Columbus Circle NJ LLC v. Island Constr. Co., LLC*, 2017 WL 958489, at *3 (N.J. App. Div.).

V. CHALLENGES TO ARBITRATOR OR FORUM

Alleged Deficiency in Demand Does Not Preclude Arbitration. The claimant here submitted a form Demand to the AAA but failed to sign and date the form and to check a box stating whether she was raising statutory claims (which she was). Respondent failed to pay the requisite arbitration fees, citing these pleading deficiencies as a basis for failing to do so. Claimant filed her statutory claims in court, and the employer then moved to compel. The court denied the motion, and in doing so rejected respondent's argument that the alleged pleading deficiencies constituted a basis for doing so. The court found that Respondent "provides no authority for the proposition that plaintiff was required to satisfy various technical pleading conditions to initiate arbitration." The court added that the arbitration agreement, the employee handbook, the FAA, and the AAA rules contained no such requirement. "Indeed, to the extent these sources address the requirements of pleadings in arbitration demands, these sources suggest the opposite conclusion: that is, that arbitration demands are not subject to formalistic requirements, nor are they comparable to pleadings in federal court." In any event, the court noted that the AAA itself found the Demand to be sufficient to initiate an arbitration, and the respondent "fails to persuade the Court why it should hold [claimant's] Demand to a higher standard than that used by the AAA." *Nadeau v. Equity Residential Properties,* 2017 WL 1842686 (S.D.N.Y.). See *Glazer v. Alliance Beverage Distributing*, 2017 WL 822174 (Del. Chanc. Ct.) (claim for advancement of legal fees, subject to arbitration clause, must be arbitrated despite fact that delay in selecting arbitration panel and in getting claim heard may undercut value of advancement of fees as separate right from indemnification).

VI. CLASS & COLLECTIVE ACTIONS

Sixth Circuit Joins Seventh and Ninth Circuits in Ruling NLRA Precludes Class Action Waivers. The Sixth Circuit, in a 2-1 decision, ruled that the right to concerted activity under the NLRA is a substantive right and mandatory arbitration provisions that permit only individual and not class claims are illegal under the NLRA. The court rejected the contention that the Supreme Court's decision in *Concepcion* "requires enforcement of arbitration provisions in all circumstances." The court distinguished the situation here where the arbitration provision runs afoul of an explicit right, namely the right to concerted activity, and those that merely "may be in tension with the underlying policy of a federal statute. Explicitly illegal arbitration provisions trigger the FAA's savings clause." The Sixth Circuit concluded that it joined "the Seventh and Ninth Circuits in holding that an arbitration provision requiring employees covered by the NLRA individually to arbitration all employment-related claims is not enforceable." *NLRB v. Alternative Entertainment, Inc.,* 2017 WL 2297620 (6th Cir.). *Novosad v. Broomall Operating Company,* 2017 WL 1314885 (3d Cir.) (arbitration clause providing that it "covers only claims by individuals and does not

cover class or collective actions" by its plain language "excludes class and collective actions from mandatory arbitration"); *Jones v. Does 1-10,* 2017 WL 2174526 (3d Cir) (arbitration under collective bargaining agreement not required for FLSA collective action that raises factual disputes but does not depend on a resolution of a disputed reading of the terms of the CBA). But see *Joseph v. Quality Dining,* 2017 WL 1062480 (E.D. Pa.) (rejects argument that NLRA precludes enforcement of class action waivers under FAA).

Proper Notice of Right to Opt Out of Arbitration Clause Not Provided. The Ninth Circuit, in *Morris v. Ernst & Young* which will be heard by the Supreme Court next term, ruled that class action waivers violate the NLRA and may not be enforced. In a footnote in that case, the Ninth Circuit noted that a violation of the NLRA was found not to be present because the employee had the option to opt out of individual dispute resolution. In this case, the employer sought to convince a district court that its class action waiver was enforceable because managers were instructed not to require employees to sign the agreement containing the class action waiver. The court rejected the employer's argument on the facts and on the law. On the facts, the court ruled that the employer failed to demonstrate that the plaintiffs were put on notice of their alleged right to opt out of the class action waiver. In any event the court opined that the footnote in the *Morris* decision "appears to be in tension with the remainder of the majority's decision . . .." As a result, the court concluded that "it is unclear whether providing a clear opportunity to opt out of an arbitration agreement containing a class action waiver . . . neutralizes a class action waiver's interference with Sections 7 and 8 of the NLRA." *Pataky v. Brigantine, Inc.,* 2017 WL 1682681 (S.D. Cal.).

VII. HEARING-RELATED ISSUES

Vacatur on Fundamental Fairness Grounds Rejected. The arbitration panel here refused to postpone a hearing to accommodate the hiring of new counsel for an individual respondent after five days of hearing had been completed with the sixth and final day scheduled weeks later. The panel also refused to subpoena a witness requested by that same party. An award was rendered against the individual respondent, and respondents moved to vacate arguing that fundamental fairness had been violated. The court rejected this claim. The court noted that a significant amount of time during the first five days of hearing related to the presentation of respondents' case, including extensive testimony by the individual respondent. The court faulted the individual respondent for "tactical" decisions that provided the panel with a reasonable basis for denying the request for a continuance, including the representation that a witness would be testifying by telephone from Hawaii and then failing to call that witness and then requesting a continuance so that the testimony of that witness could be taken live. In any event, no prejudice was shown. Finally, the court noted that the subpoena requested by the individual respondent was for a witness out of the jurisdictional reach of the panel. *Urquhart v. Kurlan*, 2017 WL 781742

(N.D. Ill.). See also *Pershing LLC v. Kieback et al.,* 2017 WL 2226130 (D. La.) (FINRA panel's failure to review disputed discovery documents in camera and its upholding of assertion of privilege to withhold production does not render proceeding fundamentally unfair requiring vacatur of award).

Denial of Request for Additional Discovery Not Arbitral Misconduct. Al Maya, a party in this commercial dispute under the New York Convention and the FAA, requested from the panel and received an order compelling production of profit and loss data. Once received that same party requested data underlying the information produced so that the accuracy of the original production could be determined. This request was denied. An award was issued against Al Maya and it moved to vacate the award on the grounds that the panel's denial of additional information requested constituted misconduct. The court denied the motion and confirmed the award. The court ruled that procedural questions were for the panel to decide and noted that the parties here had "agreed to limited discovery and granted the arbitrators flexibility with respect to the manner in which the arbitration is conducted." Moreover, the court concluded that the suggestion that the additional documentation would have prompted a favorable result for the complaining party was "wholly speculative." *Al Maya Trading Establishment vs. Global Export Marketing*, 2017 WL 1050123 (S.D.N.Y.).

VIII. CHALLENGES TO AWARD

Second Circuit Rejects Manifest Disregard Claim. Tully and Can-Am had a contract dispute relating to the delivery of fabricated steel which was submitted to arbitration to resolve. The arbitrator awarded Tully over $6.8 million and Can-Am over $366,000 on their respective claims. The district court confirmed the award, and the Second Circuit affirmed. The court rejected Can-Am's manifest disregard claim, finding a colorable basis for the arbitrator's award. For example, Can-Am argued that the arbitrator failed to properly apply a letter agreement between the parties. The Second Circuit rejected this claim, finding that the letter agreement was merely an agreement to agree and not enforceable on its own terms. The court also rejected the claim that the arbitrator's award of damages in varying percentages evidenced a disregard of a provision between the parties in their agreement. Instead, the court found there to be many possible reasons for this unrelated to the contractual term at issue. As explained by the court, "the arbitrator, based on the extensive evidence before him, concluded that Can-Am's breach was responsible for some of Tully's claimed damages and awarded Tully the amount he believed it was due." Finally, the Second Circuit found that the arbitrator satisfied his obligation to issue a reasoned award. "Here, the arbitrator laid out a factual history of the parties' dealings, and - after concluding that Can-Am delivered material late - discussed why Tully was entitled to damages on some claims and not others. In sum, the arbitrator issued a reasoned award." *Tully Construction v. Can-Am Steel*, 2017 WL 1103443 (2d Cir.). See also *Crystallex International v. Bolivarian*

Republic of Venezuela, 2017 WL 1155691 (D.D.C.) (court confirms damages award of over $6.2 billion against Venezuela where the panel reasonably employed "stock market" and "full reparation" methods for calculating damages).

Manifest Disregard Claim Upheld. Daesang sold its aspartame business to NutraSweet. Various representations were made in documents relating to the sale. Daesang later admitted to a criminal conspiracy to limit competition in the aspartame market. An arbitration before the ICC ensued in which NutraSweet sought equitable rescission based on fraudulent inducement. The panel rejected this claim, finding that under New York law an actionable fraud claim may not be based on contractual representations. Justice Charles Ramos of the New York Supreme Court vacated this part of the award. Justice Ramos ruled that "the Tribunal chose to disregard the well-established principle that a fraud claim can be based on a breach of contractual warranties where the misrepresentations are of present facts (in contrast to future performance) and cause the actual losses claimed." The court found that that was the case here. The sale documents included "false representations [by Daesang] about its criminal conduct pertaining to the operation of its business" which misrepresented "a present, material fact designed to induce NutraSweet to enter into the transaction. The present intent to defraud at the outset of the transaction is what distinguishes NutraSweet's fraudulent inducement claim from a mere breach of contract claim." As a result, the court concluded that the panel's ruling lacked even a barely colorable justification and was rendered in manifest disregard of the law under the FAA and New York law. *Daesang v. NutraSweet,* 55 Misc.3d 1218(A) (Sup. Ct. N.Y. Cty. 2017).

Subsequent Change in Law Does Not Warrant Vacatur on Manifest Disregard Grounds. The arbitrator was presented with the question whether claims under California's Private Attorney General Act could be arbitrated on a representative basis. The arbitrator issued a partial final award directing claimant to proceed with his PAGA claim on an individual basis. Subsequently, new authority provided that PAGA claims could be arbitrated on a representative basis. A motion to vacate was filed arguing that the arbitrator exceed her authority and that the award was issued in manifest disregard of the law. The Ninth Circuit rejected these arguments. The court opined that the "issue is not whether, in perfect hindsight, we can conclude that the arbitrator erred." Rather the issue was whether the arbitrator recognized applicable law and ignored it. This, the court concluded, the arbitrator did not do. The court noted that law was unsettled at the time the arbitrator rendered her award. "That the arbitrator failed to correctly predict future judicial decisions does not mean she acted in 'manifest disregard' of existing law." *Wulfe v. Valero Refining Company-California,* 2017 WL 1396685 (9th Cir.).

Evident Partiality Claim Based on Failure to Disclose Rejected. The parties selected a new chair, Goldman, for their FINRA panel due to a last-minute withdrawal by the initial chair. Goldman disclosed that he had served as arbitrator in six matters with two of them

pending in which respondent was a party. No objections to his service were submitted and the hearing proceeded and an award was issued. The losing party later learned that Goldman had also served as a mediator on a prior unrelated matter with respondent and moved to vacate on evident partiality grounds. The court rejected the claim, emphasizing that "there is simply no evidence that Goldman's prior mediation with [respondent] had any effect on the resolution" of this matter. The court noted that Goldman's disclosure of six arbitrations with respondent did raise questions of his impartiality and yet he was acceptable to the parties. The court rejected the assertion that the Supreme Court decision in *Commonwealth Coatings* sets forth a firm rule that a "failure to disclose means evident partiality and vacatur of the award." *Ploetz v. Morgan Stanley Smith Barney,* 2017 WL 2303969 (D. Minn.). See *Lumberjack Pass Amusements v. Royal Hospitality*, 55 Misc.3d 1213(A) (N.Y. Sup. Ct. Warren Cty.) (arbitrator's failure to disclose that 10 years ago he lived one quarter of a mile away from counsel for the prevailing party who he did not know not grounds for vacatur).

Motion to Vacate Under FAA Untimely. Section 12 of the FAA provides that a motion to vacate must be served within three months "after the award is filed or delivered." The FINRA panel here issued its award on February 2, 2016; the petition to vacate was served three months and one day after that. The court concluded here that the petition was untimely. The court emphasized that the "statute's three-month time limit for service is absolute." The court explained that "Section 12's clock starts ticking the same day" that an award is delivered or filed, not the day after. Here the award was emailed to petitioner on February 2, 2016 which is the date the clock started running. The court dismissed the argument that service was not proper because only two of the three arbitrators signed the award on February 2nd -- the third one signed the next day. In doing so, the court noted that FINRA only requires that an award be signed by a majority of the arbitrators and New York law not to the contrary. *Anglim v. Vertical Group*, 2017 WL 543245 (S.D.N.Y.).

Ambiguous Award Returned to Panel for Clarification. The panel awarded damages and attorneys' fees to two claimants raising parallel claims against a member of the Chicago Board Options Exchange and the entity's managing member. The award did not address the question as to whether the liability was joint and several, as requested by claimants, and did not apportion the damages between the two claimants, members of the same family with related claims. The claimants argued that although they held separate accounts, they traded together and used the individual respondent as the designated trader for both accounts. The claimants reasoned that they could apportion the damages themselves. The court emphasized that the FAA requires arbitrators to decide the entire dispute submitted to them with an award that was sufficiently clear and specific to allow a court to enforce it. The court concluded that here it "cannot definitively resolve the ambiguity from the record" and remanded the matter to the arbitration panel "for clarification." *Urquhart v. Kurlan*, 2017 WL 781742 (N.D. Ill.).

FINRA Expungement Award Confirmed. A financial representative was terminated and his employer gave as the reason on the Form U-5 "failure to follow instructions relating to [the employer's] events." An arbitration panel upheld the termination but recommended that the Form U-5 be amended to read "terminated for internal reasons unrelated to the sale of securities or insurance." The award was confirmed. The court rejected the financial representative's claim that the panel's rejection of the original U-5 language supports his defamation claim. The court emphasized that only a colorable justification for the award is required to uphold the award, and here the panel could have concluded that the revised language better reflected the many complaints against the financial representative during his tenure. "Without a finding of falsity, the Award only reflects the inference that the panel viewed the original form U-5 as too narrow in scope." *Thrivent Financial v. Bibow*, 2017 WL 1162206 (S.D.N.Y.).

Panel Did Not Exceed Authority. FINRA rule 12514(d) permits parties to jointly request an "explained decision" if the request is made 20 days before the hearing. The request for an explained award was made belatedly and by only one party, Mandelka. The panel chair, however, at the hearing expressed a willingness to provide an explained decision if the parties paid $400 in fees, which one party expressed a willingness to do. The award was issued without explanation and Mandelka moved to vacate the award. The motion was denied. The court reasoned that the decision whether to issue an explained decision was within the sound discretion of the panel. "Had the panel issued an explained decision, it would have been acting within its discretion to apply and interpret the FINRA Rules, but the failure to issue an explained decision is not itself an action that exceeded the panel's powers." The court also rejected a claim that the panel exceeded its authority by issuing an award signed by only two of the three panelists, finding it was not contrary to FINRA Rules which merely requires the "signatures of the arbitrators." *Mandelka v. Penson Financial Services*, 2017 WL 1208665 (S.D.N.Y.). See *Urquhart v. Kurlan*, 2017 WL 781742 (N.D. Ill.). (arbitration panel did not exceed its authority in granting attorneys' fees where both parties requested the award of fees).

IX. ADR – GENERAL

Mediation Includes, for Contract Purposes, Period Following Mediation Date Leading to Settlement. The agreement at issue apportioned fees among counsel depending on when the mediation concluded. The question here was when did the mediation end – at the end of the only day of mediation which concluded without settlement or weeks later when the mediator finally brokered a deal. The New York Court of Appeals ruled that the latter date was the proper one. The Court read the operative contract language to require a different percentage of fees only if the matter proceeded beyond the mediation. "Here, the mediator and [counsel] communicated in the days following the . . . mediation session, with the mediator continuing to act as a go-between." The case settled weeks later. On this

basis, the Court concluded that the mediation ended on the day the settlement brokered by the mediator was confirmed. *Marin v. Constitutional Realty*, LLC, 28 N.Y. 3d 666 (2017).

Award Modified to Apply Federal Post-Judgment Interest Rate. The arbitration panel awarded pre-judgment and post-judgment interest at the rate of 8% of the damages it awarded in a patent case under the New York Convention. The Federal Circuit Court ruled that the federal interest rate established in 28 U.S.C.A. § 1961(a) applies to post-judgment interest awarded. The court explained that once an award is confirmed it becomes a federal judgment under the doctrine of merger. "Reflecting that notion, numerous circuits have concluded that once a federal court confirms an arbitral award, the award merges into the judgment and the federal rate for post-judgment interest presumptively applies." To overcome this presumption, "courts have required the parties or arbitrators to unambiguously express their intent to replace the federal rate for the post-judgment." No such evidence was provided here, and on this basis the court modified the award to require application of the federal interest rate for calculation of post-judgment interest. *Bayer CropScience v. Dow AgroSciences*, 2017 WL 788321 (Fed. Cir.).

Post-Judgment Interest Mandatory in Second Circuit. The prevailing party sought and obtained confirmation of an award and requested post-judgment interest. The court ruled that "post-judgment interest is mandatory in the Second Circuit." The court also found that pre-judgment interest was awardable at the New York statutory rate of 9% even where the FAA applied. The court added that pre-judgment interest awarded under the New York Convention is presumed to be appropriate in the absence of persuasive authority or evidence to the contrary. *Al Maya Trading Establishment vs. Global Export Marketing*, 2017 WL 1050123 (S.D.N.Y.).

X. COLLECTIVE BARGAINING SETTING

Timeliness of Grievance for Arbitrator to Decide. Management refused to arbitrate a grievance it believed to be untimely. The employer argued that the time to file a grievance ran from when the event at issue occurred; the union argued that the clock ran from when the employer rejected the union's demand. The court ruled that the timeliness issue was for the arbitrator to decide. "This contract interpretation question, going to whether the [union's] claim is arbitrable, cannot be resolved by this court and must be resolved by the arbitrator in line with the parties' CBA." *Pacific Media Workers Guild v. San Francisco Chronicle*, 2017 WL 1861853 (N.D. Cal.).

Grievance Brought by Individual Not Barred by Class Action Waiver. The collective bargaining agreement here precluded class grievances raising discrimination claims. The grievant objected to the deduction made from his paycheck for a new self-funded health plan. The district court ruled that the grievance was not arbitrable because the collective

bargaining agreement did not permit class disputes. The Tenth Circuit reversed, ruling that the grievance here was brought by an individual grievant and was not barred by the collective bargaining agreement's term precluding class discrimination-related arbitrations. "Though resolution of his dispute about deduction of health care premiums likely would affect other employees, this fact does not disqualify the dispute from arbitration under the CBA's terms." The court reasoned that the fact that the union stepped into the grievance process on the individual grievant's behalf did not change the fact that it was the grievant, and not the union, that initiated the grievance process. *Society of Professional Engineering Employees v. Spirit AeroSystems*, 2017 WL 992411 (D. Kan.). See also *Village of Bartonville v. Lopez*, 2017 Ill. 120643 (Sup. Ct.) (terminated police officer's substantive participation in administrative proceeding upholding his discharge constituted waiver of any claim that the termination was appropriately subject to grievance arbitration).

Arbitrator Misconduct Claims Under LMRA Rejected. A Buffalo Philharmonic Orchestra musician brought a motion to vacate and a duty of fair representation claim following the upholding of his termination by an arbitrator. The district court rejected both claims and the Second Circuit affirmed. The court began its analysis by noting that while the grounds to vacate an award under the FAA did not strictly apply to the LMRA, it does provide guidance. Having said that, the court made clear that the Second Circuit has "never held that the requirement of 'fundamental fairness' applies to arbitrators under the LMRA." The court rejected the claim that the arbitrator exceeded his authority by hearing testimony about the musician's alleged musical incompetence. The Second Circuit rejected this claim, finding instead that this testimony went to the musician's "musical impertinence" rather than his incompetence. The court also rejected the musician's claims that the arbitrator's failure to admit certain recordings and transcripts constituted misconduct. In doing so, the court emphasized that courts will only interfere with arbitrator's evidentiary rulings, even under the FAA, only if fundamental fairness is implicated which is not the case here. Rather, the arbitrator specifically ruled that the dispute to which the recordings in the transcript applied were not a factor in his decision. Finally, the musician alleged that the arbitrator improperly credited the testimony of certain witnesses and failed to credit the testimony of his witness. This claim was rejected, with the Second Circuit finding that given "the arbitrator's thorough and evenhanded treatment of the competing accounts, it cannot be said that the award was obtained through fraud, corruption, or undue means." *Roy v. Buffalo Philharmonic Orchestra Society*, 2017 WL 951461 (2d Cir.).

XI. STATE LAWS

Evident Partiality Claim Under Texas Law Rejected. McAllen brought an environmental contamination arbitration against Forest. Ramos, one of the arbitrators, was proposed as a possible mediator in an unrelated dispute and McAllen objected, apparently to avoid a possible conflict with Ramos's service as arbitrator in the Forest matter. McAllen did not

disclose this to Forest, and there was no evidence that Ramos knew of this possible mediation. Forest sought to vacate the subsequent award, arguing that McAllen's and Ramos's nondisclosure constituted evident partiality. The Texas Supreme Court rejected this claim. The Court explained that under Texas law vacatur for nondisclosure is only required if the facts not disclosed are material, not trivial. "Some undisclosed relationships are too insubstantial to warrant vacating an award. And an arbitrator's impartiality cannot be affected by something of which he is completely unaware." Here, the court found it "is difficult to see how Ramos could be partial to McAllen for objecting to his serving as a mediator in a case in which McAllen was a party. One would think, if anything, the objection would have made Ramos biased against McAllen." In any event, the court concluded that there was no evidence that Ramos ever knew of the possible mediation and rejected the evident partiality claim. *Forest Oil Corporation v. El Rucio and Land and Cattle Co.*, 2017 WL 1541086 (Tex.).

Arbitrator Exceeded Authority Under New Jersey Law. A teacher was terminated for "unbecoming conduct" under New Jersey's Tenured Employees Hearing Law. Among the teacher's actions were: repeated unprofessional and inappropriate comments and behavior towards female staff members; requesting dates from female staff members in front of students; repeatedly commenting about the physical appearance and dress of female staff members, and; asking a student to deliver flowers to a female staff member along with messages that the staff member found to be offensive. The arbitrator reduced the termination to a 120-day suspension, finding that the claims were in the nature of sexual harassment and the school district failed to meet the standard for such a claim. The New Jersey Supreme Court, reversing the Appellate Division, vacated the award on the ground that the arbitrator had exceeded his authority. The Court emphasized that the standard and nature of proof required to establish claims of sexual harassment and undermining conduct differed and the arbitrator inappropriately conflated the two claims. The Court emphasized that "proving hostile work environment is not necessary to satisfy the burden of showing unbecoming conduct. A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals." An unbecoming conduct claim, the Court explained, focuses on the morale, efficiency, and public perception of the entity, and proof of sexual harassment is not required to establish a claim. "Here, the arbitrator erroneously faulted the Board for failing to prove a charge that it did not bring", and on this basis vacated the award. *Bound Bruck Board of Education v. Ciripompa*, 228 N.J. 4 (2017).

XII. NEWS AND DEVELOPMENTS

House Bill Would Amend Dodd-Frank to Remove SEC and CFPB Authority to Limit Pre-Dispute Arbitration. The House passed the "Financial Choice Act" on June 8, 2017 that, if enacted, would repeal the provision in Dodd-Frank that authorizes the SEC and CFPB

to limit or prohibit pre-dispute arbitration agreements in investment advisor/broker-dealer agreements and consumer finance agreements. H.R. 10.

New International Mediation Procedure Issued by Dispute Resolution Organization. The International Institute for Conflict Prevention & Resolution issued a new international mediation procedure, which became effective on March 1, 2017, that provides ground rules for the selection of a mediator, the sharing of information during a mediation, and confidentiality measures for the parties. The new international mediation procedure can be incorporated by reference in the dispute resolution clause of a business agreement or in a submission agreement entered into after a dispute has arisen.

Arbitration Fairness Bill Resubmitted to Congress. The proposed federal Arbitration Fairness Act, introduced by Senator Al Franken, has been resubmitted for consideration by Congress. Under this version of the bill, the FAA would be amended to eliminate mandatory arbitration clauses in employment, consumer, civil rights, and antitrust cases.

HHS Withdraws Rule Prohibiting Pre-Dispute Arbitration Agreements in Nursing Home Contracts. The Centers for Medicare and Medicaid Services of the Department of Health and Human Services withdrew a 2016 Rule prohibiting pre-dispute arbitration agreement in long-term care nursing home contracts. Instead, the agency proposed a new rule which would require that pre-dispute arbitration provisions must be in plain language, must be explained to the resident who must acknowledge that he or she understands the obligation, and must not contain language limiting the resident's ability to communicate with governmental agencies and officials. Public comments may be submitted during the applicable 60-day comment.

Legislation Pending in New York to Prohibit Consumer and Employment Pre-Dispute Arbitration Provisions. New legislation is pending before the New York State Legislature that would prohibit the use of "forced arbitration" clauses in employment agreement and consumer contracts. When consumers and employees do arbitrate such disputes, the bill would impose disclosure requirements on arbitrators and legislate a manifest disregard of the law standard for such awards. New York Assembly Bill A6983.

ADR Certification at The Preliminary Conference Stage. The Commercial Division Advisory Council in New York State's Commercial Division has proposed a new court rule requiring attorneys to certify that they had discussed ADR options with their clients and to state whether their clients are open to pursuing mediation at some stage of the litigation. The purpose of the recommended amendment to NYS court rules is to resolve cases more quickly and less expensively and to signal to the court which parties are open to mediation, since willingness to participate is a strong factor in effective mediation. Comments on the proposed rule change were due to be submitted by June 5, 2017.

XIII. TABLE OF CASES