FELIU NEUTRAL SERVICES LLC

Alfred G. Feliu
afeliu@feliuadr.com
212-763-6801

AAA Panel Case Summaries
Al Feliu
March 2016

I. JURISDICTIONAL ISSUES: GENERAL

Arbitration Procedure Purporting to Waive Federal and State Law a "Farce" and Unenforceable. A payday loan company, owned by a member of the Cheyenne River Sioux Tribe, made disputes relating to its loan agreements subject to arbitration under the laws of the Cheyenne Tribe. The loan agreement also provided that "neither this Agreement nor Lender is subject to the laws of any state of the United States of America." A later amendment to the loan agreement assigned administration of any arbitrations to the AAA or JAMS. Debtors brought suit under the loan agreement and the Fourth Circuit ruled that the loan agreement denied the debtors their substantive federal rights and was unenforceable. The court found that the arbitration agreement must fail because it purported to "renounce wholesale the application of any federal law to the plaintiffs' federal claims." The court added that it does so almost surreptitiously by waving a potential claimant's rights through the guise of a choice of law clause. While acknowledging that waiver of certain rights is permissible, the court reasoned that "a party may not underhandedly convert a choice of law clause into a choice of no law clause -- it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." The court also concluded that the offensive terms were not severable and therefore the arbitration agreement *in toto* was not enforceable. *Hayes v. Delbert Services Corp.*, 2016 WL 386016 (4th Cir.).

FAA Applies Where Choice of California Law was Applied Solely to Arbitration Procedures. The arbitration clause provided here that the parties were entitled to all discovery provided for under California civil procedure and to assert all claims as if they were in court. The issue was whether this required application of California law generally or the FAA when reviewing the arbitration provision. The Ninth Circuit concluded that the FAA applies. The court reasoned that the arbitration provision addressed solely the procedures within arbitration and not whether the arbitration agreement itself provided that California or federal law would apply to its interpretation. *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015).

FAA Governs Commercial Real Estate Dispute. The dispute here related to interfamilial investments in commercial real estate in New York State. The properties at issue included real estate in New York, including a Marriott hotel, and a property in Florida. The parties argued that their passive activities with respect to the property had no impact on interstate commerce. The New York Court of Appeals ruled that the FAA applied to this dispute which it characterized as involving agreements facilitating participation in the business of commercial real estate. "In determining whether the FAA applies, the emphasis is meant to

be on whether the particular economic activity at issue affects interstate commerce – and, here, it does." *Cusimano v. Schnurr*, 26 N.Y.3d 391 (2015).

Filing of Four Related Lawsuits Does Not Constitute Waiver of Arbitration. The Eleventh Circuit ruled that the right to arbitrate was not waived where the "litigation machinery" was not invoked despite the filing of four lawsuits concerning the transaction over 10 years. The court noted that service was not effectuated in three of the lawsuits and the fourth lawsuit did not progress beyond the filing stage. The court acknowledged that the delay weighs in favor of finding waiver but found here that there was no substantial conduct inconsistent with the intent to arbitrate to rise to the level of a waiver of the right to arbitrate. Moreover, the court found a lack of prejudice in this case due to the limited nature of the prior proceedings. The court also rejected the claim that fees incurred in defending against the lawsuits constituted prejudice where here the fees were found to be minimal. *Grigsby & Associates v. M Securities Investment*, 2015 WL 9461341 (11th Cir.).

Right to Arbitration Waived. Plaintiffs in this commercial real estate dispute vigorously pursued litigation for a year before moving to compel arbitration. The New York Court of Appeals ruled that arbitration was waived as a result of plaintiffs' active pursuit of litigation and the substantive prejudice and excessive cost it caused the other parties due to the resulting delay. The Court found "[e]ven more telling" was the fact that the plaintiffs only became interested in arbitrating after the lower court indicated that it thought that plaintiffs' claims were vexatious and largely time-barred. "Plaintiffs' behavior is indicative of blatant forum-shopping and, under these circumstances, prejudice has clearly been established." *Cusimano v. Schnurr*, 26 N.Y.3d 391 (2015).

Appeal of Order to Compel Untimely. The court granted the union's motion to compel arbitration in 2012. The arbitration occurred and an award was issued in the union's favor. The employer appealed the granting of the motion to compel and moved to vacate the award. The Eleventh Circuit ruled that the motion to compel, quoting Carole King, was "too late baby, now it's too late." The court ruled that the district court's order was final and appealable and the fact that the court stayed the litigation rather than dismissing it did not change that fact. The court also confirmed the award, rejecting the employer's various challenges. For example, the court reaffirmed that an arbitrator may, as occurred here, consider extrinsic evidence where there was ambiguity in the collective bargaining agreement. *United Steel v. Wise Alloys, LLC*, 807 F.3d 1258 (11th Cir. 2015).

Obligation to Arbitrate Survives Termination of Agreement. The consumer here signed a services agreement with TruGreen in 2013. She later terminated the agreement which contained an arbitration clause and class action waiver. She continued to receive telephone solicitations and she initiated a class action alleging violations of the Telephone Consumer Protection Act. The court granted TruGreen's motion to compel arbitration. The court

relied on the language in the services agreement which permitted TruGreen to contact plaintiff regarding "current and possible future services" and concluded that this current dispute was subject to the mandatory arbitration provision in the services agreement which had previously been terminated. *Stevens-Bratton v. TruGreen, Inc.*, 2016 WL 155087 (W.D. Tenn.).

Arbitration Panel Without Authority to Award Fees for Court Proceedings. The initial award here was vacated on bias grounds and on remand the prevailing party was awarded attorneys' fees by the arbitrator both as incurred in arbitration and for the prior court proceeding. The Utah Supreme Court concluded that the panel was without authority to award fees incurred in the court proceeding. The Court relied on language in the Utah Uniform Arbitration Act which authorized arbitrators to award "the expenses of arbitration," finding that the statute did not intend to include court-related fees in that provision. The Court also reasoned that the presiding judge was most familiar with the attorneys' work in the prior judicial action which further supported the view that the court rather than the arbitrator should rule on the issue of attorneys' fees. "We think it best to assign those courts sole responsibility for granting attorney fees in both proceedings, and we therefore conclude that the panel exceeded its authority when it ordered [the losing party] to pay post-arbitration attorney fees." *West Gate Resorts v. Adel*, 2016 WL 67717 (Utah).

Form U-4 Not Clear and Unambiguous Waiver of Judicial Forum. A stockbroker signed a Securities Industry Form U-4 in 1997 and again in 2009. The stockbroker brought suit and the brokerage house sought to compel arbitration. The New Jersey appellate court rejected the effort to arbitrate the dispute, finding that the Form U-4 did not sufficiently explain what arbitration is and how it differs from court proceedings. The court rejected attempts to apply a 2000 memorandum which contained clear language of waiver of the judicial forum. The court found that the span of nine years between the date of the memorandum and the latest signing of the Form U-4 was too great to allow the 2000 waiver language to govern. *Barr v. Bishop Rosen & Co.*, 2015 WL 6442284 (N.J. App.), cert. denied, 2016 WL 487664 (2016).

II. JURISDICTIONAL CHALLENGES: DELEGATION ISSUES

AAA Rules Constitute Clear and Unmistakable Delegation of Authority to Decide Non-Signatory Question. The parties here agreed to apply the AAA's Commercial Rules to the arbitration. At issue here was the question whether an executive liability insurance policy covered a judgment against a former executive who did not sign the insurance policy (his former employer did). The Alabama Supreme Court recognized that generally a court would decide the delegation issue. The Court, however, concluded that the AAA's rule

which assigned to the arbitrator the power to decide his or her own jurisdiction constituted a clear and unmistakable assignment of that responsibility to the arbitrator. *Federal Insurance Company v. Reedstrom*, 2015 WL 9264282 (Ala.). See *Glasswall, LLC v. Monadnock Construction, Inc.*, 2016 WL 314117 (arbitration agreement incorporating the AAA's construction industry rules constitutes clear and unmistakable evidence that parties intended to submit arbitrability issue to the arbitrator). See also *Monarch Consulting, Inc. v. National Union Fire Ins. Co.,* 2016 WL 633946 (N.Y.) (contractual provision providing that arbitrators had exclusive jurisdiction "including any question as to its arbitrability" constitutes a clear and unmistakable delegation of the question to the arbitrators for resolution); *Ellis v. JF Enterprises*, 2016 WL 143281 (Mo.) (en banc) (challenge to contract generally on fraud grounds and not specifically to the arbitration provision must be heard by the arbitrator and not the court).

AAA Rules Constitute Clear and Unmistakable Delegation to Arbitration Where Sophisticated Parties Involved. A bank executive and former law partner challenged his termination and opposed the motion to compel arbitration. The Ninth Circuit ruled that the incorporation of the AAA's rules constituted a delegation to the arbitrator of any questions of arbitrability. The court was careful, however, to distinguish this case involving a plaintiff who is a sophisticated executive and lawyer versus the unsophisticated party likely to be found in a consumer contract setting. The court limited its holding to a situation where a sophisticated party is the contracting party and expressly declined to decide whether the same analysis would apply in consumer contracts or contracts involving unsophisticated parties. *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015).

Incorporation of AAA Rules Not Sufficient to Empower Arbitrator to Rule on Class Arbitration. The default rule is that the court decides whether an arbitration clause requires class arbitration unless there is clear and unmistakable evidence that the parties intended the arbitrator to decide the issue. The question for the Third Circuit here was whether reference to "rules of the American Arbitration Association" constituted a clear and unmistakable referral of the issue to arbitration. The Third Circuit ruled that it did not. The court emphasized that the arbitration clause here made no reference to class arbitration and its use of singular terms such as "Lessee" and "Lessor" supported the view that bilateral arbitration was intended. The court also noted that the AAA's Commercial Rules appeared to contemplate bilateral arbitration and did not refer to the AAA's Class Action rules. "Given the actual contractual language at issue here as well as the language and nature of the other AAA rules, the Supplementary Rules are not enough for us to conclude that the Leases clearly and unmistakably delegate the question of class arbitrability to the arbitrators." *Chesapeake Appalachia v. Scout Petroleum*, 809 F.3d 746 (3rd Cir. 2016). See also *Epstein v. Wilentz, Goldman and Spitzer*, 2015 WL 9876918 (N.J. App.) (a single reference to

AAA rules is not a sufficient basis on which to conclude that the parties intended to submit issues of arbitrability to an arbitrator).

Issue of Waiver Is for Court to Decide in Absence of Clear Delegation to Arbitrator. A payday loan company brought more than 16,000 individual collection actions in court using a process server which was found guilty of fraud. A class action was brought on behalf of the loan recipients who were sued in court and the loan company moved to compel arbitration. The Nevada Supreme Court held that the loan company waived its right to arbitrate by proceeding to enforce the contract and obtain repayment of the plaintiffs' loans in court. The court noted that the United States Supreme Court has characterized waiver claims as procedural gateway questions and not as questions of arbitrability. The court noted that here the waiver related to litigation conduct and courts are in the best position to resolve issues relating to such conduct. "Having the court assess waiver not only comports with party expectations but also is more efficient than reconstructing the litigation history before the arbitrator and deferring the question to the arbitral forum, only to have the dispute return if the arbitrator finds waiver." The court distinguished the situation where the waiver issue relates to noncompliance with contractual conditions precedent to arbitration which are appropriately submitted to the arbitrator. The court emphasized that the loan company knew of its arbitration rights and yet proceeded in court to collect on the loans. The court added that the loan company invited the borrowers to appear in court and defend their positions on the merits and the claims asserted by plaintiffs in the class action relate to those issues thereby reinforcing that the loan company waived its right to arbitrate any such claim. *Principal Investments, Inc. v. Harrison*, 2016 WL 166011 (Nev.). See also *Clookey v. Citibank, N.A.*, 2015 WL 8484514 (N.D.N.Y.) (court decides arbitrability question where arbitration agreement expressly precludes class arbitration).

Disagreement Regarding Arbitrator Selection Process Properly Submitted to Arbitrator. JAMS refused to administer an employment discrimination arbitration which violated its minimum standard. The employer then filed with the AAA. Plaintiff brought her action in court and employer moved to compel which the trial court granted. The New York appellate court affirmed and compelled arbitration of the employee's claim. The court reasoned that the dispute here, focusing on "the manner in which the arbitrators are selected and whether JAMS" minimum standards prevail, is a dispute as to the terms upon which the arbitration would be administered" and is for the arbitrator to decide. *Bowman v. Raymours Furniture Co.*, 2016 WL 783024 (N.J. App.).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Unconscionability Challenge to Arbitration Provision Generally Rather Than Solely to the Delegation Clause Is for Arbitrator to Decide. Plaintiff here argued that the delegation to arbitration was improper and that the arbitration clause generally was unconscionable. The Ninth Circuit, applying the United States Supreme Court's decision in *Rent-a-Center*, required that the question of unconscionability be submitted to the arbitrator for decision. The court found that there were various agreements within agreements and distinguished this case because plaintiff, while objecting to the delegation of the matter to arbitration, challenged the arbitration agreement as a whole as being unconscionable. Relying on *Rent-a-Center*, the court concluded that it was the entire agreement at issue with respect to the question of unconscionability rather than the delegation to arbitration specifically and therefore the question was for the arbitrator to decide. *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015).

"Blatantly One-Side" Arbitration Agreement Unconscionable. A home painting company that hires college students as "interns" required all employees to sign an arbitration agreement which provided, among other things, that the company could go to court to seek injunctive relief but the employees could not seek any redress in court. The agreement also barred the award of attorneys' fees on wage and hour claims should employees prevail on such claims. The California appeals court found these provisions of the arbitration agreement to be substantively unconscionable and refused to enforce the agreement. The court also found the arbitration agreement to be procedurally unconscionable because it was made a condition of employment and the applicable AAA rules were not identified. *Carbajal v. CWPSC, Inc.*, 2016 WL 757552 (Cal. App.). See also *Totten v. Kellogg Brown & Root, LLC*, 2016 WL 316019 (C.D. Cal.) (employer's ability to modify arbitration agreement on 30 days' notice ruled unconscionable where modification to the arbitration provision could be made applicable to claims which had accrued but had not yet been filed); *Nelson v. Watch House International*, 2016 WL 825385 (5th Cir.) (arbitration provision that allowed employer to negate provision without notice to employees is illusory and not enforceable).

IV. CHALLENGES TO ARBITRATOR OR FORUM

Award of Attorneys' Fees Relating to Party's Effort to Confirm Award Improper. The district court in this case awarded fees to the party seeking to confirm the award. The lower court reasoned that the American Rule was displaced by contract here which provided for award of all "provable damages, and all costs of suit and attorneys' fees incurred in any action hereunder." The Second Circuit rejected the district court's reasoning that the agreement was breached by the party seeking to vacate the award. In so ruling, the appellate court relied on the American Rule relating to the award of attorneys'

fees and the fact that the contract provision only permitted fees for a breach of the agreement and no finding of a breach by the unsuccessful party was shown. *Zurich American Insurance Co. v. Team Tankers A. S.*, 2016 WL 336078 (2d Cir.).

Contract Provision Providing for Non-FINRA Arbitration Governs. The agreement between Credit Suisse and its financial advisers provided for arbitration before JAMS or the American Arbitration Association. Five financial advisers initiated an arbitration before FINRA arguing that FINRA Rule 13200 governs disputes between members and associated persons. The Second Circuit granted Credit Suisse's motion to compel arbitration before the non-FINRA arbitral forum. The court acknowledged that Rule 13200 requires arbitration in a FINRA forum, but held that this rule can be and was waived in this situation. The court viewed Rule 13200 as a default rule which may be overwritten a more specific contractual terms. The court noted that the issue here was simply the forum in which the dispute is to be heard rather than a complete waiver of arbitration which may have prompted a different result. The Second Circuit also rejected the argument that FINRA arbitration panels are better situated to hear FINRA related cases and arbitrators before JAMS and AAA may have lesser qualifications and may be less competent. The court rejected this argument, finding no basis for the conclusion that JAMS or AAA arbitrators would be less competent than FINRA arbitrators to rule in this matter. *Credit Suisse Securities (USA) v. Tracy*, 2016 WL 336190 (2d Cir.).

Arbitration Costs Prevent Effective Vindication of Wage and Hour Claim. A massage therapy student brought a wage and hour class action against her school. In response to the school's motion to compel, the student argued that the cost splitting provision of the arbitration agreement denied her the opportunity to effectively vindicate her statutory rights. The Tenth Circuit agreed. In doing so, the court rejected the argument that the ability to opt out of arbitration, which was available to her, precluded her contention that the cost of arbitration denied her the ability to vindicate her rights. The court similarly rejected the school's contention that the possibility that the arbitrator might shift or waive the student's fees barred applicability of the effective vindication exception. The court agreed with the student that "being at the mercy" of the arbitrator's discretion is not comparable to the rights available to her under the FLSA. *Nesbitt v. FCNH, Inc.*, 811 F.3d 371 (10th Cir. 2016).

V. CLASS & COLLECTIVE ACTIONS

Supreme Court Overturns California's Court's Refusal to Enforce Class Arbitration Waiver. The United States Supreme Court in this case reinforced the supremacy of the Federal Arbitration Act and the prohibition against the use of state law to disfavor arbitration. The Court began its analysis by announcing that "the Federal Arbitration Act is

the law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." DirecTV's Consumer Service Agreement contained a class arbitration waiver but made an exemption if "the law of your state" would not enforce that provision. Prior to *Concepcion*, California law would not have enforced class arbitration waivers and the California court here reasoned that since California law would not enforce such a waiver at the time the agreement was entered into the class arbitration waiver could not now be enforced. The Supreme Court rejected this holding, finding that the California court's reasoning did not put arbitration on the same footing as all other agreements. The Court found no basis for the conclusion that California courts would apply invalid California law to contracts and therefore arbitration was not being treated like other agreements. *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

Supreme Court Vacates Application of Hawaiian Law Finding Arbitration Agreement Unconscionable. The United States Supreme Court vacated and remanded for consideration the decision of the Hawaiian Supreme Court in *Narayan v. The Ritz Carlton Development Company*, 135 Hawaii 327 (2015), in light of its decision in *DirecTV v Imburgia,* 136 S. Ct. 463 (2015). In the *Narayan* case, condominium owners sued the developer and management company of the condominium, who in turn sought to compel arbitration. The arbitration agreement was not contained in the condominium owner's purchase agreement but on pages 34 and 35 of a 36 page condominium declaration mailed to the owners. The Hawaii Supreme Court ruled that the arbitration agreement was procedurally and substantively unconscionable. The Hawaii Supreme Court found that the arbitration agreement was a contract of adhesion and was "buried in an auxiliary document and was ambiguous when read in conjunction with the purchase agreements." The Court also concluded that the arbitration agreement was substantively unconscionable. While acknowledging that reasonable limitations on discovery are appropriate in arbitration, the Court ruled such provisions unconscionable as they disproportionately disadvantaged the condominium owners. "Where an arbitration clause contains severe limitations on discovery alongside a confidentiality provision, the plaintiff may be deprived of the ability to adequately discover material information about his or her claim." Finally, the Hawaii Supreme Court ruled that the restriction on punitive and consequential damages, which was contained in this contract of adhesion, was unenforceable under prevailing Hawaii law. *Narayan v. The Ritz Carlton Development Company*, 135 Hawaii 327 (2015), vacated and remanded, 136 S. Ct. 800 (2016).

Supreme Court Vacates Decision Rejecting Delegation Clause on Vagueness Grounds. The West Virginia Supreme Court refused to compel arbitration based on a delegation clause which referred "all issues regarding arbitrability" to the arbitrator. That Court reasoned that the term "arbitrability" is vague and did not clearly and unmistakably confer authority on the arbitrator to decide gateway issues. The West Virginia Supreme Court

concluded that under applicable United States Supreme Court authority on the doctrine of severability (while recognizing "that this rule seems absurd") "the delegation provision does not reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration clause to the arbitrator." The United States Supreme Court vacated the West Virginia's Court's decision "for further consideration in light of *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015)." *Schumacher Homes of Circleville v. Spencer*, 235 W.Va. 335 (2015), vacated and remanded, 2016 WL 763198 (U.S.).

NLRA Precludes Enforcement of Mandatory Arbitration Obligation. The NLRB ruled in *D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (2012), and repeatedly since, see e.g. *U.S. Xpress Enterprises*, 363 NLRB No. 46 (2015) and *Waffle House, Inc.*, 363 NLRB No. 104 (2016), that Section 7 of the NLRA precludes enforcement of mandatory arbitration agreements. A federal district court in California, contrary to the rulings of several appellate courts rejecting the NLRB's position, agreed with the NLRB and refused to enforce a mandatory arbitration agreement. The court found the Board's logic to be persuasive and in "the face of competing interpretations of the FAA and NLRA, the Court must honor the spirit animating both statutes." The court reasoned that concerted litigation activity is protected by Section 7 and a federal court may not enforce "any undertaking or promise that contravenes the public policy that employees be free from employer interference in concerted activities for the purpose of mutual aid or protection, such as pursuing employment-related collective action." The court distinguished the Supreme Court's ruling in *Italian Colors* on the grounds that federal statutory rights were not involved in that case as was in this case. *Totten v. Kellogg Brown & Root, LLC*, 2016 WL 316019 (C.D. Cal.).

VI. HEARING-RELATED ISSUES

Various Grounds for Vacatur Rejected. An arbitrator ruled that a soccer coach violated his employment agreement and upheld the termination along with counterclaims brought by the team's owners. The coach challenged the award on a variety of grounds, including manifest disregard of the agreement, legal and factual errors committed by the arbitrator, and bias. The court rejected all of these arguments. For example, the court rejected a claim that the arbitrator improperly relied on unauthenticated hearsay statements, citing evidence in the record to the contrary. Additional challenges based on claims that the arbitrator acted irrationally or was biased were also rejected. The court could not resist, however, commenting on what it felt was the inequities of mandatory arbitration between parties with disparate bargaining power. The court opined that to its "continuing surprise, intelligent and worldly parties often signed agreements to arbitrate future disputes and limit their fulsome due process citizen rights to a Federal Court and jury believing they will obtain a quicker answer with less costs." The court rejected the assumption that arbitration

is more expeditious and inexpensive as, it claimed, was evidenced by this matter. The court concluded that "while we encourage private settlements, this case, and many like it, should remind parties and counsel of the risks in cavalierly agreeing to mandatory arbitration when they should know, from experience, of a need to often ask a judicial officer to vacate findings from a private forum and the judge's deference to the private form." *Nowak v. Pennsylvania Professional Soccer*, LLC, 2016 WL 126380 (E.D. Pa.).

VII. CHALLENGES TO AWARD

Evident Partiality Demonstrated by Law Firm's Representation of Arbitrators and a Party. A dispute involving a regional sports network, the Baltimore Orioles, Major League Baseball, and the Washington Nationals was heard by the Revenue Sharing Definitions Committee of Major League Baseball. That Committee, consisting of three representatives of Major League Baseball teams, was empowered to issue an award resolving the dispute. The sports network objected to Proskauer Rose representing the Nationals in this dispute since Proskauer also represented Major League Baseball and therefore the arbitrators in this case, who were representatives of Major League Baseball teams, were also clients of Proskauer. The network's objection was rejected, an award was issued, and a motion to vacate followed. The New York trial court granted the motion on evident partiality grounds. The court noted that while the parties agreed to an "inside baseball" arbitration, that is one involving industry insiders, it did not agree to the representation "in the arbitration by the same law firm that was concurrently representing MLB and one or more of the arbitrators and/or the arbitrators' clubs in other matters." The court offered a number of common sense approaches to avoid the conflict, for example, by noting that the retention by the Washington Nationals could have retained a different law firm. Instead, the court found that there were "objective facts that are unquestionably inconsistent with impartiality." The court found that neutrality "is so fundamental to any adjudicative process that trust in the neutrality of the adjudicative process is the very bedrock of the FAA." The court concluded that without this neutrality deference to the arbitrators and to their awards may not be afforded. *TCR Broadcasting Holding v. WN Partner*, 2015 WL 6746689 (Sup. Ct. N.Y. Cty.).

Arbitrator's Brother's Prior Litigation Against Party Not Basis for Bias Finding. The district court vacated an arbitration award because the arbitrator's brother had almost 10 years before tried cases against one of the parties. The arbitrator, on his own and without JAMS involvement, denied the disqualification application and following a hearing ruled against the same party seeking his recusal. The Ninth Circuit reversed. The appellate court agreed with the arbitrator that "no coherent explanation" was offered as to how the arbitrator's brother's litigation practice reasonably implicated the arbitrator's neutrality. The court found no actual bias even though it acknowledged that the arbitrator applied the

wrong law in granting punitive damages. The court further found that the arbitrator did not otherwise exceed his authority. A concurring judge did point out that the arbitrator "should have" referred the recusal request to JAMS rather than rule on the application himself. Nonetheless, the concurring judge did not believe this was sufficient to warrant vacatur and joined the majority in overturning the district court's ruling. *Ruhe v. Masimo Corp.*, 2016 WL 685115 (9th Cir.).

Arbitration Panel Exceeded Authority by Awarding Attorneys' Fees. The majority of an arbitration panel awarded the prevailing party attorneys' fees based on the AAA's Commercial Rule authorizing relief that is "just and equitable". The Massachusetts Supreme Judicial Court ruled that the arbitration panel exceeded its authority because the arbitrators' authority to award attorneys' fees is limited and grounds did not exist in this case for such an award. In particular, authority to award attorneys' fees was neither provided for in the party's agreement nor by an applicable statute. Moreover, the AAA rule's general "just and equitable" language must give way to the more specific language in the same AAA rule providing that fees may only be awarded where authorized by agreement or law. The Supreme Judicial Court acknowledged that Massachusetts Law applicable to this case authorized a "court" to award fees but concluded that the legislature did not intend an arbitration panel to be encompassed by the term "court." *Beacon Towers Condominium Trust v. Alex*, 473 Mass. 472 (2016).

Award Affirmed in the Absence of Manifest Disregard of the Law. A financial adviser moved to vacate a FINRA award on manifest disregard of the law grounds. In particular, the financial adviser argued that the arbitration panel misconstrued the terms of the applicable agreement and failed to award appropriate compensatory damages. The Second Circuit rejected these claims and upheld the confirmation of the award. In rejecting the financial adviser's manifest disregard claim, the court stated that whether the panel misconstrued the contract is not a subject for judicial review. The court also reasoned that the panel credited at least some, but not all, of the evidence presented in reaching its damages determination and declined to probe further into potential bases for the damages award. *Singh v. Raymond James Financial Services*, 2015 WL 18242118 (2d Cir.).

VIII. ADR – GENERAL

Injunction in Aid of Arbitration Awarded. GE Transportation was awarded almost $476,000,000 by an arbitration panel in Hong Kong. It also obtained an order in Hong Kong enforcing the award as well as an order finding Respondent's CEO guilty of contempt for diminishing Respondent's assets after the award was issued. GE moved for, and obtained, an injunction in the United States freezing Respondent's assets equal to the value of the award. The court found that GE had "demonstrated that a preliminary injunction is

appropriate here to prevent [Respondent] from attempting to avoid the consequences of a potential judgment against it and thereby preserve [GE's] ability, to the extent possible, to collect on monies to it." The court concluded that in the absence of an injunction GE would be irreparably injured by its apparent inability to obtain relief. *GE Transportation (Shenyang) Co. v. A-Power Energy Generation Systems*, 2015 WL 7444625 (S.D.N.Y.).

FINRA's Dispute Resolution Task Force Report Issued. The Task Force established to review and report on FINRA's Dispute Resolution System issued its report in December 2015. The Task Force made 51 recommendations. Included in those recommendations was a proposal that arbitrator compensation be increased, that the arbitration panel become more diverse, and improved training for arbitrators be provided. Mediation was also recommended for all cases subject to a single party opt-out option. A number of recommendations were designed to ensure expedited and efficient hearings and to increase public availability of the content of awards.

Fannie Mae and Freddie Mac Announce Independent Dispute Resolution Program. The Federal Housing Finance Agency announced that an independent dispute resolution process for resolving repurchase disputes has been implemented by Fannie Mae and Freddie Mac. The program enables lenders to submit any unresolved loan disputes to a neutral arbitrator after internal remedies have been exhausted. This process is available on loans delivered to Fannie Mae and Freddie Mac after January 1, 2016.

IX. COLLECTIVE BARGAINING SETTING

Arbitrator Did Not Exceed Authority in Reinstating Grievant. The grievant entered into a "last chance agreement" without a union representative present. The grievant was later terminated and grieved his termination. The arbitrator ruled that the last chance agreement was void due to lack of union representation and reinstated the employee with full back pay. The court rejected the motion to vacate the award under the Labor Relations Management Act. The court determined that the arbitrator was well within his authority to refuse to enforce the last chance agreement as it was obtained in violation of the collective bargaining agreement. The court also rejected the argument that the arbitrator abused his discretion by allegedly failing to consider the grievant's failure to mitigate damages. "The arbitrator may reasonably be understood to have considered and rejected [the employer's] position that [the grievant] did not use reasonable efforts to mitigate his damages, and this court has no authority to disturb that conclusion." *UNITE HERE Local 100 v. Westchester Hills Golf Club*, 2016 WL 552958 (S.D.N.Y.).

X. STATE LAW ISSUES

Pre-Mediation Communications Between Counsel and Client Not Protected in Oregon. The client sued his counsel for malpractice and sought disclosure of his communications with his counsel prior to a mediation which resulted in a settlement of the matter. The counsel invoked Oregon law regarding mediation communications which prevented disclosure of such communications. The Oregon Supreme Court rejected this argument and instead read the definition of mediation in the statute narrowly. The Court required that a mediator be a participant with respect to the communication for the statute to apply. The Court concluded that under the statute "mediation communications" includes only those "communications exchanged between parties, mediators, representatives of a mediation program, and other persons while present at mediation proceedings, that occur during the time that the mediation is underway and relate to the substance of the dispute being mediated." *Alfieri v. Solomon*, 358 Or. 383 (2015).

Executrix Not Required to Arbitrate Wrongful Death Action. A nursing home patient signed an agreement to arbitrate disputes. Following the patient's death, the executrix brought a wrongful death action against the nursing home. The Sixth Circuit concluded that the executrix was not bound by the patient's agreement to arbitrate as the wrongful death claim is in the name of the decedent's beneficiaries, and not the decedent under Kentucky law. The Sixth Circuit rejected the argument that this Kentucky rule disfavored arbitration. As no wrongful death beneficiary in this case signed the agreement and therefore arbitration was in no way disfavored. *Richmond Health Facilities v. Nichols*, 811 F.3d 192 (6th Cir. 2016).

XI. TABLE OF CASES