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AAA Employment Panel Case Summaries

November 2016

I. JURISDICTIONAL ISSUES: GENERAL

Second Circuit Reviews Web Site Assent to Arbitration. The Second Circuit reversed the granting of a motion to dismiss by the district court in a putative class action against an online retailer. In doing so, the court reviewed in detail the difficult question of determining when an internet user agrees to arbitrate future disputes. The court noted that "one common way of alerting internet users to terms and conditions is via a 'clickwrap' agreement, which typically requires users to click an 'I agree' box after being presented with a list of terms and conditions of use." The court noted that clickwraps force the user to manifest his or her assent to the term presented. In contrast, "browsewrap" agreements involved terms and conditions "posted via hyperlink, commonly at the bottom of the screen, and do not request an express manifestation of assent." The court emphasized that the enforceability of any provision on a webpage "depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous." The more obscure the provision is on a webpage, the less likely a court is to find that the user has constructive notice. The court concluded that this Amazon site was a hybrid between a clickwrap and browsewrap approach and reasonable minds could disagree as to the clarity of the notice provided. The court pointed out that the button placing the order was not bolded, capitalized, or conspicuous in light of the overall web page. The court estimated that there were 15 to 25 links on the order page and various text displayed in different font sizes and colors. Further, the court noted that the "presence of customers' personal address, credit card information, shipping options, and purchase summary are sufficiently distracting so as to temper whatever effect the notification has." The court remanded this matter for further proceedings by the district court. *Nicosia v. Amazon.com, Inc*., 834 F.3d 220 (2d Cir. 2016). See *Meyer v. Travis Kalanick and Uber Technologies*, 2016 WL 4073071 (S.D.N.Y.) (Uber customer did not have reasonably conspicuous notice of Uber's user agreement and arbitration clause where registration screen "did not adequately call users' attention to the existence of Terms of Service, let alone to the fact that, by registering to use Uber, a user was agreeing to them."). See also *Nghiem v. Dick's Sporting Goods, Inc.*, Case No.: SACV 16-00097-CJC (C.D.Cal. July 5, 2016) (browsewrap agreement, with a hyperlink at the bottom of the web page evidencing assent, rejected where hyperlink grouped with 27 other hyperlinks).

Arbitration Compelled Where Hyperlink to Terms of Use Repeatedly Presented. Dissatisfied users of an internet service on airplanes sued, and the internet provider moved to compel arbitration. The district court granted the motion, finding that the clickwrap agreement provided sufficient notice to the internet users of the arbitration requirement. The court explained that each time that the internet users purchased the product they were presented with a hyperlink to the terms of use and received an e-mail containing the same

link. This happened each time they signed on to use the product and were repeatedly warned that by using the product that they were agreeing to the terms of use. The court reasoned that "in today's technologically driven society, it is reasonable to charge experienced users – as plaintiffs appear to be – with knowledge of how hyperlinks work and, by extension, how to access the terms of use they were – repeatedly – being told they were consenting to when they signed-in to the [airline internet] web site." *Salameno v. GoGo, Inc.*, 2016 WL 4005783 (E.D.N.Y.), reconsideration denied, 2016 WL 4939345 (E.D.N.Y.). See also *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325 (11th Cir. 2016) (failure to provide evidence that consumer consented to arbitration in on-line clickwrap agreement defeats motion to compel).

Arbitration Denied Where Found to be Inherently Conflicting with Bankruptcy Code. A dispute arose between a debtor and creditor in bankruptcy court, and a motion to compel was made. The issue for the district court upon review was whether arbitration under these circumstances inherently conflicted with the Bankruptcy Code. The court concluded that the arbitration of the debtor's claim against a credit card issuer alleging a violation of the Bankruptcy Court's discharge injunction would necessarily jeopardize the objectives of the Bankruptcy Code. In doing so, the court noted that a number of debtors asserted claims under virtually identical agreements and these claims would be subject to separate arbitration which "could create wildly inconsistent results. This is especially true in light of the broad discretion arbitrators have in deciding whether to apply collateral estoppel offensively." Under these circumstances, the court concluded that the exercise by the Bankruptcy Court of its discretion to override an arbitration agreements was proper. *In re: Orrin S. Anderson*, 553 BR P.R. 221 (S.D.N.Y. 2016).

Waiver of Arbitration Rejected. RSL agreed to purchase annuities for three individuals from MetLife. The annuity agreement between RSL and an individual contained an arbitration provision. RSL failed to purchase the annuities and brought a declaratory injunction against MetLife and the individuals. Later RSL moved to compel arbitration of the dispute versus the individuals. The Texas Supreme Court rejected the claim that RSL waived its right to arbitrate, reasoning that RSL's litigation was focused on MetLife's alleged breach and not on any dispute with the individuals. Indeed, no relief was sought from the individuals and the individuals supported RSL's action. In finding no waiver, the Texas Supreme Court noted that many factors must be considered in determining whether waiver occurred. The Court concluded that the "delay between the appearance of an arbitrable dispute with the Individuals and RSL's initiation of arbitration was not so long as to establish RSL intended to waive its right to arbitrate with the Individuals, especially in light of its other efforts to avoid litigation disputes with the Individuals." *RSL Funding v. Pippens*, 2016 WL 3568134 (Tex.), rehearing denied (September 23, 2016). See *Trombley Painting Corp. v. Glob. Indus. Servs., Inc.*, 52 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2016) (party

waived arbitration by answering complaint, moving for change of venue, appearing for court conference, exchanging discovery, and scheduling depositions). See also *In re: Cox Enterprises, Inc. Set Top Cable Television Box Antitrust Litigation*, 835 F.3d 1195 (10th Cir.) (litigation of related matter – with different parties and claims – did not serve as waiver of right to arbitrate in subsequent matter); *Moon v. Breathless, Inc.*, 2016 WL 4072331 (D.N.J.) (unconscionability claim denied and motion to compel granted where both parties, and not merely plaintiff, waived their rights to judicial relief). But see *Messina v. North Central Distributing*, 821 F.3d 1047 (8th Cir. 2016) (defendant's participation in litigation for eight months with knowledge of right to arbitrate causing prejudice to plaintiff constituted waiver of right to arbitrate).

Tort Claims Not Arbitrable Under Narrow Contractual Arbitration Provision. The arbitration provision in the operating agreement here mandated the arbitration of "any controversy between the parties arising out of this agreement." The complaint at issue included claims of alleged legal malpractice, breach of contract, and breach of fiduciary duty. The trial court compelled arbitration, but the appellate court reversed. In doing so, the court contrasted the narrow focus of the arbitration language in the contract to the broad language relating to the choice of law provision. The court, relying on the limited nature of the arbitration provision, concluded that the parties did not intend to subject to arbitration all controversies between them. "Had the parties intended a broadly applicable arbitration clause, they could have simply used the same phrasing they used in the jurisdictional clause" which was far broader. *Rice v. Downs*, 247 Cal. App. 4th 1213 (2016), as modified on denial of reh'g (June 23, 2016), as modified (June 28, 2016), review denied (Aug. 24, 2016).

Definiteness Doctrine Not Sufficient to Preclude Arbitration. The arbitration clause here did not identify the arbitrable forum, the identity or method for selecting the arbitrator, the arbitration procedures, or the choice of law. A plaintiff in a transgender discrimination case opposed the motion to compel on the ground that the arbitration clause was not definite enough to be enforced. The district court, in compelling arbitration, noted that where the method for selecting the arbitrator is not designated, the court may be asked to appoint the arbitrator. "Once an arbitrator is selected by the parties or the court, the arbitrator can determine the procedural aspects of the arbitration . . . and these aspects are not 'essential terms' to an arbitration agreement, the lack of which would render the agreement unenforceable." *Daskalakis v. Forever 21, Inc.*, 2016 WL 4487747 (E.D.N.Y.).

Effective Vindication Not Defense to Motion to Compel Under New York Convention. Ruling on an issue of first impression, the Eleventh Circuit concluded that the inability to afford arbitration may be asserted in a challenge to an award but not as a basis for opposing arbitration under the New York Convention. A cruise ship employee here sought to opt

out of arbitration of his negligence claim under the Jones Act by arguing he was too poor to bear the cost of arbitration. The Eleventh Circuit rejected this defense, finding that the effective vindication doctrine did not fall within one of the enumerated bases in the New York Convention for challenges to awards. In any event, the court held that the employee failed to offer an evidentiary basis for his claimed inability to pay his cost of the arbitration. *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543 (11th Cir. 2016).

Futility of Pursuing Individual Arbitration Excuses Delay. The defendants here litigated a class action for two and a half years. Following issuance of the Supreme Court decision in *Concepcion*, defendants moved to compel individual arbitration. Plaintiffs objected, arguing that defendants had waived arbitration. The Third Circuit, affirming a lower court, enforced the arbitration agreement and ordered individual arbitrations for the class claimants. In doing so, the court reasoned that to seek individual arbitration before the issuance of *Concepcion* would have been futile and "futility can excuse the delayed invocation of the defense of arbitration." The court also rejected plaintiffs' waiver argument, reasoning that "one of the primary justifications for waiver is that the party attempting to raise it as a belated defense acted inconsistently with his earlier known right to do so. However, if an earlier attempt to assert the defense of arbitration would have been futile, this failure to take a futile action is not inconsistent with that defense." *Chassen v. Fid. Nat'l Fin., Inc.*, 836 F.3d 291 (3d Cir. 2016).

Motion to Compel Granted in Dispute Involving Law Firm Leaders. The arbitration clause here authorized arbitration between "the Firm" and a principal of the Firm. A law firm principal took a leave of absence to pursue a football coaching opportunity. The Firm ultimately took the position that the principal withdrew from the Firm. The principal sued the individual leaders of the Firm. The Firm moved to compel and the Michigan Supreme Court granted the motion. The Court applied agency principles and emphasized that the limited liability corporation here granted the principals authority to manage the Firm. "Because it is axiomatic that the Firm cannot act on its own, . . . and because these particular defendants are clearly endowed with agency authority to administer the Firm's affairs, the individually named defendants must be included within the meaning of 'the Firm' in the arbitration clause." *Altobelli v. Hartmann*, 499 Mich. 284, reh'g denied, 499 Mich. 979 (2016).

Failure to File Timely Demand After Right to Sue Letter Received Requires Dismissal. The president of a company brought an EEOC charge after her termination and filed a court complaint in a timely fashion after receipt of her right to sue letter. Soon after, the parties stipulated to the dismissal of the court action, concluding that the claims were subject to arbitration. The defendant however reserved its rights and defenses in stipulating to the dismissal. One year after the court filing plaintiff filed her demand for arbitration. The arbitrator, a former federal magistrate judge, dismissed the action finding that the demand

was time-barred and there was no basis in the record for finding equitable tolling or estoppel. The arbitrator relied on the arbitration clause's requirement that untimely claims be dismissed and on the lack of diligence by plaintiff in filing her arbitration demand. Upon appeal, the court denied the motion to vacate the award and confirmed the award. *Hagan v. Katz Communications*, 2016 WL 4147194 (S.D.N.Y.).

II. JURISDICTIONAL CHALLENGES: DELEGATION ISSUES

Gateway Issues for Arbitrator Where Contract Terms Ambiguous. The arbitration agreement here was ambiguous as to whether the court or arbitrator decides gateway issues such as whether class arbitration is permitted. Most federal courts have recently ruled gateway issues are for the courts to decide in the absence of clear and unambiguous provisions to the contrary. A divided California Supreme Court rejected the federal court approach and held that gateway issues are for the arbitrator to decide when the arbitration agreement is ambiguous. The Court reasoned that under California law contractual ambiguities are to be construed against the drafters. The Court, interpreting the FAA, agreed with the plurality in *Green Tree* "that the determination whether a particular agreement allows for class arbitration is precisely the kind of contract interpretation matter arbitrators regularly handle. Along with the *Green Tree* plurality, we find nothing in the FAA or its underlying policies to support the contrary presumption, that this question should be submitted to a court rather than an arbitrator unless the parties have unmistakenly provided otherwise." *Sandquist v. Lebo Auto., Inc*., 376 P.3d 506 (Cal. 2016).

Dispute Regarding Enforceability of Insurance Agreements Requiring Arbitration for Arbitrator to Decide. A dispute arose between an employer and an insurance company. The relevant insurance agreements included arbitration clauses but the employer argued that the insurance policies were not enforceable because they were not properly filed with the California insurance regulators. The court compelled arbitration, noting that challenges to the underlying agreement containing arbitration clauses are generally for the arbitrator to decide. The court reasoned that the employer's "objections to the arbitration clauses are not to the clauses themselves but rather to the underlying [insurance agreements] as a whole, and thus, the challenge must be decided by the arbitrator, not by this court." *National Union Fire Insurance Co. v. Advanced Micro Devices*, 2016 WL 4204066 (S.D.N.Y.). See *Hedrick v. BNC National Bank*, 2016 WL 2848920 (D. Kan.) (gateway issue of class arbitration for arbitrator to decide under applicable AAA Employment Arbitration Rules); *Neal v. Asta Funding, Inc.*, 2016 WL 3566960 (D.N.J.) (AAA's Commercial Arbitration Rules sufficient to constitute clear and unmistakable agreement to allow arbitrator to decide issues of arbitrability); *Angus v. Ajio, LLC*, 2016 WL 2894246 (Del. Ct. Chancery) (arbitrability of fiduciary duty claims under Delaware law for arbitrator where asserted claims are not frivolous); *Kubala v. Supreme Prod. Servs., Inc*., 830 F.3d 199 (5th Cir. 2016) (delegation

provision in arbitration policy submitting arbitration questions to the arbitrator is enforceable even where the policy was issued two days after the FLSA collective action was filed).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Ninth Circuit Compels Individual Arbitration of Uber Drivers' Class Claims. Uber drivers have filed a number of class and collective action cases around the country raising wage and hour claims and in this case violations of the Fair Credit Reporting Act. The Ninth Circuit here ruled that the Uber clickwrap arbitration agreement and class action waiver were enforceable. The agreement allowed the drivers to opt out of these provisions but they had to appear in person or object by overnight mail to do so. The district court ruled that the arbitration provision was unconscionable and that issues of arbitrability were not clearly and unmistakenly delegated to the arbitrator to decide. The Ninth Circuit disagreed, finding that the arbitration agreement was not procedurally unconscionable because the drivers had the opportunity to opt out. "While we do not doubt that it was more burdensome to opt out of the arbitration provision by overnight delivery service than it would have been by e-mail, the contract bound Uber to accept opt outs from those drivers who followed the procedure it set forth." The court noted that some drivers did in fact opt out and therefore the promise was not illusory and the arbitration agreement was not procedurally unconscionable. *Mohamed v. Ubur Technologies*, 836 F. 3d 1102 (9th Cir. 2016). See also *Micheletti v. Ubur Technologies, Inc.*, 2016 WL 5793799 (W.D. Tex.) (substantive unconscionability argument based on cost of arbitration rejected and individual arbitration of wage and hour class claims compelled); *Rimel v. Uber Technologies, Inc.*, 2016 WL 6246812 (M.D. Fla.) ("The delegation provision in the arbitration provision is evidence of the parties' clear and unmistakable agreement that disputes not expressly excluded from arbitration will be decided by the arbitrator, not a court."). See also *Murphy v. HRB Green Resources*, 3:16-CV-04151 (N.D. Cal.) (opt out provision in plain language not coercive or procedurally unconscionable).

Anheuser-Busch Dispute Resolution Policy Upheld. Two employees terminated for criticizing their managers sued for wrongful discharge. Their former employer's motion to compel was granted. In doing so, the court rejected the argument that Anheuser-Busch's DRP was illusory, because it could be modified at will. The court, in rejecting this claim, noted that the policy would only allow prospective change to its terms and would not apply any modified terms to pending claims. The court also rejected objections to the limited discovery provided for under the policy. The court noted that the DRP allowed each party to serve 10 interrogatories, depose two witnesses and any expert witness named, and to request document production. It further provided that the arbitrator could allow for additional discovery upon good cause shown. The court concluded that the DRP did not

deprive the employees of a fair opportunity to present their claims and was not unconscionable. *Nascimento v. Anheuser-Busch Companies*, 2016 WL 4472955 (D.N.J.). See *Ekryss v. Ignite Restaurant Group*, 2016 WL 4679038 (W.D.N.Y.) (dispute resolution plan is distinct and an enforceable arbitration agreement under Texas law, even though it is nominally part of the employee handbook which allows the employer to modify the handbook at will and which might otherwise have rendered the arbitration agreement illusory). See also *Sural Barbados Ltd. v. Government of the Republic of Trinidad and Tobago*, 2016 WL 4264061 (S.D. Fla.) (arbitration award under the auspices of the International Chamber of Commerce confirmed and challenges to the panel's failure to issue a subpoena or to request and require the production of certain communications rejected).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Offensive Contractual Terms Severed Allowing Arbitration of USSERA Claims. A service member alleged a violation USSERA and the employer moved to compel arbitration. The service member argued that USSERA barred any provision limiting the protections under the Act and the agreement here, among other things, shortened the statute of limitations for bringing USSERA claims. A divided Eleventh Circuit concluded that the offensive provision could be severed from the agreement allowing the dispute to go to arbitration. The court relied on the severability clause in the agreement and its conclusion that the FAA did not conflict with USSERA. The court concluded "USSERA's non-waiver provision should not be read to automatically invalidate an entire agreement with USSERA-offending terms. Instead, the plain language of [the statute] contemplates *modification* of an agreement by replacing USSERA-offending terms with those set forth by USSERA." *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320 (11th Cir. 2016). See also *Ziober v. BLB Resources, Inc.*, 2016 WL 5956733 (9th Cir.) (USERRA claims subject to mandatory arbitration).

Arbitration Clause in Cell Phone Contract Does Not Apply to Unrelated Disputes. Plaintiff brought a putative class action under the Telephone Consumer Protection Act ("TCPA") against AT&T relating to unsolicited telephone calls and texts that she received. AT&T moved to compel arbitration based on plaintiff's agreement to arbitrate claims under her cell phone agreement with AT&T. The district court denied the motion, finding that plaintiff did not objectively intend to arbitrate her TCPA claims against AT&T by signing her cell phone agreement. The court acknowledged that the arbitration agreement was broad, but nonetheless ruled "notwithstanding the literal meaning of the clause's language, no reasonable person would think that checking a box accepting the 'terms and conditions necessary to obtain cell phone service would obligate them to arbitrate literally every possible dispute he or she might have with the service provider, let alone all of the affiliates under AT&T, Inc.'s corporate umbrella – including those who provide services unrelated to

cell phone coverage." *Wexler v. AT&T, Corp.*, 2016 WL 5678555 (E.D.N.Y.). Cf. *Jane Roes v. SFBSC Management*, 2016 WL 3883881 (9th Cir.) (motion to compel in lawsuit brought by exotic dancers against non-signatory which provided administrative services to strip clubs denied where principal-agent relationship not demonstrated between defendant and the employer strip clubs).

Award Vacated Where No Meeting of the Minds Regarding Arbitration. A Peruvian cocoa farming cooperative and a New York cocoa trading house entered into a number of one page agreements regarding delivery of cocoa to the U.S. The agreement incorporated by reference an industry standard agreement. The trading house filed for arbitration and prevailed; the cooperative did not participate in the arbitration and later moved to vacate. The court vacated the award, finding that there was no agreement to arbitrate. The court rejected the contention that the cooperative was on "inquiry" notice. In doing so, the court emphasized that the incorporation by reference to the industry agreement "lacked any reference to any arbitration provision, and did not disclose that one lurked" in the depths of the industry agreement. *Cooperativa Agaria Industrial Naranjillo v. Transmar Commodity Group*, 2016 WL 5334984 (S.D.N.Y.).

Arbitration May Not Be Compelled Where Dispute is Between Parties on the Same Side. Two brothers sold their financial firm to a third party and the sale agreement included an arbitration provision. A dispute arose between the two brothers and one brother sought to arbitrate their dispute based on the arbitration clause in the sale document. A Texas appellate court refused to compel arbitration. The court focused on the use of the personal pronouns in the sale agreement, noting that "you" and "your" was used for the brothers and their entity. Based on this reading of the contract, the court concluded that there was no basis to compel arbitration between the brothers who are on the same side of the agreement. The court concluded that "these terms demonstrate that the arbitration provision was intended to apply to disputes only between [the brothers] on one side and [the acquiring entity] on the other." *Swearingen v. Swearingen*, 2016 WL 3902747 (Tex. App.).

Continued Employment Constitutes Assent to Arbitration Agreement. Two terminated employees sued their former employer for wrongful discharge and for uncompensated overtime. The employer moved to compel, and the employees denied that they ever consented to arbitration. Applying Kentucky law, the Sixth Circuit ruled that continued employment constituted acceptance of the obligation to arbitrate their claims. The court also found sufficient consideration for the arbitration agreement in the fact that both parties agreed to be bound to arbitrate. "Because both parties to the agreement here forbore their rights to sue, consideration existed under Kentucky law. Moreover, plaintiffs' continued acceptance of at-will employment constitutes consideration under Kentucky law." *Aldrich v. University of Phoenix*, 2016 WL 6161398 (6th Cir.).

Absence of Procedural Rules Not Fatal to Arbitration. The arbitration agreement here referred to a dispute resolution provision that was not provided. The arbitration provision was otherwise "broad and plain." The court compelled arbitration, finding that "when procedural rules are not provided to the signatory of an arbitration agreement, the arbitration clause is nonetheless upheld . . . because the procedural aspects of the arbitration can be decided by the arbitrator." *Badinelli v. Tuxedo Club*, 2016 WL 1703413 (S.D.N.Y.).

Arbitration Notice in Chinese Insufficient. A commercial dispute between Chinese and U.S. based entities arose. Two years of negotiation, conducted in English, followed. Finally, a notice of arbitration in Chinese was served. The U.S.-based company was initially unaware of the arbitration and the arbitration selection process began without its participation. When it later learned of the arbitration, the U.S. entity appeared, after the panel was selected, and participated in the proceedings. The arbitration proceeded and an award in favor of the Chinese entity resulted. The district court refused to confirm the award, and the Tenth Circuit agreed. The court ruled that the arbitration notice was not reasonably calculated to apprise the U.S. entity of the arbitration proceedings. The court emphasized that all communications between the parties to that point had been in *CEEG (Shanghai) Solar Sci. & Tech. Co., Ltd v. LUMOS LLC*, 829 F.3d 1201 (10th Cir. 2016). See also *Penilla v. Westmont Corp.*, 3 Cal. App. 5th 205 (2d Dist. 2016) (arbitration agreement in English provided to Spanish speaking consumers which, among other things, shortened limitations periods is procedurally unconscionable).

V. CHALLENGES TO ARBITRATOR OR FORUM

Arbitrator and JAMS Can Be Sued for Fraud. The arbitrator's biography found in JAMS' materials stated that the arbitrator here, a former judge, founded or co-founded various business ventures, including an equity fund focused on women-led businesses. She was selected for a divorce proceeding and the husband was unhappy with the arbitrator's rulings and concluded she did not understand the venture capital business at issue in the divorce. He did some research and found inaccuracies and omissions in the arbitrator's biography. The husband sued the arbitrator and JAMS for fraud, negligent misrepresentation, and various statutory claims. JAMS and the arbitrator countered by filing an Anti-SLAPP motion under California law. The California appeals court ruled that the husband's claims were covered by the "commercial speech exemption" in California's Anti-SLAPP Act and his claims could therefore proceed. *JAMS, Inc. v. Superior Court*, 205 Cal. Rptr. 3d 307 (2016).

AAA Entitled to Arbitral Immunity. Plaintiff initiated an arbitration before the AAA, and the plaintiffs and the respondents counter-claimed. Respondents prevailed and were awarded over $7 million in damages. The counter-claimants paid an additional filing fee

two weeks after the award was issued. Plaintiffs sued the AAA on breach of contract, fraud, and under Connecticut's Unfair Trade Practices Act seeking injunctive and declaratory relief precluding the AAA from accepting any monies from counter-claimants. The AAA moved to dismiss, arguing arbitral immunity. Plaintiff countered by arguing that since the payment was sought after the award was issued the doctrine of *functus officio* applicable to arbitral immunity was not available here. The court rejected plaintiff's argument and applied arbitral immunity. The court noted that plaintiff's real complaint was that the fee from counterclaimants was not collected on a timely basis i.e. during the arbitration. "We have no trouble concluding that claimants asserting that AAA violated its rules by failing to collect a monetary counterclaim fee prior to the arbitrator accepting and issuing a damages award on that monitory counterclaim are 'sufficiently associated with the adjudicative phase of the arbitration to justify immunity.'" *Imbruce v. American Arbitration Association*, 2016 WL 5339551 (S.D.N.Y.).

Claim To Be Heard in Court where Claimant Cannot Afford Arbitration. The arbitration of a legal malpractice action was terminated when the client declared that she could not afford the arbitration fees. No award was issued in the matter. The law firm moved in federal court to dismiss on involuntary dismissal grounds the former client's malpractice claims. Reversing the district court, the Ninth Circuit ruled that the client's malpractice claim could be pursued in court. The appellate court relied on the fact that the AAA followed its rules with respect to nonpayment of fees and therefore concluded that the arbitration had been had in accordance with the arbitration agreement. The court cautioned however that its decision to allow the client's "case [to] proceed does not mean that parties may refuse to arbitrate by *choosing* not to pay for arbitration. If [the client] had refused to pay for arbitration despite having the capacity to do so, the district court probably could still have sought to compel arbitration under the FAA's provision allowing such an order in the event of a party's 'failure, neglect, or refusal' to arbitrate." The court concluded this was not the case here and that in fact, as found by the district court, the client had exhausted her funds and was unable to pay her share of the arbitration fees. *Tillman v. Tillman*, 825 F.3d 1069 (9th Cir. 2016).

Standard for Motion to Lift Stay of Arbitration Addressed. Arbitration was compelled in this putative class action brought by a pro se litigant. Once in arbitration, the pro se claimant, according to the Second Circuit, "bombarded the AAA with inappropriate, hostile, and threatening emails, which resulted in its refusal to conduct the arbitration." The pro se claimant moved to lift the stay. The Second Circuit affirmed the district court's refusal to lift the stay, agreeing with the district court that litigants may not "obtain the result they prefer by sabotaging the process the law requires." *Gaul v. Chrysler Financial Services Americas*, 2016 WL 3582822 (2d Cir.).

FAA Does Not Permit Pre-Award Removal of Arbitrator. The reinsurance agreement here set forth the qualifications necessary for party-appointed arbitrators. One party challenged the qualifications of the other party's court-appointed arbitrator and sought judicial relief. A federal district court in Massachusetts concluded that the FAA does not authorize the removal of an arbitrator before a final arbitration award has been issued. In so doing, the court rejected the argument that the limitations on removing arbitrators pre-hearing was limited to claims of bias rather than the qualifications of the arbitrator. The court concluded by joining the reasoning of the Second and Fifth Circuits as well as a multitude of district court's in rejecting the "the argument that courts have jurisdiction to remove an arbitrator pre-award simply because the challenge to the arbitrator invokes a qualification set out in the arbitration agreement." *John Hancock Life Insurance Co. v. Employers Reinsurance Corp.*, 2016 WL 3460316 (D. Mass.).

Inability to Arbitrate Before NAF Precludes Motion to Compel. The National Arbitration Forum was designated to arbitrate disputes in this consumer agreement. NAF, under a consent decree, was precluded from administering consumer disputes. The Second Circuit, applying its own precedent, refused to compel arbitration, finding that the parties' agreement contemplated arbitration only before the NAF. The court found numerous indicators that the parties contemplated arbitration only before the NAF. In particular, the agreement designated the NAF as the arbitration forum, required that the arbitration proceed under the code of the NAF, and that it be held in NAF's offices. The court further noted that the agreement did not make provision for the appointment of a substitute arbitrator. On this and other bases the court concluded that the parties did not contemplate arbitration before any other entity than the NAF. *Moss v. First Premier Bank*, 835 F.3d 260 (2d Cir. 2016). See also *Parm v. National Bank of California*, 835 F.3d 133 (11th Cir.) (arbitration provision requiring arbitration before Indian tribe's forum that did not exist ruled unenforceable).

VI. CLASS & COLLECTIVE ACTIONS

NLRA Precludes Concerted Action Waiver. Ernst & Young's arbitration agreement requires employees to pursue legal claims in arbitration and only as individuals in separate proceedings. The issue for the Ninth Circuit was – does this provision violate §7 rights of employees under the NLRA to engage in concerted activity. Rejecting the analysis of the Fifth Circuit in the *D. R. Horton* case, the Ninth Circuit joined the Seventh Circuit in holding that it did. The court reasoned that the "separate proceeding" clause was the antithesis of the right to concerted activity. The court emphasized that the illegality of the separate proceedings term was unrelated to arbitration. "The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to

that mechanism and (2) required separate individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims." The court ruled that the illegal provision happened to be in an arbitration agreement but did not target arbitration and therefore violated the substantive rights of the employees. As stated by the court, "the issue is not whether any particular forum, including arbitration, is available but rather which substantive rights must be available within the chosen forum." As the FAA did not mandate the waiver of substantive rights, the court concluded that there was no conflict between the NLRA and the FAA. The court explained "nothing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym 'FAA' and receive protection for illegal contract terms any time the party suggests it will enjoy arbitration less without those illegal terms." *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). Accord: *In Re: Fresh & Easy, LLC,* 2016 WL 5922292 (D. Del.) (class action waiver in arbitration agreement violates NLRA despite presence of 30 day opt-out clause). Cf. *Patterson v. Raymours Furniture Co., Inc.*, 2016 WL 4598542 (2d Cir. Sept. 2, 2016), as corrected (Sept. 7, 2016), as corrected (Sept. 14, 2016) (Second Circuit abides by its own precedent and rejects NLRA concerted activity, but in doing so opines "if we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the [company's] waiver of collective action is unenforceable"). Contra: *Citi Trends v. NLRB*, 2016 WL 4245458 (5th Cir.) (Fifth Circuit reaffirms its decision in *D. R. Horton*).

FLSA Collective Action Not Waivable. Employees of Kelly Services may proceed with their FLSA collective action despite having signed an arbitration provision purporting to waive the right to pursue class or collective actions. The court reasoned that, while such arbitration clauses may be enforceable in other contexts, the FLSA right to bring collective claims is not waivable. The court noted that the right to a collective action is in the statute itself and is not merely a procedural right. The court concluded that, unlike other employment statutes, the FLSA does not allow the waiver of collective actions "since allowing employees to waive those rights (and thereby permitting employers to induce employees to do so), would give employers who managed to secure such waivers a substantial economic advantage over their competitors and that outcome is the exact result that the FLSA's uniform wage regulations were enacted to prevent." *Gaffers v. Kelly Services*, 2016 WL 4445428 (E.D. Mich.).

Failure to Opt-Out of Class Action Waiver Mandates Individual Arbitration. Macy's required its retail employees to participate in its dispute resolution program but allowed them 30 days to opt out of arbitration. The plaintiff here failed to opt out and filed a class action alleging wage and hour violations and violations of California's Private Attorney

Generals Act. The district court granted the motion to compel the non-PAGA claims under existing Ninth Circuit precedent. In particular, the court noted that the Ninth Circuit "has held that opt-out arbitration provisions in the employment context are enforceable where, as here, the employee acknowledges the agreement in writing and has 30 days in which to opt out of the arbitration agreement." The court also enforced the class action waiver and ordered the plaintiff to pursue arbitration on an individual basis. *Narez v. Macy's West Stores*, 2016 WL 4045376 (N.D. Cal.). See also *Smith v. Xlibris Publishing*, 2016 WL 5678565 (E.D.N.Y.) (arbitration compelled where party failed to opt out of provision within 30 days as provided for in the agreement).

Filing of Court Complaint Evidence of Opt-Out of Arbitration Agreement. A class action challenging bank overdraft fees was filed in July 2010 and the bank amended its deposit agreement in August 2010 allowing customers to opt out of arbitration. The class representative did not opt-out in a timely fashion and the bank moved to compel arbitration. The Georgia Supreme Court declined to compel arbitration and ruled that the court filing served as notice that the class representative chose to opt out and tolled the time for that decision to be made by the individual class members. "A class member's decision to remain in the class after class certification and notification is what will serve as his or her own election to reject the arbitration clause." *Bickerstaff v. Suntrust Bank*, 299 Ga. 459, 788 S.E.2d 787 (2016).

VII. HEARING-RELATED ISSUES

Rulings by Arbitrator Not Sufficient Grounds for Vacatur. The arbitrator here awarded $3 million in damages to the prevailing party, and the award was challenged on a variety of grounds. For example, it was argued that the arbitrator refused to hear relevant evidence. Under prevailing Third Circuit law, to warrant vacatur the failure to hear evidence must result in the deprivation of a fair hearing. The court found that not to be the case here. The court also rejected the claim that the arbitrator exceeded his authority by issuing pre-hearing subpoenas. Those subpoenas required the recipient to appear and produce documents. The court acknowledged that "an arbitrator cannot order document production as such, but the arbitrator can compel a third party to appear before the arbitrator and to produce documents at that time simultaneously with the appearance." That is what happened here and therefore the arbitrator did not exceed his authority. Finally, the court rejected the arbitrator's issuance of injunctive relief and award of damages, finding that the arbitrator took pains to detail in the final award the damages to be awarded and construed the relevant agreement in doing so. As to awarding injunctive relief, the court noted that such authority can be found in the AAA's Commercial Arbitration Rules. *Neal v. Asta Funding, Inc.*, 2016 WL 3566960 (D.N.J.). See *Inficon v. Verionix*, 2016 WL 1611379 (S.D.N.Y.) (manifest disregard claim based on (1) Chair's

suggestion that they were running out of time to complete testimony, in the absence of proof that evidentiary presentation was restricted, and (2) based on alleged erroneous damages calculations by the Panel, rejected).

Procedural Rulings Not Grounds for Vacatur. An arbitration was commenced in this business dispute and after the record was closed but before the award was issued a party sought to submit for the panel's consideration a federal appellate court's decision involving the same parties on an unrelated matter. The chair of the panel declined to reopen the record and consider the decision. The court here ruled that this ruling by the chair did not violate fundamental fairness requiring vacatur of the award. "The arbitral record was by then closed, and reopening it to receive a court decision recapping aspects of the parties' history had the potential to invite additional submissions and prolong the proceedings." The court found the decision at issue not to be of central relevance to the proceeding. The court also rejected the argument that fundamental fairness was denied because the panel did not provide the parties "advance notice of the premise of, or language to be used, in the award." *Benihana, Inc. v. Benihana of Tokyo*, 2016 WL 3913599 (S.D.N.Y.). See also *Odeon Capital Group v. Ackerman*, 2016 WL 1690693 (S.D.N.Y.) (FINRA panel's ruling relating to admission into evidence of respondent's calculations and spreadsheets and refusal to postpone hearing did not rise to level of misconduct requiring vacatur).

VIII. CHALLENGES TO AWARD

Award of NFL Commissioner's Designee Upheld. Running back Adrian Peterson pled guilty to the misdemeanor of reckless assault on one of his children. The NFL suspended him for six games and Peterson appealed to the arbitrator selected by the NFL Commissioner as permitted under the collective bargaining agreement. The arbitrator, a former NFL Vice President for Labor Relations, upheld the punishment. The district court vacated the award, but the Eighth Circuit reversed, finding the arbitrator had the authority to rule on the question and in so ruling was arguably construing the collective bargaining agreement. The court rejected the Players' Association contention that the question before the arbitrator was a pure legal one (whether the alleged new policy was inappropriately applied retroactively) and could not be faulted for adopting the League's interpretation that the issue before him was whether the discipline was appropriate. The Eighth Circuit also rejected the claim that the arbitrator was evidently partial by pointing out that "allowing the Commissioner or the Commissioner's designee to hear challenges to the Commissioner's decisions may present an actual or apparent conflict of interest for the arbitrator. But the parties bargained for this procedure, and the [Players'] Association consented to it." Finally, the court rejected the Players Association's argument that the arbitration was "fundamentally unfair" as that is not a basis under the Labor Management Relations Act for vacatur. *Nat'l Football League Players Ass'n on behalf of Peterson v. Nat'l*

Football League, 831 F.3d 985 (8th Cir. 2016). See *Parker v. ETB Management*, 2016 WL 4151216 (5th Cir.) (pro se litigant's motion to vacate denied on claim of evident partiality based on alleged non-credible testimony of witnesses in support of arbitrator's findings).

Well-Pleaded Complaint Rule Applies to Motion to Vacate in Federal Court. Investors sought to challenge and vacate an unfavorable award before FINRA. They moved in federal court to vacate that award. The Third Circuit dismissed the application for lack of subject matter jurisdiction, finding that the investors failed to raise a substantial federal question. Instead, the court characterized the challenge to the award as fundamentally a state law breach of contract action. The court explained that under the well-pleaded complaint rule a court may not "look through" a motion to vacate to the underlying subject matter of the arbitration in order to establish federal question jurisdiction. Instead, the motion to vacate must, on its face, necessarily raise a federal issue sufficient for a federal court to entertain the motion. *Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d 242 (3d Cir. 2016). Contra: *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372 (2d Cir. 2016) ("A Federal District court faced with [a motion to vacate under the FAA] may 'look through' the petition to the underlying dispute, applying to it the ordinary rules of federal-question jurisdiction").

Ex Parte Communication With Arbitrator Requires Vacatur of Award. Each party in this case selected an arbitrator and those two arbitrators selected a chair. The panel issued a scheduling order which provided, among other things, that ex parte communications with the panelists would cease. A party-appointed arbitrator nonetheless continued to communicate with the party that selected him, even after an interim final award was issued. A motion to vacate was filed under Michigan law after the final award was issued. The motion was granted. The court found that the ex parte communications "violated the plain terms of the parties' scheduling orders." As a result, the court reasoned that the moving party did not need to demonstrate prejudice in order for the award to be vacated. *Star Insurance Co. v. National Union Fire Insurance Co.*, 2016 WL 4394563 (6th Cir.).

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 district court vacated the award, but 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.*, 640 F. App'x 685 (9th Cir. 2016), cert. denied, 2016 WL 2927973 (U.S. Oct. 3, 2016).

IX. ADR – GENERAL

Second Circuit Clarifies Requirements for Reasoned Award. The arbitrator in this case determined, in a preliminary order, that a reasoned award was required by the parties' agreement. Following issuance of the award, one party challenged the award by arguing that a reasoned award had not in fact been issued. The Second Circuit reviewed the available case law on the point from its Circuit and others as well and offered the following less than granular analysis. The court explained that "a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel." The "basic reasoning" of the panel is required on the central issue before it but it "need not delve into every argument made by the parties." The award in this case satisfied the standard as it set forth the relevant facts and key findings supporting its conclusion. The Second Circuit was not troubled by the fact that the award did not "provide a detailed rationale for each and every line of damages awarded" or by the "summary nature of its analytical discussion", reasoning that the summary nature of the discussion really reflected that the panel accepted the prevailing party's arguments on those points. *Leeward Construction Co. v. American University of Antigua - College of Medicine*, 826 F.3d 634 (2d Cir. 2016).

Judge Affirms Arbitration Award Confirming FLSA Settlement. The FLSA requires court approval of disputes to ensure the fairness and reasonableness of the settlement and that no overreaching occurred. The parties to the FLSA dispute here settled the matter in arbitration and the arbitrator issued a final award. The parties moved before a judge to confirm the award. The judge confirmed the arbitrator's award and "independently" approved the settlement. In particular, the judge found that there was an arm's length negotiation, that the settlement was fair and reasonable and in the best interests of the parties, and otherwise satisfied the fairness and adequacy factors required for the resolution of a FLSA claim. *Hines v. Cowabunga*, Inc., 1:15-cv-00828-LMM, (N.D.Ga. September 20, 2016).

Mediator's Proposal Admissible in Evidence Under Federal Privilege Law. The mediator in this anti-trust dispute involving federal and state claims emailed a "mediator's proposal". The offer was accepted and the matter was resolved. When one party failed to comply with the settlement agreement, the second party sued for breach of the settlement

agreement. The Ninth Circuit, reversing a lower court, ruled that federal law applied and under federal privilege law the email exchange relating the settlement agreement was admissible into evidence. *Sony Electronics v. Hannstar Display*, 835 F.3d 1155 (9th Cir. 2016).

Determination of CPAs Does Not Rise to Level of Arbitration Award. The agreement here provided that the parties would be bound by the determination of designated accountants for purposes of "net profit" calculations. The CPAs issued a determination and the unhappy party sued. The Kentucky Supreme Court rejected the claim that the accountants' determination constituted an arbitration award which would otherwise preclude the lawsuit. The Court reasoned that "arbitration is an adversarial process with the fundamental components of due process including a hearing with an opportunity to present evidence and cross-examine witnesses, and to have representation by counsel if desired." The calculation by CPAs of a net profit number is fundamentally different than arbitration, if for no other reason than "arbitration is a process, not an answer." *The Kentucky Shakespeare Festival v. Dunaway*, 490 S.W. 3d 691 (Ky. 2016).

X. COLLECTIVE BARGAINING SETTING

Collectively Bargained Protocol Requiring Arbitration of Disputes Upheld. The New York Real Estate Advisory Board and the SEIU negotiated and implemented a no-discrimination protocol. Under the protocol, a claim of discrimination by a union member is first submitted to mediation and if mediation fails and the union declines to arbitrate the case under the collectively bargained process, procedures are set forth for the employee to pursue the claim on his or her own. The court commented that the protocol and the nondiscrimination provision under the collective bargaining agreement do not conflict and "the No-Discrimination Protocol provides a mediation and arbitration procedure for Plaintiff and his employer as an alternative to the arbitration procedure between the Union and the RAB." As the employee here made no attempt to initiate a grievance under the collective bargaining agreement or protocol, and the union has not yet and may never decline to pursue his claim, there is no basis for the challenge to the process here. *Favors v. Triangle Services*, 2016 WL 4766267 (E.D.N.Y.). Cf. *Lawrence v. Sol G. Atlas Realty Co.*, 2016 WL 6310802 (2d Cir.) (district court's order compelling arbitration of a union member's discrimination claim vacated where no clear and unmistakable waiver of the right to pursue statutory claims found).

Challenge to Award on Public Policy Grounds Rejected. The arbitrator found that a lifeguard knowingly used controlled substances in front of minors but reinstated the lifeguard to his job. The arbitrator reasoned that the termination was too severe a penalty for a lifeguard with an unblemished work history of over 20 years. The court concluded that the award was neither irrational nor violative of public policy. In addition to a long

and unblemished employment history of the lifeguard, the court noted that the arbitrator cited evidence to the effect that supervisory employees were treated less harshly for the same incident. *City of New York v. District Council 37*, Case No. 450075/2016 (Sup. Ct. N.Y. Cty. May 19, 2016).

Challenge to Award on Rationality and Public Policy Grounds Rejected. An employee was terminated for allegedly announcing, shortly after being disciplined for tardiness, that she was going on a break and would return with a shotgun. The employee grieved her termination and was reinstated by the arbitrator. Her employer, a hospital, sought to vacate the award, arguing that it lacked any rational basis and violated public policy. The court, while acknowledging the real threat of gun violence, nonetheless noted that it was not able to revisit credibility to determinations made by the arbitrator. Here, the question of whether the threat of violence was made was in dispute. The court observed that if in fact the arbitrator had found that the threat to return with a shotgun was made, the hospital would have "had a meritorious argument that the award contravened public policy regarding violence in the workplace." But that was not the case here, and reinstatement in the absence of a finding of such a threatening statement does not violate public policy and is not a rational. *St. Barnabas Hospital v. 1199 SEIU*, 2016 WL 4146143 (S.D.N.Y.).

NLRB Overturns ALJ's Rejection of Award. An employer changed its payroll practices without consulting its union. An arbitration was brought and the arbitrator concluded that the employer had the authority under its management rights clause to make the change. A charge was filed with the NLRB and the board refused to defer to the arbitrator's award, finding that the arbitrator did not hear and consider all the relevant facts and relied on extra contractual provisions. A divided NLRB overturned the ALJ decision. In doing so, the majority found that the arbitrator's award contained sufficient textual evidence establishing that the arbitrator relied on the contractual management rights clause and therefore was worthy of deference. *Weavexx v. Teamsters Local Union 984*, NLRB Case No. 15-CA-119783.

XI. STATE LAW ISSUES

Vacatur Denied Under Maine Law. The arbitrator in this case awarded $1.5 million under a guarantee. The losing party sought to vacate the award under Maine law, arguing that under state law the arbitrator had exceeded his authority. The Maine Supreme Judicial Court emphasized that the standard for exceeding an arbitrator's power is exceptionally narrow. So long as there is a rational construction for the arbitrator's determination, the award must be confirmed. To exceed his or her authority, an arbitrator must determine a matter that was not subject to arbitration or effectively rewrite the party's contract. In this case, the court found that the arbitrator did what he was asked to do, namely, "he interpreted the guarantee to determine which parties would be liable and for how much."

The court concluded that the arbitrator found any necessary facts and rationally determined and interpreted the relevant agreements and consequently did not exceed his authority. *Xpress Nat. Gas, LLC v. Cate St. Capital, Inc.*, 144 A.3d 583 (Me.).

Award Vacated When Arbitrator Exceeded Authority Under Illinois Arbitration Act. The arbitration panel here relied on disclaimers in a collective bargaining agreement between the parties, but the agreement at issue was unrelated and did not contain those disclaimers. The Seventh Circuit, by Judge Richard Posner, ruled that under the Illinois Arbitration Act the arbitrators exceeded their authority. "The arbitrators' role was to interpret the agreement, not additions to it by one party without the consent of the other - such additions could not amend the agreement." Because the award was based on documents "outside the parties' agreement and ignored the agreement itself", a divided Seventh Circuit, applying Illinois law, vacated the award. *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 143 A.3d 859 (2016), 497 S.W.3d 490 (Tex. 2016), reh'g denied (Sept. 23, 2016) 830 F.3d 729 (7th Cir. 2016). Cf. *Hoskins v. Colonel Clifton Hoskins and Hoskins Inc.*, 2016 WL 2993929 (Tex.) (the grounds provided under the Texas General Arbitration Act to vacate awards are exclusive and manifest disregard is not an enumerated ground for vacatur under Texas law).

Stricter New Hampshire Standard for Review of Arbitration Awards Not Preempted. New Hampshire arbitration law allows for review of arbitration awards on "plain mistake" grounds, a more relaxed standard than under the FAA. The question for the New Hampshire Supreme Court was -- did the FAA preempt the more relaxed New Hampshire standard? The Court ruled that it did not. "The fact that a state law affecting arbitration is less deferential to an arbitrator's decision that the FAA does not create an obstacle so insurmountable as to preempt state law." The parties here selected New Hampshire law, which included its arbitration law and its plain mistake standard. Applying New Hampshire law, the Court upheld partial vacatur of the award by the lower court on "plain mistake" grounds. The Court noted that "although judicial review is deferential, it is the Court's task to determine whether the arbitrators were plainly mistaken in their application of law to the specific facts and circumstances of the dispute they were called upon to decide." On this basis, the Court rejected the argument that the "trial court misapplied the plain mistake standard by conducting an overly searching review of the panel's decision." *Finn v. Ballantine Partners*, 2016 WL 3268852 (N.H.). Cf. *Golden v. O'Melveny & Myers*, 2016 WL 4168853 (C.D. Cal.) (choice of law provision requiring application of California law does not overcome application of the FAA to question of alleged invalidity of agreement).

Award Modified Where Affirmative Defense Mistakenly Treated as Counterclaim. A terminated executive filed for arbitration seeking severance pay he claimed was owed. The former employer raised several affirmative defenses, including that the plaintiff violated a restrictive covenant. The arbitrator ruled that the restrictive covenant was violated but no

damages were demonstrated. On this basis, the arbitrator declined to award the fees and costs to the employee despite having prevailed on several claims, finding that since each party "prevailed" on their claims the costs would be shared. Under the New Jersey Arbitration Act, the court concluded that the arbitrator decided an issue not submitted to him, namely, the violation of the restrictive covenant, and the award would be modified to grant fees and costs to the employee, as the prevailing party. *McHale v. Taylored Services*, LLC, Civ. Action No. 16-1785 (JLL) (D.N.J. July 7, 2016).

Vacatur Appropriate Where Arbitrator Failed to Review Full Record. The collective bargaining agreement required arbitrators to "review the record of the disciplinary hearing" to determine if the decision below was based on clear and convincing evidence. The deputy sheriff was terminated here for driving while intoxicated. The arbitrator excluded the underlying blood tests relied on by the disciplinary panel. The Appellate court, applying New York Law, ruled that the arbitrator clearly exceeded his authority by excluding the blood tests. "Rather than comply with that mandate and review the record from the hearing, the arbitrator considered a portion of the record only, deciding to exclude certain evidence from his review." On this basis, the court vacated the award. *In re O'Flynn (Monroe Cty. Deputy Sheriffs' Ass'n, Inc.),* 141 A.D.3d 1097, 34 N.Y.S.3d 843 (N.Y. App. Div. 2016).

Wrongful Death Claims Not Arbitrable Under Ohio Law. A son signed an arbitration agreement when admitting his father to a nursing home. The father passed away and the son sued for medical malpractice and negligence. The nursing home sought to compel arbitration. The Ohio appellate court ruled that the son signed the arbitration clause on behalf of his father but not in his individual capacity. Since the claims here were in the nature of wrongful death which was brought on behalf of his father's beneficiaries, the court declined to compel arbitration. *Vickers v. Canal Pointe Nursing Home*, 2016 WL 308329 (Ohio App.).

Ability to Extend Due Date for Award Renders Arbitration Clause Enforceable. A contract between a casino and its contractors required that an award be issued within 21 days of selection of the panel. A dispute arose and the casino sought to arbitrate the dispute. The contractor sought to stay the arbitration under North Carolina law, citing the doctrine of contractual impossibility. The court rejected the challenge and compelled arbitration. In doing so, the court explained that the arbitration agreement granted to the arbitrator the discretion to extend the time frames and the AAA's Commercial Rules under which the arbitration was proceeding similarly granted the arbitrators that authority. The court added that the authority of the AAA to adjudicate disputes was a matter of contract and how "the AAA accomplishes its adjudicatory task is a different question altogether and one governed by its rules, any subsequent agreement by the parties, and any pertinent

contractual provisions construed in accordance with state law." *Tribal Casino Gaming Enterprise v. Yates*, 2016 WL 5402763 (W.D.N.C.).

XII. NEWS AND DEVELOPMENTS

Pre-Dispute Arbitration Agreements Barred in Skilled Nursing Facilities. The Centers for Medicare and Medicaid Services issued regulations prohibiting skilled nursing facilities from including arbitration agreements in the resident admission process. The rules take effect on November 28, 2016. The rules do allow arbitration for an existing dispute and requires that the facility maintain any arbitration award for inspection for at least five years. [**Note**: a federal judge in Mississippi has temporarily blocked enforcement of this regulation, finding that the agency lacked authority to bar arbitration in nursing facilities. *American Health Care Assoc. v. Burwell*, Case No. 3:16-CV-00233 (N.D. Miss.).]

California Limits Out of State Arbitration. In September 2016 California enacted a new statute that generally prohibits agreements requiring California-based employees to litigate or arbitrate their California-based employment-related claims in other states. The statute will apply to all agreements entered into after January 1, 2017. Any contractual provision under this statute that violates it is voidable by the employee. If found void, the underlying dispute must be adjudicated in California under California law.

Governor Brown Vetoes Limitation on Arbitrator Selection. The California Legislature enacted a bill that would prohibit an arbitrator from accepting an offer of employment in a future case involving a party or a lawyer in a pending arbitration without receiving prior written consent. The statute also added additional disclosure requirements on arbitrators and private arbitration companies. Governor Brown vetoed this legislation. In doing so, he noted that California subjects arbitrators to stringent disclosure requirements and "I am reluctant to add additional disclosure rules and further prohibitions without evidence of a problem."

XIII. TABLE OF CASES

Cases