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Employment Arbitration: What Recent Caselaw Teaches Us

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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).

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).

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).

Motion to Compel Denied Where Website Actively Misled User. A customer purchased a credit score package from TransUnion to check his creditworthiness. The customer later brought suit and TransUnion moved to compel. The Seventh Circuit affirmed denial of the motion. The court found the on-line arbitration site misled customers as the relevant web pages related to the purchase made but made no mention of any further terms and conditions. The bolded text below the scroll box told the user that "clicking on the box constituted his authorization for TransUnion to obtain his personal information. It says

nothing about contractual terms. No reasonable person would think that hidden within that disclosure was also the message that the same click constituted acceptance of the Service Agreement." The court concluded that whatever notice TransUnion intended to give was undone by explicitly stating that a click permitted access to the purchaser's personal information and thereby distracted the purchaser from the fact that it purported to serve as acceptance of unrelated terms. *Sgouros v. TransUnion Corp.*, 817 F.3d 1029 (7th Cir. 2016).

"Complete Arbitration Rule" Precludes Confirmation of Award in Bifurcated Proceeding. A dispute arose between a coal company and the mine workers' union. An arbitrator ruled that a preferential hiring agreement was enforceable and, since the parties had agreed to bifurcate the proceeding, was prepared to move into the remedial phase of the proceeding. A motion to confirm the award was granted but the Fourth Circuit reversed. The court reasoned that the parties' agreement to bifurcate the arbitration "does not change the fact that they also agreed to submit the entire dispute - both the liability and remedies questions - to arbitration." The court acknowledged that the complete arbitration rule is "not a hard and fast jurisdictional limitation", but noted that federal courts are courts of limited jurisdiction and can only resolve those disputes over which they have authority. The Fourth Circuit concluded that invocation of the complete arbitration rule was prudent under these circumstances as it "insures that courts will not become incessantly dragooned into deciding narrow questions that form only a small part of a wider dispute otherwise entrusted to arbitration. And it mitigates the possibility of one party using an open courthouse door to delay the arbitration." *Peabody Holding Co. v. United Mine Workers*, 2016 WL 8782 (4th Cir.).

Subject Matter Jurisdiction Found to Confirm Arbitration Award. An award was issued and the amount awarded was paid. Nevertheless, the prevailing party sought to confirm the award, and this motion was opposed on the ground that the court lacked subject matter jurisdiction. Applying the "demand approach", the district court concluded that "the appropriate way to measure the amount in controversy during a Section 9 confirmation proceeding is by using the amount demanded in the underlying arbitration." The amount demanded here far exceeded the jurisdictional amount (although the amount awarded did not), and therefore on this basis the court found that the amount in controversy requirement was satisfied. The court also ruled that a "case or controversy" existed, even though the award was satisfied, because parties to an arbitration are statutorily entitled to confirmation of the award. The court found that the "parties retain an undisputed right to Section 9 confirmation whatever the nature of an award and the parties' degree of compliance with it." *National Casualty Co. v. Resolute Reinsurance Co.*, 2016 WL 1178779 (S.D.N.Y.). See also *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179 (5th Cir. 2016) ("The amount in controversy is measured the same way in federal court for litigation and for matters submitted on petitions to compel arbitration: the plaintiff's pleading, not the ultimate result in the case, governs jurisdiction.").

Amendment of Complaint Undoes Waiver of Right to Arbitrate. Close to the date of trial and after completion of discovery in a FLSA action, plaintiff's motion to amend the complaint to add a breach of contract and quantum meruit claim was granted. The defendant then moved for the first time to compel arbitration. The district court denied the motion, but the 11th Circuit overturned the lower court and compelled arbitration. The circuit court found that the amendment to the complaint "revived" defendant's right to compel arbitration. The court emphasized that the amendment here pled new claims and ruled that defendant "did not waive the right to arbitrate the state law claims raised in the second amended complaint because those claims were not in the case when it waived by litigation the right to arbitrate the FLSA claim." The court rejected the argument that defendant must have known that a state law claim was "lurking in the case", reasoning that a party "is not required to litigate against potential but unasserted claims." *Collado v. J&G Transport*, 2016 WL 1594591 (11th Cir.).

Intervener EEOC Must Await Arbitration Proceeding. A transgender man brought a sex discrimination claim against his former employer and the EEOC intervened in the pending action. The employer's motion to compel was granted and the action was stayed. The EEOC objected, arguing that it was not party to the arbitration agreement. The court rejected the EEOC's position, finding that the stay applied to it as well. The court noted that the claims brought by the employee and the EEOC involve "identical operative facts" and the litigation would likely have a "critical impact" on the arbitration. "Because the arbitration and litigation involve common, likely identical, questions of law and fact, resolving the EEOC's claims would resolve issues that the arbitrator will decide in [the employee's] arbitration." The court also observed that the "outcome of the arbitration may benefit the parties to the litigation" and found that this also weighed in favor of staying the EEOC action. The court stayed the action for six months to permit the arbitration to proceed and presumably be concluded in that time period. *Broussard v. First Tower Loan*, 2016 WL 879995 (E.D. La.).

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.).

E-Mail Notice of Arbitration Agreement Sufficient. A Toyota employee received notice of an arbitration agreement via e-mail, did not opt out of the agreement as was permitted, and continued to work for Toyota after receipt of the e-mail. The employee brought a lawsuit alleging discrimination, and Toyota successfully compelled arbitration. The court held that an implied-in-fact agreement existed between the employee and Toyota based on the e-mail notice of the arbitration agreement. In doing so, the court rejected the employee's subjective understanding that she had to sign something in order to be bound as being contrary to exist in California law. *Aquino v. Toyota Motor Sales USA*, 2016 WL 3055897 (N.D. Cal. 2016).

"Terse" Arbitration Provision Enforceable. The offer of employment here included one sentence submitting "to mandatory binding arbitration any and all claims arising out of or relating to your employment." The employee was terminated and opposed a motion to compel on the ground that the arbitration provision was too uncertain and indefinite to constitute a binding agreement. The court disagreed and compelled arbitration. The court held that the parties clearly agreed to be bound to the arbitration provision. The court also found that the lack of specific terms governing the procedures to be followed "does not invalidate the agreement, considering that the FAA provides an objective method to fill gaps in arbitration agreements." The court noted that once an arbitrator was selected "pursuant to those gap-filling methods, other aspect of the arbitrations' procedure, such as discovery and cost, can be decided by the arbitrator." *WeWork Companies, Inc. v. Zoumer*, 2016 WL 1337280 (S.D.N.Y.).

Later Agreements With Arbitration Provisions Did Not Supersede Underlying Agreement. The defendant encouraged the plaintiffs to provide interest-free loans for a project overseas. The loans were not repaid and plaintiffs sued. Respondent sought to compel arbitration because subsequent agreements between the parties included an arbitration clause. A New York appellate court declined to compel arbitration, finding that the alleged breach first occurred under the terms of the initial agreement which had a forum selection clause designating New York courts. In any event, the court noted that even if some of the disputes fell under the later agreements with arbitration clauses those disputes "are cut from the same cloth, and are, unquestionably, inextricably bound together and therefore should be litigated in court." *NNANB Garthon Bus. Inc. v. Stein*, 138 A.D.3d 587, 31 N.Y.S.3d 19 (1st Dep't 2016).

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).

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).

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).

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).

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).

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.).

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).

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).

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).

II. JURISDICTIONAL CHALLENGES: DELEGATION ISSUES

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.).

Gateway Question of Class Arbitration for Court. The Carlsons signed a sales agreement, which included an arbitration clause, for the purchase of a house in Hilton Head. They filed a class action and the district court ruled that the gateway question of class arbitration was for the arbitrator to decide. The Fourth Circuit disagreed and joined the Third and Sixth Circuits in ruling that whether the parties have agreed to a class action arbitration is a gateway question for the court. The court reasoned that the benefits of arbitration are "dramatically upended in class arbitration." The Fourth Circuit noted that the risks for management in class arbitration are higher and that the certification action in court, unlike in arbitration, can be challenged on an interlocutory basis. The court added that the grounds to overturn an arbitration award are severely limited, and the procedural formality of class actions undercut one of the main benefits of arbitration - the efficiency that comes with the lack of formal procedural rules. The court concluded that unless the parties clearly and unmistakably provide otherwise, "whether an arbitration agreement permits class arbitration is a question of arbitrability for the Court." *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016). See also *Morgan v. Sanford Brown Institute,* 2016 WL 3248016 (N.J.) (challenge to clarity of delegation clause goes to formation of the arbitration agreement requiring the court, and not the arbitrator, to determine question of arbitrability).

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).

Agreement Assigns Class Arbitration Determination to Arbitrators. The agreement here between the employer and the employee assigned to the arbitrator "claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim." The employee sought to bring the arbitration as a class arbitration and moved to compel in court. The trial court granted the motion, and submitted the question of whether the action should proceed as a class arbitration to the arbitrator to decide. The Fifth Circuit affirmed that determination. The court, relying on prior Fifth Circuit precedent, concluded that where the arbitration language is broad the "parties' intent to submit arbitrability disputes to the arbitrator is unambiguous." *Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193 (5th Cir. 2016).

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).

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).

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).

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.).

Arbitration Clause in Sham Contract Not Enforceable. The parties entered into a sham agreement, called the Commercial Contract, solely for the purpose of allowing a potential franchisee to obtain a visa. The Commercial Contract included an arbitration clause. A second agreement was signed the same day, providing that the Commercial Contract was not valid or effective and that the parties will sign a new contract at a later date. A new contract was never entered into, a dispute arose, and the case was sent to arbitration under

the terms of the Commercial Contract by the district court. The Ninth Circuit reversed, finding that the parties did not mutually consent to be bound and that since the Commercial Contract was a "sham, the arbitration clause is no more enforceable than any other provision in that document." *Casa del Caffe Vergnano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1208 (9th Cir. 2016).

Fraudulent Inducement Claim for Court to Decide. Plaintiff purchased a manufactured home, completed the paperwork, and made the first of three payments. Soon after, the manufacturer told the plaintiff that they needed to complete some additional paperwork, which included an arbitration clause, "so we can move the home". Problems arose and the plaintiff sued. The manufacturer moved to compel and the plaintiff opposed on fraudulent inducement grounds. The parties agreed that the fraudulent inducement claim was for the court to decide, and it refused to compel arbitration. The court emphasized that the manufacturer admitted that it would have sold the house to plaintiffs even if they did not sign the arbitration agreement and told the plaintiffs that they had to sign the agreement "so we can move the house". The court reasoned that this statement was false and upheld plaintiff's fraudulent inducement claim. *Adams v. CMH Homes, Inc.*, 2016 WL 1719373 (Tenn. App. 2016).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

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 Hawaiian high 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).

"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).

Arbitration Clause Not Unconscionable Where Opportunity to Opt Out Provided. Within days of each other two district courts rejected unconscionability claims brought against Uber's arbitration provision based on the fact that the drivers had the option to opt out of arbitration when they joined the company. The relevant provision provided that arbitration is not a mandatory condition of the relationship between the company and the driver and gave the drivers 30 days within which to opt out. The provision also encouraged the drivers to consult with counsel. Both courts ruled that the opt out option precluded any finding of procedural unconscionability. The courts also rejected claims of substantive unconscionability, finding that the fee-splitting provision did not clearly require excessive or unreasonable costs be paid by the drivers or that the arbitration would necessarily be prohibitively expensive. Finally, the Maryland District Court ruled that the delegation clause was enforceable and that any disputes relating to the enforceability of the arbitration provision was for the arbitrator to decide. *Suarez v. Uber Technologies*, 2016 WL 2348706 (M.D. Fla.); *Varon v. Uber Technologies*, 2016 WL 1752835 (D. Md.).

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).

Arbitration Agreement Providing for Injunctive Relief Not Substantively Unconscionable. The California Supreme Court rejected a claim of substantive unconscionability where the arbitration agreement provided that the parties could seek injunctive relief. Appellant, a former employee opposing the arbitration of a race and sex discrimination claim, argued that since the employer was more likely to seek injunctive relief the agreement was substantively unconscionable. The Court reasoned that this contractual provision did no more than recite what California law otherwise provided during the pendency of an arbitration. "Thus, regardless of whether [the employer] is, practically speaking, more likely to seek provisional remedies than its employees, simply reciting the parties' rights under [California law] does not place [the employee] at an unfair disadvantage." The California Supreme Court also rejected the employee's argument that the arbitration provision was procedurally unconscionable because a copy of the applicable AAA Rules were not supplied. The Court noted that the employee was not complaining about the AAA Rules themselves and no argument was presented that failure to provide copies of the Rules prejudiced her. *Baltazar v. Forever 21, Inc.,* 62 Cal. 4th 1237, 367 P.3d 6 (2016).

Procedural Unconscionability Claim Rejected. An apartment manager brought a wage and hour class action. The employer moved to compel, citing two agreements signed by the apartment manager. A California appeals court, overturning the trial court, granted the motion to compel arbitration. The court found that the agreements were not contracts of adhesion because the employee was given ample time to question the terms of the agreements and was never told that there would be repercussions if she did not sign the agreement. The court added that the arbitration provisions were clearly marked and were not hidden or buried, for example, near the end of a long text. The court also rejected the claim that the failure to include copies of the AAA Rules was unconscionable. In this regard,

the court found that the "failure to affix the AAA Rules, was insufficient to constitute procedural unconscionability." *J. K. Residential Services, Inc. v. Superior Court*, 2016 WL 1535702 (Cal. App.).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

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).

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.).

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.).

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.).

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).

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 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).

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.).

V. CHALLENGES TO ARBITRATOR OR FORUM

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).

NFL Commissioner's Award Upheld under LMRA. A divided Second Circuit overturned a district judge's vacatur of the decision of the NFL Commissioner Roger Goodell to suspend Tom Brady in the deflategate controversy. The majority emphasized the limited review afforded labor award under Labor Management Relations Act because "it is the arbitrator's view of the facts and meaning of the contract for which the parties bargained, courts are not permitted to substitute their own." The three grounds offered by the district judge, the lack of adequate notice of possible discipline, the exclusion of certain testimony, and the denial of access to the notes of counsel conducting the investigation, were found to be insufficient to require vacatur of the award. For example, the court rejected the notion that the Commissioner improperly punished Brady for destroying his cell phone just days before the arbitration hearing. "It is well established that the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence the party had an obligation to produce did so in order to conceal damaging information form the adjudicator." The majority also

found no basis to overturn the award based on the Commission's exclusion of testimony of the NFL's General Counsel, noting that evidentiary rulings are left to the sound discretion of the arbitrator. The majority concluded "that the Commissioner's decision to exclude the testimony fits comfortably within the broad discretion to admit or exclude evidence and raises no questions of fundamental fairness." Notably, the majority, in a footnote, observed that the courts often look to the FAA when reviewing challenges to awards under the LMRA, but passed on deciding whether the principles of "fundamental fairness" present in FAA jurisprudence applies to the LMRA. *National Football League Management Council v. National Football League Players Association,* 2016 WL 1619883 (2d Cir.).

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).

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.).

***Functus Officio* Bars Reopening of Arbitration Based on New Evidence.** A rabbi acting as an arbitrator in a rabbinical court issued an award in 2011 in favor of Pinkesz requiring Wertzberger to pay him $425,000. Two years later, the arbitrator reopened the matter and ordered Wertzberger to pay Pinkesz $3,750,000. The motion to vacate was granted on *functus officio* grounds. The New York appellate court ruled that the 2011 award was final and definite under the CPLR and the arbitrator exceeded his authority by reopening the arbitration two years later. *Pinkesz v. Wertzberger*, 139 A.D.3d 1071, 30 N.Y.S.3d 832 (2d Dep't 2016).

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.).

Arbitral Immunity Applied Even Where Award is Vacated. A rabbinical court reopened an award two years after its issuance and the award was vacated on *functus officio* grounds. Various claims were brought against the rabbinical court and the trial court ruled that the defendants were not entitled to arbitral immunity because the award had been vacated. The appellate court reversed this ruling, and applied arbitral immunity to the defendant's actions. The court noted that the factual allegations in the complaint merely asserted conduct by the defendants in their capacity as arbitrators. "As the plaintiffs failed to allege how any of the acts of the rabbinical court defendants were undertaken in the clear absence of all jurisdiction, these defendants enjoy arbitral immunity from civil liability." *Pinkesz Mut. Holdings, LLC v. Pinkesz, 139 A.D.3d 1032 (2d Dep't 2016)*.

Arbitral Forum Entitled to Absolute Immunity. The losing party in a domain name dispute sought to overturn an unfavorable arbitration award and named the arbitral forum, National Arbitration Forum (NAF), as a defendant. The claim against NAF was that it favored the prevailing party's law firm which had filed almost 400 arbitrations with NAF and lost only 11. The federal district court granted NAF arbitral immunity, finding that such immunity protects "arbitrators and the arbitral process" from reprisal by dissatisfied litigants. The

court noted here that the complaint against NAF did not contend that NAF's processes or systems were corrupt but instead argued that it was biased in favor of a particular law firm. These allegations, the court concluded, did not serve to overcome the strong policy in favor of arbitral immunity. *VirtualPoint v. Poarch Band of Creek Indians and National Arbitration Forum*, No. SACV 15-02025-CJC, (C.D.Cal. 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.).

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).

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.).

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 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.).

NLRB Continues to Rule Class Action Waivers Unlawful. The National Labor Relations Board has continued its consistent stand in finding class action waivers to be violative of the National Labor Relations Act, despite rejection of its position by various courts. *Victory II, LLC d/b/a Victory Casino Cruises II,* NLRB Case No. 12-CA-146110, and *Prime Healthcare Paradise Valley, LLC,* NLRB Case Nos. 21-CA-133781, 133783.

Seventh Circuit Rules Class Action Waiver Violates NLRA. The Seventh Circuit, diverging from the Fifth, Second, and Eighth Circuits, ruled that a class action waiver violates §7 of the National Labor Relations Act. The court noted that under §7 employees are permitted to engage in collective activities, and held that the class action waiver, which in this case was not part of the collective bargaining agreement, violated the NLRA. The court also pointed out that the employees impacted here were not provided the opportunity to opt out of the class action waiver. The court rejected the argument that under the FAA the agreement must be enforced. In doing so, the Seventh Circuit focused on the FAA's savings clause, which provides that arbitration provisions are generally enforceable except if the agreements themselves are unlawful. Since the agreement here was unlawful under the NLRA, the court concluded that there was no conflict between the NLRA and FAA. *Lewis v. Epic-Systems Corp.*, 2016 WL 3029464 (7th Cir.).

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).

Separate Class Action Waiver Applied to Arbitration Agreement. The plaintiffs in this putative class action agreed to waive their right to file class actions in a merchant cash advance agreement. This agreement was separate from other agreements which contained arbitration provisions. The court concluded that this rendered the plaintiffs inadequate to serve as class representatives and compelled individual arbitration. The court rejected the notion that a class action waiver is substantively unconscionable when executed outside the context of an arbitration agreement as well as the argument that the United States Supreme Court decision in *Italian Colors* required a different result. *Korea Week v. Got Capital*, 2016 WL 3049490 (E.D. Pa.).

VII. 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.).

Arbitrator Did Not Exceed Powers By Adopting Proposed Findings. A dispute arose between a medical center and a vendor providing administrative services. An arbitration was initiated and an award was issued. A motion to vacate was filed, raising a variety of issues including the alleged bribing of witnesses at the arbitration. The court denied the motion. In doing so, the court rejected the argument that the arbitrator exceeded his authority by adopting one of the parties' proposed findings of fact and conclusions of law rather than those provided by the other party. The court reasoned that sufficient evidence was present in the record to support the proposed findings selected by the arbitrator. *Weirton Medical Center, Inc., v. QHR Intensive Resources, LLC,* 2016 WL 2766650 (N.D. W.Va. 2016).

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

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").

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).

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.).

Award Vacated For Not Ruling on Claim. The parties submitted the question of the enforceability of indemnity provisions to the arbitrator to decide. The arbitrator ruled that the indemnity provisions were against public policy and not enforceable. The Sixth Circuit, in an earlier ruling relating to the same award, also found that the award was not in manifest disregard of the law. The arbitrator did not rule upon the losing party's fraudulent inducement claim which flowed from the finding that the individual or the indemnity agreement violated public policy. The district court vacated the award so that the arbitrator could decide the fraudulent inducement claim. The court reasoned that by not finally resolving all legal and factual disputes presented, the award lacked fundamental fairness and should be remanded to the arbitrator to allow the party raising its fraudulent inducement claim an opportunity to present evidence to the arbitrator. *Schafer v. Multiband Corp.*, 2016 WL 1665153 (E.D.Mich.).

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).

Disclosure of Conflict at Time of Selection Timely. The potential umpire in this case fully disclosed any possible conflicts at the time that he received notice that he was being considered for the position. Approximately ten months later, when actually selected as the umpire, he promptly disclosed his selection as a party-appointed arbitrator in an arguably related proceeding. The court rejected a motion to vacate on evident partiality grounds. The court commented that it had not found "a case holding an arbitrator's voluntary disclosure of a potential conflict after his or her selection, rather than before, to be grounds for vacatur." The court reasoned that to allow vacatur here would impose a duty of "continuous disclosure" that would be unreasonable. In any event, the court found that it "is not the nondisclosure itself but the materiality of the undisclosed facts that control the evident partiality inquiry." *Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 2016 WL 1030139 (S.D.N.Y.), amended, 2016 WL 3144057 (S.D.N.Y.).

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).

Challenge to Damages Awarded Rejected. An employee retained a financial advisor to counsel her on the merits of a proposed retirement package. A dispute arose and the now retired employee initiated a FINRA arbitration against the financial advisor. The customer prevailed and the financial advisor moved to vacate, arguing that the panel awarded damages not awardable on the claims before it. The court denied the motion to vacate and confirmed the award. The court noted that the award did not provide any reasoning for the damages awarded, which "makes it difficult (if not impossible) to determine the reasons for the specific amount the panel awarded." In any event, various assumptions could reasonably be made which would have allowed for the amount awarded. The court also

rejected the argument that the panel failed to reduce the damages to "present value" and to take into account the duty to mitigate. The court concluded that even if these complaints were meritorious "that error was not of the kind that would permit the Court to overturn the award." *Rogers v. AUSDAL Financial Partners*, 2016 WL 951078 (D. Mass.).

Claim for Manifest Disregard of Evidence Rejected. The district court confirmed an award and the losing party appealed to the Second Circuit on manifest disregard grounds. The Second Circuit rejected the challenge on such grounds. In doing so, the court reiterated that the Second Circuit does not recognize a claim for manifest disregard of the *evidence*. In also rejecting the manifest disregard of the law claim, the court relied on the arbitrator's finding that the request for adequate assurances, a key claim in the case, was not cognizable because it was not put in writing. The court reiterated that Circuit's established rule that the application of the manifest disregard of the law principle is severely limited and rejected the claim here. *ISMT, Ltd. v. Fremak Indus., Inc.*, 634 F. App'x 332 (2d Cir. 2016).

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).

More Deferential Review Given to "Consensual" Arbitration. An inter-company arbitration was conducted between two insurance companies relating to an uninsured motorist claim. An award was issued and cross motions to confirm and vacate were filed. The New York appellate court affirmed the award. In doing so, the court noted that where the arbitration provision was compulsory "closer judicial scrutiny of the arbitrator's determination" is afforded. The court added that where, as here, "the arbitration was consensual, a more deferential standard of review applies." *Geico Indemnity Insurance Co. v. Global Liberty Insurance Co.*, 51 Misc. 3d. 138 (A) (2d Dep't 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).

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.).

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 ALJ Rules "Voluntary" Arbitration Agreement Violative of NLRA. A hospitality company managing a Doubletree Hotel required employees to sign an arbitration agreement at the time of hire. Although the agreement expressly provided that signing it was "voluntary", a NLRB administrative law judge concluded that the word voluntary "has more than one possible meaning or definition" and concluded that the policy violated §7 of the NLRA. The ALJ also ruled that even though the agreement did not expressly waive class or collective actions, the employer sought to utilize it in court that way and therefore was also unlawful under prevailing NLRB authority. *Rim Hospitality v. Nelson Chico,* NLRB Case No. 21-CA-137250.

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. 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.).]

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.

CFPB Issues Notice of Proposed Rulemaking. The Consumer Financial Protection Bureau issued a Notice of Rulemaking on May 5, 2016 soliciting comments on a proposed rule to prohibit certain consumer institutions from including pre-dispute arbitration agreements that contain class action waivers in their consumer contracts. The proposed rule would require that all covered entities submit records to the CFPB related to each arbitration including pleadings and related documents. The comment period will be for three months.[update]

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."

XII. TABLE OF CASES

Federal Cases