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AAA Case Summaries:
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I. JURISDICTIONAL ISSUES: GENERAL

Supreme Court to Rule on FAA Transportation Worker Exemption. The Supreme Court has heard oral argument on the question of the proper scope of the FAA exemption from the Act's coverage for contracts of employment of transportation workers. The dispute here was between a former truck driver and the trucking company for which he drove under the terms of an "Independent Contractor Operating Agreement." The driver brought a class action alleging violations of the FLSA, and the trucking company moved to compel arbitration under the arbitration provision in the Agreement. The First Circuit framed the question before it as whether the FAA exemption "extends to transportation-worker agreements that establish or purport to establish independent-contractor relationships." Here, the trucking company conceded that the driver was a transportation worker. This concession, along with the legislative history and giving the phrase "contract of employment" its ordinary meaning, led the First Circuit to conclude that "the contract in this case is excluded from the FAA's reach." The court emphasized that its holding was limited to situations in which the "arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.,* 857 F.3d 7 (1st Cir. 2017), cert. granted, 138 S. Ct. 1164 (2018). Cf. *Magana v. Doordash, Inc.,* 2018 WL 5291988 (N.D. Cal.) (transportation worker exemption in FAA does not apply in absence of allegation that driver moved or supervised movement of goods across state lines).

Supreme Court to Rule on "Wholly Groundless" Doctrine. Under the "wholly groundless" doctrine, courts may decide arbitrability issues which are otherwise delegated to the arbitrator to decide. The federal circuit courts have split on this doctrine, with the Fourth, Fifth, Sixth, and Federal Circuits adopting the "wholly groundless" doctrine and the Tenth and Eleventh Circuit rejecting it. The Supreme Court granted *certiorari* in *Archer and White Sails v. Henry Schein, Inc.*, 878 F. 3d 488 (5th Cir. 2017), cert. granted, 138 S. Ct. 2678 (2018), in which the Fifth Circuit upheld the "wholly groundless" doctrine in reserving for itself the authority to rule on the question of arbitrability despite the presence of a valid delegation clause. The question posed for the Supreme Court to decide is whether "the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is 'wholly groundless'". See also *Taylor v. Shutterfly, Inc.*, 2018 WL 4334770 (N.D. Cal.) ("wholly groundless" test "asks only whether the asserted claims are *arguably* covered by the arbitration agreement but not whether that contract is enforceable").

FLSA Did Not Displace FAA. The Sixth Circuit ruled that the FAA and the FLSA are not irreconcilable and therefore FLSA claims are arbitrable. Plaintiff, seeking to bring a collective action under the FLSA, argued that the FLSA displaced the FAA with respect to the adjudication of claims subject to collective action. The Sixth Circuit, in rejecting this

argument, noted that the Supreme Court held that there must be a "clear and manifest" congressional intent to make individualized arbitration agreements unenforceable. The court found no such intent with the FLSA. The Sixth Circuit explained that the FLSA "gives employees the option to bring their claims together. It does not require employees to vindicate their rights in a collective action, and it does not say that agreements requiring one-on-one arbitration become a nullity if an employee decides that he wants to sue collectively after signing one." Consequently, the court concluded that it could give effect to both statutes by recognizing that "employees who do not sign individual arbitration agreements are free to sue collectively, and those who do sign individual arbitration agreements are not." *Gaffers v. Kelly Services*, 900 F.3d 293 (6th Cir. 2018).

FAA Did Not Preempt Kentucky Law Banning Mandatory Employment Arbitration. Kentucky prohibits conditioning employment on acceptance of mandatory arbitration for resolution of employment disputes. The question for the Kentucky Supreme Court was did the statute violate the FAA? The Court concluded it did not. In doing so, the Court recognized that the FAA preempts statutes that discriminate towards arbitration. The Court reasoned, however, that the statute did not evidence hostility against arbitration as it did not prevent employers from agreeing to arbitration. Rather, it "simply prevents [the employer] from conditioning employment on the employee's agreement to arbitration." This distinction, the Court held, was enough to remove the statute from the bounds of FAA preemption. The Court concluded that this statute "is not a law that discriminates or singles out arbitration clauses. It is a law that prohibits employers from firing or failing to hire on the condition that the employee or prospective employee waive all existing rights that employee would otherwise have against the employer." *Northern Kentucky Area Development District v. Snyder*, 2018 WL 4628143 (Ky.).

FAA Preempts Florida State Law Requiring Local Arbitration for Contractors. A subcontract agreement to perform drywall work on property located in Florida provided that any disputes arising out of the contract must be arbitrated in Michigan. A Florida trial court invalidated the agreement, finding it was contrary to a Florida statute prohibiting the enforceability of any agreement with a resident contractor, subcontractor, or materialman requiring venue outside the State of Florida. On appeal, the Florida District Court reversed, finding that the Federal Arbitration Act (FAA) applies and preempts the Florida law to the extent the contract involved interstate commerce. Section 2 of the FAA provides that arbitration provisions in contracts involving commerce "shall be valid, irrevocable, and enforceable" and that the exception to enforcement of an arbitration provision is "grounds as exist at law or in equity for the revocation of *any* contract." Because the Florida statute at issue only applies to contracts with contractors, subcontractors and materialmen, and not to *any* contract, the court ruled that the FAA preempts that statute, making it inapplicable to a contract involving interstate commerce. However, because the trial court never addressed the threshold issue of whether the contract involves interstate commerce so as to make the FAA applicable, the court remanded the matter back to the trial court to determine the

interstate commerce question. *Sachse Constr. & Dev. Corp. v. Affirmed Drywall, Corp.*, 251 So.3d 1005 (Fla. Dist. Ct. App. 2018).

Court Must Determine Factual Issues Before Arbitrability Issue is Ripe. Car purchasers and the car dealer rescinded their sales agreements that they had entered into and plaintiff sued on a class basis. The New Jersey Appellate Division ruled that the issue of whether the dispute was arbitrable was for the court and not for the arbitrator to decide. The court emphasized that there were disputed questions of fact relating to the formation of the agreement. "Only a finding that an enforceable sales contract was finally formed would give rise to the question whether they agreed to arbitrate the arbitrability of the particular disputes arising from that contract." The court concluded that the parties could engage in limited pre-arbitration discovery to determine whether an enforceable agreement exists and, if so, whether the arbitrability question was for the arbitrator or the court to decide. *Goffe v. Foulke Management Corp.*, 454 N.J. Super. 260 (App. Div. 2018). See also *Taylor v. Shutterfly, Inc.*, 2018 WL 4334770 (N.D. Cal.) (severability clause which references "court of competent jurisdiction" did not render express delegation clause ambiguous as court jurisdiction may be invoked with respect to all arbitration awards to address, for example, jurisdictional and enforcement issues).

District Court Erred in Awarding Default for Failure to Pay Arbitration Fees. The employer compelled arbitration and then failed to pay the substantial arbitration fees incurred in this and two related cases. The district court entered a default judgment against the employer based on its failure to pay the arbitration fees. On appeal, the Eleventh Circuit reversed. The appellate court observed that rather than lifting the stay the district court went further and entered a default judgment in court. The Eleventh Circuit could "find no basis in the FAA, the case law, or anywhere else to support a court's decision to enter a default judgment solely because a party defaulted in the underlying arbitration." The court cautioned, however, that it was not ruling that a default judgment could never be awarded. Rather, it noted that bad faith, rather than mere inability to pay, was required. The court remanded the matter to the district court to determine whether the employer was acting in bad faith in choosing not to pay the required arbitration fees. *Hernandez v. Acosta Tractors*, 898 F.3d 1301 (11th Cir. 2018).

ERISA Fiduciary Claims on Behalf of Plans Not Subject to Arbitration. A group of USC employees, all of whom agreed to arbitrate individual claims against the university, brought a class action alleging retirement plan mismanagement under ERISA brought on behalf of the plan itself. The university moved to compel arbitration, relying on the arbitration agreement signed by each plaintiff. The trial court denied the motion, and the Ninth Circuit affirmed. The appellate court noted that the arbitration agreements require the arbitration of all claims that the individual employees and university had against each other. The court emphasized that the plaintiffs "seek financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries, including a determination as to the method

of calculating losses, removal of breaching fiduciaries, a full accounting of Plan losses, reformation of the Plans, and an order regarding appropriate future investments." For this reason, the court concluded that the claims were brought on behalf of the Plans themselves and not just to benefit the individuals' accounts. On this basis, the court held that "the claims asserted on behalf of the Plans in this case fall outside the scope of the arbitration clauses in individual Employees' general employment contracts." *Munro v. University of Southern California*, 896 F. 3d 1088 (9th Cir. 2018).

Retiree Benefits Dispute Not Arbitrable. The collective bargaining agreement ("CBA") here applied to employees whose definition did not include former employees. A Memorandum of Agreement ("MOA") between the union and the employer, which did not include an arbitration provision, provided that retiree benefits would remain the same while in contrast existing employees would migrate to a new health plan. The union brought an arbitration under the CBA on behalf of the retirees relating to their health benefits. The district court compelled arbitration but the Third Circuit overruled that decision, finding no agreement between the parties to arbitrate retiree disputes. The court noted that the CBA did not cover retirees in its ambit. The court also rejected the argument that the MOA implicitly incorporated the CBA's arbitration obligation where it referenced medical benefits available to existing employees. The court found that "this single mention is insufficient to incorporate the MOA on the subject of retiree healthcare into the CBA." The court further observed "if anything, the CBA suggests an intent not to incorporate the MOA, as language expressly incorporating other agreements can be found elsewhere in the CBA." Finally, the court rejected the argument that the presumption of arbitrability should apply because the MOA did not include an arbitration provision. "Here, the CBA indisputably has an arbitration clause . . ., but the MOA – the contract under which this dispute actually arises – does not. And where there is n o arbitration clause, the presumption does not apply." *Cup v. Ampco Pittsburgh Corp.*, 903 F.3d 58 (3d Cir. 2018).

Anti-Suit Injunction Granted. Courts have the authority to grant anti-suit injunctions enjoining a party from prosecuting a foreign lawsuit. To do so, a court must find that the parties are the same in both actions and the resolution of the case before the enjoining court would be dispositive of the action to be enjoined. In this case, three foreign lawsuits were filed against the same party, one in Romania, one in Spain, and one in Cyprus. The defendant in those actions argued that the other party was bound by an arbitration agreement. The court concluded that that was the case and issued an anti-suit injunction against the Cyprus action but not the other two proceedings. The distinction made by the court was that the Cyprus action included the precise same parties whereas the Romanian and Spanish proceedings did not. The court was mindful that anti-suit injunctions are to be used sparingly but found that in this case the Cyprus action entirely duplicated the domestic proceeding. Because the applicable agreement here committed all disputes to arbitration, the court concluded that an anti-suit injunction with respect to the Cyprus action was warranted. *WTA Tour v. Super Slam Ltd.*, 2018 WL 5077178 (S.D.N.Y.).

Non-Arbitrable Issues Stayed Pending Resolution of Arbitration. An action was brought by an insurance company, as subrogee for its insured, against a construction company, the contractor and subcontractor allegedly responsible for damages caused by a fire at the subrogee's restaurant. The federal court here granted the construction company's motion to compel arbitration but stayed the claims against the contractor and subcontractor. The court noted that there was no agreement binding the other parties to arbitrate their claims and found that there was significant factual and legal overlap with respect to the claims such that judicial efficiency would be better served if the arbitration was to be resolved before the court action proceeds. *Catlin Syndicate 2003 v. Traditional Air Conditioning, Inc.*, 2018 WL 3040375 (E.D.N.Y.).

II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Delegation to Arbitrator to Determine Class Arbitration Upheld. An arbitrator determined that the question whether class arbitration was authorized had been delegated to him and ruled in favor of class arbitration. The district court upheld the award and the Tenth Circuit affirmed. On the delegation question, the appellate court joined the Second Circuit in rejecting the rulings of the Third, Sixth, and Eighth Circuits requiring explicit authority for arbitrators to rule on the class arbitration determination. The court held that the "incorporation of the AAA rules provide clear and unmistakable evidence that the parties intended to delegate matters of arbitrability to the arbitrator." The Tenth Circuit agreed with the Second Circuit's reasoning that concerns about the distinction between bilateral and class arbitration are not applicable where the delegation to the arbitrator to decide whether the arbitration provision authorizes class arbitration is clear and unmistakable. *Dish Network v. Ray*, 900 F.3d 1240 (10th Cir. 2018). See also *Spirit Airlines v. Maizes*, 899 F.3d 1230 (11th Cir. 2018) (incorporation of AAA rules constitutes clear and unmistakable referral of arbitrability of class arbitration dispute to arbitrator); *Zacher v. Comcast Cable*, 2018 WL 3046955 (N.D. Ill.) (arbitrability issue delegated to arbitrator to decide where arbitration agreement broadly defines "disputes" subject to arbitration). But see *Jody James Farms v. Altman Group*, 547 S.W. 3d 624 (Tex. 2018) (AAA rules not sufficient to delegate arbitrability issue to arbitrator where one party is non-signatory as "an agreement silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability in such cases"). Cf. *O'Connor v. Uber Technologies*, 904 F.3d 1087 (9th Cir. 2018) (district court's class certification order reversed where arbitrability question was properly delegated to the arbitrator under the applicable arbitration agreements).

Implicit Waiver of Obligation to Arbitrate Before FINRA Rejected. Two circuit courts, the Second and Ninth Circuits, have ruled that forum selection clauses in broker-dealer agreements that require customers to bring "all actions and proceedings" in court supersedes the obligation to arbitrate claims before FINRA. The Fourth Circuit disagreed,

ruling that forum selection clauses in broker-dealer agreements are insufficient to waive a customer's right to arbitrate a claim before FINRA. The Third Circuit now joins the Fourth Circuit in compelling arbitration before FINRA despite the presence of a forum selection clause directing disputes to court. The Third Circuit noted that it was "reluctant to find an implied waiver" of the right to arbitrate based on "a binding, regulatory rule that has been adopted by FINRA and approved by the SEC." The court reasoned that by "condoning an implicit waiver of [the customer's] regulatory right to arbitrate, we would erode investors' ability to use an efficient and cost-effective means of resolving allegations of misconduct in the brokerage industry and thus undermine FINRA's ability to regulate, oversee, and remedy any such misconduct." In any event, the court ruled the forum selection clause here did not reference arbitration and therefore "lacks the specificity required to advise [the customer] that it was waving its affirmative right to arbitrate" under FINRA rules. *Reading Health System v. Bear Stearns & Co., Inc.*, 900 F.3d 87 (3d Cir. 2018). See also *Pictet Overseas Inc. v. Helvetia Trust*, 905 F.3d 1183 (11th Cir. 2018) (FINRA member cannot be required to arbitrate dispute which did not arise in connection with the member's business activities as an associated person).

Waiver Claim Rejected in Class Action Setting. Plaintiffs brought a race and national origin action on behalf of a class of employees, some of whom were bound by arbitration agreements with class action waivers. During the class certification process the employer notified the employees that it intended to move to compel arbitration for those bound by arbitration agreements. After the class was certified, the employer moved to compel arbitration for those who signed arbitration agreements, and the plaintiffs argued that the employer had waived its right to compel arbitration. The district court rejected the plaintiffs' argument and compelled arbitration. The court observed that granting the motion would reduce the size of the class but would not derail the class action. The court also was persuaded by the fact that plaintiffs would not suffer any prejudice as "all the parties' litigation actions would have had to occur in any event – plaintiffs knew of the arbitration agreements in drafting their motion for class certification in opposition to [the employer's] motion for summary judgment." On this basis, the court held that the employer did not waive its right to compel arbitration of claims brought by class members bound by arbitration agreements. *Buchanan v. Tata Consultancy Services*, 2018 WL 3537083 (N.D. Cal.). See also *Catlin Syndicate 2003 v. Traditional Air Conditioning, Inc.*, 2018 WL 3040375 (E.D.N.Y.) (finding no waiver of company's right to arbitrate when it failed to raise arbitration as a defense in its answer and affirmative defenses in court proceeding, particularly since there was no showing of prejudice); *Wang v. Precision Extrusion Inc.*, 2018 WL 3130589 (N.D.N.Y.) (employer did not waive right to arbitrate while dispute was pending before a human rights agency and in the subsequent court proceeding as agency would not have been bound by the parties' arbitration agreement); *Laver v. Credit Suisse Securities*, 2018 WL 3068109 (N.D. Cal.) (FINRA Rules do not preclude pre-dispute waiver of class and collective procedures).

Substantive Questions of Arbitrability To Be Determined by a Court Unless Parties Intended Otherwise. The Kentucky Court of Appeals vacated an arbitration award holding that the court, and not the arbitrator, should have decided whether arbitration was required. Plaintiff had initially filed a breach of contract claim but then moved to stay and compel arbitration, which was granted by the circuit court. Following an arbitration, the circuit court confirmed the award in favor of the plaintiff and defendant appealed. The contract at issue contained an arbitration provision but also provided that (1) plaintiff was required to designate an "Advisor," as defined in the agreement, within forty-five days of the agreement's execution; and (2) before arbitration is commenced, the dispute must be submitted to the Advisor. The plaintiff did not comply with these terms. At the circuit court level, the court determined that these were procedural questions of arbitrability because they created conditions precedent to either party invoking its right to arbitrate. The Kentucky Court of Appeals disagreed. Distinguishing between procedural and substantive questions of arbitrability, the court explained that substantive questions of arbitrability involve the underlying authority of the arbitrator and include issues concerning the validity of an arbitration agreement and the applicability of an arbitration clause to a particular dispute. On the other hand, procedural questions of arbitrability arise after the determination is made that an obligation to arbitrate exists and include issues such as statutes of limitation and notice requirements. The court concluded that unless the parties clearly intend in their agreement for an arbitrator to decide substantive questions of arbitrability, they must be decided by a court. Turning to the provisions at issue, the Court of Appeals found that they were preconditions to the validity of the arbitration clause and therefore involved substantive questions of arbitrability that had to be resolved by a court. The lower court's decision was therefore reversed, the arbitration award vacated, and the matter was remanded for further proceedings. *Ambac Assur. Corp. v. Knox Hills, LLC*, 2018 WL 2990839 (Ky. App.).

Determination Regarding Non-Signatory for Court Under California Law. Bruce Willis agreed to do a movie produced by Benaroya Pictures. The agreement between the parties included an arbitration clause. Willis moved before the arbitrator to add Michael Benaroya, a non-signatory, as a party on alter ego grounds. The arbitrator agreed and issued an award against both the individual and corporate respondents. The trial court confirmed the award, but a California appellate court reversed. The court ruled that under California law only a court and not an arbitrator can determine the rights and obligations of a non-party to an arbitration agreement. The court rejected the argument that incorporation of the JAMS Rules was sufficient to delegate the authority to rule on the non-signatory questions. The court concluded that the "wrong decision-maker decided the issue; the arbitrator exceeded his authority by purporting to compel appellant to arbitrate and making him liable for the award as Benaroya's alter ego. Therefore, the arbitration award must be set aside insofar as it binds appellant." *Benaroya v. Willis*, 23 Cal. App. 5th 462 (2018). See also

Denson v. Trump, 2018 WL 4352827 (N.Y. Sup. Ct.) (arbitrability question for court where arbitration provision invoked from one agreement clearly not applicable to current dispute).

Waiver Based on Extensive Involvement in Litigation. A California Court of Appeal upheld a trial court's denial of a former employee's motion to compel arbitration made three weeks prior to the trial date. The court held that the trial court's decision was proper where the former employee was actively involved in over three years of litigation, including discovery disputes, attacks on pleadings, and a removal to federal court, and therefore his lengthy delay in seeking arbitration was unreasonable, unjustified, and prejudiced the plaintiff. *Masimo Corp. v. Welch*, 2018 WL 3018964 (Cal. App.). See also *Hebei Hengbo New Materials Technology v. Apple*, 2018 WL 4635635 (N.D. Cal.) (waiver found where plaintiff filed an action in federal court claiming "there was no valid arbitration clause, along with other failures to compel arbitration in a timely manner" which demonstrated that defendant "acted inconsistently with the right to arbitrate"). Cf. *Caruso v. J & M Windows*, 2018 WL 4579691 (E.D. Pa.) (failure to seek arbitration during EEOC process did not constitute waiver of right to arbitrate where no prejudice shown); *Darden Restaurants v. Ostanne*, 2018 WL 4781528 (Fla. App.) (participation in EEOC proceeding did not constitute waiver of right to arbitrate claims).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Unconscionability Claim by a "Not Unsophisticated" Executive Rejected. Plaintiff, a successful executive at Facebook, was recruited and hired by Snapchat. As noted by the court, Snapchat "had to make an aggressive pitch to convince" plaintiff to join. Plaintiff was able to negotiate a $15,000 raise, but nonetheless argued that his agreement containing an arbitration clause was adhesive and that he was not given an opportunity to negotiate its terms. The executive worked for three "tension-filled weeks" after which he was terminated for allegedly disputing Snapchat's key metrics. The executive sued, and Snapchat moved to compel arbitration. The executive's unconscionability argument was rejected by the court. The court emphasized that the executive was not "unsophisticated" and negotiated a raise in salary and "as a matter of law, he cannot claim lack of knowledge of contract terms to which he agreed." The court concluded that under the circumstances of this case "any oppression or surprise is minimal and procedural unconscionability is present only to a limited degree due to the speed with which the agreement had to be signed after the terms were finalized." *Pompliano v. Snap Inc.*, 2018 WL 3198454 (C.D. Cal.). See also *Boves v. Aaron's Inc.*, 2018 WL 3656103 (S.D.N.Y.) (provision in arbitration agreement rendering arbitration confidential not unconscionable).

Delegation Provision Not Substantively Unconscionable. A terminated Ernst & Young manager disputed his obligation to arbitrate his dispute. In particular, he argued that the delegation clause sending gateway issues to the arbitrator was substantively unconscionable. Plaintiff argued that the arbitration process was an "inherently biased

forum" and that the AAA and JAMS did not "provide plaintiffs with the necessary information to make an informed decision regarding the selection of arbitrators." The court rejected these arguments, finding that plaintiff "has not demonstrated that the delegation clause in Defendant's arbitration program unreasonably or grossly favors Defendant." On this basis, the court referred the issues of arbitrability to the arbitrator to decide. *Eisenbach v. Ernst & Young U.S.*, LLP, 2018 WL 5016993 (E.D. Pa.).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Uber Online Arbitration Agreement Rejected. The First Circuit ruled that Uber's on-line rider registration platform failed to give registrants proper notice of its mandatory arbitration requirement. As a result, the court allowed a proposed class action accusing Uber of inflating its fees to proceed. Uber admitted that plaintiffs never actually saw or ever clicked on the terms of service; rather, it argued that "its online presentation was sufficiently conspicuous as to bind the plaintiffs whether or not they chose to click through the relevant terms." In determining whether the arbitration terms were reasonably conspicuous, the court noted that Uber "chose to rely on simply displaying a notice of deemed acquiescence and a link to the terms" rather than the "common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen." The court reasoned that the hyperlink must be "contextualized". Here the hyperlink was not as is typically the case, in blue ink and underlined, but rather was presented in a gray rectangular box with white bold text which raised concerns for the court "as to whether a reasonable user would have been aware that the gray rectangular box was actually a hyperlink." Generally, the court found the hyperlink to the relevant terms of service "not to be sufficiently conspicuous." As the court noted, "if everything on the screen is written with conspicuous features then nothing is conspicuous." In sum, the court concluded that the notice provided to registrants "simply did not have any distinguishable features that would set it apart from all the other terms surrounding it." *Cullinane v. Uber Technologies*, 893 F.3d 53 (1st Cir. 2018). See also *Ramos v. Uber Technologies*, 60 Misc. 3d 422 (N.Y. Sup. Ct. 2018) (motion to compel rejected where court found Uber registration process to be ambiguous because it "did not compel the registrant to see the subject terms and conditions and does not compel the registrant to indicate in some fashion its acceptance of the subject terms and conditions, such as, by clicking an acceptance button"). But see *Johnson v. Uber Technologies*, 2018 WL 4503938 (N.D. Ill.) (agreement to arbitrate found where "the Uber app contained a clear and conspicuous statement that, by creating an Uber account, a user agreed to the Terms of Service & Privacy Policy and prompted the user to click the hyperlink by displaying it prominently in an outlined box"). Cf. *National Federation of the Blind v. The Container Store*, 904 F.3d 70 (1st Cir. 2018) (motion to compel denied were no evidence provided that terms and conditions of loyalty enrollment program were not made accessible to sight-impaired customers); *Rushing v. Viacom,* 2018 WL

4998139 (N.D. Cal.) (notice of arbitration in on-line end user agreement lacking where relevant provision "became visible only when a user clicked on a hyperlink titled 'more', and that it was not necessary for a user to click on that 'more' hyperlink to 'get' the app").

Employee Bound by Arbitration Policy He Claims He Never Received. The Third Circuit upheld an order to compel arbitration, rejecting employee's argument that the arbitration agreement was invalid because he never received a copy of the actual arbitration policy. The employee's Human Resources file in fact contained only the signature page, and not the policy itself. The court nonetheless found that there was no genuine issue of material fact as to whether employee agreed to the arbitration policy where the employer had a long-standing onboarding practice which included providing a copy of the arbitration policy to all new employees, in addition to the facts that the employee signed an offer letter expressly referencing the arbitration policy and had access to the policy through the company's intranet. *Ace American Insurance Company v. Guerriero*, 738 F. App'x 72 (3rd Cir. 2018). See also *Boves v. Aaron's Inc.*, 2018 WL 3656103 (S.D.N.Y.) (plaintiff's electronic signature on arbitration agreement constitutes consent to arbitrate despite plaintiff's claim that he did not recollect signing document). Cf. *National Federation of the Blind v. The Container Store*, 904 F.3d 70 (1st Cir. 2018) (court to decide arbitrability issue where plaintiffs, who are blind, allege they could not have accepted the terms and conditions of the agreement, including the arbitration provision, where they were never communicated to them).

Receipt of E-mail Sufficient Notice of Arbitration Obligation. Morgan Stanley sent an e-mail transmitting its arbitration agreement to its senior vice president Schmell who received it but did not recall reviewing it. The record established that Schmell was at work the day the e-mail was sent and responded to emails both before and after the e-mail transmitting the arbitration program. From this the court concluded that Morgan Stanley could expect that Schmell also received the e-mail containing the arbitration agreement. The court concluded that because "the record establishes the indicia that Plaintiff had notice of the e-mail, he assented to the Agreement, and that Agreement may be enforced by compelling arbitration." *Schmell v. Morgan Stanley*, 2018 WL 4961469 (D.N.J.). See also *Friends for Health v. PayPal, Inc.*, 2018 WL 2933608 (N.D. Ill.) (non-supported denial of receipt of amended arbitration agreement insufficient to create triable issue of fact under mailbox rule presuming mail was received and read in the face of properly supported motion to compel).

Employee Not Bound If He Did Not Receive Arbitration Agreement. In an action for discrimination between Macy's and a former employee, the Second Circuit reversed a lower court decision denying a motion to compel arbitration. The question on appeal was whether the former employee entered into an arbitration agreement with Macy's governing the dispute. The lower court had determined there was no agreement to arbitrate because the company's form was vague, and it was never accepted. The Second Circuit disagreed with both conclusions, stating that it was satisfied that the employee was bound to arbitrate his dispute if he received the documents, failed to send back the form opting him out of

arbitration, and continuing to work for Macy's. However, noting that the lower court's factual findings are to be reviewed for clear error, the court recounted the employee's evidence establishing that, because of his learning disability which made it difficult to read and process information, he had a regular procedure with his family to review mail. The employee also provided sworn support that the arbitration documents did not arrive or go through this process. Concluding that the employee could not be bound by an agreement he never received, the court found that the employee's evidence was a sufficient rebuttal of New York's mailing presumption and created a disputed issue of material fact concerning whether he actually received the arbitration documents. Because that issue was never resolved, the matter was remanded to the district court for determination. *Weiss v. Macy's Retail Holdings, Inc.*, 2018 WL 3409143 (2d Cir.). See also *Boves v. Aaron's, Inc.*, 2018 WL 3656103 (S.D.N.Y.) (summary jury trial ordered to determine whether plaintiff signed the arbitration agreement in question).

Website Notice of Arbitration Binds Ticket Purchasers. Plaintiff navigated the Live Nation website to browse for tickets for concerts. To avoid paying a fee for ticket purchases online, plaintiff went to the box office and purchased concert tickets, only to be charged a lesser fee. He brought a putative class action claiming false advertising and Live Nation moved to compel arbitration. The district court granted the motion, finding that plaintiff had reasonable notice of the Terms of Use and of the arbitration provision. The court noted that plaintiff, by using the website, "would have clicked on multiple Live Nation web pages, including the home page and interior pages which contained the reasonably conspicuous hyperlinked Terms of Use and notices advising users that by continuing past that page, they agree to abide by the Terms of Use." The court found the notice to be sufficient whether or not plaintiff actually purchased the tickets online. The Terms of Use made clear, in the court's view, that it applied to "use" of the web site, and not merely purchases of tickets on line. As the "current dispute and claims for false advertising and deceptive practices relate to the [plaintiff's] use of Live Nation's web site and to his use of the web site in connection with his box-office purchase of tickets", therefore, plaintiff was bound to arbitrate his dispute. *Himber v. Live Nation Worldwide*, 2018 WL 2304770 (E.D.N.Y.).

Dispute Falls Outside Scope of Arbitration Provision. A driver for both Uber and Lyft brought a putative class action against Uber on behalf of Lyft drivers, alleging that he and other Lyft drivers suffered economic damages as a result of Uber's practice of directing its drivers to create and use fake Lyft accounts. A California appellate court denied Uber's motion to compel arbitration, which was premised on the driver's arbitration agreement with Uber, and the appellate court affirmed. The court held that even though the parties' arbitration provision included a delegation clause, delegating authority to an arbitrator to determine applicability and enforceability, the court properly denied the motion because Uber's arguments were "wholly groundless." The driver's claims had nothing to do with his relationship with Uber since they were brought in his capacity as a Lyft driver. *Smythe v. Uber Technologies, Inc.*, 24 Cal. App.5th 327 (2018).

User's Consent Lacking for eBay's Later-Amended Arbitration Policy. A user who accepted eBay's terms and conditions in 1999 could not be compelled to arbitrate his claims against the company where proof that he received notice of the updated terms and conditions, which included an arbitration provision, was lacking. When the user joined eBay in 1999, the User Agreement he agreed to did not contain an arbitration provision but gave eBay the right to change the terms at any time by posting the amended the terms on its site. In 2012 and 2015, eBay amended its terms to include an arbitration provision. According to the district court, a party may consent to a later-added arbitration clause if the party: (1) is notified about the arbitration clause; and (2) assents by way of continued use of the product or service. Focusing on eBay's efforts to provide notice of the amended terms, the court held that mere publication of the terms on its site was insufficient and that eBay's evidence of a "form email" purportedly sent to all users did not establish that any efforts were made to notify the user at issue. Explaining that eBay was not required to prove the user received actual notice, but rather was required to show it undertook specific efforts to provide notice to the user at issue on a certain date, the court concluded that eBay's efforts were not sufficient and there was no mutual assent to arbitrate disputes. *Daniel v. eBay, Inc.*, 319 F. Supp. 3d 505 (D.D.C. 2018). See also *Kiraly v. Forcepoint, Inc.*, 2018 WL 4701678 (N.J. App.) (arbitration agreements ruled unenforceable under New Jersey law where it did not inform employee that her right to pursue claims in court was being waived).

Arbitration Cannot be Based on Rescinded Agreement. Plaintiff purchased a used car and signed a sales agreement with an arbitration clause. As part of the deal, plaintiff traded in her car and made the down payment. The transaction was conditioned on financing being approved. The financing was not approved, and plaintiff returned the car and received her old car in return, but the car dealer kept the down payment. Plaintiff sued on a class basis alleging, among other things, consumer fraud. The car dealer moved to compel arbitration. The New Jersey Appellate Division denied the motion, finding that by rescinding the sales agreement the parties also rescinded the agreement to arbitrate. The court concluded that "there can be no doubt that the arbitration provisions were discarded in the process just as the promise to pay for the vehicle or the promise to allow the plaintiffs to retain the vehicles upon a commitment to pay the purchase price were also discarded." *Goffe v. Foulke Management Corp.*, 454 N.J. Super. 260 (App. Div. 2018).

Mutuality Not Required Where Sufficient Consideration Present. The agreement at issue expressly allowed the employer to seek injunctive remedies in court pending arbitration but did not provide the same right to the employee. The Kentucky Court of Appeals found that the lack of mutuality in the respective remedial rights available to the parties under an agreement does not invalidate the agreement and the "question is not whether the obligations and benefits of the contract are equally disbursed between the parties; . . . [it] is whether the consideration is *adequate* to support the agreement." Reviewing the terms of the agreement at issue, the court held that adequate consideration existed, finding that "each party received, and committed itself to provide, adequate

consideration to validate the agreement, even if each party received different consideration." Nevertheless, the court further found that since parties to an arbitration agreement may seek pre-arbitration injunctive relief in the absence of affirmative language expressly limiting that right, the provision granting that right to the employer did nothing to strip away the employee's right to do the same. Therefore, the agreement did not lack mutuality on that point. *Grimes v. GHSW Enterprises, LLC*, 2018 WL 4628160 (Ky.).

Arbitration Agreement in Separate Document Not Enforceable. The automobile loan agreement in this case consisted of two documents, the loan agreement itself which contained an arbitration provision, and a "text consent" provision which did not. Plaintiff signed the first document but refused to sign the second. Plaintiff received a number of unauthorized texts and sued the automobile loan company alleging violations of the Telephone Consumer Protection Act. The loan company moved to compel arbitration. The district court denied the motion and the Eleventh Circuit affirmed. The appellate court noted the rights asserted here were statutory and not based on the loan agreement. The court acknowledged that the arbitration provision in the loan agreement was broad, but not limitless, and the claims here did not derive from the terms of the loan agreement. The court concluded that the loan company "cannot avoid the strictures of the TCPA, and force arbitration of its alleged TCPA violations, by placing the request for consent to receive text messages in the same document as, but after and apart from, a separate and independent contract, and then, after it failed to get the individual's consent, claim that the consent request was actually part of that contract." *Gamble v. New England Auto Finance*, 735 F. App'x 664 (11th Cir. 2018). See also *Cavlovic v. JC Penney Corp.*, 884 F. 3d 1051 (10th Cir.) (department store could not invoke arbitration provision in credit card agreement and rewards program documentation for fraudulent and deceptive practices unrelated to the credit card and rewards program); *Denson v. Trump*, 2018 WL 4352827 (N.Y. Sup. Ct.) (motion to compel denied where discrimination and harassment claim brought by Trump campaign worker did not apply to non-disclosure agreement containing arbitration clause).

Arbitration Provision in At-Will Contract Not Illusory. The at-will employment agreement here included an arbitration provision. Plaintiff was terminated, and she sued for sexual harassment and defamation. The trial court denied the employer's motion to compel, finding that the arbitration obligation was illusory. The Texas appellate court reversed. The court rejected the argument that because the employment agreement was terminable at-will the arbitration provision is therefore illusory. The court emphasized that the agreement did not give the employer the right to unilaterally modify the agreement or to terminate the arbitration obligation without terminating the agreement. The court was also persuaded by the fact that the obligation to arbitrate, of necessity, survived the termination of the agreement. Because the employer "did not have the right to end the arbitration policy's applicability to claims raised on [the employee's] termination, either through unilateral modification or termination of the employment agreement, the arbitration agreement was not illusory as applied to [the employee]." For these reasons, the

appellate court reversed the trial court and granted defendant's motion to compel. *CBRE, Inc. v. Turner*, 2018 WL 5118648 (Tex. App.).

Non-Signatory Insurance Agency Not Bound to Arbitrate. The agreement between the insured and the insurance company provided for the arbitration of disputes. The insured sued the insurance agency through which the insurance coverage was obtained for deceptive practices. The agency moved to compel based on the arbitration provision in the insurance agreement to which the agency was not a party. The Texas Supreme Court ruled that the insured could not be compelled to arbitrate the dispute with the non-signatory agency. In doing so, the Court rejected the agency's third-party beneficiary and estoppel theories. For example, the estoppel claim was rejected because plaintiff's claim was independent of the insurance agreement and raised statutory and non-contractual obligations. The Court also rejected an estoppel argument based on an "intertwined claims" argument. The Court acknowledged that the insurance agency and insurance company have "an entangled business relationship" but are nonetheless "independent and distinct entities." The Court concluded that a "reasonable consumer would not anticipate being forced to litigate complaints against an independent insurance agent in the same manner they agreed to litigate disputes with the insurer." *Jody James Farms v. Altman Group,* 547 S.W. 3d 624 (Tex. 2018). See also *Stephan v. Millennium Nursing and Rehab Center*, 2018 WL 4846501 (Ala.) (arbitration provision in nursing home agreement signed by daughter who lacked power of attorney to act on behalf of her mother ruled unenforceable where mother suffered from dementia); *Lesico Initiation and Civil Engineering v. Travelers Casualty and Surety Co.*, (D. Conn. June 13, 2018) (non-signatory surety may not compel parties to the agreement containing an arbitration provision to arbitrate the dispute). But see *WTA Tour v. Super Slam Ltd.*, 2018 WL 5077178 (S.D.N.Y.) (non-signatory owner of business who signed agreement containing arbitration provision cannot avoid obligation to arbitrate where he gained direct "reputational, operational, and financial benefits" from the agreement).

Non-Signatory Not Bound by Arbitration Agreement. The Supreme Court of Mississippi upheld a circuit court order denying a motion to compel arbitration in an action for emotional distress brought against a contractor by the adult daughter of the parties who contracted his services. Stating that a signatory may enforce an arbitration agreement against a non-signatory if the non-signatory is a third-party beneficiary or if the doctrine of equitable estoppel applies, the Mississippi Supreme Court found neither exception applied here. First, the Court found that the contract terms were not broad enough to include the daughter as a third-party beneficiary and that her residence in the home only made her an incidental beneficiary, and not a direct beneficiary of the contract. Next, the court found that the daughter's action was not based on the contract terms and did not seek contract damages therefore making equitable estoppel inapplicable. *Olshan Foundation Repair Co. of Jackson, LLC v. Moore*, 251 So. 3d 725 (Miss. 2018).

Arbitration Agreement Does Not Apply to Non-Signatory Employer. The Fourth Circuit upheld a district court's ruling that no valid arbitration agreement existed between an employee and his employer where the agreement was signed by the employer's parent company. The court rejected the employer's argument that the reference to the parent company was a clerical error and pointed to textual evidence in the agreement itself supporting its conclusion that it was indeed the parent company who was intended to be bound, including the venue and choice of law provisions, which designated Florida, where the parent operates and not South Carolina, where the employer does. *Weckesser v. Knight Enterprises S.E., LLC*, 735 F. App'x 816 (4th Cir. 2018).

Arbitration Ordered Based on Actual Allegations Rather Than Their Characterization. The arbitration provision here was broad, covering any dispute "arising from or relating to the credit offered" in a financing agreement. A class action was brought alleging various usury law violations and deceptive practices. Plaintiffs sought to escape the reach of the broad arbitration provision by arguing, contrary to their allegations in the complaint, that their claims would exist even apart from the financing covered by the underlying agreement. The court rejected plaintiffs' contention, finding that the "*actual* allegations – regardless of how the plaintiffs now attempt to characterize them" directly involve the financing at issue. As it could not be said with positive assurance that the arbitration clause here was not susceptible to an interpretation covering the dispute, arbitration of plaintiffs' claims was compelled. *Parm v. Bluestem Brands, Inc.*, 898 F. 3d 869 (8th Cir.). See also *Tecnimont v. Holtec Int'l*, 2018 WL 3854797 (D.N.J.) (defamation and tortious interference claims subject to arbitration in London under broad clause requiring arbitration of disputes "arising from or connected with" the purchase of steam condensers); *Fox Bend Development v. Ennis*, 2018 WL 4003311 (N.D. Tex.) (arbitration clause in shareholder agreement covering disputes "in connection therewith" is broad and includes fraudulent inducement claim); *Denson v. Donald J. Trump for President*, 2018 WL 4352827 (N.Y. Sup. Ct.) (arbitration compelled under arbitration provision in non-disclosure agreement signed by worker in Trump's 2016 presidential campaign).

Arbitration Prohibited When Contract Violates Public Policy. A law firm was disqualified for failing to provide notice of a conflict in violation of the Rules of Professional Conduct. The law firm sought the fees it incurred in an arbitration as provided for in its engagement letter with the client and was awarded $1.3 million. On appeal, the California Supreme Court upheld the vacatur of the award. The Court found that the engagement letter which contained the arbitration provision was invalid and unenforceable because it violated public policy, namely, was not compliant with the Rules of Professional Conduct. The Court explained that "California cases have made clear that the legislative policy favoring contractual arbitration, and the finality of arbitral awards, applies only when there is, in fact, a valid contract to arbitrate." Here, the Court concluded that the agreement itself was illegal and, therefore, the contract provision contained within that agreement was unenforceable as well. *Sheppard, Mullin, Richter & Hampton v. J-M Manufacturing Co.*, 6 Cal. 5th 425 (Cal.

2018). See also *Gentry v. Robert Half Int'l, Inc.,* 2018 WL 3853775 (Cal. Ct. App.), reh'g denied (Sept. 10, 2018), review denied (Oct. 31, 2018) (non-severability clause applicable to claims covered by arbitration provision mandates denial of motion to compel arbitration which includes a California PAGA claim which is not arbitrable).

New York Convention Requires Signed Arbitration Agreement. The Eleventh Circuit ruled that an arbitration agreement must be in writing to be enforceable under the New York Convention. GE Energy sought to arbitrate a dispute it had with a steel mill owner based on an arbitration clause in a contract that the mill owner entered into with a supplier of motors. Subcontractors were expressly made parties to that agreement. GE Energy was a subcontractor to the contractor that made the motors and invoked the arbitration clause in an effort to arbitrate its dispute with the steel mill. The district court granted GE Energy's motion to compel, but the Eleventh Circuit reversed, finding that GE Energy "is undeniably not a signatory" to the applicable agreement. The court based this on its holding that the New York convention requires that arbitration agreements be signed by the parties. The court also rejected GE Energy's estoppel and third-party beneficiary theories. In doing so, the court noted that GE Energy did not become a subcontractor until after the agreement between the mill and the motor manufacturer had been signed, undercutting any notion that the motor manufacturer was acting as GE Energy's agent. *Outokumpu Stainless USA v. Converteam SAS*, 2018 WL 4122807 (11th Cir.).

Arbitration Provision with Conflicting English and Spanish Translations Ruled Unenforceable. The employee handbook here was translated from English to Spanish. The English version provided that claims under California's PAGA law were arbitrable but if ruled unenforceable that provision would survive, and the offensive provision would be severed. The Spanish version did not allow for severing of the PAGA provision. A Spanish-speaking employee, who signed both versions, brought a wage and hour claim as a representative action under PAGA. The employer moved to compel, and the trial court denied the motion which was affirmed on appeal. In doing so, the court held that the trial court's finding that the PAGA waiver violated California public policy under prevailing California jurisprudence. The appellate court also upheld the trial court's refusal to sever the offensive provision, focusing on the inconsistent translations of the relevant provision. "At best, the difference in the severability clauses in the English-language and Spanish-language versions of the handbook is negligent; at worse it is deceptive. Under the circumstances, we construe the ambiguous language against the interest of the party that drafted it." *Juarez v. Wash Depot Holdings*, 24 Cal. App. 5th 1197 (Cal. App. 2018). See also *D.M. v. Same Day Delivery Service*, 2018 WL 4011660 (N.J. App.) (arbitration compelled despite presence of several "poorly drafted" sentences where remainder of the agreement was clear and unambiguously mandated arbitration of employment disputes).

V. CHALLENGES TO ARBITRATOR OR FORUM

Less Stringent Evident Partiality Standard Applied to Party-Appointed Arbitrators. The Second Circuit ruled that a party-appointed arbitrator is not held to the same standards of disclosure as are applied to neutral arbitrators. The reinsurance agreement here provided that each party would appoint an arbitrator who was to be "disinterested", and that the two party-appointed arbitrators would select an umpire. One party-appointed arbitrator failed to disclose significant prior and current contacts with the party that selected him. Following issuance of the award, the losing party moved to vacate the award on the ground that the party-appointed arbitrator's failure to disclose constituted evident partiality. The Second Circuit acknowledged that the arbitrator appeared to have violated existing ethical codes for arbitrators, but that was not enough to establish evident partiality in the case of a party-appointed arbitrator. The court noted that the party-appointed arbitrators serve "as de facto advocates" for the party that selected them. "The ethos of neutrality that informs the selection of a neutral arbitrator to a tripartite panel does not animate the selection and qualification of arbitrators appointed by the parties." The court emphasized that in the reinsurance industry "an arbitrator's professional acuity is valued over stringent impartiality." From this the court reasoned that "Expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution." Nonetheless, the Second Circuit found that the undisclosed relationship of a party-appointed arbitrator could constitute grounds for vacatur where they violated the terms of the arbitration agreement or where "the party-appointed arbitrator's partiality had a prejudicial effect on the award." The court concluded that in "the absence of a clear showing that an undisclosed relationship (or the non-disclosure itself) influenced the arbitral proceedings or infected an otherwise-valid award, that award should not be set aside even if a reasonable person (or court) could speculate or infer bias." *Certain Underwriting Members of Lloyd's of London v. State of Florida*, 892 F.3d 501 (2d Cir. 2018).

Award Vacated Based on the Arbitrator's Failure to Comply with California Ethics Standard. California imposes strict standards on arbitrators including a non-waivable obligation to disclose any pending or new appointments involving a party or that party's lawyers. The arbitrator here, a retired judge, accepted eight additional arbitrations in which respondent's counsel was involved and two cases in which respondent was a party. The parties to this arbitration only received notice of four of the matters with respondent's counsel. The trial court confirmed the award, but the California appellate court reversed. The court found, and the parties did not disagree, that the arbitrator failed to comply with the ethical standards requiring disclosure of offers to serve as arbitrator or mediator in another case involving the same parties or counsel. The court concluded that the "pending arbitrations were grounds for disqualification of the arbitrator" because they were matters that were required to be disclosed and for this reason vacated the award. The court acknowledged that the arbitrator disclosure rules "are strict and unforgiving" but found that

to be "for good reason. Although dispute resolution provider organizations may be in the business of justice, they are still in business. The public deserves and needs to know that the system of private justice that has taken over large portions of California law produces fair and just results from neutral decision makers." *Honeycutt v. JP Morgan Chase Bank*, 25 Cal. App. 5th 909 (2018).

Failure to Disclose Service as a Mediator Not Grounds for Vacatur. A FINRA arbitrator disclosed that he was currently serving in two cases and had eight times in the past served as arbitrator in matters in which the respondent was a party. He failed to disclose that he had also once served as a mediator in a case with respondent. A motion to vacate on evident partiality grounds was denied and the Eighth Circuit affirmed. The court observed that plaintiff did not explain how the failure to disclose "creates even an impression of possible bias." The court noted that plaintiff had the burden of proving evident partiality and did not ask the trial court for discovery on this question. The court added that it saw nothing in the arbitrator's "undisclosed mediation of a years-old, unrelated case that could create an appearance of bias" and the fact that the arbitrator had earned $1,375 from his prior service as a mediator did not indicate that he "might have been biased" in this case. The court concluded that since the arbitrator "timely disclosed the ten other cases he arbitrated where a member of the [party and related entities] was a party, his undisclosed mediation… represented at most a trivial and inconsequential addition to that relationship." *Ploetz v. Morgan Stanley,* 894 F.3d 894 (8th Cir. 2018).

VI. CLASS & COLLECTIVE ACTIONS

Supreme Court to Decide Specificity of Language Required for Class Arbitration to Be Ordered. The Supreme Court has agreed to decide and has heard oral argument on the question of "whether the Federal Arbitration Act forecloses a state law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements." Employees at Lamps Plus were required to sign an arbitration agreement waiving the right to bring claims in court. A class arbitration was filed against Lamps Plus after employees' personal information was publicly disclosed, and Lamps Plus moved to compel bilateral arbitration. The district court refused to order bilateral arbitration and the Ninth Circuit affirmed. The court found that the terms of the arbitration agreement were ambiguous and construed it against the drafter, Lamps Plus. The arbitration provision sought to preclude court actions and required arbitration "in lieu of any and all lawsuits or other civil proceedings relating to my employment." The Ninth Circuit reasoned that "[c]lass actions are certainly one of the means to resolve employment disputes in court" and that the provision "can be a reasonably read to allow for class arbitration." The court also pointed out that "claims against the company include those that could be brought as part of a class." The court also noted that the agreement authorized the arbitrator to award any remedy allowed by law and those "remedies include

class-wide relief." The court affirmed the district court's conclusion that any ambiguity is to be construed against the drafter and authorized class arbitration of this dispute. *Varela v. Lamps Plus, Inc.,* 701 F. App'x 670 (9th Cir. 2017), cert. granted, 138 S. Ct. 1697 (2018).

Class Arbitration is Ruled Gateway Question for Court to Decide. Plaintiffs sought to proceed as a class in arbitration. The defendant moved to compel individual arbitration. The questions posed for the Eleventh Circuit was who decides whether a court or an arbitrator presumptively rules on the question of class arbitration and, if the court, whether the agreement between the parties clearly and unmistakably referred the question to the arbitrator to resolve. As to the first question, the court ruled that "the availability of class arbitration was a substantive 'question of arbitrability,' presumptively for the court to decide." The court recognized that the availability of class arbitration is a threshold question both "formally and functionally." Formally, because it is a gateway through which potentially thousands of absent class members may pass and functionally because generally the individual claims are of small value and class proceedings remove "the economic barrier blocking the 'gateway' to arbitration for many plaintiffs." The court acknowledged that the difference between class and bilateral arbitration is substantial and, on this basis, ruled that "we leave the question of class availability presumptively with the court because we do not want to force parties to arbitrate so serious a question in the absence of a clear and unmistakable indication that they wanted to do so." But in this case, the court found that while the question of class arbitrability was presumptively for the court, the parties here clearly and unmistakably referred this question to the arbitrator to decide. In doing so, the Eleventh Circuit noted that the parties incorporated the AAA rules which leave to the arbitrator the authority to rule on his or her jurisdiction and on the broad language of the arbitration agreement itself. The court concluded that "the language cries out with express intent and emphasizes that a broad reading of the foregoing express delegation clause is warranted and is, in fact, what the parties intended when they contracted." *JPAY, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018). See also *Herrington v. Waterstone Mortgage, Corp.,* 2018 WL 5116905 (7th Cir.) (the "availability of class or collective arbitration involves a foundational question of arbitrability: whether the potential parties to the arbitration agreed to arbitrate").

Arbitrator's Class Arbitration Ruling Upheld. Wells Fargo mandated that employment disputes go to arbitration. An arbitrator was asked to determine under the AAA's class arbitration rules whether class arbitration was authorized under Wells Fargo's policy. The arbitrator, in her clause construction award, ruled that the matter should proceed as a class arbitration. Wells Fargo sought to vacate the award. The district court denied the motion, noting that "Wells Fargo appears to want it both ways: it wants to limit its employees to an arbitral forum, but then wants to be able to get a court to intervene when it disagrees with the outcome of the arbitration." The court rejected Wells Fargo's argument that the use of singular pronouns precluded class arbitration, noting that the Second Circuit has rejected that argument in an earlier stage of this dispute. The court also rejected Wells Fargo's

contention that the arbitrator, by going beyond the four corners of the agreement and considering extrinsic evidence, violated Missouri law. The court disagreed but noted that in any event a legal error was not a basis to overturn an arbitration award "in all, the Court has no trouble concluding that the basis of the clause construction award is at least colorable. In assessing whether the Arbitrator exceeded his authority, the Court does not focus on whether he correctly decided the issue but must simply determine whether the Arbitrator considered issues beyond those submitted for his consideration or reached issues clearly prohibited by law or the terms of the Agreements." As that was not the case here, the court denied the motion. The court added that "the law in this area is in flux, but more importantly, as with review of any contract, courts' determinations on the availability of class arbitration are tethered to the idiosyncratic terms of the relevant agreements, rather than pure legal doctrine." *Wells Fargo Advisors v. Sappington*, 328 F. Supp.3d 37 (S.D.N.Y. 2018).

Employer Not Barred by Pending Class Action from Issuing Arbitration Agreement to New Employees. The hospital here had a policy of mandating arbitration disputes prior to the filing of a wage and hour class and collective action. The hospital continued that policy and the plaintiffs moved for sanctions, alleging that to seek arbitration of disputes after the filing of the class and collective action deprived the putative class members of important rights and subverted the court's authority. The court rejected plaintiffs' motion. The court found no basis for requiring the hospital to inform new employees of the pending lawsuit when providing the arbitration agreement for signature. "It is not inherently abusive for Defendants to continue their preexisting policy of requiring new hires to sign arbitration agreements as a condition of employment." The court also rejected the claim that the agreement somehow misled the new employees. The court found that the "agreement here is not internally inconsistent, did not reference this litigation, does not contain self-effectuating language, and does not contain sufficiently complex, lengthy, or small-type language to make the communication misleading or abusive." The court concluded that the hospital's continuation of its pre-existing practice of distributing arbitration agreements to new employees was neither unauthorized or misleading. *Gauzza v. Prospect Medical Holdings*, 2018 WL 4853294 (E.D. Pa.).

VII. HEARING-RELATED ISSUES

Arbitrator's Summary Judgment Order Under MPPAA Upheld. An arbitrator granted summary judgment in a Multiemployer Pension Plan Amendment Act case. The losing party argued that a hearing on the merits was required under the MPPAA rules. A California district court rejected this argument and confirmed the award. The court reasoned that the arbitrator was required only to provide a "fair and equitable" process and was not required to provide an oral hearing. The court observed that in "cases involving similar sets of arbitration rules, nearly every court to consider the question has held" that arbitrators have the authority to grant summary judgment unless the applicable rules or the party's

agreement provide otherwise. The court stated that the arbitrator followed federal procedural rules and found there to be no genuine issues of material fact and, therefore, could not have denied the parties' right to present their arguments to a fact-finder where the facts were not disputed. The court concluded that plaintiffs had "not offered the Court any evidence that they were not afforded a full and equal opportunity to present any material or relevant proof through the summary judgment proceeding." *South City Motors v. Automotive Industries Pension Trust Fund*, 2018 WL 2387854 (N.D. Cal.).

Discovery Subpoena Commissioned by California Court Enforceable in New York. A party in a California arbitration requested permission from the tribunal to seek a commission from a California court to take the deposition of a non-party witness in New York. The court commission was issued, and the proposed deponent moved to quash the subpoena, arguing that "the California court did not have the authority to issue a commission to take an out-of-state deposition on which the subpoena at issue was based." The New York court rejected this argument and enforced the subpoena. The court noted that New York CPLR §3119 provides a way to enforce out of state subpoenas "issued under authority of a court of record requiring a person to . . . attend and give testimony at a deposition." The court concluded that a "commission issued by a clerk of the California Superior Court to take an out of state deposition falls within the statute's definition of an out-of-state subpoena issued under authority of a court of record of a state other than New York." The court rejected the claim that CPLR §3119 did not apply to arbitrations as the subpoena here was issued on "a commission obtained from a court of record based on the arbitrator's authorization to seek such a commission." *Roche Molecular Systems v. Gutry*, 60 Misc. 3d 222 (N.Y. Sup. Ct. Westch. Cty. 2018).

VIII. CHALLENGES TO AWARD

Arbitrator Exceeded Authority by Reforming Agreement. The parties agreed to three future contingent payments after a designated threshold of revenues. A dispute arose over the first contingent payment. An arbitrator ruled that there was mutual mistake made by the parties and reformed the agreement between them. In particular, the arbitrator revised the threshold figure for the vesting of the contingent payments. On appeal, the Fifth Circuit ruled that the arbitrator exceeded his authority by reforming the agreement based on a finding of mutual mistake. The court noted that the arbitrator's jurisdiction was limited to the review of the revenue calculation relating to the first contingency payment and did not relate to the agreed upon threshold amount. "Unlike the revenue calculation, which as a future event was one the parties anticipated might be disputed, the threshold amount is an exact figure defined earlier in the agreement and thus not contemplated for reexamination." Put another way, the "engagement letter asked the arbitrator to decide not what the threshold amount should be, but whether it 'has been met'." Moreover, the finding of mutual mistake would impact the second and third contingent payments which was not

before the arbitrator. The court concluded that there was "no shared interest of the parties to allow an arbitrator to make the reformation decision" and ruled that the mutual mistake issue was for the court and not the arbitrator to decide. *Hebbronville Lone Star Rentals v. Sun Belt Rentals*, 898 F. 3d 629 (5th Cir. 2018). Cf. *Beumer Corp. v. Proenergy Services*, 899 F.3d 564 (8th Cir. 2018) (arbitrator did not exceed his authority by excluding from a cap on liability attorneys' fees as under applicable law it did not matter "whether the arbitrator was right or wrong" as this was "really beside the point").

Partial Vacatur Improvidently Granted. A New York State trial judge partially vacated an arbitration award with damages of over $100,000,000 on manifest disregard grounds. The trial court reasoned that the arbitration panel was guilty of, among other things, "an egregious dereliction of duty" based on its finding of a waiver and for refusing to consider certain evidence. The appellate court reversed, finding no basis to conclude that the "arbitrators knew of the applicable law and nonetheless willfully refused to apply it." The appellate court emphasized that it was not appropriate for a court to base its determination on "whether or not we agree with it on the merits." This is particularly so, the court opined, where, as here, the legal question at issue was not well-defined. The court also rejected as a basis for vacatur disagreement with an arbitration panel's dismissal of a claim on procedural grounds, finding that "even if such a disposition would have constituted error reversible on appeal in a judicial proceeding – does not mean that the arbitral tribunal exceeded or imperfectly executed its powers, nor does it mean that the resulting award falls short of being a mutual, final, and definite award upon that claim or defense." The court added "a court is not empowered by the FAA to review the arbitrators' procedural findings, any more than it is empowered to review the arbitrators' determinations of law or fact." For these reasons, the appellate court reversed and granted the motion to confirm the award. *Daesang Corp. v. NutraSweet Company*, 2018 WL 4623562 (N.Y. App. 1st Dep't).

Defaulting Party's Vacatur Motion Denied. Deacero Power brought arbitration claims against Dixie Equipment. The parties selected an arbitration provider, agreed arbitration would be conducted under the rules of the International Centre for Dispute Resolution, and agreed on a scheduling order and hearing date. Dixie then announced it could not pay the requisite arbitration fees or defend itself and that its counsel would only play a limited observer's role. Counsel for Dixie attended the first morning of the hearing and did not return. The panel awarded Deacero over $16,000,000 in damages and the award was confirmed. On appeal, Dixie argued that the panel was guilty of misconduct for, among other reasons, not requiring a transcript of the hearing. The Texas appellate court rejected Dixie's argument. The court relied on precedent finding that in the absence of a transcript it is presumed that no misconduct occurred. The appellate court also rejected the claim that Dixie's due process rights were violated because of its lack of financial resources, noting that it failed to provide any proof of its inability to pay. The court also ruled that under applicable ICDR Rules Dixie's counterclaims were properly deemed withdrawn due to the

failure to pay the requisite fees. For these reasons, the court confirmed the award. *Dixie Equipment v. Energia De Ramos*, 2018 WL 3748896 (Tex. App.).

Punitive Damages Prohibition Violates Public Policy. The arbitration provision here barred the award of punitive damages. Plaintiff sued under New Jersey's Law Against Discrimination ("LAD") alleging sexual harassment. The employer moved to compel arbitration, and the trial court granted the motion. The ruling was affirmed on appeal, but the New Jersey appellate court ruled that the bar on punitive damages violated New Jersey public policy and was unenforceable. The court reasoned that a contractual provision that eliminates the award of punitive damages "eviscerates an essential element of the LAD's purpose – deterrence and punishment of the most egregious discriminatory conduct by employees who, by virtue of their position and responsibilities, . . . control employer policies and actions that should prevent discriminatory conduct in the workplace." The court found, however, that the offensive provision barring punitive damages could be severed from the otherwise valid arbitration agreement and upheld the employer's right to enforce the arbitration agreement as modified. *Roman v. Bergen Logistics*, 456 N.J. Super. 157 (App Div. 2018.).

IX. ADR – GENERAL

Summary Judgment Granted on Motion to Compel. Plaintiff's employment agreement included a dispute resolution procedure requiring arbitration. Plaintiff sued for age discrimination, and the employer moved to compel arbitration. The court initially found the question of whether an obligation to arbitrate the claim applies was unclear and authorized limited discovery on the question of arbitrability. Following completion of discovery, the court ruled, applying summary judgment standards, that plaintiff's claim was subject to arbitration. The court noted that in making such a determination a court must also make "credibility determinations or weigh the evidence." Here, the court found that plaintiff signed the employment agreement with the arbitration clause and that his age discrimination claim fell within the scope of the arbitration clause. The court concluded that the "arbitration agreement is a valid, enforceable contract requiring [plaintiff] to arbitrate the claim set forth in his Complaint." *Schwartz v. The Ritz-Carlton Hotel Co.*, 2018 WL 3661447 (E.D. Pa.).

Sanctions Ordered Based on Fitbit's and Counsels' Bad Faith Tactics. Fitbit succeeded in compelling arbitration of a consumer class action, and then failed to pay arbitration fees in a timely manner. Once this was brought to the court's attention, Fitbit paid the overdue arbitration fees. According to the court, "Fitbit's conduct has multiplied the proceedings in this case for no good reason and at the expense of plaintiffs' and the Court's." The court declined to find that Fitbit waived its right to arbitrate but ruled that sanctions were warranted, finding that "Fitbit delayed and impeded the arbitration on frivolous grounds, and was evasive and misleading after the matter was brought to the Court's attention." The

court observed that Fitbit's actions "also bolstered the perception that arbitration is where consumer lawsuits go to die." The court awarded plaintiffs reimbursement of their fees and costs incurred due to Fitbit's misconduct. And to ensure this did not happen again in other lawsuits, the court ordered Fitbit for one year "to file a copy of this decision in all cases where it seeks to compel arbitration under its Terms of Service with consumers." *McLellan v. Fitbit*, Inc., 2018 WL 3549042 (N.D. Cal.). See also *Purus Plastics GMBH v. Eco-Terr Distributing*, 2018 WL 3064817 (W.D. Wash.) (court rejects claim of bad faith sufficient to require payment of attorneys' fees where losing party contested merits of foreign arbitration award for three years in court "indicating that it did not simply choose to disregard" the award).

ICDR Entitled to Arbitral Immunity. An arbitration was filed with the International Centre for Dispute Resolution. The respondent immediately challenged the jurisdiction of the ICDR to administer the dispute, and instead argued that the dispute was properly before the International Court of Arbitration of the ICC. The parties disputed the jurisdictional question and the ICDR case manager proceeded with administration of the dispute. The respondent moved for an injunction to stay the ICDR arbitration and named the ICDR as a party. The ICDR moved to dismiss on arbitral immunity grounds. The court announced as the standard whether the "arbitrability issue is facially obvious" and if it is not, "then immunity should apply to the administrative stages prior to an official appointment of an arbitrator or panel of arbitrators." Here the parties made "significant arguments" relating to the jurisdictional issue. The court found the question not to be a simple one and "certainly not an issue that seems appropriate to ask an administrator who is tasked with getting the parties to choose the panel to resolve. It is an issue more appropriately considered by the panel." For these reasons, the court granted the ICDR's motion and afforded it absolute immunity. *Wartsila North America v. International Centre for Dispute Resolution*, 2018 WL 3870015 (S.D. Tex.).

X. COLLECTIVE BARGAINING SETTING

Arbitrator's Application of External Law Authorized by Parties. The labor arbitrator here rejected application of the employer's Workplace Violence Policy based on his reading of Illinois's Concealed Carry Act. The terminated employee here clearly violated the employer's Policy by having a concealed weapon in his car in its parking lot. The arbitrator, however, concluded that the employer failed to properly post its Policy as required by Concealed Carry Act and consequently was barred by that law from enforcing its Policy. The issue for the reviewing court was whether a labor arbitrator, whose mandate was to interpret the collective bargaining agreement, could base his award on external law. The court, somewhat hesitatingly, upheld the arbitrator's decision because the parties included in their collective bargaining agreement a provision "suspending" any of its provisions which conflicted with state or federal law. "Further, both parties framed their arguments to the arbitrator in terms of the statute. Because that is the case, the courts have no further role to

play in reviewing the terms of the award or whether the arbitrator correctly applied the law." *Ameren Illinois Co. v. International Brotherhood of Electrical Workers*, 2018 WL 4939034 (7th Cir.).

Arbitrator's Finding of Mutual Mistake Enforced. The collective bargaining agreement provided that employees were entitled to a quarterly bonus if enrolled in the pension plan. The parties agreed that employees hired after a certain date would not be entitled to a pension. When the employer did not pay the new employees a bonus, the union grieved the dispute and the arbitrator awarded the bonus to the new employees, finding that the parties had made a mutual mistake. The employer moved to vacate the award, and a divided Ninth Circuit affirmed the lower court's denial of the motion. The court ruled that the arbitrator's award was "grounded in his reading" of the collective bargaining agreement and the award drew its essence from it. The court reasoned that the arbitrator was construing the collective bargaining agreement "in light of the evidence presented to him and was applying basic principles of contract law" and ruled that his decision must be afforded great deference. On these grounds, the award was confirmed. *Asarco v. United Steel*, 893 F.3d 621 (9th Cir. 2018).

Award Reinstating Inebriated Worker Upheld. A welder reported to work late and was inebriated. He started to work but then was sent home and soon after was terminated. The union grieved the termination and the arbitrator reinstated the welder while imposing a suspension of 15 days. The arbitrator reasoned that management offered no proof that the welder's performance was impaired or substandard. The arbitrator concluded that management could not terminate a worker solely because he worked while inebriated. A magistrate judge recommended that the award be vacated but the district court rejected that recommendation and affirmed the award. The court emphasized that while reasonable rules for the work place was within management's power to assert, the collective bargaining agreement did not give management "the authority to prescribe the appropriate punishment for violating those rules." The court noted that the parties posed for the arbitrator the question of what the appropriate remedy should be in the event that cause was found. The court explained that "both parties well understood that the arbitrator might find that [the welder] was terminated without proper cause. The fact that [management] may have been surprised by the arbitrator's decision does not make the decision beyond his authority – especially when his explicit authority was to answer the very questions he answered." *Niagara Blower Company v. Shopmen's Local Union 576*, 2018 WL 4382371 (W.D.N.Y.).

Arbitration Compelled Where CBA Incorporated by Reference. A general contractor told a subcontractor that it was required to use union workers. The subcontractor refused to sign the collective bargaining agreement but instead signed a job site agreement (JSA) limited to that job. The JSA incorporated by reference the full collective bargaining agreement. Five years after the job was completed the benefit funds under the collective

bargaining agreement sought substantial withdrawal liability under the collective bargaining agreement and the subcontractor refused to pay those funds. The subcontractor moved for a declaratory judgment that it was not an employer for purposes of withdrawal liability. The court ordered the dispute to arbitration finding that the "JSA could not be any clearer that it incorporates the CBA." As such, the question of whether the subcontractor was subject to withdrawal liability was for the arbitrator to decide. *Grammercy Wrecking v. Trucking Employees of North Jersey Welfare Fund*, 2018 WL 2709202 (E.D.N.Y.).

Layoff Dispute Arbitrable. The collective bargaining agreement included a provision calling upon the parties to act with "mutual responsibility and respect" in carrying out their relationship. The employer conducted a substantial layoff, and the union went to court arguing that the employer violated "the promise of respectful and fair dealings" which removed this dispute from the parties' arbitration obligation. The Magistrate Judge rejected this argument and granted the employer's motion to compel. The court noted that the requested relief could not be awarded without interpreting the collective bargaining agreement. The court found that the union had failed to meet its burden of proving that the dispute was outside of the scope of the collective bargaining agreement and on this basis concluded that it lacked jurisdiction to rule on the underlying dispute. *Communications Workers of America v. Southwestern Bell*, 2018 WL 2944435 (W.D. Tex.).

XI. STATE LAWS

Substantial Compliance with Colorado Health Care Law Sufficient to Compel Arbitration. Colorado's Health Care Availability Law governs the form of an arbitration agreement between a patient and a healthcare provider. The arbitration provision in this case complied with the law in that the correct language was included in an appropriate font size. However, the relevant language was not bolded as required by the statute. The Colorado Supreme Court ruled that substantial, rather than strict, compliance with the particulars of the statute is all that is required. The Court reasoned that it did not "believe that the General Assembly intended to elevate form over function. And function – that is notice to the patient consumer of services – is better served by the flexibility substantial compliance affords." *Colorow Health Care, LLC v. Fischer*, 420 P.3d 259, as modified on denial of reh'g (July 2, 2018).

Failure to Comply with Ethics Rules Precludes Arbitration with Client. The Florida ethics rules require certain recitals and notices to be provided to clients where lawyers seek to mandate arbitration of fee disputes. The engagement agreement with the client included a mandatory arbitration provision relating to fee disputes but did not include the requisite notice required by the Florida bar. The appellate court refused to require the arbitration of the client's dispute. The court also refused to sever the offensive provision, finding that "the arbitration clause clearly violated the rule by prospectively providing for mandatory arbitration of fee disputes without giving the required warning language. This is enough to

invalidate the arbitration clause in its entirety." *Owens v. Corrigan & KLC Law*, 252 So. 3d 747 (Fla. App. 2018).

XII. NEWS AND DEVELOPMENTS

#MeToo Legislation Likely to Draw Pre-Emption Challenge. Several states, including California, New York and most recently Maryland have enacted legislation prohibiting enforcement of pre-dispute agreements mandating arbitration of sexual harassment claims. These new laws are intended to have a deterrent effect by refusing to allow companies to hide behind the confidentiality that arbitration offers and instead expose allegations against companies and alleged harassers. Many legal observers have suggested that the legislation is likely to draw a pre-emption challenge under the Federal Arbitration Act based on recent Supreme Court precedent. See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

FINRA's Option for Simplified Arbitration. On July 23, 2018, FINRA amended its rules to provide for a third option for the resolution of disputes under its Code of Arbitration Procedure for Customer Disputes (Customer Code) and its Code of Arbitration Procedure for Industry Disputes (Industry Code). Previously the codes provided for a "Default" option, where a single arbitrator makes a decision based on the parties' pleadings and other materials or a full hearing with a single arbitrator. The new, third option now allows for a "Special Proceeding," for claims of $50,000 or less (excluding interest and expenses). The Special Proceeding is held by telephone and imposes time limits on the parties' presentation of their cases, rebuttals and closing statements. It is designed to be time and cost efficient. The Simplified Arbitration is effective immediately subject to FINRA's Regulatory Notice 18-21.

California Governor Vetoes Bill Banning Mandatory Arbitration Agreements. In August 2018, the California Legislature passed AB 3080, which banned mandatory arbitration agreements for all claims of employment discrimination, retaliation, and harassment under the California Fair Employment and Housing Act, as well as wage and hour claims under the California Labor Code. The bill also provided that employers cannot side step these prohibitions by using opt-out clauses or otherwise requiring an employee to "take any affirmative action to preserve their rights." That bill was vetoed by Governor Brown on September 30, 2018. In his veto message, the Governor stated that the Legislature's argument that AB 3080 only regulates behavior prior to an agreement being reached is wrong and that AB 3080 "plainly violates federal law." The Governor pointed out that in a 2017 Supreme Court decision, *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), even Justice Kagan, "an appointee of President Obama," acknowledged that the FAA "cares not only about the 'enforcement' of arbitration agreements, but also about their initial 'valid[ity].'"

California Widens Attorney Qualifications for International Arbitration. Effective January 1, 2019, foreign and out-of-state attorneys will be able to represent parties in international arbitrations in California, subject to certain conditions. This change allows out of state lawyers and foreign lawyers in good standing in their home jurisdiction to represent parties in international commercial arbitrations held in California provided that one of the following conditions is met (1) a California lawyer actively participates; (2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is qualified; (3) the client resides in or has an office in the jurisdiction in which the lawyer is qualified; (4) the services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is qualified, or; (5) the dispute is governed primarily by international law or the law of a foreign or out-of-state jurisdiction. The out-of-jurisdiction lawyer will be subject to the jurisdiction of the California courts and disciplinary authority under the California Rules of Professional Conduct as well as the laws governing the conduct of attorneys to the same extent as a member of the State Bar of California. The State Bar of California may also report complaints and evidence of disciplinary violations against a lawyer practicing under the law to the disciplinary authority of any jurisdiction in which the attorney is qualified.

New California Law Requires Written Disclosure to Clients About Mediation. On September 11, 2018, California Governor Brown signed SB 954 into law, requiring attorneys to inform their clients of the confidentiality restrictions related to mediation, to obtain their clients' written acknowledgment that this disclosure has been made to them and that they understand it. While this requirement does not apply to class or representative actions, it does apply, ". . . as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation" and directs the attorney to "provide that client with a printed disclosure containing the confidentiality restrictions described in Section 1119 [of the California Evidence Code] and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions." The new statute contains a sample disclosure form that if used, will provide a "safe harbor" such that the disclosure requirements will be deemed met. This new law goes into effect on January 1, 2019.

California Legislature Clarifies Court's Review of Arbitration Agreements. In July 2018, Governor Brown signed into law California Assembly Act 3247, which amends the California Code of Civil Procedure § 1281.2, to clarify that when a court is determining the validity of an arbitration agreement, it must consider whether "grounds exist for rescission of the agreement." This amendment is an important change to the terminology that was previously used in the Act, which required a court to consider whether "revocation" of the agreement occurred. The amendment was drafted after the California Supreme Court's observation in *Armendariz v. Foundation Health Psychcare Services, Inc*. 24 Cal. 4th 83 (2000) that use of the term revocation is a misnomer because once a contract s formed, it can only be undone by rescission; only offers to create a contract may be revoked.

XIII. TABLE OF CASES

Federal Cases