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Feliu Case Summaries:

June 2022

Contents

I. JURISDICTIONAL ISSUES: GENERAL

Jurisdiction Under FAA to Vacate or Confirm Award Limited. The Supreme Court ruled that a court may not "look through" a motion to confirm or vacate an award under the FAA to determine federal jurisdiction. This contrasts with the Court's earlier ruling in *Vaden v. Discover Bank* under Section 4 of the FAA where the look-through method was invoked to confer FAA jurisdiction. The distinction, the Court explained, is based on differing language in the applicable sections of the FAA. It is well established that the FAA does not confer federal jurisdiction itself. The Court explained that Section 4 of the FAA addressing enforcement of arbitration agreements provides that "save for the [arbitration agreements]", the federal court would have jurisdiction indicating that a court should assume the absence of the arbitration agreement when determining whether jurisdiction is present. No such language appears in Sections 9 and 10 of the FAA relating to the confirmation and vacatur of awards. The Court reasoned that it must assume that Congress's decision to include particular language in one provision of a statute but omit it from another section is deliberate. "We have no warrant to redline the FAA, importing Section 4's consequential language into provisions containing nothing like it." The Court emphasized that the "look-through rule is a highly unusual one: It locates jurisdiction not in the action actually before the court, but in another controversy neither there nor ever meant to be." The Court also rejected the policy arguments, adopted by Justice Breyer in dissent, in favor of uniformity in the application of the FAA. In doing so, the Court explained that "Congress chose to respect the capacity of state courts to properly enforced arbitral awards. In our turn, we must respect that evident congressional choice." *Badgerow v. Walters*, 142 S. Ct. 1310 (2022). *NOTE: Bissonnette v. Lepage Bakeries Park Street*, 33 F.4th 650 (2d Cir. 2022) (dictum from Judge Dennis Jacobs following the decision in *Badgerow* suggesting that, although it is "too early to say", dismissal of, rather than staying, case following the granting of a motion to compel has "ramifications." In particular, dismissal will almost certainly require an independent jurisdictional basis upon further action in the case, while granting a stay "pursuant to Section 3 may allow parties to seek enforcement, vacatur, or modification of an award . . . or seek other assistance from the FAA . . . without need for an independent basis for federal jurisdiction" noting that "Justice Breyer's dissent in *Badgerow* suggests as much.").

ERISA Fiduciary Claim Not Arbitrable. Plaintiffs, former employees of Cintas Corporation, brought a class action under Section 502(a)(2) of ERISA alleging that Cintas breached its fiduciary duty to plan participants in the administration of its Plan. Cintas moved to compel arbitration based on plaintiffs' agreement to arbitrate their individual claims against Cintas. The district court denied the motion, and the Sixth Circuit affirmed. The court explained that Section 502(a)(2) claims are brought in a representative capacity on behalf of the plan as a whole. Such claims must be for injuries to the plan as a whole even if the harm is

inherently individualized. "Although Section 502(a)(2) claims are brought by individual plaintiffs, it is the plan that takes legal claim to the recovery, suggesting that the claim really 'belongs' to the Plan. And because Section 502(a)(2) claims 'belong' to the Plan, an arbitration agreement that binds only individual participants cannot bring such claims into arbitration." Cintas argued that the mere fact that plaintiff proceeded via a class action indicates that if they were truly acting in a representative capacity class proceedings would not be required. The court rejected that claim, accepting plaintiffs' explanation that some courts require class action processes to protect the interests of the plan participants as a whole. The court concluded that in "the absence of a sufficient manifestation of the Plan's consent to arbitrate these claims, we hold that the Plan has not consented to arbitration. There is, therefore, no basis for the Plaintiffs' claims to be arbitrated." *Hawkins v. Cintas Corp.*, 32 F.4th 625 (6th Cir. 2022). Accord: *Harrison v. Envision Management Holding*, 2022 WL 909394 (D. Colo.) (defendant's motion to compel arbitration of class action under Section 502(a)(2) of ERISA denied as "the Plan's arbitration provision prohibits remedies that are explicitly provided for by ERISA" in that it "disallows a litigant from seeking plan-wide remedies").

Choice of Law Provision Does Not Supplant FAA. Georgia law recognizes manifest disregard of the law as a basis for overturning an arbitration award, while the New York Convention does not. The party seeking to vacate the award here asserted that the choice of law provision in the agreement between the parties mandated that Georgia law governs. In particular, the contract provided it "shall be governed by the laws of the State of Georgia, and the UN Convention of Contracts for the International Sale of Goods ["CISG"] . . . shall not apply without reference to rules regarding conflicts of law." The Eleventh Circuit concluded that that language did not "supplant federal standards for confirmation of an arbitration award." The court noted that "because the CISG could not have provided standards for the review of the arbitral award, the clause suggests that the parties did not intend for Georgia law to supply standards for review of the arbitration award." The court noted that eight other circuit courts have reached the same conclusion in similar circumstances. For these reasons, the Eleventh Circuit concluded that the FAA governed these arbitration proceedings. *Gulfstream Aerospace Corp. v. Oceltip Aviation 1 Pty Ltd.*, 31 F.4th 1323 (11th Cir. 2022).

Case Shorts

- *Process and Industrial Developments Ltd. v. Federal Republic of Nigeria*, 27 F.4th 771 (D.C. Cir. 2022) (motion to dismiss confirmation proceedings denied because arbitration exception in Foreign Sovereign Immunities Act abrogates foreign state's sovereign immunity even where, as here, a foreign court has annulled the award).
- *Leonard. A. Sacks & Associates v. International Monetary Fund*, 26th F.4th 470 (D.C. Cir. 2022) (IMF agreement to arbitrate disputes with its law firm did not constitute waiver

of its immunity from suit under Bretton Woods Agreements Act and therefore law firm could not confirm arbitration award in its favor against the IMF in court).

- *Bissonnette v. Lepage Bakeries Park Street*, 33 F.4th 650 (2d Cir. 2022) (truck drivers who transport baked goods from warehouses to restaurants and stores are not entitled to FAA transportation worker exemption; "though plaintiffs spend appreciable parts of their working days moving goods from place to place by truck, the stores and restaurants are not buying the movement of the baked goods, so long as they arrive . . . the commerce is in breads, buns, rolls, and snack cakes – not transportation services.").
- *Harrison v. Revel Transit*, 2022 WL 356988 (N.Y. Sup. Kings Cty.) (FAA preempts New York law where agreement to rent a moped with arbitration clause sufficiently affects interstate commerce as moped maker relies "on a host of out-of-state and international partners and suppliers" and the mopeds were made in China).
- *Dalla-Longa v. Magnetar Capital*, 33 F.4th 693 (2d Cir. 2022) (vacatur motion served by e-mail after FAA 90-day filing period ruled untimely where opposing party did not consent to service by e-mail and AAA Rules and direct exchange program did not displace FAA requirements).
- *Doe v. Tonti Management Co.*, 24 F.4th 1005 (5th Cir. 2022) (court's order denying motion to reconsider order compelling arbitration "does not possess any more finality than the order compelling arbitration itself; both are interlocutory and unappealable under . . . the FAA").
- *Lobel v. CCAP Auto Lease*, 74 Misc. 3d 1230 (A) (N.Y. Sup. Ct. Westch. Cty. 2022) (FAA preempts New York law barring mandatory arbitration provisions in consumer agreements).
- *GateGuard, Inc. v. Goldenberg*, 2022 WL 452637 (S.D.N.Y.) (request to stay court action between parties in favor of arbitration denied where arbitration of contract dispute between same parties addressed fraud claims "which have no factual overlap with the contract claim" in arbitration).
- *People v. Maplebear, Inc.*, 2022 WL 1565000 (Cal. App. 4th Dist.) (action by city attorney challenging independent contractor status of grocery delivery drivers under California's Unfair Competition Law brought in city's own law enforcement capacity and therefore city cannot be compelled to arbitrate claim based on drivers' execution of arbitration agreements).
- *Maide, LLC v. Dileo*, 504 P.3d 1126 (Nev. 2022) (assisted living facility sufficiently implicated interstate commerce where its supplies are shipped across state lines and facility received federal funding so that Nevada statute disfavoring arbitration was preempted by the FAA).

- *Leshane v. Tracy VW, Inc.*, 78 Cal. App.5th 159 (2022) (plaintiffs who withdrew individual claims in favor of PAGA claims could not be compelled to arbitrate claims that they were no longer pursuing).
- *Wing v. Chico Health Care and Wellness Centre*, 78 Cal. App.5th 22 (2022) (right to bring PAGA claim is unwaivable and not preempted by FAA).
- *LALO, LLC v. Hawk Apparel*, 2022 WL 1173801 (N.D. Tex.) (arbitrator may set rate for post-award but not post-judgment interest; for diversity cases, post-judgment interest is set by 28 U.S.C. Section 1961).
- *Woodmen of the World Life Insurance Society v. Mayo*, 2022 WL 894246 (S.D. Miss.) (insurance company may compel arbitration where potential beneficiaries make claim to same benefits certificates worth over $171,000).

II. JURISDICTIONAL CHALLENGES: DELEGATION, ESTOPPEL, AND WAIVER ISSUES

Showing of Prejudice Not Required for Waiver of Arbitration. A unanimous United States Supreme Court ruled that a showing of prejudice is not required for finding that a party waived its right to compel arbitration. In doing so, the Court rejected the prevailing view among a large majority of federal appellate courts which imposed prejudice as a condition for a finding of the waiver of a right to arbitration. The Court rebuked those courts of appeal for applying a rule specific to the arbitration context. The Court noted that "a federal court deciding whether a litigant has waived a right does not ask if its actions caused harm." The Court rejected the appellate courts' grounding of their reasoning on the FAA's policy favoring arbitration. The Court emphasized that the policy favoring arbitration "does not authorize federal courts to invent special, arbitration-preferring procedural rules." The FAA was enacted, the Court noted, to overrule the judiciary's refusal to enforce arbitration agreements on their terms, not to make them more enforceable than other contracts. "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." The issue to be decided in the waiver context, the Court concluded, is whether the party seeking to compel arbitration "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right" and on that basis remanded the case to the Eighth Circuit for further proceedings. *Morgan v. Sundance, Inc.*, 2022 WL 1611788 (U.S. 2022).

[**Note** – *the following decisions were issued before Supreme Court released its Morgan v. Sundance decision above*].

Waiver of Contractual Right to Arbitrate. A California trial court denied a motion to compel arbitration in an action involving the respective rights between domestic and foreign investors in a California office complex. There was no dispute that an arbitration agreement existed. The trial court found, however, that the domestic investors acted in a

manner inconsistent with an intent to arbitrate and therefore waived their right to arbitration. The appellate court agreed, noting that "trial courts are uniquely positioned to evaluate the conduct of litigants before them within the broader context of a case" and that the California Supreme Court has granted them "considerable flexibility to determine when waiver occurs." After citing the six factors that courts consider when determining whether waiver occurred, the court observed that "virtually every case" finding waiver of arbitration "has cited to the existence of 'prejudice' as one of the factors present." Turning to the facts at issue here, the appellate court held that the trial court's denial of the motion to compel arbitration was supported by substantial evidence including that the domestic investors "invoked the litigation machinery," took advantage of judicial discovery procedures not available in arbitration and delayed their attempt to arbitrate for more than two years. The court also agreed with the trial court's finding that the foreign investors were prejudiced by these tactics which allowed the domestic investors to "retain possession and control of the Property for a longer period of time", delayed resolution of the case, and caused them to incur more than $300,000 in litigation costs. The trial court's denial of the motion to compel arbitration was therefore affirmed. *Kokubu v. Sudo*, 76 Cal. App.5th 1074 (2022). See also *Quach v. California Commerce Club*, 2022 WL 1468016 (Cal. App. 2d Dist.) (the incurring of additional expenses due to employer's delay of 13 months in seeking to compel arbitration does not constitute sufficient prejudice to warrant waiver of right to arbitrate); *Taylor v. Boeing Co.*, 2022 WL 580455 (E.D. Pa.) (employer did not waive right to arbitrate due to fact that it initially "overlooked" what it should have been aware of where the "short delay did not seem purposeful or manipulative" and did not prejudice plaintiff). Cf. *United States v. Miraca Life Sciences*, 33 F.4th 352 (6th Cir. 2022) (in a decision issued weeks before the Supreme Court's ruling in *Morgan*, the Sixth Circuit applied prejudice requirement and found waiver of arbitration right where party tactically invoked litigation processes causing party resisting arbitration to incur duplicative expenses).

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- *Revis v. Schwartz*, 38 N.Y.3d 939 (2022) (gateway questions of arbitrability are for arbitrator under the NFL's standard representation agreement, which was not limited, as argued by the former plaintiff here, to disputes with NFL teams).
- *K.F.C. v. Snap, Inc.*, 29 F.4th 835 (7th Cir. 2022) (question whether arbitration clause signed by minor was enforceable is for arbitrator and not court to decide as under Illinois law such agreements are not void but rather voidable which could be later ratified and any challenge to the agreement as a whole goes to the arbitrator).
- *Mendoza v. Trans Valley Transport*, 75 Cal. App.5th 748 (2022) (validity of arbitration clause for court to decide, despite presence of delegation clause, where party seeking arbitration litigated the merits of the contract formation issue before the trial court

and waived any delegation argument by first raising it in a reply brief to the trial court).

- *Park Plus v. Palisades of Towson*, 478 Md. 35 (2022) (right to arbitrate not waived under Maryland law where statute of limitations period had run on claim being arbitrated as arbitration provision in agreement had no time limitation and only contractual right at issue was to arbitrate, not substance of underlying claim).
- *Scipio v. 225 Bowery LLC*, 74 Misc. 3d 1226 (A) (N.Y. Sup. Ct. Bx. Cty. 2022) (assertion of indemnification cross-claim did not constitute waiver of right to arbitrate as the cross claim "falls within the ambit of necessary defensive action taken in the judicial forum, which could not wait until the matter was arbitrated").
- *AirBnB v. Doe*, 2022 WL 969184 (Fla.) (incorporation of AAA Rules in arbitration agreement constitutes clear and unmistakable evidence that party submitted for resolution to arbitrator arbitrability issues including, as here, question whether arbitration agreement was accepted by plaintiffs).
- *Key v. Warren Averett,* 2022 WL 1597691 (Ala.) (incorporation of AAA Commercial Rules into personal services agreement constituted unmistakable evidence that parties delegated arbitrability issue to arbitrator).
- *Burstein v. AutoLotto*, 2022 WL 1229291 (W.D. Tex.) (incorporation of the AAA Rules constitutes clear and unmistakable evidence of delegation of arbitrability issue to arbitrator).
- *Car Credit Inc. v. Pitts*, 643 S.W.3d 366 (Mo. 2022) (delegation provision enforced and arbitrability issue submitted to arbitrator where party resisting arbitration challenged arbitration contract generally).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Court Appoints Arbitrator Where Selection Process Unconscionable. The arbitration agreement between a bar and an entertainer contained several unconscionable provisions. In particular, the bar reserved for itself sole authority to select the arbitrator as well as the location for the arbitration and required the entertainer to bear the full arbitration costs even if she prevailed on her claims against the bar. The district court refused to compel arbitration due to these unconscionable provisions. The Seventh Circuit reversed. The appellate court noted that if "the parties have made clear that they want to arbitrate only under prescribed conditions, which cannot be fulfilled, then litigation is the only remaining option." But that was not the case here, in the court's view. The court found no evidence that plaintiff agreed to arbitrate only because the bar would select the arbitrator. The district court's finding of unconscionability eliminated that selection process but not the parties' mutual assent to arbitrate the dispute. In rejecting the argument that to proceed in this fashion would rewrite the arbitration clause, the court reasoned that it "would be better

to say that [the FAA] permits (indeed requires) a judge to name an arbitrator, even if the only thing that survives a judge's encounter with the clause is the fact that the parties have agreed to arbitrate." In the court's view that is what happened here. For these reasons, the district court's decision was vacated, and the case was remanded with instruction for the district judge to select an arbitrator and refer the matter to arbitration. *Campbell v. Keagle, Inc.*, 27 F.4th 584 (7th Cir. 2022), reh'g denied, 2022 WL 1009565 (7th Cir. 2022).

Unconscionable Durational Term May Not be Severed. Raymour & Flanagan's arbitration agreement purported to shorten the statute of limitations under New Jersey's Law Against Discrimination from two years to six months. The New Jersey Supreme Court, in 2016, ruled that that provision violated public policy and was unenforceable. Years later Raymour sought to compel arbitration under the same arbitration agreements but agreed to sever the unconscionable durational term. The trial court refused to sever that term, and the New Jersey appellate court affirmed. The court reasoned that while courts can sever invalid contract terms they may not do so where it would defeat the primary purpose of the agreement. Here, Raymour expressly tied the 180-day deadline to the filing of any arbitration. "In other words, Raymour's chose to link and intertwine the time-limitation concept with the agreement to arbitrate. To sever the time-limitation provisions would require a rewriting of the contract that Raymour's drafted." For this reason, the court concluded that the "plain language" of the arbitration agreement "precludes severance and the intertwining of the time limitations with the arbitration requirements make the agreements in their entirety substantively unconscionable." *Guc v. Raymour's Furniture Co., Inc.*, 2022 WL 729539 (N.J. App.).

Harsh and One-Sided Agreement Ruled Unconscionable. A California appellate court ruled that an arbitration agreement between a psychiatric facility and the parents of an adult son with symptoms of psychosis who died by suicide after being admitted to the facility on psychiatric hold was unconscionable and unenforceable. The agreement presented "a high level of unconscionability" because of its "adhesive nature", the facility's failure to provide the AAA arbitrability terms it seeks to enforce, and the patient's "impaired mental state" at the time he was presented with the agreement. Observing the rule that a finding of unconscionability involves a sliding scale of weighing procedural versus substantive unconscionability, the appellate court noted "where there is substantial procedural unconscionability . . ., even a low degree of substantive unconscionability may suffice to render the agreement unenforceable." Agreeing with the lower court, it then found the Release provisions were "significantly harsh and one-sided." The court concluded "in light of the high degree of both procedural and substantive unconscionability present, the [agreement] here was unquestionably unconscionable." For these reaons, the lower court's denial of the facility's motion to compel arbitration was affirmed. *Nelson v. Dual Diagnosis*, 77 Cal. App.5th 643 (2022).

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- *Abbey Bridges Construction v. Kroger Limited Partnership*, 2022 WL 989146 (N.D. Miss.) (arbitration agreement, even if one-sided, is not substantively unconscionable where consideration for the agreement is present).
- *Adell v. Cellco Partnership*, 2022 WL 1487765 (6th Cir.) (wireless customer's unconscionability claim rejected where she had option to choose other cell phone services).

IV. ISSUES RELATING TO AGREEMENT TO ARBITRATE

Court Must Rule on Issue of Mutual Recission. Courts decide the question whether a contract containing an arbitration clause exists as well as the validity of the arbitration clause; arbitrators are assigned the responsibility for determining the validity of the agreement as a whole. Here, it was established that a contract with an arbitration clause existed, but the question was presented whether the parties mutually rescinded their earlier agreement. The Eleventh Circuit reasoned that the issue of mutual recission was not one of whether the earlier agreement was void or voidable but rather whether a new agreement had been made between the two parties not to be bound by the prior agreement. As a result, "whether the parties later agreed to rescind their earlier contract are disputes about whether a new agreement was formed – and courts decide contract formation disputes, not arbitrators." The court analogized the mutual recission setting to one in which the question is raised whether a subsequent agreement superseded an earlier contract. "We see no reason the two situations should be treated differently; in both cases, the existence of the earlier contract is called into doubt, not its validity." For these reasons, the court concluded that a court must first decide the mutual rescission issue rather than an arbitrator. *Reiterman v. Abid*, 26 F.4th 1226 (11th Cir. 2022).

Website Fails to Create Binding Agreement to Arbitrate Disputes. Plaintiffs used defendants' website but claim they did not see a notice in fine print stating, "I understand and agree to the Terms & Conditions which includes mandatory arbitration." When a dispute arose and plaintiffs filed a lawsuit, defendants moved to compel arbitration, arguing that plaintiffs' use of the websites signified their agreement to the mandatory arbitration provision found in the hyperlinked terms and conditions. The district court rejected their argument. On appeal, the Ninth Circuit revisited the circumstances under which a website user will be effectively bound to a set of hyperlinked "terms and conditions" that the consumer never saw or read. The court noted that when a website operator cannot show a consumer has actual knowledge of the agreement, an enforceable contract may be found under the "inquiry notice theory" where "(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her

assent to those terms." The Ninth Circuit found that the notice of the website's terms & conditions was not reasonably conspicuous because "the text disclosing the existence of the terms and conditions . . . is printed in a tiny gray font considerably smaller than the font used in the surrounding website elements, and indeed in a font so small that it is barely legible to the naked eye" and "the hyperlinks to the actual terms and conditions were not clearly denoted on the webpage." On the issue of assent, the court found plaintiffs were not on notice that they were agreeing to be bound by the website's terms and conditions when they clicked the "Continue" button and therefore did not unambiguously assent to the website's terms and conditions. On this basis, the court concluded that plaintiffs did not enter into a binding agreement to arbitrate their dispute. The district court's denial of the motion to compel arbitration was therefore affirmed. *Berman v. Freedom Financial Network, LLC,* 30 F.4th 849 (9th Cir. 2022).

Inquiry Notice and Assent to Terms of Service Found. Plaintiffs were users of defendant's mobile payment app. The on-line app process, the court ruled, put the plaintiffs on inquiry notice of the service's terms of service which contained a dispute resolution process ending in arbitration. The court found the e-mail interface "included all the hallmarks of conspicuousness that put them on inquiry notice: the underlined text signified a hyperlink to a reasonably smart phone user; the familiar warning language prompted the user to read the hyperlinked terms; and the terms were temporally coupled with a successful registration." Once on inquiry notice, the question became whether a "reasonably prudent smartphone user's attention to the hyperlinked General Terms of Service" was directed to those terms. The court noted that "[h]yperlinks do not provide an incorporation-by-reference cure-all." Nonetheless the court found here that the hyperlinked text was reasonably conspicuous and placed plaintiffs on actual notice of the terms of service. Finally, the court found assent to those terms of service based on plaintiffs' entering sign-in codes provided to them and the fact that they were twice "provided the familiar warning language and terms of service in a clear and conspicuous way, coupled spatially and temporally with the mechanism for manifesting assent to those terms, i.e., the 'Next' button." For these reasons, the court granted defendant's motion to compel. *Thorne v. Square, Inc.*, 2022 WL 542383 (E.D.N.Y.). See also *Harrison v. Revel Transit*, 2022 WL 356988 (N.Y. Sup. Kings Cty.) (reasonably prudent user of on-line registration process was placed on notice of arbitration clause where assent to terms of use was on first screen viewed and "design and content of these mobile application screenshots rendered the existence of [defendant's] agreements to be reasonably conspicuous"); *B.D. v. Blizzard Entertainment, Inc.*, 76 Cal. App.5th 931 (2022) (video game's pop-up notice sufficiently conspicuous to alert user that dispute resolution policy with arbitration provision applied as pop-up notice displayed the entire agreement in a scrollable text box); *Aguirre v. Conduent Patient Access Solutions*, 2022 WL 893636 (N.J. App.) (employee who clicked box showing acceptance of dispute resolution plan cannot later resist arbitration by arguing that the plan

was confusing as the "controlling consideration is whether the employee had the chance to review and understand the arbitration agreement").

Arbitration Compelled on Agency Principles. Three pediatric medical practices were bound to arbitrate their claims against a pharmaceutical company pursuant to arbitration agreements contained in loyalty contracts executed between the pharmaceutical company and certain physician buying groups (PBGs) of which the medical practices were members. The Third Circuit found that one of the three medical practices appointed the PBG as its agent by contract and therefore the PBG had actual authority to act on its behalf. With respect to the two remaining practice groups, the court found the PBG had apparent authority because the practices granted the PBG limited authority to act on their behalf and the PBG represented themselves as agents for the medical practices when executing the loyalty contracts with the pharmaceutical companies. The court thereafter concluded that the PBGs used their authority as agents of the medical practices to execute the loyalty contracts with the pharmaceutical company. The loyalty contracts not only granted the medical practices discounts on large purchases of vaccines but also bound the medical practices to arbitrate any claims arising out of or relating to the loyalty agreement. *In Re: Rotavirus*, 30 F.4th 148 (3d Cir. 2022). See also *Espinoza v. CareerStaff Unlimited, Inc.*, 2022 WL 313434 (N.D. Tex.) (employee bound by arbitration agreement signed by agent, an administrative service agency, for actual employer against whom employee filed suit); *Smith v. Amazon.com Services*, 2022 WL 1002099 (D. N.J.) (broad arbitration agreement between delivery service and driver covering all disputes with "anyone" includes Amazon as third-party beneficiary for whom driver made deliveries).

Agreement Not Illusory Based on Unilateral Right to Modify. The Supreme Court of Texas reversed and remanded a trial court order denying employer's motion to compel arbitration, starkly disagreeing with the trial court's ruling that the agreement was illusory. The employee argued that the arbitration agreement was illusory because it unilaterally granted the employer the right to modify the terms of the agreement. In addition, she argued the parties' promises to arbitrate were rendered illusory because they were conditioned on her continued, at-will employment. The Court disagreed with both points, finding the text of the agreement, which was set apart as a separate and distinct agreement within the Employee Handbook, contained a detailed procedure for any changes the employer would make to the arbitration agreement, including providing employees with "30 days advanced written notice." The court also rejected the employee's argument that the agreement was conditioned on the employee's continued at-will employment, finding it was only *accepted* by the employee continuing her employment after receiving notice of the agreement to arbitrate. The trial court was therefore directed to "promptly issue an order compelling arbitration." *In Re Whataburger*, 2022 WL 1194373 (Tex.). See also *Mendoza v. Trans Valley Transport*, 75 Cal. App.5th 748 (2022) (arbitration term in employee handbook

not enforceable where handbook stated it was "informational", policies could be changed at any time, and no contractual rights were afforded by handbook terms).

Evidence Lacking of Employee's Acceptance of Agreement to Arbitrate. The Second Circuit ruled that an employee's sworn declaration that she did not agree to the terms of an on-line arbitration agreement is sufficient to defeat a motion to compel. The employer in this case produced an electronic signature affixed to the arbitration agreement and proof that the employee was on-site the day the electronic signature was entered. The court nonetheless found sufficient the employee's declaration which related in "specific and exacting terms, and under penalty of perjury, [that] she categorically denied ever completing the electronic paperwork" or having any knowledge of or ever using the system required to provide such affirmance. The court was also not persuaded by the fact that the electronic signature was entered at the workplace, noting that the employer owned and possessed the equipment as opposed to the signature being entered from the employee's computer at home. The employer's claim was further undercut, according to the court, by the fact that the employer produced a paper copy of a signed arbitration agreement for a co-plaintiff but not for this plaintiff. The Second Circuit concluded that "[c]ombined, this evidence makes clear that [plaintiff] has created a triable issue of fact as to the validity of the signature on her electronic . . . arbitration agreements." *Barrows v. Brinker Restaurant Corp.*, 2022 WL 1739560 (2d Cir.). See also *Trinity v. Life Ins. Co. of N. Am*er., 2022 WL 1617986 (Cal. App. 2d Dist.) (auto-generated acceptance of employee handbook containing arbitration agreement not sufficient to support acceptance of terms where confirmatory email which would have been auto-generated as well was not produced and plaintiff denied ever seeing or accepting handbook terms); *McCoy v. Pan American Group*, 2022 WL 1136953 (W.D. Pa.) (jury trial ordered on whether plaintiff signed her former employer's employment agreement where, among other things, plaintiff alleges that incorrect information about her prior employment was entered and that it was her manager who completed her onboarding documentation). But see *Dickson v. Continuum Global Solutions*, 2022 WL 847215 (N.D. Tex.) (employer established through circumstantial evidence that plaintiffs must have agreed to the employer's dispute resolution program terms even if on boarding documents for plaintiffs cannot be produced).

Case Shorts

- *Leshane v. Tracy VW, Inc.*, 78 Cal. App. 5th 159 (2022) (a party may choose without consequence to disregard contractual arbitration provision in favor of litigation leaving it to the opposing party to move to compel).
- *Kelly v. The McClatchy Co.,* 2022 WL 1693339 (E.D. Cal.) (on-line arbitration agreement with newspaper subscriber did not extend to post-termination dispute regarding potential violations of TCPA where it lacked reference to defendant's right to "continue contact indefinitely after termination").

- *Lobel v. CCAP Auto Lease*, 74 Misc. 3d 1230 (A) (N.Y. Sup. Ct. Westch. Cty. 2022) (car manufacturer and bank making car loan may enforce arbitration agreement in car lease agreement against non-signatories under equitable estoppel principles as plaintiff's only basis for suing both entities was the lease agreement which included the arbitration provision).
- *Tribeca Asset Management v. Ancla International*, 336 So.3d 246 (Fla. 2022) (provision in arbitration agreement designating Florida as the jurisdiction "accepted by the parties irrespective of the fact that the principal activity" would be in Colombia constitutes a choice-of-law rather than forum selection clause).
- *Bristol v. Securitas Security Services USA*, 2022 WL 1078203 (S.D.N.Y.) (arbitration agreement which provides that the parties "will attempt to negotiate a mutually agreeable arbitrator" ruled not to be an indefinite agreement to agree where process for court appointment of arbitrator is provided and no mutual agreement reached).
- *Micheli & Shel v. Grubhub, Inc.*, 2022 WL 622828 (S.D.N.Y.) (Postmates' modification of agreement with bakery to add arbitration provision fails as initial agreement precluded unilateral modification of its terms and modification was not, as required, in writing signed by both parties).
- *GateGuard, Inc. v. Goldenberg*, 2022 WL 452637 (S.D.N.Y.) (seller's fraud claims against buyers did not relate to purchase and sale of equipment and thus were not subject to arbitration clause in purchase agreement as there is "no connection between the delivery of goods and the allegations of fraud").
- *Rogers v. Roseville SH, LLC*, 75 Cal. App.5th 1065 (2022) (son ruled not to have actual or ostensible authority to consent to arbitration on behalf of mother residing at residential care facility where mother did not authorize him to sign as her representative and arbitration agreement did not define "representative").
- *Easterday v. USPack Logistics, LLC*, 2022 WL 855583 (D.N.J.) (New Jersey law bars enforceability of arbitration provision in delivery drivers' employment agreements that failed to clearly state waiver of right to proceed with court proceeding).
- *Williams v. Bankers Life and Casualty Co.*, 2022 WL 304657 (M.D. La.) (arbitration agreement signed when plaintiff was an independent contractor that covered disputes arising out of the relationship between the parties applies to disputes which arose after contractor became employee of defendant).
- *Boil v. Anderson*, 871 S.E.2d 226 (Va. 2022) (an arbitration provision in a trust agreement may not be enforced against the beneficiary since a trust is not a contract that can be enforced under the FAA or Virginia law against a beneficiary who did not agree to arbitrate disputes under the trust).

V. CHALLENGES TO ARBITRATOR OR FORUM

Financial Hardship Constitutes Ground for Lifting of Court Stay. Plaintiff's legal malpractice action was ordered to arbitration and the court action was stayed. Plaintiff sought to lift the stay, arguing he could not afford the costs of arbitration. The trial court denied the application but certified the question to the appellate court which reversed. The court reviewed California's indigent litigant jurisprudence and concluded that a court may not consign an indigent litigant to costly private arbitration procedures which would have the practical effect of depriving the litigants' equal access to justice. The court concluded that a trial court has jurisdiction to determine if a plaintiff is unable to pay for compelled arbitration to insure the "right to a fair, neutral tribunal to decide the case." Where the court concludes that plaintiff cannot afford to arbitrate the matter, the trial court can offer the employer the option of covering the costs of the arbitration or of trying the case in court. The court found that the arbitration costs issue should be decided "before commencement of the arbitration" but declined to "prescribe singular procedures", leaving it to the trial court to consider "various approaches" which would allow "it to balance the parties' due process rights with the need for judicial economy." The court added that limited discovery with respect to the plaintiff's ability or inability to bear the costs of arbitration may be conducted. *Aronow v. Superior Court of San Francisco County*, 76 Cal. App.5th 865 (2022), as modified on denial of reh'g (April 22, 2022).

Arbitration May Proceed Without Designated Administering Agency. The agreement between a termite control company and a condominium owners' association designated the National Arbitration Forum (NAF) as the provider for any dispute between the parties. The NAF was later prohibited from participating in consumer arbitration as part of a consent judgment. Disputes arose between the parties and the condominium association moved in court for the appointment of an arbitrator; the termite company opposed the application, arguing that proceeding before an arbitral forum other than the NAF was inconsistent with the parties' agreement. The trial court granted the condominium owners' application and the Alabama Supreme Court affirmed. The Court emphasized that even though "the arbitration agreement identifies the NAF as the arbitrator, we cannot say that references to the NAF 'pervade' the agreement, which includes numerous generic references to arbitration." The Court pointed to language in the agreement making clear that the parties waive their rights to a judicial forum and that the termite company's agreement to arbitrate disputes before the AAA in later agreements reinforced its commitment to arbitration. Taken together, the Court concluded that "the primary and essential purpose of the arbitration agreement was to ensure that the parties' disputes be resolved solely by binding arbitration and that the designation of NAF as the arbitrator was secondary to that purpose and not an integral part of the agreement." *The Terminix International Co. v. Dauphin Surf Club Association*, 2022 WL 1514770 (Ala.).

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- *Gross v. Tamir*, 2022 WL 705665 (N.Y. Sup. Ct. N.Y. Cty.) (motion to compel submission of dispute before rabbinical court denied where sole writing is Biblical passage in Deuteronomy and an attempt to order arbitration on that basis "would risk an impermissible entanglement of the court in a matter of religious doctrine").
- *Noble Capital Fund Management v. U.S. Capital Global Investment Management*, 31 F.4th 333 (5th Cir. 2022) (arbitration was conducted for purposes of the FAA where it was dismissed by JAMS for nonpayment and as such court was correct in refusing to stay judicial proceedings further or order a new arbitration where one party let the prior arbitration fail).
- *Spagnuoli v. Louie's Seafood Restaurant*, 2022 WL 657411 (E.D.N.Y.) (court denies injunctive relief where it concludes that arbitrator can provide requested relief to employer who argues plaintiff's claim in arbitration was addressed and released in settled court class action).

VI. CLASS AND COLLECTIVE ACTIONS AND GROUP FILINGS

Uber Must Pay Arbitration Fees for Over 31,000 Demands. Over 31,000 claims were filed with the AAA against Uber Eats alleging reverse discrimination resulting from its decision to waive delivery fees for Black owned restaurants following the death of George Floyd. Under the AAA fee schedule, Uber would owe a $500 filing fee, $1400 case management fee, and $1500 arbitrator fee for each demand, totaling approximately $107 million. The AAA decided to organize the claims in five batches under California rules. Uber paid a reduced filing fee of $4.3 million and agreed to pay a case management fee of $667,800 for the first batch of cases but did so under protest. The AAA agreed to refund the case management fees provided under protest if that protest was upheld. Uber filed a complaint seeking declaratory judgment and injunctive relief after receiving the AAA's next case management fee of $10.79 million, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and restitution, and unfair competition under California law. The trial court denied Uber's motion for injunctive relief and the appellate court affirmed. The court explained that neither the application of California rules nor the AAA's Consumer Due Process Protocol Statement of Principles requires the AAA to charge "reasonable" fees, only fees in accordance with the applicable fee schedule. To the extent reasonable fees are addressed in the Protocol they relate to ensuring that consumers receive due process. The court added that Uber was unlikely to demonstrate a likelihood of success on the merits of its good faith and fair dealing or unfair competition claims where there is no evidence that the AAA "acted with dishonesty, deceit, or unfaithfulness to duty" for that enforcement of its fee schedule would "offend public policy, and is not immoral, unethical, oppressive, unscrupulous, or substantially injurious" to consumers. In affirming

the trial court's denial of Uber's request for injunctive relief, the appellate court opined that while "Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and the AAA's fees are directly attributable to that decision." *Uber Technologies v. American Arbitration Association*, 204 A.D.3d 506 (N.Y. App. 1st Dep't 2022).

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- *Adolph v. Uber Technologies*, 2022 1073583 (Cal. App. 4th Dist.) (PAGA claims under California law are not subject to arbitration "[u]nless and until the United States Supreme Court or the California Supreme Court directly overrules" prevailing California law).
- *Adell v. Cellco Partnership*, 2022 WL 1487765 (6th Cir.) (Class Action Fairness Act not shown to conflict with the FAA and therefore did not preclude enforcement of arbitration agreement with a class action waiver).

VII. HEARING-RELATED ISSUES

Evident Partiality and Manifest Disregard Claims Denied. Connecticut law provides that arbitration awards issued more than 30 days after the proceeding concludes "shall have no legal effect." The losing party here challenged the award, seeking to apply Connecticut law and overturn it on manifest disregard grounds. The district court rejected this argument and the Second Circuit affirmed, both courts finding that the panel or its "umpire" did not intentionally disregard applicable law. The appellate court noted that no provision in the agreement between the parties "indicates that disputes will be arbitrated pursuant to the law of the State of Connecticut, and nothing more than speculation indicates that the umpire knew he was obliged to issue an award within 30 days of the final submissions." The court also declined to vacate the award on evident partiality grounds because the law firm of one party-appointed arbitrator and the law firm of the umpire had conducted business together prior to the arbitration and no disclosure of this connection was made. The court pointed out that the other party-appointed arbitrator was made aware of the connection and consented to the umpire continuing his role. In any event, the court focused on the fact that the two arbitrators themselves were not connected individually but "merely that their firms had had prior interactions. Such a threadbare allegation – that would not show 'evident partiality' even if true – does not require the district court to hold a hearing on the allegation, let alone vacate the award." *Loch View v. Seneca Insurance Co.*, 2022 WL 1210664 (2d Cir.).

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- *State Farm Mutual Automobile Insurance Co. v. Robinson*, 76 Cal. App.5th 276 (2022), reh'g denied (March 29, 2022), review filed (April 25, 200) (court's discovery rulings, which California law requires be made by a court in uninsured motorist cases, which the arbitrator adopted may not serve as a basis to vacate an arbitration award).
- *Reiterman v. Abid*, 26 F.4th 1226 (11th Cir. 2022) (courts have the option, when determining whether an arbitration agreement exists, to proceed by summary judgment motion or evidentiary hearing).
- *Begole v. North Mississippi Medical Center*, 2022 WL 601024 (N.D. Miss.) (arbitrator not guilty of misconduct for refusing to consider implied covenant of good faith and fair dealing claim first raised in opposition papers to summary judgment motions).
- *Loren Imhoff Homebuilder v. Taylor*, 400 Wisc.2d 611 (2022) (party did not forfeit its objection to arbitrator's sleeping during the hearing that was raised after the evidentiary hearing but before award was issued as arbitrator could have reopened hearing to address party's objection).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Court Resolves Ambiguity in Award. The arbitrator in this intellectual property dispute made awards to both sides. The inventor assignor was ordered to pay the assignee technology company $1.5 million and the assignee $1 million dollars to the inventor. The arbitrator stated that the inventor could pay $500,000, the amount after offset "in such manner as [he] chooses." The Seventh Circuit rejected the notion that this language granted the inventor "complete discretion to decide if, when, and how [the inventor] pays the award during his lifetime." The court reasoned that the "manner" the inventor chooses did not mean the "time" he chooses; rather, he could satisfy the indebtedness by choosing which asset to employ. "But [the inventor] cannot refuse to turn over his only identifiable asset, choose hypothetical forms of payment that may never come to fruition, or require [the assignee] to wait until he dies. Both the language of the arbitrator's opinion and common sense easily resolve this issue." The court concluded that while courts may remand a proceeding to an arbitrator to clarify an award, it was impractical here because the award was issued five years before and the arbitrator's whereabouts was unknown. Where, as here, the award's "language compels only one conclusion, the parties need not track down the arbitrator to confirm the obvious" but rather the court can resolve the matter itself. *Nano Gas Technologies v. Roe*, 31 F.4th 1028 (7th Cir. 2022). See also *Trustees of New York State Nurses Association Pension Plan v. White Oak Global Advisors*, 2022 WL 815273 (S.D.N.Y.) (court can modify obvious error in award so as to "resolve the ambiguity" where arbitrator referenced "performance fee" rather than "management fee" which the context makes evident the arbitrator intended). Cf. *Romanzi v. Fieger & Fieger*, 31 F.4th 367 (6th Cir.

2022) (remand to arbitration panel warranted where reasoning for decision was absent; "the mere fact that an arbitration decision is unambiguous in its result does not make its reasoning incapable of clarification").

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- *Begole v. North Mississippi Medical Center*, 2022 WL 601024 (N.D. Miss.) (arbitrator's dismissal of case on summary judgment did not constitute misconduct, particularly where party moving to vacate award willingly participated in the process).
- *Trustees of New York State Nurses Association Pension Plan v. White Oak Global Advisors*, 2022 WL 815273 (S.D.N.Y.) (award confirmed where modifications to partial final award, which was incorporated by reference, made in final award were limited to damages calculations and not to liability findings made in partial final award).
- *Industrial Steel Construction v. Lunda Construction Co.*, 33 F.4th 1038 (8th Cir. 2022) (award confirmed where arbitrator awarded attorneys' fees based on AAA's Construction Rules even though parties withdrew attorneys' fees as awardable damages; court reasoned that the arbitrator arguably construed the terms of the parties' agreement when he ordered the payment of fees).
- *Romanzi v. Fieger & Fieger*, 31 F.4th 367 (6th Cir. 2022) (arbitration panel's failure to provide reasoning with its one paragraph award as required by the applicable agreement did not constitute "exceeding their authority" but warranted remand to supplement the award under the clarification exception to the *functus officio* doctrine).
- *Gonzalez v. Mayhill Behavioral Health*, 2022 WL 1185889 (E.D. Tex.) (arbitrator's failure to award attorneys' fees under ADEA where liability was found but no damages were awarded did not justify modification of the award by court as plaintiff was not a "prevailing party" under the statute warranting a fees award).
- *Gonzalez v. Mayhill Behavioral Health*, 2022 WL 1185889 (E.D. Tex.) (clock starts to run for motions to confirm or vacate under FAA on date final award is issued, not on date motion for reconsideration was denied).
- *Schorr v. American Arbitration Association*, 2022 WL 294849 (S.D.N.Y.) (motion to remand claims against the AAA for allegedly inappropriately terminating arbitration denied under Section 203 of the New York Convention as plaintiff effectively seeks to vacate arbitration decision short of a final award).

IX. ADR – GENERAL

Settlement Terms Agreed to in Mediation Enforced. A *pro se* plaintiff sued her former employer asserting claims of discrimination. The court sent the matter to the court-annexed mediation program and assigned plaintiff a *pro bono* counsel. The parties reached an agreement and prepared a "Mediation Agreement" which stated that the parties reached an agreement on "all issues" and set forth certain key terms of the settlement including: the settlement amount; COBRA terms, and; a release of claims. The parties also agreed that a "full settlement agreement with the applicable releases will follow." The parties negotiated a full agreement which included additional terms including a no reemployment provision, a confidentiality requirement with a liquidated damages term for any violations of confidentiality, neutral reference and non-disparagement terms, and a pledge by plaintiff not to assist anyone else in bringing claims against defendant. Plaintiff notified the court that she wanted to revoke her agreement to the Mediation Agreement. She alleged that: she was confused during the mediation; a lawyer told her that the mediation was the "nicer portion" of the lawsuit; the mediator told her that in litigation she would "be stuck in a room filled with white men that would question every aspect of [her] life for years"; she took ten minutes to "clear her head" and asked for a few additional days to consider the terms and was told that she could not have that time, and; that she signed the agreement because she felt she "had no choice." The employer moved to enforce the Mediation Agreement and the district court granted the motion. The Second Circuit affirmed. The court noted that in this circuit preliminary agreements are viewed as either comprehensive or one in which there is a mutual commitment to the major terms with recognition that open terms remain to be negotiated. In this case, the text itself, which the court emphasized "is the most important consideration when determining how the parties intended to be bound", states that agreement had been reached "on all issues" and that the terms that had been agreed to were "material." The court acknowledged that the full agreement contained terms not in the Mediation Agreement but added "there is no evidence – either in the text of the mediation agreement or the record – to suggest that those new terms were considered open issues in need of negotiation at the time the parties entered into the Mediation Agreement, which is the proper frame of reference. And a party cannot reopen a deal by proposing additional terms at a later date. Of course, [plaintiff] cannot be bound by those additional terms because she never agreed to them." But the court concluded that plaintiff could be bound by the terms in the Mediation Agreement as it was "clear that everyone in the mediation understood the executed Mediation Agreement to bind the parties to its terms and not merely set a framework for future negotiations." The court noted that plaintiff admitted that she had "agonized" over the Agreement and took time "to clear her head and to call her mother before signing, indicating that she thought the mediation agreement would bind her and conclude the litigation." The court concluded that the record established that the parties intended to be bound by the Mediation Agreement and

that it was enforceable." *Murphy v. Institute of International Education*, 32 F.4th 146 (2d Cir. 2022).

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- *Murphy v. Institute of International Education*, 32 F.4th 146 (2d Cir. 2022) (party in mediation given opportunity to "collect herself" and "call her mother" defeats claim of duress as no coercive behavior shown to the present).

X. COLLECTIVE BARGAINING SETTING

Vacatur of Award Overturned Where Arbitrator Arguably Interpreted CBA. The parties' collective bargaining agreement ("CBA") provided that a worker could be terminated after four "strikes" under the employer's attendance policy. The worker here was terminated after receiving four strikes under that policy, but the arbitrator reduced the termination to a 60-day suspension. The district court vacated the award, finding that the arbitrator exceeded his authority by inquiring beyond the finding of four strikes against the worker under the attendance policy. The 11th Circuit reversed. The majority here made clear that a labor arbitrator's award must be upheld where the arbitrator "arguably" interpreted the CBA. The majority found sufficient ambiguity in the CBA to conclude that the arbitrator was arguably interpreting the four strikes attendance policy. The majority acknowledged that the CBA provided that the "only issue" in a grievance under the attendance policy was whether the absence occurred but noted that that language was solely in the grievance section and not in the termination section which required "just cause for discharge." The majority concluded that the arbitrator's award supported the view that his ruling was the result of his arguably interpreting the CBA and, therefore, must be upheld "because of the deference we give to the arbitrator's interpretation of an agreement, we can find that an agreement is 'open to interpretation' even if we would not conclude that the language was open to interpretation in other contexts." *Warrior Met Coal Mining v. United Mine Workers of America*, 28 F.4th 1073 (11th Cir. 2022).

Ambiguity in Award Not Sufficient for Vacatur. The arbitrator here reduced a grievant's termination for harassment to an unpaid suspension and immediate reinstatement following issuance of the award. In doing so, the arbitrator stated in the award both that there was just cause for dismissal but nonetheless declined to uphold the termination. The district court vacated the award under the Labor Management Relations Act, but the Fifth Circuit reversed. The court noted that the collective bargaining agreement designated certain violations as warranting automatic discharge but did not do so for harassment violations. "The flexibility in this disciplinary approach permitted the arbitrator to opt for a penalty short of termination." The arbitrator opined that the employer's decision to terminate was for just cause but mitigating factors such as the worker's seniority warranted

a lesser penalty. The employer argued that having found just cause for the termination the arbitrator was required to uphold the discharge. The court disagreed, finding that the arbitrator's award drew its essence from the collective bargaining agreement "given that arbitrators need not explain their reasoning at all, an ambiguity in reasoning generally will not disturb their awards." *Ball Metal Beverage Container Corp. v. Local 129*, 2022 WL 340573 (5th Cir.).

Obligation to Arbitrate Expires with CBA. The union here filed grievances and sought arbitrations on claims that arose after expiration of the applicable collective bargaining agreement (CBA) and while the parties were negotiating a new CBA. Management had sent a letter to the union before expiration of the CBA stating that all contractual obligations would cease upon expiration of the agreement and that it "will decide its obligations to arbitrate grievances on a case-by-case basis." The district court ruled that the employer could not be obligated to arbitrate the pending grievances, and the Third Circuit affirmed. The appellate court reasoned that applicable Supreme Court decisions required courts to "apply ordinary contract principles in determining whether a contractual provision in a CBA survives the expiration of the CBA." As the arbitration provision of the CBA here did not have a durational term, the duty to arbitrate was governed by the general durational term of the CBA which had expired by the time the arbitrations were filed. For these reasons, the Third Circuit affirmed the lower court's denial of the union's motion to compel. *Pittsburgh Mailers Union v. P.G. Publishing Co.*, 30 F.4th 184 (3d Cir. 2022).

Case Shorts

- *Communications Workers of America v. DEX Media Inc.*, 2022 WL 865889 (N.D. Tex.) (labor arbitrator's decision to rule on the issue of laches on submission of papers only over the objection of the union which wanted a hearing on the issue did not deny the union's due process rights as no prejudice was shown).

XI. NEWS AND DEVELOPMENTS

EEOC Releases Reports Comparing Online and In-Person Mediations. The Equal Employment Opportunity Commission issued two reports reflecting the views of participants and mediators on the transition to video mediations from in-person sessions. During the pandemic, the EEOC out of necessity transitioned its substantial mediation program to online mediations. A study conducted by Professor E. Patrick McDermott surveyed the experiences of both mediators and participants with respect to the online mediations. Based on the survey participants' responses, Professor McDermott reported that 92% of charging parties and 98% of employers were willing to conduct online mediations before the EEOC. Further, 86% of charging parties and 94% of employers believe that the EEOC's online mediation procedures are fair and in similar numbers regard

the overall online mediation process as fair. As for results, 60% of charging parties and 72% of employers were satisfied with the outcomes of their online mediations and nearly 70% of the participants preferred online mediation to in-person mediation. Overall, the survey found that employers were more willing to participate in online mediations than in-person mediations.

IFTA Designates ICDR as Administering Agency. The Independent Film & Television Alliance (IFTA) has designated the international division of the American Arbitration Association, the International Centre for Dispute Resolution (ICDR), as the new administering organization for arbitrations governed by the rules for IFTA arbitrations. The ICDR has committed to establishing a specialized arbitration panel for IFYA arbitrations consisting of attorneys with significant entertainment, intellectual property, copyright and entertainment law expertise. The IFTA and the ICDR will work together to promulgate new rules for IFTA arbitrations with a focus on resolving international disputes in the independent film and television industry.

XII. TABLE OF CASES

Cases