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AAA Case Summaries:
March 2019

I. JURISDICTIONAL ISSUES: GENERAL

FAA Transportation Worker Exemption Expanded. The FAA exempts from its reach "contracts of employment" of transportation workers. The truck drivers in this case were retained as independent contractors. The Supreme Court ruled that under the usage at the time the FAA was enacted the term "'contract of employment' usually meant nothing more than an agreement to perform work. As a result, most people then would have understood §1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." In support, the Court cited to dictionaries at the time which afforded the word "employee" broad construction as a synonym for work. The Court also emphasized that Congress used the term "workers" with respect to the exemption, not the word employees. The Court rejected policy arguments offered by the trucking company in favor of strict application of the statute's terms. "If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing" to consider a legislative compromise which the Court noted was essential to the passage of legislation. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

Supreme Court Rejects "Wholly Groundless" Exception. Can a court rule on the question of arbitrability in contravention of the assignment of the arbitrability question to the arbitrator where it finds the claim wholly groundless? The Supreme Court ruled unanimously that it may not. Rather, the Court reasoned that a court must enforce the arbitration agreement as written. "That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." The Court analogized it to a court's inability to rule on the merits of a dispute subject to arbitration. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." In sum, the Supreme Court concluded that the wholly groundless exception was contrary to both the FAA and its own precedent. "It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019).

Exception to *Functus Officio* Doctrine Adopted. An award was issued in a reinsurance dispute and, at the request of one party only, was clarified by the panel. The majority reasoned that the award contained "ambiguities requiring clarification." The district court confirmed the award as clarified, and the Second Circuit affirmed. In doing so, the Second Circuit joined the Third, Fifth, Sixth, Seventh, and Ninth Circuits in allowing an exception to the *functus officio* doctrine where the award fails to address a contingency that later arises or when it is susceptible to alternative interpretations. The court gave due deference to the

panel's conclusion that the award it issued was ambiguous. The court reasoned that this holding was in keeping with the rule that a district court should remand to the arbitration panel a request to clarify an ambiguous award. For the exception to apply, the Second Circuit required three conditions to be satisfied: "(1) the final award is ambiguous; (2) the clarification merely clarifies the award rather than substantively modifying it; and (3) the clarification comports with the parties' intent as set forth in the agreement that gave rise to arbitration." The court found that the clarification here did not change the remedy awarded in the initial award, but simply explains how it was intended to be read. The court concluded that this approach satisfied the twin objectives of settling disputes efficiently and cost effectively. *General Re Life v. Lincoln National Life Insurance Company*, 909 F.3d 544 (2d Cir. 2018).

Arbitrator Authorized to Award Declaratory Judgment. The risk manager for the NHL's Anaheim Ducks, who was subject to an arbitration agreement, threatened to file a litigation alleging various claims, including a whistleblower claim relating to the safety of the Ducks' ice rink. The Ducks moved for declaratory relief before an arbitrator. The risk manager filed a complaint in court, but the Ducks successfully moved to compel the matter to arbitration. The risk manager fully participated in the arbitration but refused to raise his substantive claims before the arbitrator, stating that he would do so in a separate action. The Ducks proved that plaintiff's claims were without merit, and the arbitrator issued an award granting the Ducks' requested relief. The risk manager moved to vacate the award, arguing that the arbitrator did not have the authority to issue a declaratory relief award. The district court denied the motion and the California appellate court affirmed. The court found that the arbitration agreement afforded the arbitrator broad authority, including authority to issue declaratory relief. The court rejected the risk manager's public policy claims, emphasizing that he chose not to affirmatively assert his claims before the arbitrator. The arbitrator noted that "a full hearing was held on the merits of his allegations, and [the risk manager] had the opportunity to present witnesses, documents, and argument." The court added that the risk manager was never discouraged or prevented from bringing his claims as cross claims, and therefore his argument that unwaivable statutory rights were being waived was without merit. *Vogelgesang v. Anaheim Ducks Hockey Club*, 2018 WL 6301710 (Cal. App.), review denied (Feb. 27, 2019).

Non-Signatory May Compel Arbitration on Agency Grounds. Smith sought employment with TruGreen and in the process of applying agreed to be bound by TruGreen's arbitration program. Under the program, Smith was required to arbitrate all claims against TruGreen, its officers, and agents. Smith's application for employment was ultimately denied based on a background check conducted by GIS. Smith sued GIS, and GIS moved to compel. The district court reviewed the grounds under which a non-signatory may compel arbitration or be compelled to arbitrate. One of those grounds is where an agency relationship exists. The court concluded that Smith was bound to arbitrate his claim against GIS under agency principles. The court explained that it was clear that GIS was

acting as TruGreen's agent when the alleged illegal activity occurred which "points convincingly to the conclusion that GIS, as TruGreen's agent, is entitled to the protection of the Agreement between Smith and TruGreen, GIS's principal." *Smith v. General Information Solutions*, 2018 WL 6528155 (D. S.C.).

Non-Signatories Bound to Arbitrate Where Direct Benefit Received. The owners of a security firm entered into a Security Representative Consulting Agreement with the NFL containing an arbitration provision. They signed the Agreement as owners rather than in their individual capacities. A dispute arose and a litigation was initiated by the security firm. The NFL's motion to compel was granted. The court rejected the owners' argument that they were not bound by the arbitration provision in the Agreement because they were non-signatories. The court noted that the Second Circuit will enforce an agreement against a non-signatory where the non-signatory received a direct benefit from the agreement containing the arbitration clause. Here, the Agreement was the "sole means by which [security firm owners] could be compensated for their success" and, therefore, were required to arbitrate the dispute. *Buckley v. National Football League*, 2018 WL 6198367 (S.D.N.Y.).

Non-Signatory Not Bound to Arbitrate. Two pediatric practices brought a putative antitrust class action against Merck alleging antitrust violations involving the sale of Merck's rotavirus vaccines. Merck moved to compel arbitration pursuant to mandatory arbitration provisions in Merck's contracts with the Physician Buying Groups (PBGs) from whom the pediatric practices obtained the drugs. The court found that the pediatric practices were not parties or signatories to that agreement and therefore were not bound by it unless one of five exceptions to this general rule applied. Of these exceptions, the only two theories that could apply were agency and estoppel. The court found, however, that neither of these theories could bind plaintiffs to arbitrate. First, the court found there was no evidence that an agency relationship existed – expressly or impliedly. There was also no parent-subsidiary, ownership, or other similar relationship between the pediatric practices and the contract signatories. As a result, the agency theory failed. The court then considered the estoppel theory and rejected that as well, finding that the pediatric practices did not knowingly exploit the agreement or have a "obvious and close nexus" with the contract or the parties who signed it. The motion to compel was therefore denied. *In re Rotavirus Antitrust Litigation*, 2019 WL 297934 (E.D. Pa.).

Arbitrators' Order Consolidating Related Arbitrations Upheld. The courts have generally recognized that the issue of consolidation is not a threshold issue of arbitrability for courts to decide and that arbitrators can consolidate cases if given that authority. The panel here consolidated six separate arbitrations pursuing the same claims under the same profit-sharing agreements. In doing so, the panel agreed to consolidate the separate cases for discovery and motion practice purposes but noted that this would "not prevent separate, individual evidentiary presentations as to the defenses or claims" and will allow each claimant the right to petition for separate hearings. An award was issued granting relief to

five of the six claimants. Respondents moved to vacate, arguing that under the Supreme Court's ruling in *Stolt-Nielsen S.A. v. AnimalFeeds International Group*, 559 U.S. 662 (2010) bilateral arbitrations may not be consolidated in absence of consent. The trial court and Ohio Court of Appeals rejected this argument, finding that respondents mischaracterized Supreme Court authority which focused on class arbitration. Here, the panel had broad authority under the arbitration agreements and since "the contracts were identical and the defenses were likely identical, the panel found consolidation permissible by the contract language and efficient." The appellate court concluded that the panel acted within its authority in consolidating these cases. *Champion Chrysler v. Dimension Services Corp.*, 2018 WL 6822550 (Ohio App.).

Consolidation Issue for Arbitration Panel to Decide. Reinsurance disputes between The Hartford and Employer's Insurance Company of Wausau under 19 separate reinsurance treaties and eight reinsurance programs were submitted to arbitration. The Hartford expressed its intent to consolidate all the cases before one arbitration panel; Wausau proposed that the cases be heard before three different panels. The parties could not agree, and Wausau moved in court to compel appointment by The Hartford of three arbitrators for the three proposed panels in accordance with the contractual terms while The Hartford sought the selection by Wausau of an arbitrator for the single panel it proposed. The court sided with Wausau. The court made clear that the question of whether to consolidate cases was for an arbitrator to decide and not the court. The Hartford, however, by refusing to proceed except before a single panel constituted in the court's view a "de facto request for the Court to fashion a new procedure in contradiction of the agreements" and in effect consolidate the cases. "Hartford's unilateral arbitration demand is indisputably not a valid contract as there is no mutual assent by the parties to proceed in a consolidated arbitration, evident by their communications prior to filing their petitions." The court concluded that once each party designated their arbitrators, those two arbitrators can select an umpire at which time "the proceedings can begin, and the empaneled arbitrators can consider Hartford's request to consolidate." *Employer's Insurance Company of Wausau v. The Hartford*, 2018 WL 6330425 (C.D. Cal.).

Court Must Decide Whether Arbitration Agreement Covers Dispute. A law firm non-equity partner filed a sex discrimination class action against her firm. The law firm moved to compel arbitration based on e-mail notices to the partner of the mandatory arbitration program which provided to the attorneys the ability to opt out of the program. The partner argued that she was unaware of the arbitration program and therefore was not bound to arbitrate her dispute. This, the court reasoned, raised issues of contract formation which it framed as "whether [the partner] agreed to arbitration when she did not sign the Agreement and failed to opt out, but then continued to work at [the law firm]." This issue, the court concluded, was one to be decided by the court in the first instance. The court, in doing so, rejected the partner's argument that she was unaware that she had been sent the arbitration agreement via e-mail and had the ability to opt out of it. In particular, the court

noted that the partner had in fact replied to one of these notices. The court observed that the partner – "an experienced employment lawyer – may not have read or fully comprehended the contents of those emails and their attachments" but concluded that this did not "preclude a determination that she is bound by the Arbitration Agreement." Finally, the court rejected the partner's argument that the arbitration agreement could only be enforceable if she actually signed it, noting that failure to opt out of the program would be deemed consent to the agreement as provided for under the program. *Knepper v. Ogletree, Deakins*, 2019 WL 144585 (N.D. Cal.). See also *Midwest Neurosciences Associates v. Great Lakes Neurosurgical Associates*, 384 Wis. 2d 669 (2018) (court determines arbitrability question where parties' dispute involves earlier agreement with arbitration provision and later agreement without one, as the parties failed to demonstrate a clear and unmistakable intent to submit arbitrability issue to arbitrator).

Judicial Enforcement of Arbitration Subpoena. Health Options, a health insurance benefits provider, and Navitus, a pharmaceutical products provider, were involved in an arbitration proceeding in Madison, Wisconsin. The central claim by Health Options was that Navitus overcharged it through its retail pharmacy network. In an effort to discern the amount it was allegedly overcharged, Health Options requested discovery from Navitus concerning the retail pharmacies' price lists. Navitus claimed the requested discovery was not in its possession. At Health Options' request, the arbitration panel issued subpoenas to retail pharmacies in Navitus' network, including one to Walgreens, which is headquartered in Maine. After Walgreens refused to comply with the subpoena absent a court order, Health Options filed a petition in the Southern District of New York to enforce the subpoena under §7 of the FAA. In that proceeding, Walgreens argued that the district court could not enforce the subpoena because Walgreens' headquarters were more than 100 miles from the arbitration forum. Walgreens also argued that the court lacked personal jurisdiction over the company. Both arguments were rejected by the court. First, the court determined that Walgreens' headquarters in Deerfield, Illinois was within 100 miles of the arbitration forum in Madison, Wisconsin "as the crow flies." The court also concluded that personal jurisdiction over Walgreens existed because Health Options' assertion that it was injured by Walgreens' acts in Wisconsin (i.e., the alleged inflated prices to Navitus that were charged to Health Options) was sufficiently related to Health Options' arbitration claims. Turning to the question of due process, the court further held that because Walgreens purposely availed itself to do business with Navitus, a Wisconsin company, it should have reasonably expected that it could be hauled into a Wisconsin court. The arbitration subpoena was therefore enforced. *Maine Community Health Options v. Walgreen Co.*, 2018 WL6696042 (W.D. Wis.).

Jurisdictional Issues Related to Arbitration Subpoena. Petitioner filed a petition under §7 of the FAA to enforce two third-party arbitration subpoenas seeking information to substantiate its fraudulent inducement claim. The third-party respondents moved to dismiss the petition and quash the subpoenas on the grounds that there was no subject matter jurisdiction because (1) there was no diversity of the parties; (2) petitioner failed to

allege an amount in controversy that would trigger diversity jurisdiction; and (3) the arbitrators were not sitting in the district court's venue. The court denied respondents' motion and respondents moved for reconsideration or reargument. The court began by observing that respondents' motion was a thinly-veiled attempt to relitigate the motion to dismiss and, on that basis alone, it was groundless. Regarding diversity of the parties, the respondents argued that the court should determine that issue by looking at the underlying arbitration and determine whether those parties were diverse. The court rejected the argument, holding that it should consider the citizenships of the parties to the controversy before it, namely, the parties appearing before the court on the petition to enforce the subpoena. Next, turning to the issue of whether the amount in controversy exceeded the $75,000 threshold, the court found that the arbitration panel had "already determined that the summonses seek relevant information." Noting that even if documents produced in compliance with the subpoena pertained to only a small fraction of the $134 million in damages sought in the underlying arbitration, the court held the amount in controversy requirement was satisfied. Finally, turning to the venue argument, the court rejected respondents' view that the court should look to the business address of the arbitrators in determining where they sit. Finding instead that "nothing in Section 7 requires an arbitration panel to sit in only one location," the court held the proper inquiry is to consider the location the arbitrators specified in the subpoena. Here, the subpoena set New York City as the hearing location, and therefore the court concluded that it was the proper venue for the enforcement petition. Accordingly, the petition to enforce the arbitration subpoenas was granted. *Washington National Insurance Co. v. Obex Group LLC*, 2019 WL 266681 (S.D.N.Y.).

California *McGill* Decision Preempted By FAA. The California Supreme Court in *McGill v. Citibank* ruled that an arbitration provision that purports to bar a plaintiff's statutory right to seek injunctive relief under California's Unfair Competition Law was unenforceable. The bank here sought to compel the arbitration of a claim for damages and injunctive relief under the Unfair Competition Law relating to the charge of ATM fees by Citibank. The district court granted the bank's motion. In doing so, the court ruled that California's *McGill* ruling was preempted by the FAA. The court reasoned that the ruling disfavored arbitration as it did not apply to all contracts, only arbitration agreements. The "*McGill* rule makes public injunctive relief waivers unenforceable regardless of the fact that public injunctive relief is, by definition, unnecessary to make a plaintiff whole in an individual arbitration." For this reason, the court concluded that the *McGill* rule stood as an obstacle to the proper enforcement of the FAA and was preempted. *McGovern v. U.S. Bank, N. A.*, Case No. 18-CV-1794 (S.D. Cal. January 25, 2019).

Calculation of Time to File Petition to Vacate Governed By FRCP. The Ninth Circuit upheld a district court order denying a petition to vacate an arbitration award on the ground that it was untimely. The FAA requires notice of a petition to vacate to be "served upon the adverse party or his attorney within three months after the award is filed or

delivered." 9 U.S.C. § 12. The award at issue was delivered on September 14, 2016 and the petition to vacate was filed and served upon respondents on December 15, 2016. The court began its analysis by examining "whether Federal Rule of Civil Procedure 6(a) or the FAA governs how to calculate the three-month deadline" and concluded that Rule 6(a) provides the controlling protocol unless the FAA provides otherwise. Here, while the FAA set forth the three-month deadline, it did not provide a procedure for calculating that time. Rule 6(a), however, provides a detailed three-step process that (a) excludes the day of the triggering event; (b) counts every day, including intermediate Saturday, Sundays and legal holidays; and (c) includes the last day of the period. Applying this three-step process, the court determined that the last day to file the petition to vacate was December 14, 2016. Being one day past that deadline, the petition was untimely, and the district court order was affirmed. *Stevens v. Jiffy Lube International, Inc.*, 911 F.3d 1249 (9th Cir. 2018).

Standard for Confirmation of Award on Default Explained. An award was issued, and the prevailing party moved to confirm the award. The motion was unopposed. In confirming the award, the court explained that where a motion to confirm is without opposition, the motion is treated in the same manner as a motion for summary judgment that is unopposed. In particular, the court explained that the "movant's burden on the motion is lightened such that, in order to succeed, it need only show its entitlement to the relief requested in its motion, which has appropriately been characterized as a 'modest' burden." In this case, the court found that the petition met this modest burden and confirmed the award. *Millrock Technology v. Pixar Bio Corp.*, 2018 WL 6257499 (N.D.N.Y.).

Case Shorts:

- *U.S. Home Corp. v. Lanier*, 431 P. 3d 38 (Nev. 2018) (FAA applies to purchase and sale agreement for private home as "the general practice of developing, buying, and selling homes substantially affects interstate commerce). Accord: *Greystone Nevada v. Phuc Le Huynh*, 431 P. 3d. 38 (Nev. 2018).
- *In re: Servotronics, Inc.*, 2018 WL 5810109 (D. S.C.) (28 U.S.C. § 1782, which authorizes the taking of discovery for a proceeding before a foreign tribunal, ruled not applicable to overseas private arbitration).
- *Simmons v. Trans Express, Inc.*, 355 F.Supp.3d 165 (E.D.N.Y. 2019) (small claims arbitrator's award entitled to *res judicata* effect under New York law).
- *Tailor v. Rushmore Service Center*, 2019 WL 518543 (D. N.J.) (motion to compel under Fed. R. Civ. P. 12(b)(6) denied where no arbitration clause is referenced in the complaint nor was one incorporated by reference and lack of clarity requires discovery on the issue).

II. JURISDICTIONAL CHALLENGES: DELEGATION AND WAIVER ISSUES

Waiver Based on Substantial Participation in Court Proceeding. The Fifth Circuit ruled that the defendant waived its right to arbitrate where it substantially invoked the judicial process. Waiver of the right to arbitrate will be found when a party "at the very least, engage[s] in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration" and the party opposing arbitration demonstrates prejudice. Here, defendant initially moved to transfer the case from Illinois to Texas, based in part on the arbitration agreement. However, once the case was transferred, defendant moved to dismiss the case but did not include a request, even in the alternative, for an order compelling arbitration. The Fifth Circuit found that these actions demonstrated a desire to resolve the dispute in litigation rather than arbitration. Turning next to the issue of prejudice, the Fifth Circuit concluded that plaintiff was prejudiced not only by the 13-month delay but also by the fact that defendant waited to receive the court's merits decision, which partially dismissed a portion of the case with prejudice, before making its motion to compel. The court emphasized that its finding of prejudice was not just based on the significant delay but also on the fact that plaintiff's legal and financial positions were prejudiced by the prospect of having to re-litigate an issue in arbitration that was already tested in court. *Forby v. One Technologies, Inc.,* 909 F.3d 780 (5th Cir. 2018).

Arbitrability Issue for Arbitrator to Decide, Class Action Ruling for Court. Rogers entered into a lease agreement with Shell Oil which included an arbitration provision. A dispute arose and Rogers filed a putative class action in court. The district court denied Shell's motion to compel arbitration. On appeal, the Sixth Circuit reversed. The majority first ruled that since Rogers challenged the various provisions of the agreement and not merely the arbitration clause, the severability doctrine required that the arbitrator determine the arbitrability question. The Sixth Circuit found, however, that the agreement did not provide clear and unmistakable evidence that the class action question was referred to the arbitrator to decide, and therefore this gateway issue was for the court. The court remanded the class action question to the district court for a ruling in the first instance. *Rogers v. Swepi, LP*, 2018 WL 6444014 (6th Cir.).

Question of Arbitrability Delegated to Arbitrator. Lyft moved to compel arbitration in a putative class action alleging violations of the Fair Credit Reporting Act. The court granted the motion, finding that plaintiff consented to Lyft's terms of service, which contained an arbitration agreement, when he applied for employment through Lyft's app and consented to the terms by clicking the "I accept" button. The court found that the language in the agreement providing that "legal disputes or claims arising out of the Agreement (including but not limited to . . . the arbitrability of any dispute), . . . shall be submitted to binding arbitration" properly delegated the question of arbitrability to the arbitrator. Citing to another California district court that recently ruled on Lyft's terms-of-service arbitration provision, the court agreed with its conclusion that such language "is evidence that the

parties clearly and unmistakably have referred the arbitrability question to the arbitrator.'" (citing *Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 954 (N.D. Cal. 2015)). Accordingly, the parties were ordered to arbitrate, and the court action was dismissed. *Petersen v. Lyft*, 2018 WL 6047085 (N.D. Cal.). See *Soars v. Easter Seals Midwest*, 563 S.W.3d 111 (Mo. 2018) (en banc) (failure to challenge delegation provision specifically requires under Missouri law that the issue be submitted to the arbitrator rather than to court as the severability doctrine only applies when the arbitration agreement itself, including the delegation provision, is specifically challenged).

Court Decides Arbitrability Where CBA Does Not Clearly and Unmistakably Delegate to Arbitrator. The union submitted a wage dispute to arbitration under the collective bargaining agreement. The arbitrator concluded that the dispute was not arbitrable and denied the grievance. The district court confirmed the award, but the appellate court reversed, reasoning that substantive arbitrability issues are generally for a court to decide. Here, the court concluded that the arbitrator blurred the lines between the issue of arbitrability and his merits analysis by concluding that the dispute was not arbitrable without first determining who had jurisdiction to decide that question, the court or arbitrator. *Local Jt. Executive Board v. Mirage Casino-Hotel, Inc.*, 2018 WL 6539725 (9th Cir.).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Unconscionable Terms Severed. The arbitration provision applicable to this employment dispute was found to be procedurally unconscionable because it was in an adhesion contract and the applicable rules of procedure were not attached to it. The court also found the arbitrator selection process to be substantively unconscionable. Under this unique process, the employer initially proposed three JAMS arbitrators to which the employee was to react. If the parties could not agree, the employee could then propose three JAMS arbitrators and then if no agreement was reached at that point the employer was empowered to designate two JAMS arbitrators from which the employee was required to select one. The "likely consequence" of this procedure, in the court's view, was that the employer can "force the employee to pick between defendant's two favorite arbitrators. There is nothing to prevent defendant from always rejecting the three names proposed by the employee, thereby ensuring that defendant always has complete and unilateral control over the pool of potential arbitrators." The court found, however, that these unconscionable provisions did not permeate the agreement. The arbitrator could be fairly selected, the court reasoned, through normal JAMS processes. The court concluded that severance of the substantively unconscionable provision was in keeping with prevailing law which favors enforcement of arbitration agreements and "considering the ease" here with which it "can be made entirely conscionable" the court found severance to be appropriate. *Pichardo v. American Financial Network*, 2019 WL 153704 (Cal. App.).

Case Shorts:

- *U.S. Home Corp. v. Lanier*, 431 P. 3d 38 (Nev. 2018) (requiring that arbitration provision be more prominent than other contractual provisions would disfavor arbitration and therefore arbitration provision in normal typeface and prominence is not procedurally unconscionable).
- *Spaulding v. PJCA-2*, 2019 WL 517667 (Cal. App.) (AAA rule giving arbitrator discretion to limit discovery "consistent with the expedited nature of arbitration" not substantively unconscionable under California law).
- *Molina v. Kaleo*, 2019 WL 330748 (S.D.N.Y.) (provision in arbitration agreement authorizing employer, but not employee, to seek injunctive relief "does not reflect a broader lack of mutuality" and therefore did not render the agreement substantively unconscionable).
- *Molina v. Kaleo*, 2019 WL 330748 (S.D.N.Y.) (arbitration provision in all caps and bold lettering on page 6 of a 22-page terms and conditions not "hidden" and therefore not procedurally unconscionable).
- *O'Neil v. Comcast Corp.*, 2018-CV-04249 (N.D. Ill. February 27, 2019) (unconscionability claim rejected as the "presence of an arbitration opt-out clause 'weighs heavily against' a finding of procedural unconscionability").
- *Perez-Tejada v. Mattress Firm*, 2019 WL 830450 (D. Mass.) (modification provision in arbitration agreement not substantively unconscionable where employer may only modify the agreement on 30 days' notice and the modification may only have prospective effect).
- *Sanfilippo v. Tinder*, 2018 WL 6681197 (C.D. Cal.) (retroactive application of arbitration provision not substantively unconscionable).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Opt-Out Provision Enforced According to Terms. A Lyft driver who enrolled online in 2017 was found to have accepted Lyft's Terms of Service which included an arbitration provision. That arbitration provision allowed prospective drivers to opt-out within 30 days of acceptance of the Terms of Service, but the driver here failed to do so. Over a year later Lyft asked the driver to reaffirm acceptance of the arbitration requirement. The opt-out in the 2018 agreement, however, did not apply to drivers already bound to arbitrate. The driver brought a wage and hour putative class action and Lyft moved to compel. The court granted Lyft's motion. In doing so the court rejected the driver's argument that he affirmatively opted out of the 2018 agreement. The court noted that the driver did not opt-out of the 2017 agreement and his attempts to opt-out of the later agreement, by its own terms, did not have the effect of mooting the earlier agreement. In so holding, the court cited the emphatic federal policy in favor of arbitration and the court's obligation to interpret an agreement in accordance with its unambiguous terms. *Wickberg v. Lyft*, 2018

WL 6681791 (D. Mass.). See also *Perez-Tejada v. Mattress Firm*, 2019 WL 830450 (D. Mass.) (failure to opt-out of arbitration agreement and to continue to remain employed constituted acceptance of arbitration obligation).

Arbitration Provision on Product Wrapping Constitutes Valid Offer. The consumer here purchased roof shingles. The shingle wrapping had conspicuously written on it warranty and other important information including a mandatory arbitration provision which contained a class action waiver. The consumer filed a class action alleging that the shingles were faulty. The manufacturer's motion to compel was granted and affirmed by the Eleventh Circuit. The court ruled that under Florida law opening a product package following notice of terms of sale constitutes acceptance of the manufacturer's offer. The court found that the manufacturer's "packaging provided conspicuous notice of its offer – something a reasonable, objective person would understand as an invitation to contract." The court reached this conclusion while acknowledging that it is the contractor who generally receives the shingles, the packages are "large and unwieldy", and the packaging is unlikely to be kept once opened. The court found "those distinctions neither alter the underlying principles nor require a different result." Further, the court noted in the age of Amazon Prime as "fewer and fewer purchases are consummated face to face, and more and more are made online, consumers should (and must) know that vendors will often employ a 'simple approve-or-return' model, enclosing their full legal terms with a product at shipment." The court added that as "master" of the offer the manufacturer "was free to invite acceptance by specified conduct, and it did." The court also rejected the argument that it was the roofer rather than the consumer who accepted the offer on agency grounds, that is, the roofer was the duly authorized agent of the consumer and the acts of the roofer were properly imputed to the consumer. *Dye v. Tamko Building Products*, 908 F. 3d 675 (11th Cir. 2018). See also *Perez-Tejada v. Mattress Firm*, 2019 WL 830450 (D. Mass.) (adequate notice present where employer sent emails "to all of its employees calling special attention to the Agreement, including a video explaining its impact, inserting clear warning language in the Agreement and providing all of its new and integrated employees with the Agreement as part of a new hire process).

Electronic Acknowledgement Constitutes Acceptance of Dispute Resolution Policy. Plaintiff filed a court action against her former employer, TSI, alleging claims for employment discrimination in violation of the New Jersey Law Against Discrimination and the New Jersey Family Leave Act. TSI moved to dismiss the action and compel arbitration, arguing that plaintiff had agreed to arbitrate all workplace disputes. The court agreed, finding that plaintiff's written employment offer conditioned her employment on existing TSI policies, which included the dispute resolution policy. During her onboarding process, plaintiff electronically signed an acknowledgement of her agreement to the dispute resolution policy which provided "[i]f (1) your dispute involves a claim under federal, state, or local law, (2) you are not satisfied with the results you received through the internal process, and (3) you want to pursue the matter further against TSI, you must file a request

for arbitration with the American Arbitration Association ("AAA") to pursue the claim." Although plaintiff did not print a copy of the policy, the court found that all employees had access to it from any TSI network computer as well as a website available to them on the internet. In addition, the court found that plaintiff was aware of and enforced the TSI dispute resolution policy against other employees in her capacity as a TSI manager. Holding that the language of the dispute resolution policy was broad and covered the claims at issue, the court dismissed the action and ordered the parties to arbitrate. Plaintiff appealed, arguing that the trial court erred in concluding that she accepted the dispute resolution policy and that her electronic acknowledgement was valid. The appellate court rejected plaintiff's arguments and affirmed the lower court order, holding that the record contained ample evidence supporting the trial court's findings of fact and conclusions of law. *Brownlee v. Town Sports International Holdings, Inc.*, 2019 WL 149645 (N.J. App.). See also *Wickberg v. Lyft*, 2018 WL 6681791 (D. Mass.) (Lyft driver bound by on-line enrollment process where clickwrap agreement employed and driver had to agree to terms of service, which were appropriately conspicuous, to complete the registration process); *Sultan v. Coinbase, Inc.*, 354 F. Supp.3d 156 (E.D.N.Y.) (digital currency depositor bound by arbitration provision in the on-line user agreement where he was put on inquiry notice and required to click acceptance of user agreement on a single screen containing all relevant screens "with a minimalist layout and no distractions"); *Dicent v. Kaplan University*, 2019 WL 158083 (3rd Cir.) (student ruled bound to arbitrate where student "simply did not read or review the Enrollment Packet PDF closely before she e-signed it, which will not save her from her obligation to arbitrate").

New Jersey Supreme Court Refuses to Enforce "Debatable, Confusing, and Contradictory" ADR Provision. New Jersey courts require that mutual assent be clear when enforcing a mandatory arbitration provision. The New Jersey Supreme Court found in this case that the ADR provision in a home warranty agreement was unenforceable. The Court noted that the obligation to arbitrate was included under the "Mediation" section of the agreement and referred to the AAA's "Commercial Mediation Rules". The Court found other "material discrepancies" in the agreement which called into question "the essential terms of the purported agreement to arbitrate." For this reason, the Court found that mutual assent was lacking. "The small typeface, confusing sentence order, and misleading caption exacerbate the lack of clarity in expression. It is unreasonable to expect a lay consumer to parse through the contents of this small-font provision to unravel its material discrepancies." *Kernahan v. Home Warranty Administrator of Florida*, 236 N.J. 301 (2019). See also *Trout v. Winner Ford*, 2018 WL 6613644 (N.J. App.) (arbitration agreement providing that either party "may" submit dispute to arbitration which "leaves open the possibility a party may also proceed with a course of action in court" renders the agreement unenforceable); *Skuse v. Pfizer, Inc.*, 2019 WL 237301 (N.J. App.) (Pfizer's on-line arbitration training module ruled a "prosaic effort" and insufficient to gain employee's assent to waive legal rights in favor of arbitration of claims).

Scope of Arbitration Agreement Covered Former Employee's Declaratory Judgment Action. Plaintiff was a former sales representative for defendant. When she went to work for a competitor, defendant threatened to sue her for breach of two non-solicitation agreements she signed. Plaintiff filed an action seeking a declaratory judgment with respect to the enforceability of the non-solicitation agreements, including whether she is subject to certain employment-related contractual obligations and whether she breached any of those obligations. Defendant moved to compel arbitration, arguing that the claims fell within the scope of the parties' arbitration agreement (called "the Program"). The trial court denied the motion and defendant filed an interlocutory appeal. The Texas Court of Appeals reversed the trial court order, noting that the Program contained broad language, covering "all legal claims arising out of or relating to employment, application for employment, or termination of employment, except for claims specifically excluded under the terms of this Program." Turning to the excluded claims, the court found that the only claims carved out of the Program were specific ERISA-related claims, claims for temporary relief, and administrative proceedings before the EEOC. Holding that plaintiff's request for a permanent declaration of her rights under the parties' non-solicitation agreements is not excluded from the Program but rather is covered by its plain language, the appeals court vacated the lower court's order and remanded the case to the trial court for dismissal and an order compelling arbitration. *IPFS Corp. v. Lopez*, 2018 WL 6175119 (Tex. App.). See also *Novick v. Credit One Bank*, 2019 WL 103878 (4th Cir.) (non-party house designer may seek arbitration under arbitration provision in builder's construction agreement that broadly provided that all disputes and claims related to the project are to be arbitrated).

Fraudulent Inducement Claim Not Covered by Arbitration Agreement. Plaintiffs filed an action for fraudulent inducement, claiming that defendant made fraudulent representations to induce them to purchase membership interests in an athletic training facility. Defendant countered with a motion to compel arbitration, arguing that although the Unit Purchase Agreement did not contain an arbitration provision, it incorporated the terms of the parties' Operating Agreement, which did contain an arbitration provision. The trial court agreed that the arbitration provision was incorporated into the Purchase Agreement but, applying Tennessee law to the contract formation issues, held that the fraudulent inducement claim was not arbitrable. The appellate court upheld the denial of the motion to compel arbitration but disagreed on the incorporation issue. The appellate court examined the specific terms of the two agreements and found that "the purchase agreements merely include an obligation to be bound by a separate agreement; they do not evidence an intent that the provisions of the referenced separate agreement define and shape the understanding of the purchase agreement." The appellate court therefore held that the purchase agreement did not contain an arbitration provision, whether by incorporation or otherwise, and the trial court's decision was affirmed on these other grounds. *Melo Enterprises, LLC v. D1 Sports Holdings*, LLC, 2019 WL 338941 (Tenn. App.).

Arbitration Provision Appropriately Applied Retroactively. Plaintiff raised claims of sex harassment with her employer, Tinder. After raising these claims internally, she signed Tinder's arbitration agreement. Plaintiff then filed her sexual harassment claims in court, and Tinder moved to compel. The court granted Tinder's motion. In doing so, the court rejected plaintiff's argument that the arbitration agreement could not be applied retroactively as her claims arose prior to her signing of the agreement. The court emphasized that the arbitration agreement covered "a broad scope of disputes. Indeed, the addition of 'in connection with' after the initial clause 'arising out of' seems to extend the scope of the Agreement well beyond present or future disputes." In support of its holding, the court noted that disputes regarding hiring were arbitrable and "those disputes would have occurred prior to the Agreement's effective date." For these reasons, the court found plaintiff's claims to be arbitrable. *Sanfilippo v. Tinder*, 2018 WL 6681197 (C.D. Cal.).

Arbitration Provision in Staffing Agency Agreement Governs Dispute with Employer. The employees here signed an employment agreement with a staffing agency which included an arbitration provision requiring that any dispute be brought against both the staffing agency and the worksite employer in arbitration. The employees were placed by the staffing agency, and ultimately sued the worksite employer for labor law violations. The employer cross-claimed against the staffing agency. The employer and staffing agency together moved to compel arbitration relying on the arbitration agreements in the staffing agency contract. The trial court denied the motion, but a California appellate court reversed. The court found that the staffing agency and worksite employer were joint employers and their "co-employer relationship and identity of interest with regard to their mutual employees allows them to compel arbitration of an employment dispute." The court rejected the employees' effort to avoid arbitration with the worksite employer by only suing it and not the staffing agency. Suing only the worksite employer, and not the staffing agency, in the court's view "is a distinction without a difference because [the staffing agency] is a party to this litigation; [the staffing agency and worksite employer] are equally responsible for complying with wage and hour laws; and this entire dispute arose from [the employees'] employment with [the staffing agency], which must ensure lawful work breaks when its employees are assigned to a client such as [the worksite employer]." *Vasquez v. San Miguel Produce, Inc.,* 31 Cal. App. 5th 810, 242 Cal. Rptr. 3d 852 (Ct. App. 2019), reh'g granted, opinion not citeable (Feb. 28, 2019). See also *Novick v. Credit One Bank*, 2019 WL 103878 (4th Cir.) (plaintiff homeowner can be required to arbitrate claims under arbitration agreement in a Construction Contract against building designer whose agreement did not have an arbitration agreement where homeowner's "allegations of related and interdependent misconduct by both parties were intimately founded in or intertwined with the Construction Contract").

Severability Clause Used to Save Flawed Arbitration Agreement. Plaintiffs entered into a construction contract with defendant, a home builder, to build a home for them in Ohio. The construction contract contained an arbitration provision designating the Ohio Arbitration and Mediation Center ("OAMC") as the chosen arbitration forum. Within the first year of moving into the home, plaintiffs allege they experienced issues with the driveway and kitchen floor. The home owners filed an action in court alleging, among other things, breach of the construction contract. The builder moved to stay the litigation and compel arbitration and plaintiffs opposed. Plaintiffs argued that the arbitration provision was unenforceable because their chosen forum (1) is not responsive and appears to be defunct; (2) likely was defunct when the agreement was entered into; and (3) has a fatal conflict of interest due to its undisclosed relationship with the builder. In response, the builder argued that the essential purpose of the arbitration provision could still be met because the parties could agree to a different forum or the court could appoint one. The trial court disagreed, holding that the arbitration clause was unenforceable due to impossibility because OAMC was defunct. The appellate court reversed. Agreeing with the builder's position, the court held that it is still possible to arbitrate the claims despite OAMC's absence. The court also held that the severability clause allows the court to sever the designation of OAMC as the arbitration forum, leaving the remainder of the provision enforceable. Finally, the court noted that either party could ask the court to appoint an arbitrator. *Paulozzi v. Parkview Custom Homes, LLC*, 2018 WL 5734658 (Ohio).

Merger Clause in Later Agreement Did Not Negate Arbitration Provision in Earlier Contract. The parties entered into an employment agreement in 2015 with an arbitration provision. In 2017 the parties entered into a second agreement without an arbitration provision that also had a merger clause and provided that New York law applied. The employee sued and the employer moved to compel arbitration. The court granted the employer's motion, finding that the earlier arbitration provision was not invalidated by the later agreement. The court found important that the later agreement did not contain a mandatory forum selection clause and made no mention of arbitration. "Because the 2017 Agreement does not specifically preclude arbitration and can be read as complementary to the 2015 Agreement's arbitration provision, the parties' agreement to arbitrate remains valid." *Zendon v. Grandison Management*, 2018 WL 6427636 (E.D.N.Y.).

Case shorts:

- *Buckley v. National Football League*, 2018 WL 6198367 (S.D.N.Y.) (vindication of rights under FLSA and ADEA not precluded by language in arbitration agreement providing that each party must bear its own attorneys' fees where the language did not expressly preclude recovery of fees by the prevailing party and the AAA rules permit arbitrators to grant any remedy available in a court proceeding including award of attorneys' fees).

- *Alvarado v. Lowe's Home Centers*, 2018 WL 6697181 (N.D. Cal.) (Fair Credit Reporting Act claim subject to arbitration even if plaintiff did not know of claim when he signed the arbitration agreement).
- *Perez-Tejada v. Mattress Firm*, 2019 WL 830450 (D. Mass.) (officers of employer entitled to invoke arbitration defensively where mutual arbitration agreement signed by employees defined the employer to include officers, directors, and managers).
- *Stagg Restaurants v. Serra*, 2019 WL 573957 (Tex. App.) (motion to compel denied where facts disputed as to whether McDonald's employee received occupational injury plan containing arbitration provision).

V. CHALLENGES TO ARBITRATOR OR FORUM

AAA Afforded Arbitral Immunity. The University of Iowa hired a contractor to perform work on one of its buildings. After legal disputes arose between the parties, the contractor filed a demand for arbitration before the AAA. In response, the University sought an order from an Iowa trial court enjoining the AAA from adjudicating the dispute, contending that it did not have jurisdiction. The University argued that the AAA improperly considered its case alongside another arbitration between the University and a different contractor. The trial court dismissed the action, finding that the doctrine of arbitral immunity applied, and the Iowa Court of Appeals affirmed. The Court of Appeals explained that the doctrine "provides that arbitrators are immune from liability for acts performed in their arbitral capacity," and "applies unless there is a 'clear absence' of jurisdiction." The University argued that a clear absence of jurisdiction existed because there was not a court order determining AAA's jurisdiction. Rejecting that contention, the court stated that "the question is not whether the court has determined that AAA has jurisdiction to arbitrate a dispute; the question is whether the arbitration demand 'was not facially valid so that jurisdiction was clearly lacking.'" Finding that the University failed to show that the arbitration demand was so deficient on its face as to signal a "clear absence" of jurisdiction, the court held that arbitral immunity applied, and the University could not enjoin the AAA from arbitrating the case. *University of Iowa v. American Arbitration Association*, No. 17-0949 (Iowa App. 2019).

Arbitration Barred Where Designated Arbitration Forum Not Available. A consumer lender sued a borrower on a defaulted loan, and the borrower counterclaimed on a class basis alleging a violation of the Missouri Merchandising Practices Act. The loan agreement contained an arbitration provision that designated the National Arbitration Forum as the provider of arbitration services. The NAF entered into a consent decree with the government and was no longer arbitrating consumer claims. The Missouri Supreme Court held that the plain language of the arbitration agreement makes clear that arbitrations must be "before – but only before – NAF." The court rejected the lender's request that the court designate another arbitration forum to hear the case. The court reasoned that the "unequivocal, plain and clear terms" of the arbitration agreement established that the

parties "agreed to arbitrate before NAF." In further support of its holding, the court noted that the arbitration was required to proceed under the NAF Code of Procedure which by its own terms mandates that "only NAF can apply and administer that code." The court cautioned that merely naming an arbitrator or arbitration forum did not preclude naming a substitute under the FAA in the absence of a basis, as is present in this case, for limiting arbitration to that arbitrator or forum. *A-1 Premium Acceptance v. Hunter*, 557 S.W. 3d 923 (Mo.) (en banc).

Failure to Identify Arbitral Forum Precludes Enforcement. The arbitration provision here did not specify an arbitral forum to administer any resulting arbitration. A New Jersey appellate court, applying that state's precedent requiring that any agreement to arbitrate claims must "clearly and unambiguously" waive statutory rights and ramifications of the provision, denied the motion to compel. The court reasoned that the failure to identify an arbitral forum or a particular arbitrator rendered the arbitration agreement unenforceable under New Jersey law. "Selecting an arbitral institution informs the parties, at a minimum, about that institution's general arbitration rules and procedures. Without knowing this basic information, parties to an arbitration agreement will be unfamiliar with the rights that replaced judicial adjudication." As a result, the court concluded that there had been no meeting of the minds and, therefore, no agreement to arbitrate claims. *Flanzman v. Jenny Craig*, 456 N.J. Super. 613 (N.J. App. 2018).

VI. CLASS & COLLECTIVE ACTIONS

FLSA Collective Action Notice Not Issued to Employees Subject to Arbitration. The district court conditionally certified a collective of approximately 42,000 call center employees alleging wage and hour violations under the Fair Labor Standards Act. The court ordered that notice be issued to all putative collective members, 35,000 of which were subject to arbitration agreements. On appeal, the Fifth Circuit concluded that notice should not issue to those employees who are subject to arbitration. The court found that only potential plaintiffs were entitled to notice, and employees bound to an enforceable arbitration agreement were not potential plaintiffs to whom notice must be sent. According to the Fifth Circuit, notice may only be sent to employees who are subject to arbitration if the record demonstrates "that nothing in the [arbitration] agreement would prohibit that employee from participating in the collective action." *In Re JPMorgan Chase & Co.,* 2019 WL 758984 (5th Cir.). See *Smigelski v. PennyMac Fin. Servs., Inc.,* 2018 WL 6629406 (Cal. App.), reh'g denied (Jan. 9, 2019), review filed (Jan. 28, 2019) (waiver of right to bring representative actions is illegal waiver of right to file PAGA claim under California law which renders arbitration provision unenforceable).

VII. HEARING-RELATED ISSUES

Arbitrator Abused Discretion in Failing to Consider Federal Employer's New Evidence. A federal employee was terminated for drinking on the job and other serious misconduct. The employer rejected certain mitigating evidence, including that the employee was seeking treatment for alcoholism. The union challenged the dismissal, but the arbitrator upheld it. The union attempted to put in evidence before the arbitrator of the employee's improvement under the employee assistance program, prior work-related traumatic events, and personal stressful events affecting to the employee. The arbitrator refused to consider this mitigating evidence which had not been presented to the employer when the termination decision was made. The federal circuit court vacated the award. The court concluded that the arbitrator abused his discretion by failing to consider these mitigating circumstances. The court added that the error was not harmless because the arbitrator did not give an alternative explanation for excluding the evidence. As a result, the court concluded that it could not "say without impermissibly reweighing the evidence ourselves whether that new body of evidence would alter the arbitrator's evaluation of the reasonableness of the agency's removal penalty" and remanded to the arbitrator the case to reassess the penalty with all evidence taken into account. *Koester v. United States Park Police*, 2019 WL 81105 (Fed. Cir.).

VIII. CHALLENGES TO AWARD

Arbitrator Exceeded Authority by Ignoring Contract Terms. The court observed in this case that we have "become an arbitration nation." While the courts' role in reviewing arbitration awards is limited, "our duty remains an important one. When an arbitrator disregards the plain text of a contract without legal justification simply to reach a result that he believes is just, we must intervene." The subcontractor in this case worked in Afghanistan for a general contractor under an agreement with the U.S. government. As part of the subcontractor's agreement with the contractor, it agreed to abide by federal regulations, which were incorporated by reference, applicable to the work being performed. A dispute arose, and the subcontractor was awarded damages against the contractor. The district court vacated the award, and the Ninth Circuit affirmed. The appellate court acknowledged that an arbitrator may interpret an agreement but may not "disregard contract provisions to achieve a desired result." The arbitrator here recognized that the subcontractor was contractually bound to comply with applicable federal regulations, but instead excused the subcontractor's failure to do so because, in the arbitrator's estimation, it was complying with local practices common in Afghanistan. From this, the arbitrator concluded that there had not been a meeting of the minds between the contractor and subcontractor. The court found that the arbitrator, who had acknowledged the enforceability of the contractual terms requiring compliance with federal regulations, "disregarded" these plain terms of the agreement "in an effort to prevent what the

Arbitrator deemed an unfair result. Such an award is 'irrational.'" On this basis, the court affirmed vacatur of the award. *Aspic Engineering and Construction v. ECC Centcom Constructors, LLC*, 913 F.3d 1162 (9th Cir. 2019). Cf. *MEMC II, LLC v. Cannon Storage Systems*, 2019 WL 549633 (10th Cir.) (arbitrator did not exceed authority where she "interpreted the Contract and applied the law of the jurisdiction selected by the parties" and therefore did not dispense her own brand of industrial justice).

Vacatur Ruling Overturned. Crop insurance policies for farmers are governed by federal regulation. An arbitration panel ruled in favor of a farmer's crop damage claim. The panel's award did not break down the damages award of over $1.4 million. The district court vacated the award, finding that the panel imperfectly executed its powers because it did not comply with federal regulations that require that the insurance claim have a "breakdown by claim." The Eighth Circuit reversed. The court found nothing in the regulations that required every claim to be particularized, noting that the farmer filed a single claim seeking damages for damage to both his corn and soybean crops. The panel only awarded damages on the corn crop claim. "Nothing in the regulations required the panel to segregate this claim into multiple separate claims." The court pointed out that the panel accepted the insurance company's approach of collapsing all acres and claims into one. "There is no requirement that the arbitrator's decision be particularly detailed; so long as it adequately explains the disposition of each claim at issue, it should be upheld." *Great American Insurance Co. v. Russel*, 914 F.3d 1147 (8th Cir. 2019).

Case shorts:

- *Champion Chrysler v. Dimension Services Corp.*, 2018 WL 6822550 (Ohio App.) (bias claim under Ohio law rejected where no evidence presented that arbitrator, who later withdrew after accepting employment with entity related to a party in the arbitration, had any conflict of interest when earlier key rulings on consolidation of cases was made).
- *Champion Chrysler v. Dimension Services Corp.*, 2018 WL 6822550 (Ohio App.) (fact that arbitrator served as arbitrator in separate arbitration proceedings involving the same parties not sufficient to support challenge on bias and evident partiality grounds).
- *Hamilton v. Navient Solutions*, 2019 WL 633066 (S.D.N.Y.) (ruling of AAA appellate panel overturning arbitrator's award upheld as appellate panel obeyed applicable law and did not manifestly disregard existing law).

IX. ADR – GENERAL

Motion to Seal Denied. CAA Sports moved to vacate an arbitration award issued in favor of its former sports agent, Ben Dogra. In an effort to keep the underlying arbitration confidential, CAA also immediately filed a motion to seal the court action. CAA's motion to seal was based on a confidentiality provision in Dogra's employment agreement which provided "[the] arbitration will be confidential" and "the award or decision rendered by the arbitrator is final, binding, and conclusive and judgment may be entered upon the award by any court." The district court denied CAA's motion to seal for two reasons. First, the court examined the agreement and held that the confidentiality requirement did not expressly extend to the subsequent confirmation or vacatur of the award. Second, the court found that the presumption of public access to courts outweighed any concern about confidentiality. Recognizing that there are exceptions allowing a record to be sealed, such as protecting personal identifying information, shielding victims' identities, protecting trade secrets, and securing national security, the court found that none of those exceptions applied here. Moreover, CAA's stated desire to seal the record to avoid media attention was "patently insufficient to justify overriding the strong presumption of public access." The court did, however, address the issue of arbitration materials CAA claimed to be irrelevant to the petition to vacate and held that the presumptive right of access attaches only to materials relevant to a court proceeding. The parties were directed to move for further relief if they could not agree on the materials that should come before the court. *CAA Sports, LLC v. Dogra*, 2018 WL 6696622 (E.D. Mo.).

Judge Not Disqualified for Being a Facebook Friend. A Florida court refused to disqualify a judge on the grounds that he was a Facebook "friend" with one of the attorneys, finding that, without any additional circumstances, being connected on a social networking site is a legally insufficient basis for disqualification. The court recognized that in some instances a relationship between a judge and an attorney or party may present grounds for disqualification but refused to create a per se rule that a Facebook friendship disqualifies a judge. *Law Offices of Herssein & Herssein, P.A. v. United Servs. Auto. Ass'n*, 2018 WL 5994243 (Fla.), reh'g denied, 2018 WL 7136575 (Fla.).

X. COLLECTIVE BARGAINING SETTING

Railway Labor Act Award Vacated. A union accused Southwest Airlines of improperly using contractors to clean aircraft and brought an arbitration under the Railway Labor Act. The collective bargaining agreement ("CBA") here provided that it took affect once ratified by the union. The CBA was ratified by the membership on February 19th and signed by the parties on March 16th. Under the CBA, grievances must be filed within 10 days after an issue arose. The grievance here was filed within 10 days after the CBA was signed, but not 10 days after it was ratified. The Fifth Circuit vacated the award, ruling that it "conflicts with the

plain language of the CBA" which required that the grievance be filed within 10 days after the issue arose. Here, the grievance was filed 10 days after the CBA was signed (which occurred on March 16th), but more than 10 days after it was ratified (which was February 19th). The court acknowledged that the standard of review for awards under the Railway Labor Act is very deferential. The court concluded, however, that vacatur was warranted because the award conflicted with the plain language of the CBA and "it was not an arguable construction of the CBA and instead amounted to the arbitrator's own brand of industrial justice." *Southwest Airlines Co. v. Local 555*, 912 F. 3d 838 (5th Cir. 2019).

XI. NEWS AND DEVELOPMENTS

Congress Moves To End Forced Arbitration. On February 28, 2019, House Representative Hank Johnson (D-Ga.) and Senator Richard Blumenthal (D-Conn.) introduced the Forced Arbitration Injustice Repeal Act of 2019 (the "FAIR Act") during a press conference on Capitol Hill. The newly introduced legislation would eliminate forced arbitration for employees as well as in situations involving many consumer, antitrust and civil rights disputes. The legislation also seeks to preclude various agreements that would waive class action claims by both individuals and businesses. Supporters of the bill say it would increase Americans' rights to seek justice and accountability through the court system. The House bill, H.R. 1423, has 147 co-sponsors. Senator Blumenthal introduced the companion bill in the Senate, S. 635, which has 34 co-sponsors.

No More Forced Arbitration for Google Workers. On February 21, 2019, Google announced that it would end the practice of mandatory arbitration for all employment disputes and would remove the bar against class-action suits. This change in policy came on the heels of a November 2018 employee walk-out and protest of Google's handling of sexual harassment claims. After those protests, Google announced that it would remove employee arbitration requirements as they related to sexual harassment and assault claims. However, some employees continued to push for Google to drop arbitration agreements altogether and Google ultimately acceded. As of March 21, 2019, current and future Google employees, as well as direct Google contractors, will no longer be subject to mandatory arbitration with the company and will also be permitted to join class actions against the company.

XII. TABLE OF CASES

Federal Cases