FELIU NEUTRAL SERVICES LLC
Alfred G. Feliu
afeliu@feliuadr.com
212-763-6801

AAA Case Summaries:
November 2021

Contents

I. Jurisdictional Issues: General 2

II. Jurisdictional Challenges: Delegation, Estoppel, and Waiver Issues 7

III. Jurisdictional Issues: Unconscionability 11

IV. Challenges Relating to Agreement to Arbitrate 12

V. Challenges to Arbitrator or Forum 20

VI. Class, Collective, and Group Filings 23

VII. Hearing-Related Issues 24

VIII. Challenges to And Confirmation of Awards 25

IX. ADR – General 29

X. Collective Bargaining Setting 31

XI. News and Developments 33

XII. Table of Cases 35

I. JURISDICTIONAL ISSUES: GENERAL

California Statute Barring Arbitration of Statutory Employment Claims Upheld. California enacted a statute that prohibited the mandatory arbitration of state discrimination and wage claims which provided for criminal and civil penalties when violated. A District Court enjoined enforcement of the statute on the ground that it was preempted by the FAA. A divided Ninth Circuit vacated the injunction and ruled that the FAA did not preempt the statute. The majority emphasized that the statute did not create a contractual defense that discriminated against arbitration agreements once they were consummated. Rather, the majority reasoned that the statute, by placing "a pre-agreement condition on the waiver of 'any right, forum, or procedure' does not undermine the validity or enforceability of an arbitration agreement -- its effects are aimed entirely at conduct that takes place prior to the existence of any such agreement." By regulating "pre agreement behavior", the majority concluded that the statute avoided the snare of FAA preemption. The majority pointed out that the FAA sought to ensure the enforceability of consensual arbitration agreements. "In light of Congress's clear purpose to ensure the validity and enforcement of consensual arbitration agreements according to their terms, it is difficult to see how [the California statute], which in no way affects the validity and enforceability of such agreements, could stand as an obstacle to the FAA." The majority concluded that nothing in the statute interfered with the right protected by the FAA to enforce consensual arbitration agreements according to their terms. *Chamber of Commerce v. Bonta*, 13 F.4th 766 (9th Cir. 2021).

Uber Drivers Not Exempt Under FAA Transportation Worker Exemption. The FAA exempts certain classes of workers, including transportation workers, engaged in interstate commerce from coverage under the Act. The Ninth Circuit concluded that Uber drivers as a class are not sufficiently engaged in interstate commerce to qualify for the transportation worker exemption. "As almost any user of Uber's product would attest, Uber trips are often short and local, and they only infrequently involved either crossing state lines or a trip to a transportation hub, as the evidence demonstrates." The court acknowledged that Uber drivers cross state lines and that approximately 10% of the riders begin or end at an airport. The court reasoned, however, that these trips constitute a small percentage of Uber rides overall and generally are merely conveying passengers to their homes. The court rejected and criticized other courts which applied the exception to Uber drivers, finding that they gave too much weight to the occasional interstate trips and "do *not* consider whether the trips form part of a single, unbroken stream of interstate commerce that renders interstate travel a 'central part' of a rideshare driver's job description." The court emphasized that "even when transporting passengers to and from transportation hubs as part of a larger foreign or interstate trip, Uber drivers are unaffiliated, independent participants in the passenger's overall trip, rather than an integral part of a single, unbroken stream of

interstate commerce." For these reasons, the court concluded that Uber drivers were not entitled to invoke the FAA's transportation worker exemption and affirmed the denial of Uber's motion to compel." *Capriole v. Uber Technologies*, 2021 WL 3282092 (9th Cir.).

Eleventh Circuit Announces Test for FAA Transportation Worker Exemption. The 11th Circuit's *Paladino-Hill* test provides a two-part framework for determining which workers are "transportation workers" within the narrow exception of § 1 of the FAA: First, the worker seeking application of Section 1's exemption "must be in a class of workers employed in the transportation industry" that "move goods in interstate commerce." Second, the class of workers must "actually engage in the transportation of goods in interstate commerce." This second factor, referred to as the "interstate transportation factor," is met "where the class of workers, in its employment in the transportation industry, is engaged in transporting goods across state lines." A Florida district court applied this test to a group of "final-mile delivery drivers – drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse" and concluded the drivers were exempt from having to arbitrate their claims. The 11th Circuit reversed, holding that the district court erred in applying the *Paladino-Hill* test because it "focused on the movement of the goods and not the class of workers." Emphasizing that §1 of the FAA "is directed at what the class of workers is engaged in, and not what it is carrying," the case was remanded for the district court to properly apply the *Paladino-Hill* test. *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021). See also *Slough v. Legacy Home Health Agency, Inc.*, 2021 WL 3367816 (S.D. Tex.) (when determining whether a contract evinces a transaction involving commerce for FAA jurisdictional purposes, the "issue is not whether the individual employee activities are in commerce, but the employer's 'commercial activity as a whole'").

State Arbitration Law Fills Void Where FAA Exemption Applies. A divided Third Circuit panel ruled that a federal court sitting in diversity must look to a state's arbitration law if the FAA does not apply. Here, an Amazon "flexible" driver who made local "last mile "package deliveries alleged that he was misclassified as an independent contractor. The district court ordered discovery on the question whether the FAA exemption for transportation workers applied and refused to apply state law as the parties' contract designated the FAA as the governing law. The Third Circuit majority reversed, reasoning that the FAA did not preempt state law. The majority explained that the parties' arbitration agreement "need not be read to hinge arbitrability on the application of federal law. Equally plausible is a reading that creates an obligation to arbitrate all disputes and a separate, possibly severable, choice of federal law. One term need not depend on the other." The majority announced a three-step analysis that must be followed when reviewing an FAA transportation worker exemption. First, the court must determine whether the worker is engaged directly in commerce. If the analysis "leads to a murky answer", the court must then look to see if arbitration is required under state law. "After all, the parties' primary agreement is to

arbitrate their disputes, so courts should explore both contractual routes to effectuate that agreement when one is called into question." If the arbitration agreement is unenforceable under state law, then the court must return to the FAA to decide whether the transportation exemption applies. The majority remanded the case to the district court to apply the new test set forth in this opinion and to determine whether the dispute is arbitrable under state law. *Harper v. Amazon.com Services*, 2021 WL 4075350 (3d Cir).

Challenge to Railway Arbitration Process Rejected. Locomotive engineers who were terminated claimed that their union, their former employer, and the arbitrator who upheld their termination were guilty of fraud. In particular, they claimed that management, the union, and the arbitrator colluded to uphold their terminations for ulterior reasons. The court ruled that the Railway Labor Act pre-empted these state law claims. The court observed that it "would make little sense for Congress to strictly limit review of RLA arbitration decisions, but to permit state law challenges to the same." The mandatory arbitration scheme created by Congress included narrow grounds to overturn awards. By necessity, the court reasoned, the fraud claims were directed at the arbitration process and, by implication, the outcome with which the engineers disagreed. The court concluded that the RLA completely pre-empted the fraud claims brought by the engineers. The court also granted the defendants' motion to dismiss finding that that conclusory allegation of collusion based on information and belief failed to meet the minimum pleading requirements in federal court. *Franke v. Norfolk Southern Railway Co.*, 2021 WL 3737913 (N.D. Ohio).

Case Shorts.

- *Hansen v. LMB Mortgage Services*, 1 F.4th 667 (9th Cir. 2021) (order denying motion to compel immediately appealable under FAA even if court ordered discovery and possible trial regarding question of arbitrability).
- *Hamrick v. Partsfleet, LLC*, 1 F. 4th 1337 (11th Cir.) (order denying motion to compel arbitration immediately appealable under FAA; same motion denying motion to compel under state arbitration law not inextricably intertwined and therefore not subject to pendent appellate jurisdiction).
- *The Application of the Fund for Protection of Investor Rights v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir. 2021) (arbitration between investor and foreign state under a bilateral investment treaty occurring before panel established by treaty constitutes a "proceeding in a foreign or international tribunal" for purposes of Section 1782 warranting enforcement of discovery subpoena).
- *Chongqing Loncin Engine Parts Co. v. New Monarch Machine Tool*, 2021 WL 3360538 (N.D.N.Y.) (delay of one year in rendering final award not subject to challenge based on alleged deterioration in Chinese-U.S. trade relations during that period as the argument that "the confirmation of a foreign arbitral award somehow hinges on the

current state of trade relations between signatories to the New York Convention" is not the law).

- *Rubicon Research Private Ltd. v. Kartha Pharmaceuticals*, 2021 WL 4233887 (W.D.N.C.) (motion for a preliminary injunction in the United States merely an interim measure to preserve the status quo and did not serve as waiver of enforceable contract provision requiring arbitration in Switzerland).
- *Capriole v. Uber Technologies*, 2021 WL 3282092 (9th Cir.) (trial court appropriately addressed motion to compel before motion for injunctive relief where injunction granting reclassification of Uber drivers as employees rather than contractors would "upend" rather than preserve the status quo and would displace arbitration).
- *CLMS Management Services v. Amwins Brokerage of Ga.*, 8 F. 4th 1007 (9th Cir.) (New York Convention is self-executing and "shall" enforce arbitration agreements and therefore is "reverse pre-empted" by the McCarran-Ferguson Act in accordance with a Washington state statute banning the enforcement of arbitration provisions in insurance contracts).
- *Glad Tidings Assembly of God Church of Lake Charles v. Indian Harbor Insurance Co.*, 2021 WL 2676963 (W.D. La.) (McCarran-Ferguson Act allows states to reverse-preempt state laws regulating insurance but does not apply, as in this case, to treaties).
- *Government of the Lao People's Democratic Republic v. Baldwin*, 2021 WL 3056871 (D. Idaho) (injunction seeking to freeze sale of alter ego companies to secure funds to satisfy arbitration award denied where no evidence that defendant and related companies will dissipate proceeds from sale or hide assets sufficient to cover indebtedness).
- *Law Finance Group v. Key*, 2021 WL 324076 (Cal. App.) (parties may not agree to extend time to file motion to vacate and motion made outside statutory time limit must be dismissed).
- *Camac Fund v. McPherson*, 2021 WL 2232351 (Bankr. Ct. D. Md.) (Bankruptcy Court removes stay of non-core Fair Debt Collection Practices claims filed pre-bankruptcy and allow those claims to proceed to arbitration but requires core claims resulting from bankruptcy to be resolved by the Bankruptcy Court).
- *Lavvan v. Amyris*, 2021 WL 3173054 (S.D.N.Y.) (requirement that intellectual property claims be submitted to court not undercut by contract dispute, which would otherwise be subject to arbitration, as such claims "are regularly intertwined [and] the mere fact that an intellectual property claim may involve contractual analysis is insufficient to strip the 'intellectual property' label for purposes of this motion").
- *Doe v. The Trump Corp.*, 6 F.4th 400 (2d Cir. 2021) (court lacked jurisdiction over dispute for third-party discovery in arbitration as no case or controversy existed

between the third-party and the party seeking discovery and, therefore, the court lacked subject matter jurisdiction to hear the dispute).

- *Hodges v. Comcast Cable Communications*, 2021 WL 4127711 (9th Cir.) (arbitrator not precluded under the California *McGill* Rule prohibiting waiver of public injunction relief as Ninth Circuit limits *McGill* to "prospective injunctive relief that aims to restrain future violations of law for the benefit of the general public as a whole, rather than a discrete subset of similarly situated persons, and that does so without requiring consideration of the individual claims of non-parties").
- *Winns v. Post Mates, Inc.*, 2021 WL 3046592 (Cal. App.) (PAGA claim not an individual dispute between parties but rather an action on behalf of the state and aggrieved worker who serves as representative of the state in the action and therefor Supreme Court decision in *Epic Systems* did not overrule California law barring waiver of PAGA claims).
- *Affinipay, LLC v. West*, 2021 WL 4262225 (Del. Ct. Ch.) (injunction issued precluding arbitration of CEO's contract claims where three applicable arbitration agreements conflicted making it "impossible to discern which arbitrator (and which rules) the parties intended would determine the matter of arbitrability" and therefore no clear and unmistakable evidence that parties intended to refer substantive arbitrability issues to the arbitrator).
- *Boykin v. Family Dollar Stores of Michigan*, 3 F.4th 832 (6th Cir. 2021) (motion to dismiss case based on existence of arbitration agreement, rather than motion to compel and for a stay of the litigation, constitutes a final decision subject to appeal).
- *Baker v. Iron Workers Local 25*, 999 F.3d 394 (6th Cir. 2021) (parties are required to exhaust remedies, including arbitration process to break deadlocks, before bringing an ERISA claim in federal court).
- *CW Baice Ltd. v. The Wisdomobile Group Ltd.*, 2021 WL 3053147 (N.D. Cal.) (motion to dissolve preliminary injunction preserving defendant's assets pending arbitration in Hong Kong denied where "dissipation of assets is unlikely" in the absence of injunctive relief).
- *Al-Qarqani v. Chevron Corp.*, 2021 WL 3557596 (9th Cir.) (individuals' partial ownership interest in land involved in dispute not sufficient to confer standing to confirm award under agreement between Saudi Arabia and Chevron).
- *Skaf v. Wyoming Cardiopulmonary Services*, 495 P.3d 887 (Wyo. 2021) (party may not waive appellate review of district court ruling on arbitration award where, as here, the award violated public policy).
- *Perini Management v. Kildare Construction Consultants,* 2021 WL 4523620 (S.D.N.Y.) (neither Declaratory Judgment Act nor Federal Arbitration Act provide subject matter jurisdiction permitting court to consider motion to enjoin pending arbitrations).

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

Arbitrability Issue for Arbitrator, Not AAA Administrator, to Decide. A dispute governed by the AAA's Health Care Due Process Protocol and Healthcare Policy Statement ("Healthcare Protocol") was submitted to the AAA for administration based on a court ruling in a related matter that held the gateway contract interpretation issue was for an arbitrator to decide. The AAA case administrator informed the parties that under the Healthcare Protocol a post-dispute arbitration agreement or court order was required for the case to proceed in arbitration. Plaintiff refused to sign an arbitration agreement and the AAA rejected the defendant's argument that the court's order in the related matter applied. The district court denied defendant's motion to compel, and a majority of the Sixth Circuit panel reversed and sent the case to an arbitrator to rule on the arbitrability question. The majority ruled that the issue whether the Healthcare Protocol governed the proceeding was an arbitrability question and the "text of the Agreement confirms that the parties didn't intend to allow an administrator to short-circuit arbitration by refusing to appoint an arbitrator to answer this initial gateway question." The court reasoned that "if the administrator was independently interpreting the Agreement, he erred because the parties contracted for an arbitrator (not an administrator) to do so." The majority rejected the notion that the arbitrability issue was a procedural question in the province of an administrator. The court explained that although "the AAA may choose for *itself* which claims it will arbitrate, it is not at liberty to 'impose its own view of sound policy' regarding when or how parties should be allowed to arbitrate independent of *the parties'* own choices in their contract." The court acknowledged that incorporation of the AAA rules could be read to incorporate by reference the Healthcare Protocol, but it was the court's role to harmonize the rules and the parties' express intent to arbitrate. The court concluded that the "fundamental question here is arbitrability" and as the parties delegated that question to the arbitrator, the motion to compel would be granted and the requirement under the Healthcare Protocol for a court order would therefore be met requiring the AAA to administer the arbitration. *Ciccio v. SmileDirectClub*, 2021 WL 262115 (6th Cir.).

AAA Rules Alone Not Sufficient to Delegate Threshold Issues to Arbitrator. The joint venture agreement here contained an arbitration provision which incorporated the rules of the American Arbitration Association. A dispute arose between the parties regarding the application of a prevailing party provision in the agreement and a suit was filed in federal court. A motion to compel arbitration was made and the question for the court was who was to decide the question -- the court or the arbitrator -- whether the dispute was arbitrable. The Second Circuit made clear that incorporation of the AAA Rules by themselves may serve as clear and unmistakable evidence of the parties' intent to delegate the question of arbitrability to the arbitrator. However, the court added that "in evaluating the import of incorporation of the AAA Rules (or analogous rules) into an arbitration

agreement, context matters. Incorporation of such rules into an arbitration agreement does not, *per se*, demonstrate clear and unmistakable evidence of the parties' intent to delegate threshold questions of arbitrability to the arbitrator where other aspects of the contract create ambiguity as to the parties' intent." The court reasoned that the coupling of a broad arbitration clause with incorporation of the AAA rules would "constitute[] clear and unmistakable evidence of the parties' intent to delegate the question of arbitrability to the arbitrator." In contrast, where as was the situation in this case, the arbitration clause is narrow or contains exclusionary language the requisite clear and unmistakable intent is not present. Consequently, the court reserved for itself the determination as to whether the underlying dispute was arbitrable. *DDK Hotels v. Williams Sonoma, Inc.,* 2021 WL 3118947 (2d Cir.). See also *Downing v. A&E Television Networks, LLC*, 2021 WL 4131652 (S.D.N.Y.) (incorporation of the JAMS Rules coupled with a broad arbitration clause constitutes clear an unmistakable delegation of arbitrability question to arbitrator). But see *Communication Workers of America v. AT&T, Inc.*, 6 F.4th 1344 (D.C. Cir. 2021) (collective bargaining agreement adoption of the AAA's Labor Arbitration Rules constitutes clear and unmistakable delegation of arbitrability questions to arbitrator); *Sha-poppin Gourmet Popcorn v. JPMorgan Chase Bank*, 2021 WL 3511315 (N.D. Ill.) (arbitrability issue relating to PPP loan for arbitrator to decide based on incorporation of JAMS and AAA rules).

Challenge to Delegation Clause Must Be Direct and Specific. Agreements delegating issues of arbitrability to an arbitrator create "additional, antecedent agreements" that, if challenged, must be challenged separately from the arbitration agreement itself. A Missouri appellate court explained that "[t]he challenge must directly and specifically address the delegation provision" and a court must consider the delegation provision "standing alone" from the rest of the arbitration agreement. The employer whose agreement was challenged argued that the employee's opposition failed because it was the same challenge she made to the agreement as a whole and therefore was not specific to the delegation provision. The court disagreed, holding that a party opposing a delegation clause is not required to craft new arguments; it is only necessary for the opposing arguments to target the delegation clause specifically. The employee did so here by dedicating nearly two pages of her motion papers to argue against the validity of the delegation clause including her argument that the clause lacked consideration because the employer reserved its right to unilaterally "change, interpret or cancel any of its rules, policies, benefits, procedures or practices . . .." *Harris v. Volt Management Corp.*, 625 S.W.3d 468 (Mo. App. 2021).

Delegation Provision Requires Arbitrator to Rule on Question of Prospective Waiver. What comes first, the chicken or the egg, or in this case the delegation or choice of law provision? Borrowers brought a class action against a defunct on-line lender arguing that the internet rates charged were usurious. The loan agreements were governed by tribal law and contained an arbitration agreement delegating to the arbitrator the question of its

enforceability. The Second, Third, and Fourth Circuits refused to compel arbitration in similar circumstances, finding that the prospective waiver of statutory rights in the loan agreement rendered the entire agreement unenforceable. The majority of the Ninth Circuit panel in this case instead concluded that the question of the enforceability of the arbitration agreement was delegated to the arbitrators under the loan agreement, and compelled arbitration of the dispute. According to the majority, the "proper question is not whether the entire arbitration agreement constitutes prospective waiver, but whether the antecedent agreement delegating resolution of that question to the arbitrator constitutes prospective waiver." The majority concluded that where there is an enforceable delegation provision the question of enforceability is not for anyone "wearing a black robe" but rather "for the arbitrator to decide so long as the delegation provision itself does not eliminate parties' rights to pursue their federal remedies." The majority concluded that "the delegation provision is not itself invalid as a prospective waiver and that it is for an arbitrator, not the court, to decide whether the parties' arbitration agreement is enforceable." *Brice v. Haynes Investments*, 13 F.4th 823 (9th Cir. 2021).

Statute of Limitations Defense for Arbitrator to Decide. A customer brought a FINRA arbitration alleging his broker engaged in "egregious churning and excessive trading." The brokerage firm obtained a temporary restraining order in state court and the action was removed to federal court where the customer moved to dismiss the action alleging that the statute of limitations defense that had been asserted was for the arbitration panel and not the court to decide. The motion was granted. The court provided three grounds for submitting the statute of limitations defense to the arbitration panel. First, the arbitration provision was broad and committed "all controversies" to arbitration. Second, the fact that FINRA's rules were adopted provided, in the court's view, "an additional clue as to the parties' intent to arbitrate timeliness issues." Third, the court noted that under traditional contract principles the brokerage firm drafted the arbitration provision and "should be held to its word and proscribed from evading the consequences of its own bargain." The court rejected the brokerage firm's argument that the choice of law provision argued for court review, noting that "choice of law provisions in arbitration agreements must be construed narrowly in light of the pro-arbitration federal policy reflected in the FAA." Finally, the court dismissed the brokerage firm's contention that the right of the parties to seek provisional relief in court argued in favor of judicial review of the statute of limitations question. In doing so, the court noted that the request here was for permanent and not provisional dismissal of the case. *Empire Asset Management v. Best*, appeal pending, 2021 WL 2650457 (S.D.N.Y.).

Court, Not Arbitrator, Decides Litigation Waiver Issue. The parties engaged in significant litigation activities relating to their contract dispute despite the presence of an arbitration provision. In addition, on separate occasions, two different arbitrators ruled that

the right to arbitrate had been waived. The issue for the Fifth Circuit was whether the waiver issue was properly submitted to the arbitrators for resolution. The court concluded that it was not. The circuit court acknowledged that the arbitration agreement was broad enough to cover the issue and incorporated the AAA's rules which had been interpreted as providing arbitrators with the authority to rule on issues of arbitrability. The court distinguished the typical situation in which the question is whether the AAA rules provide clear and unmistakable evidence that the dispute initially belongs before an arbitrator or instead a judge. "But the rules do not expressly give arbitrators the power to resolve questions of waiver through litigation. So incorporation of those rules cannot supply the clear and unmistakable agreement that is required here." The court therefore concluded that the general rule would be applied here, namely, that claims of waiver based on litigation conduct is for the court to decide. *International Energy Ventures Management v. United Energy Group*, 999 F.3d 257 (5th Cir. 2021).

Arbitration Waived by Substantial Invocation of Litigation. The parties here engaged in significant litigation activities despite the presence of an arbitration agreement. The court noted that the waiver of arbitration is disfavored but acknowledged that waiver is found where a party has substantially invoked the judicial process. Here, a lawsuit was brought without mention of the existence of an arbitration agreement. From that point forward, that party: moved to remand the case to state court; appealed the denial of the motion; vigorously defended the claim of personal jurisdiction in Texas; appealed the dismissal based on personal jurisdiction, and; sought *en banc* review of motions it lost. Only after this petition was denied was arbitration initiated. The court concluded that this party's "litigation conduct is therefore a paradigmatic example of what it means" to invoke the litigation process only to pursue litigation after failing to succeed before the court. *International Energy Ventures Management v. United Energy Group*, 999 F.3d 257 (5th Cir. 2021). See also *McCoy v. Wal-Mart, Inc.*, 13 F.4th 702 (8th Cir. 2021 F.4th 1097) (waiver of right to a arbitrate found where defendant removed case to federal court, filed substantial motion to dismiss, and "participated in discovery, including filing a joint scheduling order and serving its initial disclosures"); *Sitzer v. National Association of Realtors*, 2021 WL 4125787 (8th Cir.) (waiver found where defendant knew about arbitration clause but nonetheless pursued litigation aggressively in federal court for over a year causing additional cost and prejudice to plaintiff); *Dean v. Biggs & Greenslade*, 2021 WL 2002440 (S.D. Tex.) (filing of contract claim in small claims court did not constitute substantial invocation of judicial process so as to constitute waiver of statutory debt collector's actions in federal court); *Barnett v. American Express National Bank*, 2021 WL 4188051 (S.D. Miss.) (American Express waived arbitration right by filing suit despite plaintiff's three earlier requests to arbitrate dispute)*; CDIC of NC Protected Cell v. Gottlieb*, 2021 WL 2201311 (S.D. Tex.) (waiver of arbitration found where motion to dismiss filed despite acknowledgment of

right to arbitrate and motion to compel only filed two years after dismissal motion was granted in part).

Case Shorts:

- *Jacksen v. Chapman Scottsdale Autoplex*, 2021 WL 3410912 (D. Ariz.) (waiver argument based on litigation expenses incurred in case management and limited discovery proceedings rejected, as court notes that plaintiff "likely will benefit from the strategic thinking and information learned in that process, even in arbitration").
- *Lavvan v. Amyris*, 2021 WL 3173054 (S.D.N.Y.) (delegation of arbitrability issues for arbitrator argument rejected where "the parties explicitly agreed that intellectual property disputes would be determined by a court").
- *Nii-Moi v. McAllen Hospitalist Group*, 2021 WL 2139402 (E.D. Tex.) (question whether plaintiff waived mediation and whether mediation was a condition precedent for arbitration best decided by arbitrator).
- *Romero v. Watkins and Shepard Trucking, Inc.*, 9 F.4th 1097 (9th Cir. 2021) (the FAA's transportation worker exemption cannot be waived by the terms of a private contract).
- *DotConnectAfrica Trust v. Internet Corp.*, 68 Cal. App.5th 1141 (2021) (lawsuit appropriately barred on judicial estoppel grounds where plaintiff previously argued before arbitration panel that, among other things, it had waived its right to sue in court).
- *Beijing Shougang Mining Investment Co. v. Mongolia*, 11 F.4th 144 (2d Cir. 2021) (parties' agreement that international ad hoc tribunal would rule on jurisdictional issues during first phase of arbitration constituted clear and unmistakable evidence of parties' intent to delegate to tribunal issues of arbitrability).
- *Donelson v. Ameriprise Financial Services*, 999 F.3d 1080 (8th Cir. 2021) (district court order denying motion to strike class action allegations and to compel arbitration immediately appealable under Section 4 of the FAA).
- *Forby v. One Technologies, L.P.*, 13 F.4th 460 (5th Cir. 2021) (second motion to compel granted despite denial of earlier motion on waiver grounds, where complaint was amended to add statutory claim that was subject to arbitration).
- *Mars, Inc. v. Szarzynski*, 2021 WL 2809539 (D.D.C.) (court must resolve gateway issues where party resisting arbitration is a non-signatory and where agreement only employs broad language incorporating arbitration rules which reserve to the arbitrator questions of arbitrability).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Arbitration Agreement Unconscionable. An arbitration provision in a consumer adhesion contract that reduced the length of the statute of limitations, invoked the application of the arbitrators' higher commercial fees, and required consumers to bear their own costs and fees for experts and attorneys was declared substantively unconscionable and invalid by a California appellate court. The court concluded that the arbitration provision was also procedurally unconscionable largely because it was hidden on the back side of a money transfer order form, in tiny 6-point print that it deemed "virtually illegible" and also because it operated to benefit the defendant at the plaintiff's expense. As such, the superior court's order denying MoneyGram's petition to compel arbitration was affirmed. *Fisher v. Moneygram*, 66 Cal. App.5th 1084 (2021).

Case Shorts:

- *Holsapple v. Doggett Equipment Services*, 2021 WL 2210896 (W.D. Tex.) (substantively unconscionable provision requiring FLSA plaintiff to pay one half of the cost of arbitration severable and motion to compel otherwise granted).
- *Pirzada v. AAA Texas, LLC*, 2021 WL 2446193 (S.D. Tex.) (arbitration provision limiting discovery to three depositions of fact witnesses, expert depositions, document requests, and up to 35 interrogatories not substantively unconscionable).
- *Holsapple v. Doggett Equipment Services*, 2021 WL 2210896 (W.D. Tex.) (forum selection provision requiring FLSA claimant to arbitrate dispute 750 miles from her home in El Paso severed as being substantively unconscionable).
- *Glad Tidings Assembly of God Church of Lake Charles v. Indian Harbor Insurance Co.*, 2021 WL 2676963 (W.D. La.) (contract provision requiring parties to insurance dispute to select "senior officials in claims handling or underwriting" not unconscionable because insured can select "a broker or employee in a company representing claimants").
- *Nii-Moi v. McAllen Hospitalist Group*, 2021 WL 2139402 (E.D. Tex.) (arbitrator is better situated than court to decide question whether contractual fee shifting provision in Title Seven context is unconscionable).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Arbitration Agreement Barred on Effective Vindication Grounds. The Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth* recognized in dictum that arbitration agreements which prevent the effective vindication of federal statutory rights may not be enforced. The *Mitsubishi Motors* Court and most courts since have rejected challenges on effective vindication grounds. In this case, the Seventh Circuit found that the class action waiver in an ERISA retirement plan did in fact deny the plaintiff's ability to effectively

vindicate his statutory rights. Plaintiffs claimed that the plan administrators violated their fiduciary duties. The Seventh Circuit noted that ERISA provided for equitable and remedial relief for fiduciary violations, but the arbitration provision precluded a plan participant from seeking relief for other participants. "All that is to say that the plain text of [ERISA] and the terms of the arbitration provision cannot be reconciled: what the statute permits, the plan precludes." The court concluded that the arbitration agreement served as a prospective waiver of statutory rights warranting invocation of the effective vindication exception. In doing so, the court recognized that class action waivers are enforceable but clarified that here "the problem with the plan's arbitration provision is its prohibition on certain plan-wide remedies, not plan-wide representation." By way of example, the court noted that plaintiff sought the removal of a plan trustee which in the court's view "cannot have anything *but* a plan-wide effect." The court concluded that "the conflict in need of harmonization is not between the FAA and ERISA; it is between ERISA and the plan's arbitration provision which precludes certain remedies" that ERISA expressly provides. *Smith v. Board of Directors of Triad Manufacturing*, 13 F.4th 613 (7th Cir. 2021). See also *Rizzio v. Surpass Senior Living*, 251 Ariz. 413 (2021) (fee arrangement between claimant in arbitration and her attorney in which attorney agrees to advance arbitration fees ruled relevant to question whether claimant can afford to arbitrate claims raised and effectively vindicate her rights).

Amazon "Flex" Drivers Not Required to Arbitrate. Amazon was sued for allegedly spying on a closed Facebook group of "Flex drivers", individuals who agree to make deliveries for Amazon. Flex drivers sign up for the program online using an app that includes an arbitration provision covering disputes relating to their "participation in the program or your performance of services." Amazon moved to compel, arguing that the claims which included a federal Wiretap Act and Stored Communications Act as well as California statutory and constitutional claims was subject to the arbitration agreement. A federal district court in California disagreed. The court noted that plaintiffs alleged that Amazon illegally accessed and monitored the Flex drivers' Facebook groups "to secretly observe and monitor Flex Drivers' electronic communications in confidential postings in their closed Facebook groups, through the use of monitoring tools, automated software, and dedicated employees with backgrounds in signals intelligence and communications intelligence." The court concluded that these claims existed independently from the drivers' employment with Amazon, the plaintiffs' "participation in the Flex program, or Plaintiff's performance of services." For these reasons, the court rejected Amazon's motion to compel. *Jackson v. Amazon.com, Inc.*, 2021 WL 4197284 (S.D.Cal.). See also *Banc of California v. Superior Court of Los Angeles County*, 69 Cal. App.5th 357 (2021) (arbitration provision in airline usage agreement did not apply to claims related to loan agreement entered into two months before).

Non-Signatory Trump Corporation Cannot Compel Arbitration. Plaintiffs allege that Donald Trump and his family fraudulently induced them to sign up to serve as independent business owners with ACN. In particular, plaintiffs allege that in exchange for millions of dollars in secret payments Trump and his family fraudulently promoted and endorsed ACN. Plaintiffs' contract with ACN included an arbitration agreement. Defendant Trump Corporation moved to compel arbitration based on plaintiffs' agreement with ACN. The district court denied the motion to compel, and the Second Circuit affirmed. The court recognized that non-signatories can seek to compel arbitration where there is a "close relationship among the signatories and non-signatories such that it can reasonably be inferred that the signatories had knowledge of, and consented to, the extension of their agreement to arbitrate to the non-signatories." Here, the court found that the Trump Corporation did not have the requisite close relationship with ACN. "There was no corporate relationship between the defendants and ACN of which the plaintiffs had knowledge, the defendants do not own or control ACN, and the defendants are not named in the [independent business owners] agreements between ACN and the plaintiffs." The court concluded that, whereas here, the claim is that the Trump Corporation made false and deceptive statements inducing plaintiffs to enter into their agreements with ACN "there is no unfairness in denying estoppel to a third-party wrongdoer aligned with a signatory in effectuating allegedly wrongful business practices." *Doe v. The Trump Corp.*, 6 F.4th 400 (2d Cir. 2021). See also *Hayden v. Retail Equation, Inc.*, 2021 WL 3044168 (C.D. Cal.) (retailer may not compel arbitration of dispute with customer based on terms and conditions in credit card account between bank issuing the credit card and the customer).

Third-Party May Not Invoke Arbitration. Onfido verifies for its customers the identity of users of the customers' web sites. Onfido provided service to defendant OfferUp and verified the identity of a new customer, Sosa, using biometric identification technology. Sosa agreed to OfferUp's terms of service which provided for arbitration. Sosa sued Onfido claiming a violation of Illinois' Biometric Information Privacy Act and Onfido moved to compel arbitration based on OfferUp's terms of service. The trial court denied the motion, and the Seventh Circuit affirmed. The court noted that under Illinois's equitable estoppel and related principles it was clear that Onfido was not intended to be a beneficiary of the agreement between Sosa and OfferUp. In addition, the court noted that the arbitration provision did not include a reference to non-parties and the terms of service disclaimed control over third-party content. The court also rejected Onfido's agency argument, stating that "OfferUp encouraged users to register their identities with the app's [related] feature and that Onfido and OfferUp partnered to provide this technology through the app established nothing more than a business relationship between the parties – not agency." Finally, the court emphasized that Sosa did not induce Onfido to rely on the terms of service – OfferUp did – and Onfido presented no evidence for its detrimental reliance argument on the terms of service. For this reason, the Seventh Circuit affirmed the trial court's denial of

Onfido's motion to compel. *Sosa v. Onfido, Inc.*, 8 F.4th 631 (7th Cir. 2021). See also *Atricure, Inc. v. Meng*, 12 F.4th 516 (6th Cir. 2021) (non-party may not invoke equitable estoppel under Ohio law to stay a lawsuit in favor of arbitration under a distribution agreement to which it was not a party as statutory and tort claims against it were not based on any potential contractual duties owed to it under the applicable distribution agreement).

Non-Signatory Not Bound to Arbitrate under New York Convention. Two brothers entered into a partnership agreement relating to their late father's incense manufacturing company which contained an arbitration clause. They later created separate companies under the same trademark and a dispute subsequently occurred regarding that trademark and its use. One of the brothers sought to arbitrate the dispute on behalf of his company which was not a signatory to the underlying partnership agreement. The Ninth Circuit, upon remand from the United States Supreme Court following its decision in *GE Energy Power v. Outokumpu*, accepted that, as the Supreme Court instructed, "a non-signatory could compel arbitration in a New York Convention case." Nonetheless, the majority denied the motion to compel arbitration, finding that "as a factual matter, the allegations here do not implicate the agreement that contained the arbitration clause – a prerequisite for compelling arbitration under the equitable estoppel framework." The majority noted that while the dispute involved the trademarks reflected in the partnership agreement, the dispute did not hinge on a provision in that agreement but rather on the partnership's "prior use" of the trademarks in question. *Setty v. Shrinivas Sugandhalaya*, 3 F.4th 1166 (9th Cir. 2021).

Non-Signatory Not Bound to Arbitrate Under Direct-Benefits Estoppel Theory. Columbia Hospital, a service provider, and IMA, a health plan administrator, are connected through a series of intermediary agreements entered into over approximately ten years that connect hospitals (like Columbia Hospital) with various PPO networks, then to plan administrators (like IMA), and finally to health plans and patients. The only intermediary agreement with an arbitration provision was a "Hospital Agreement" between Columbia Hospital and a PPO Network with whom IMA has a tangential connection. There was no direct contract between Columbia Hospital and IMA. Nevertheless, when a dispute arose, Columbia Hospital moved to compel IMA to arbitrate its claims under the theory of direct benefits estoppel. The district court denied the motion, holding that IMA lacked knowledge of the "existence and terms, including the arbitration provision" of the Hospital Agreement. On appeal, the Fifth Circuit noted that "direct benefits estoppel applies to non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." A non-signatory can be shown to have embraced a contract "by knowingly seeking and obtaining 'direct benefits' from that contract" if the evidence sufficiently supports the conclusion that the non-signatory was "aware both of the existence of the . . .

contract and its basic terms." Here, the crux of the district court's decision was that "IMA neither was shown to have, nor needed, knowledge of the Hospital Agreement in order to fulfill its obligations . . . rather IMA could process the claims 'with a copy of the [Health] Plan and the PPO Contract Rates.'" Finding that the district court did not clearly err in making this conclusion, the Fifth Circuit affirmed its denial of Columbia Hospital's motion to compel arbitration. *IMA, Inc. v. Columbia Hospital Medical City at Dallas, Subsidiary, L.P.*, 1 F.4th 385 (5th Cir. 2021).

Assumption of Agreement by Non-Signatory. The Seventh Circuit held that a provider agreement between Robert Meinders, a chiropractor, and American Chiropractor Network ("ACN"), a wholly owned subsidiary of United Healthcare, was enforceable by United Healthcare. The provider agreement granted Meinders access to United's network of patients in exchange for ACN's provision of administrative and network management services to Meinders. However, "from day one" it was United who performed the variety of services and administrative duties promised by ACN. Indeed, over several years Meinders used United's forms to request explanations of benefits and submit over 6,000 insurance claims to United. He also used the United website and telephone number to check patient eligibility and he received monthly Network Bulletins from United discussing changes in United policies. Because of this consistent and extensive course of conduct, the Seventh Circuit held that under Illinois' contractual theory of assumption, United had impliedly assumed ACN's obligations under the agreement and was entitled to invoke the arbitration clause it contained. The district court's order compelling arbitration was affirmed. *Meinders v. United Healthcare Services, Inc.*, 7 F.4th 555 (7th Cir. 2021).

Arbitration Agreement Does Not Encompass Non-Signatory. An arbitration agreement between Orbitz, an online travel booking company, could not be enforced by Sixt Rent a Car, a car rental agency doing business through Orbitz, in a dispute between Sixt and a consumer who used Orbitz to book a Sixt rental car. Affirming the lower court's denial of Sixt's motion to compel arbitration, the court found that the arbitration agreement's plain terms related only to services or products provided by Orbitz; not to companies doing business through it. As such, the dispute between the customer and Sixt fell outside the scope of the agreement and arbitration could not be compelled. *Calderon v. Sixt Rent a Car, LLC*, 5 F.4th 1204 (11th Cir. 2021).

Scope of Arbitration Provision Clarified under Michigan Law. The female support staff at a law firm alleged that the named partner, Morse, sexually assaulted them. The law firm moved to compel arbitration based on the arbitration provision in the firm's handbook requiring arbitration of "all concerns . . . relative to your employment." The issue for the Michigan Supreme Court was whether the plaintiffs' sexual harassment, negligence, and related claims were subject to this arbitration provision. The court reasoned that whether the claims were subject to arbitration depended on whether they could be maintained

without reference to the contract or relationship at issue. To illustrate the point, the court posited "If Morse had groped or propositioned opposing counsel or a client while at the Morse firm's office, or if Morse had grabbed the breasts of a server or other patron of the restaurant during the firm's Christmas party, could those individuals bring the same claims as plaintiffs?" As the standard articulated by the Court had not previously been applied, the Court remanded the case to determine whether "plaintiffs' claims may be maintained without reference to the contract or relationship at issue." *Lichon v. Morse*, 2021 WL 3044458 (Mich.).

No Agreement to Arbitrate. The subcontract here contained a forum selection clause providing that any litigation arising from the subcontract "shall be conducted in federal or state court . . ." However, it also incorporated the terms of a separate agreement between the Contractor and Property Owner (the "Prime Agreement"), which included an arbitration clause. Reconciling the conflict in these provisions, the court turned to another section in the subcontract providing "[i]n the event of any conflict, variation or inconsistency between any provisions of the Subcontract Documents, the provision imposing the more or most stringent requirement as the case may be shall govern." The court read this section to encompass the terms of the Prime Agreement, including its arbitration clause, and concluded that because the subcontract upholds the parties' constitutional right to a jury trial and protects their appellate rights by providing for litigation, "its forum selection provision is the more restrictive and stringent and therefore controls the parties' dispute." As such, the court held that "the Subcontract does not evidence an intention, clear or otherwise, for arbitration of disputes" between the parties and affirmed the trial court's order denying the motion to compel. *Remedial Construction Services, LP v. AECOM*, Inc., 2021 WL 2431256 (2d Dist. Cal.), as modified on denial of reh'g (July 15, 2021), review denied (September 1, 2021).

Arbitration Provision Enforceable Even if Contract Voided. Plaintiff obtained ten loans from a tribal payday loan entity at interest rates ranging from 596% to 650%. She brought an arbitration under the loan agreements and the agreements were ruled void *ab initio* and she was awarded damages. Plaintiff moved to confirm, but also in the same action brought a class action against the defendant loan company. Defendant moved to compel arbitration of the class action, and plaintiff opposed the motion on the ground that the loan agreements with the arbitration provision were void as a matter of law. The court compelled arbitration of the class action, reasoning that "the arbitration award finding that the loan contracts are void *ab initio* [were] within same remain enforceable as such are severable from the remainder of the contract." The court added that any claim that the loans were illegal was for the arbitrator to decide, as the challenge was to the agreement as a whole and to not to the arbitration provision in particular. The court concluded that when there is no challenge to the making of the arbitration agreement within a contract "the

arbitration agreement contained within a void contract still stands." *Easley v. WLCC II*,, 2021 WL 4228876 (S.D. Ala.).

Contractual Right to Compel Arbitrable Issues. California Insurance Code of Civil Procedure §11580.2, which has been incorporated into every California car insurance policy, "provides that if the insurer and insured cannot agree whether the insured is legally entitled to recover damages from an uninsured motorist and the amount of such damages, those issues shall be determined by arbitration." Relying on this provision, defendant insurance company moved to compel arbitration of a motorcyclist's underinsured motorist claim and stay his bad faith litigation claim, which was not subject to mandatory arbitration. The trial court denied the motion, concluding that the motorcyclist's action was one for bad faith and was not a dispute over coverage or the amount of the underinsured motorist claim. The appellate court reversed, stating "[t]he fact that a litigation involves some nonarbitrable issues is not a basis to deny a petition to compel arbitration unless those issues involve a third party who is not contractually obligated to arbitrate." Here, the complaint contained allegations that defendant "breached the contract by failing to pay damages due under the policy" and therefore "the issue of UIM damages to which plaintiff is entitled is relevant to at least some of plaintiff's claims." The case was remanded to the trial court with direction to grant the motion to compel arbitration of the UIM damages and rule on defendant's request for a stay of the litigation pending arbitration. *McIsaac v. Foremost Ins. Co. Grand Rapids, Michigan*, 64 Cal. App.5th 418 (2021).

Question of Fact Whether Term in Online Arbitration Agreement is Enforceable. Purchasers of Walmart gift cards sued the retailer to obtain a refund of their money, alleging that the gift cards were tampered with by a third party and were worthless. Walmart moved to compel arbitration, relying on a notation on the back of the gift cards directing purchasers to "see Walmart.com for complete terms." If they did so, Walmart contended, they would find an arbitration provision covering "ALL DISPUTES ARISING OUT OF OR RELATING TO THESE TERMS OF USE OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND WALMART." According to the website, "using or accessing the Walmart Sites" is deemed acceptance of the arbitration provision by customers. The district court found the clause unenforceable against the gift card purchasers, but the Eighth Circuit disagreed, finding questions of fact precluded a determination. Specifically, the court found there was insufficient information to determine "whether any of the plaintiffs actually 'used or accessed' Walmart's website." The court also found that there were questions surrounding the structure and design of the website and the notation on the back of the gift card, including its size and placement, "which are relevant to determining whether the plaintiffs would have been on notice to inquire further." The matter was remanded for a trial on these factual issues. *Foster v. Walmart, Inc.*, 15 F.4th 860 (8th Cir. 2021).

Online Agreement Unenforceable for Lack of Notice. In the "ever-evolving arena of online consumer contracts," a New Jersey appellate court reversed and remanded a lower court's order compelling arbitration, holding that the online company failed to establish that the user assented to the arbitration agreement. In doing so, the court distinguished between a clickwrap agreement and a browsewrap agreement. Clickwrap agreements require "user consent to any terms and conditions by clicking on a dialog box on the screen in order to proceed with the internet connection" and are "routinely enforced by courts." On the other hand, browsewrap agreements exist "where the online host dictates that assent is given merely by using the site" and "do not require users to expressly manifest assent." The enforceability of browsewrap agreements "may turn on whether the terms or a hyperlink to the terms are reasonably conspicuous on the webpage." Regardless of the agreement's characterization, however, the court noted that the pertinent inquiry is "whether the user was provided with reasonable notice of the applicable terms, based on the design and layout of the website." In this case, the website contained a statement that the user is agreeing to its Terms and Conditions by clicking the submit button, but that statement was located underneath the submit button and "did not contain any other explanatory terms, such as "Click Here to Accept [or Acknowledge, or Read, or View] the Terms & Conditions." In addition, while the phrase "Terms and Conditions" was "offset in blue font and acted as a hyperlink to a separate, seven-page document," it was not "underlined, bolded, or enlarged." Based on these characteristics, the court found that the agreement could "best be described as a browsewrap agreement" because the website "did not require plaintiff to open, scroll through, or acknowledge the terms and conditions by 'clicking to accept' or checking a box that she viewed them" and concluded that there was no evidence in the record establishing that plaintiff affirmatively assented to the arbitration agreement. *Wollen v. Gulf Stream Restoration and Cleaning, LLC*, 2021 WL 2878703 (N.J. App.). See also *Selden v. AirBnB, Inc.*, 4 F.4th 148 (D. Cir. 2021) (Airbnb signup screen placed users on reasonable notice of terms of service including arbitration provision where terms and policies "appeared in red text against a white background and were hyperlinked to the full policies" and appeared on a single screen with no scrolling required).

Case Shorts:

- *Glacier Park Iron Ore Properties v. United States Steel Corp.*, 961 N.W.2d 766 (Minn. 2021) (arbitration clause limited to disputes "herein specifically stated" ruled "not sufficiently broad to include contract formation claims").
- *Patterson v. Superior Court,* 2021 WL 4843540 (Cal. App.) (provision in employer's arbitration agreement providing for award of attorneys' fees for filing successful motion to compel only enforceable under California's Fair Employment and Housing Act if employee's opposition was "groundless").

- *Pena v. 220 East 197 Realty, LLC*, 2021 WL 3146031 (S.D.N.Y.) (motion to compel granted even where plaintiff did not first submit claim to mediator as required under collective bargaining agreement).
- *ISS Facility Services v. Fedcap Rehabilitation Services*, 2021 WL 2784550 (S.D.N.Y.) (completion of contractual dispute resolution process was condition precedent to filing of breach of contract action and failure to complete that process requires dismissal of action).
- *Ixmata v. Mogonye Land Tech, LLC*, 2021 WL 3555832 (S.D. Tex.) (affidavit from employee resisting arbitration that he did not recall seeing arbitration agreement did not put making of agreement "in issue" where employer produced sworn statements confirming that the employee signed the agreement).
- *Boykin v. Family Dollar Stores of Michigan*, 3 F.4th 832 (6th Cir. 2021) (plaintiff who certifies that he "unequivocably did not consent to sign, acknowledge or authorize any type of arbitration agreement" with his employer created a genuine issue of fact regarding the formation of a contract under the FAA requiring targeted discovery and a trial on the question).
- *Dodson International Parts v. Williams International Co. LLC*, 12 F.4th 1212 (10th Cir. 2021) (arbitration provision that applies to disputes "in connection with" services provided "has no apparent temporal limitation" and disputes arising after services were fully performed are arbitrable).
- *Donelson v. Ameriprise Financial Services*, 999 F.3d 1080 (8th Cir. 2021) (arbitration clause in account application which plaintiff signed was incorporated by reference into client agreement and was enforceable even though plaintiff was not provided with a copy and did not sign the client agreement).
- *Harris v. Volt Management Corp.*, 625 S.W.3d 468 (Mo. App. 2021) (arbitration agreement invalid as illusory and lacking consideration where employer retained the unilateral right to modify all parts of it without notice and at any time.)
- *Donelson v. Ameriprise Financial Services*, 999 F.3d 1080 (8th Cir. 2021) (imbalance in arbitration agreement – requiring employee to bring all claims to arbitration and employer to bring only some – did not render arbitration agreement unconscionable).
- *Fuel Husky, LLC v. Total Energy Ventures International*, 999 F.3d 257 (S.D. Tex. 2021) (unsubstantiated declarations of fraud did not satisfy the narrow grounds under the New York Convention to deny enforcement of otherwise enforceable arbitration agreement).
- *Donelson v. Ameriprise Financial Services*, 999 F.3d 1080 (8th Cir. 2021) (unilateral right to modify arbitration agreement did not render the agreement illusory as the contract further provided that continued use of the investor account constituted agreement to be bound to any changes).

- *Caballero v. Premier Care Simi Valley*, 69 Cal. App.5th 512 (Cal. App. 2021) (limited proficiency in English not grounds to avoid enforcement of arbitration agreement in absence of fraudulent inducement – "it is incumbent upon the party to have it read or explained to him or her").
- *Hansen v. LMB Mortgage Services*, 1 F.4th 667 (9th Cir. 2021) ("court must proceed without delay to a trial on arbitrability and hold any motion to compel arbitration in abeyance until the factual issues have been resolved" where genuine issues of material fact are present on the question of formation of the arbitration agreement).
- *Hartranft v. Encore Capital Group*, 2021 WL 2473951 (S.D. Cal.) (applicant for credit card bound to arbitrate where he received the credit card agreement containing an arbitration provision and promptly used the credit card).
- *Local Union 97 v. NRG Energy, Inc.,* 2021 WL 4288505 (N.D.N.Y.) (dispute relating to side agreement without arbitration provision is not arbitrable under main agreement with arbitration provision where the collateral matter did not implicate issues of contract construction or the parties' rights or obligations under it).
- *Hartranft v. Encore Capital Group*, 2021 WL 2473951 (S.D. Cal.) (arbitration agreement providing that either party "may" arbitrate any claim between them is enforceable where provision goes on to say that once arbitration is invoked by one party the other party is bound).
- *Baker v. Iron Workers Local 25*, 999 F.3d 394 (6th Cir. 2021) (arbitrator required to resolve dispute where union and management trustees deadlocked, and trust agreement provided process to break ties).
- *Lee v Engel Burman Grande Care at Jericho, LLC,* 021 WL 3725986 (E.D.N.Y.) (plaintiff bound to arbitrate dispute even where she was rushed into signing and was only provided last page of dispute resolution agreement which stated that she was bound if she did not opt out of the program).
- *Dentons US v. Zhang*, 2021 WL 2187289 (S.D.N.Y.) (party's agreement to keep documents filed in court relating to arbitration under seal did not outweigh presumption of public access to judicial documents absent a showing, not made here, that sealing was necessary to preserve "a higher value").
- *Lee v Engel Burman Grande Care at Jericho, LLC,* 021 WL 3725986 (E.D.N.Y.) (arbitration provision applied to non-signatory manager "who had authority to supervise, hire, fire, demote, and promote plaintiff").
- *Burgess v. Cole ABA Solutions*, 2021 WL 4295131 (S.D. Tex.) (client employer of professional employer organization can compel arbitration under agreement between the PEO and client/employee who performed services for employer).
- *Holistic Industries of Arkansas v. Feurstein Kulick, LLP*, 2021 WL 4005872 (E.D. Ark.) (malpractice action against law firm arbitrable even though plaintiff did not exist at time engagement letter was signed but law firm assisted plaintiff to seek medical

marijuana license and directly benefited from law firm's efforts even though it did not sign engagement letter).

- *Western Bagel Company v. Superior Court of Los Angeles County*, 66 Cal. App.5th 649 (Cal. App. 2021), review filed (August 23, 2021) (the FAA's default rule that any ambiguities regarding the scope of an arbitration agreement must be resolved in favor of arbitration requires enforcement of arbitration agreement despite ambiguity created by due to translation error undercutting an otherwise binding arbitration provision).

V. CHALLENGES TO ARBITRATOR OR FORUM

Arbitrator Immunity Bars Suit. Seemingly unhappy with the result of their underlying arbitration, plaintiffs sued the arbitrator who presided over the matter, claiming he colluded with petitioner in the proceeding to stall for time, run up his fees, and conduct numerous other acts. Dismissing the case in its entirety, a Texas district court held that the doctrine of arbitral immunity conclusively barred all of plaintiffs' claims. The court explained that arbitral "immunity protects arbitrators from civil liability arising from actions taken in the course of conducting arbitration proceedings" and "is essential to protect decision-makers from undue influence and the process from reprisals by dissatisfied litigants." Responding to plaintiffs' argument that the doctrine was not applicable because the arbitrator "did not have proper jurisdiction," the court noted that the "Supreme Court long ago differentiated acts 'in excess of jurisdiction,' for which immunity from civil liability applies and acts taken in 'the clear absence of all jurisdiction,' for which there is no legal protection." As such, plaintiffs must establish a "clear absence of all jurisdiction over the subject matter," which is "a markedly higher bar." Finding that the arbitrator was appointed by the state court "using the usual judicial machinery" and that he "exercised only those powers corresponding to his roles," the court held that the arbitrator "cannot be civilly liable regardless of whether his decision was legally defensible or was part of a conspiracy to enrich himself as Plaintiffs' claim." *Hudnall v. Smith*, 2021 WL 3744580 (W.D. Tex.). See also *Cruz v. Feliu et al.*, 2021 WL 3725606 (N.Y. Sup. Ct. N.Y. Cty.) (monetary sanction awarded to arbitrator where plaintiff offered no basis for arbitrator's alleged undisclosed business conflict and suit was an impermissible collateral attack on unappealed award issued by panel of which arbitrator was member four years prior).

Effort to Expand *Monster Energy* Disclosure Requirements Rejected. A dispute was heard and resolved by a JAMS arbitrator, and the award was affirmed in most respects by a JAMS appellate panel. The award was confirmed and a few days later the Ninth Circuit issued its ruling in *Monster Energy* interpreting the evident partiality standard as applied to JAMS' arbitrators with an ownership interest in the organization. The losing party then requested disclosures by JAMS of the respective arbitrators' ownership interests in the

institution as well as the number of arbitrations or mediations each party and counsel had with it. JAMS responded that the appropriate disclosures had been made. The losing party moved to vacate the award before the district court and the Ninth Circuit and both courts rejected the motion. The Ninth Circuit explained that the *Monster Energy* decision is limited to a party's non-trivial dealings with JAMS and where an arbitrator holds an ownership interest in JAMS. The court rejected the notion that *Monster Energy* required vacatur where *counsel* had non-trivial dealings with JAMS. The court noted that "*Monster Energy* focuses on the unique *economic* incentives of a JAMS co-owner to find in favor of repeat clients." The court in *Monster Energy* focused on the profit motive of the arbitrators, not merely on "the familiarity and rapport established with repeat players *per se*. The *Monster Energy* court was therefore concerned with the potential bias created by repeat *payors* in the arbitral forum, as opposed to merely repeat players." The court also rejected the argument as "nonsensical" that the arbitrators were required to provide a supplemental disclosure stating that they had nothing further to disclose. The court noted that this applied also to disclosures regarding counsel. "While there is nothing wrong with providing confirmation that an arbitrator had no prior professional interactions with a law firm, there is no requirement that the arbitrator do so." The three panelists in a concurring opinion urged the Ninth Circuit to reconsider *Monster Energy en banc* recognizing that the decision may generate endless litigation over arbitrations as was the case here. *EHM Productions v. Starline Tours of Hollywood*, 1 F.4th 1164 (9th Cir. 2021).

Case Shorts:

- *Selden v. AirBnB, Inc.*, 4 F.4th 148 (D. Cir. 2021) (Fair Housing provision of Civil Rights Act of 1964 which provides that claimant need not exhaust "other remedies" did not prohibit arbitration of such claims as arbitration is not a remedy but is an alternative forum for the adjudication of these claims).
- *Hillhouse v. Chris Cook Construction*, 2021 WL 4471090 (Miss.) (court may not appoint arbitrator where, as here, agreement designated defunct arbitration forum and the designated "situs or arbitrator is a contract requirement").

VI. CLASS, COLLECTIVE, AND GROUP FILINGS

Case Shorts:

- *Donelson v. Ameriprise Financial Services*, 999 F.3d 1080 (8th Cir. 2021) (district court order denying motion to strike class action allegations and to compel arbitration immediately appealable under Section Four of the FAA).

- *Daly v. Autofair, Inc.*, 2021 WL 4170139 (D. Mass.) (motion to enjoin state court proceeding to grant final approval of class action settlement denied as the four plaintiffs' individual claims brought by class members before arbitrators were encompassed by class settlement).

VII. HEARING-RELATED ISSUES

Arbitral Subpoena Must be Enforced Where Arbitrator Sits. The seat of the arbitration here was Washington, D.C. The arbitrator issued third-party summons to parties in California and plaintiff moved to enforce the subpoenas in a California district court. The court refused to enforce the subpoenas, concluding that "motions to enforce summonses must be brought in the district court covering the location in which the arbitrators are sitting and not, if the two locations are different, in a district court covering the location to which the parties were summoned." The court recognized that parties can agree to change the seat of the arbitration but found no evidence that the opposing party in the arbitration here agreed to do so. Rather the merits hearing was going to be held in Washington, D.C. For these reasons, the court denied the motion to compel compliance with the third-party arbitral subpoenas. *Jones Day v. Orrick Herrington & Sutcliffe*, 2021 WL 4069753 (N.D. Cal.).

Case Shorts:

- *Dodson International Parts v. Williams International Co. LLC*, 12 F.4th 1212 (10th Cir. 2021) (arbitrator did not deny party a fundamentally fair hearing by failing to delay the hearing until a court ruled on enforceability of a subpoena served on a testifying witness).
- *TCSS Environmental Technologies v. Cavortex Technology*, 2021 WL 4319674 (N.D. Tex.) (post-judgment interest awarded in diversity cases at applicable federal post-judgment interest rate pursuant to 28 U.S.C. § 1961 unless parties contracted for a different rate).
- *Selden v. AirBnB, Inc.*, 4 F.4th 148 (D. Cir. 2021) (arbitrator not guilty of misconduct where plaintiff failed to request permission to issue interrogatories and to authorize depositions until the close of discovery).
- *TCSS Environmental Technologies v. Cavortex Technology*, 2021 WL 4319674 (N.D. Tex.) (arbitrators do not have authority to specify post-judgment interest rate unless parties granted that authority to award a non-statutory rate in the agreement).
- *Continental Casualty v. Certain Underwriters at Lloyd's of London*, 10 F.4th 814 (7th Cir. 2021) (panel's various awards in reinsurance dispute upheld where a court found panel members were "striving to effectuate the broader purpose of the agreement" which "gave them the power to resolve the case on general principles not just legal entitlements and that seems to be what they did").

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Manifest Disregard Found Where Award Upheld Non-Compete Agreement Violative of Public Policy. The arbitration panel declared that "Wyoming law strongly supports covenants not to compete." The Wyoming Supreme Court found that statement to be "the antithesis to clear Wyoming law" and vacated the award on manifest disregard grounds. The panel here reformed a non-compete agreement in a cardiologist's contract and awarded damages to the doctor's former employer of $1,000 for each of the 193 patients treated in violation of the covenant. The Court characterized the panel's actions as "application of a nonexistent public policy and direct[ing] the Panel's review of the contract in a manner not authorized by law." The Court explained that by beginning with an "antithetical public policy" the panel ignored "the parties' contractual intent and [rewrote] the agreement from its own perspective." The Court reasoned that parties to a contract do not submit disputes for resolution based on manifest error and courts do not place their power "behind arbitral awards that flaunt the law." The Court concluded that the panel "made a manifest error of law when it ignored a specific public policy arising from well-established judicial mandate – covenants not to compete are prima facie invalid unless necessary for the reasonable protection of the employer; that error led the Panel to rewrite the parties' contract" and on this basis vacated the award. *Skaf v. Wyoming Cardiopulmonary Services*, 495 P.3d 887 (Wyo. 2021). Cf. *EHM Productions v. Starline Tours of Hollywood*, 1 F.4th 1164 (9th Cir. 2021) (manifest disregard claim rejected despite appellate arbitration panel finding that arbitrator "exceeded her authority" by failing to follow a California case where arbitrator was merely mistaken and did not intentionally ignore or disregard applicable law).

Manifest Disregard Claim Rejected. Jordan, who led JP-Richardson ("JP"), while serving as the managing partner of a joint venture with Pacific Oak was subject to a grand jury investigation relating to political corruption. When Pacific Oak learned about the grand jury investigation it terminated JP as managing member of the joint venture. JP initiated an arbitration against Pacific Oak and Pacific Oak was granted summary disposition in its favor on collateral estoppel grounds when Jordan was ultimately convicted by a jury. That conviction was overturned due to jury misconduct. The arbitrator ruled in favor of Pacific Oak on a renewed summary disposition motion based on various adverse inferences applied against JP based on "highly probative" evidence in the record. The trial court confirmed the award and the California Court of Appeals affirmed, rejecting JP's manifest disregard claim. The court emphasized that the arbitrator reconsidered the matter after the conviction was overturned and found sufficient evidence to rule in favor of Pacific Oak based on "evidence of gross negligence and willful misconduct (arising from adverse inferences in trial testimony)." In particular, the arbitrator reasoned that "the incident of juror misconduct warranted a new criminal trial but did not diminish the value of the trial testimony that

further supported the arbitrator's previously found adverse inferences." For these reasons, the court rejected JP's claim of manifest disregard and affirmed the trial court's confirmation of the award. *JP-Richardson v. Pacific Oak SOR Richardson Portfolio JV*, 65 Cal. App.5th 1177 (Cal. App. 2021).

Disqualifying Conflict Waived by Belated Search. The arbitrator here failed to disclose that he was serving as a guarantor on a significant loan to an entity with which he was a member from a bank that was a party in an active matter before him. The arbitrator personally signed $2,000 checks to the bank monthly for a period of time during the arbitration. The arbitrator ruled against the bank which then conducted a search of its records and discovered the conflict. The bank moved to vacate the award on evident partiality grounds. The court authorized the deposition of the arbitrator because there was, in the court's view, "a difference of opinion as to what the facts actually show concerning an alleged conflict. This court determined that the Arbitrator's testimony was paramount to the issue at hand because there may exist some explanation regarding the Arbitrator's disclosures, which had not yet been brought forth by the parties." However, the court concluded that the bank had waived its right to object to the arbitrator's continued service. The court found that the bank had constructive notice of the arbitrator's conflict as "illustrated by the Arbitrator's testimony, a significant connection existed between the Arbitrator and the Bank. This court acknowledged that the Arbitrator's failure to disclose that connection creates a 'reasonable impression of bias', amounting to a material disqualifying conflict of interest in this matter." The bank admitted that it did not search its files until after the award was issued as it stated, "we do not investigate potential arbitrators." The court found that the bank failed to satisfy its "unquestionable duty to conduct a reasonable investigation weather [the arbitrator] manifested any disqualifying features." As a result, the court concluded that the bank waived its right to object on evident partiality grounds. *Shaffer v. PriorityOne Bank*, 2021 WL 2386824 (S.D. Miss.).

Award Vacated for Lack of Jurisdiction. An arbitration award issued by an arbitrator who never had proper jurisdiction over the parties in the first place was vacated by a District of Massachusetts judge. The arbitration provision was contained in an agreement signed by New Balance ("NB") and PSG, a Peruvian sporting goods company. The arbitration proceeding, however, also named PSG's majority shareholder and a PSG-owned company as Respondents (collectively, "PSG Entities"). PSG Entities objected to the arbitrator's jurisdiction throughout the proceeding, but the arbitrator ultimately ruled jurisdiction existed and issued a Partial Final Award in NB's favor. The PSG Entities moved to vacate the award and NB cross-moved to confirm it. The court first addressed the standard of review, which would turn on whether PSG Entities' "clearly and unmistakably" agreed to arbitrate the arbitrability question. Finding that PSG Entities' "continued challenges and objections to the arbitrator's jurisdiction over them shows that they did not want to be bound by the

arbitrator's decision on arbitrability," the court concluded the next step was for it to "independently decide whether they were bound to arbitrate under the Agreement." On this point, the court determined that none of "the six theories for binding non-signatories to arbitration agreements" under Massachusetts law applied. The award was therefore vacated. *Ribadeneira v. New Balance Athletics, Inc.*, 2021 WL 4419943 (D. Mass).

Declaratory Relief to Resolve an Ambiguous Award Authorized. The district court confirmed an award by a panel addressing a series of disputes between a trucking company and a railroad. In doing so, the court declined to grant additional relief seeking to interpret the award. The Eighth Circuit affirmed the confirmation of the award but granted the request for declaratory judgment interpreting ambiguities in the award. In the court's view, "a dispute about what an arbitration award held to be one party's contractual obligations to another is a dispute that either party has the requisite interest to ask a federal court to resolve by a declaration. . .." The court reasoned that a declaratory judgment that clarifies the meaning of an award leaves the award "unmodified." In addressing the ambiguities in the award, the court explained that "the first step toward resolving this ambiguity is to read the passages cited by the parties together, harmonizing them where it is possible to do so and, where it is not, looking for indicators of which passage is controlling." The court then proceeded to harmonize the panel's rulings by looking to the "textual and structural indicators" in the final and interim awards. The court then proceeded to articulate the parties' objections under the final award and remanded that aspect of the district court's rulings denying the motion for declaratory judgment consistent with its opinion. *J. B. Hunt Transport v. BNSF Railway Co.*, 9 F.4th 663 (8th Cir. 2021).

Vacatur Not Warranted Based on Reduction of Termination of Long-Term Suspension. A certified nursing assistant was terminated for getting into an argument with a nursing home resident. The nursing home concluded that this encounter violated its Resident Abuse Policy. An arbitrator disagreed, finding that while the nursing assistant spoke in a "loud and intemperate voice" and engaged in an "unprofessional dialogue" she did not use "derogatory terms" as set forth in the resident abuse policy. On this basis, the arbitrator found that the nursing home had just cause to discipline but not terminate the nursing assistant and reduced the termination to a 120-day suspension. The nursing home moved to vacate the award. The district court denied the motion and the Eighth Circuit affirmed. The court rejected the claim that the arbitrator exceeded his authority by overturning the decision to terminate in the face of a just cause finding. "The arbitrator here never found that there was just cause for termination; he found only that there was just cause to impose discipline." The court added that the nursing home expressly authorized the arbitrator to determine the remedy to be imposed if the collective bargaining agreement was violated. The court also rejected the nursing home's contention that the arbitrator violated public policy by reinstating an employee who arguably abused a nursing home resident. The court

pointed out that the narrow public policy exception focused not on the underlying behavior of the resident but on whether the arbitrator's decision itself violated public policy. In rejecting the nursing home's claim, the court ruled that the "record does not establish that [the nursing assistant] committed abuse as defined by the cited statutes, or that allowing [the nursing assistant] to return to work after suspension violates public policy. *WM Crittenden Operations v. United Food and Commercial Workers*, 9 F.4th 732 (8th Cir. 2021).

Arbitration Panel Exceeded Authority. The Supreme Court of Alaska held that arbitration panels in two separate proceedings involving insureds with identical medical payment and UIM coverage exceeded their authority in determining total benefit amounts owed to insureds. An examination of the UIM Insuring Agreement led the court to conclude that the policy distinguished between damages and benefits. "The insurance policy refers to the amount an insured person would have been legally entitled to recover from an at-fault driver as 'damages'; it refers to what the insured is entitled to recover from Allstate as 'amount payable,' a sum that may differ from an insured's damages . . .." The UIM arbitration provision, on the hand, "discuss[es] only damages — and thus excludes from arbitration questions relating solely to the insureds' right to collect benefit amounts from Allstate . . .." Therefore, "[b]ecause "the arbitration panels had no authority to determine anything beyond the insureds' damages arising from their accidents and because Allstate withheld its consent for the panels to determine anything else," the panel[s] exceeded [their] authority in determining issues the parties did not agree to arbitrate. As such, the court held that the lower court's confirmation of those awards was legal error. The matters were reversed and remanded to the lower court for further determination. *Allstate Insurance Company v. Harbour*, 491 P.3d 374 (Alaska 2021). See *Car Credit, Inc. v. Pitts*, 2021 WL 3729658 (Mo. App.), reh'g denied (Sept. 21, 2021) (arbitration award by AAA arbitrator vacated where parties' agreement expressly required that the arbitration be conducted by the National Arbitration Forum, which was no longer available to arbitrate the case, as the AAA arbitrator is deemed to have exceeded his power as not having been designated in the parties' agreement to hear the dispute). But see *Legacy Agency, Inc. v. Scoffield*, 2021 WL 4155238 (S.D.N.Y.) (mere disagreement with arbitrator's interpretation of what constitutes breach of contract not sufficient to support claim that arbitrator exceeded her authority).

Case Shorts:

- *Jefferies, LLC v. Gegenheimer*, 849 Fed. App'x 16 (2d Cir. 2021) (manifest disregard claim rejected even where FINRA panel did not explain its decision where authority provided to panel constituted colorable justification for its rulings).
- *Chongqing Loncin Engine Parts Co. v. New Monarch Machine Tool*, 2021 WL 3360538 (N.D.N.Y.) (delay in issuing award not grounds for vacatur where panel expressly requested and received permission to extend deadline from president of the CIETAC's Arbitration Court).

- *City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. 918 (2021) (manifest disregard not recognized as ground for vacatur under Nebraska's Uniform Arbitration Act).
- *City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. 918 (2021) (award of attorneys' fees based on finding that motion to vacate was frivolous overturned where "arguments made by the City that the arbitration award should be vacated, while not meritorious, were also not so unreasonable to be deemed frivolous).
- *McLaurin v. The Terminix International Co.*, 13 F.4th 1232 (11th Cir. 2021) (when motion to confirm is filed before the 90 day period to move to vacate has passed, the 11th Circuit cites as "best practice" for the district court to "issue an order that sets simultaneous deadlines for a losing party to file an opposition to the motion to confirm, if any, and to file a separate motion to vacate, modify, or correct, if any").
- *News+Media Capital Group vs. Las Vegas Sun, Inc.*, 495 P.3d 108 (Nev. 2021) (motions to vacate denied under Nevada law based on alleged error of fact and law as "arbitrator's misinterpretation of an agreement constitutes an excess of authority only if the adopted interpretation is not even minimally plausible").
- *Dynasty Stainless Steel v. Hill International,* 2021 WL 4398203 (E.D.N.Y.) (award not final and appealable where University's dispute resolution process allowed internal appeal to Vice Chancellor).
- *University of Notre Dame (USA) in England v. Tjac Waterloo*, 2021 WL 2827442 (D. Mass.) (FAA's three-year statute of limitations for confirmation of awards under New York Convention begins to run after all rulings on damages were resolved and not after each sub-category of damages were addressed under the "piecemeal approach" adopted by the arbitrator).
- *BST Ohio Corp. v. Wolfgang*, 2021 WL 2148497 (Ohio) (court can confirm award under Ohio law before ninety-day period to file motion to vacate has passed).
- *Dodson International Parts v. Williams International Co. LLC*, 12 F.4th 1212 (10th Cir. 2021) (party's failure to identify motion in court caption as one to confirm award not fatal as intent was clear and no prejudice was shown).

IX. ADR – GENERAL

Email Confirmation of Settlement of Arbitration Claim Sufficient. The parties here arbitrated an underinsured motorist claim. The parties agreed to settle the claim for $400,000 through e-mail correspondence after the award of $950,000 was issued but before the award was received. The trial court ruled that the e-mail communications were sufficient to settle the dispute; the appellate court reversed. The court rejected earlier precedent finding that prepopulated signature blocks in emails do not qualify as

subscribing to the terms of a settlement. Adding that "this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today." Rather, the court held that "if an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their e-mail account is identified in some way as their own, then it is unnecessary for them to type their own signature." The court noted that the e-mail communication here related to a "subject freighted with ethical obligations" which helps to "insure that an attorney considers their authority before communicating settlement offers and acceptances to opponents, whatever the mode of communication." The court found that material terms of the agreement were present, including the settlement amount, and were followed by delivery of a general release to be executed. Finally, the court rejected the argument that the fear expressed in the e-mail exchange that the motorist might "renege" on the deal requiring expedition evidences uncertainty. On the contrary, the court viewed this as "an expression of concern that a party might renege presupposes the existence of an agreement." For these reasons, the court concluded that a binding settlement agreement had been reached as a result of the e-mail exchange between counsel. *Philadelphia Insurance Indemnity Co. v. Kendall*, 197 A.D.3d 75 (N.Y. App. 1st Dep't 2021).

Referral to "Alternative Dispute Resolution" Did Not Constitute Arbitration. The Sixth Circuit here noted that the FAA did not define the term "arbitration." To qualify as "classic arbitration," the court explained the process must provide a final and binding remedy where each side has an opportunity to present its case before an independent adjudicator applying substantive standards. The employer here made various references to "alternative dispute resolution" in its handbook and employment application. For example, it noted that disputes that cannot be resolved internally "may be referred to Alternative Dispute Resolution, unless prohibited by law, before any other legal action is taken." The court noted that ADR is referred to as "arbitration or mediation, that exists outside the state or federal judicial system." The employer's documentation also indicates that disputes are to be referred to mediation. The trial court denied the motion to compel arbitration, and the Sixth Circuit affirmed. The Sixth Circuit held that the parties "agreed to alternative dispute resolution generally, not arbitration specifically." The court concluded that the employer's ADR provision did not resemble "classic arbitration" and pointed out that "arbitration is juxtaposed with mediation, which, while also overseen by a neutral third party, is non-binding in nature." For these reasons, the court denied the motion to compel arbitration. *Southard v. Newcomb Oil Co.*, 7 F.4th 451 (6th Cir. 2021).

DOL Found Not to Be Bound by Private Arbitration Agreements. A New York federal court recently ruled that private arbitration agreements will not prevent the federal Secretary of Labor from bringing suit against an employer for violation of the Fair Labor Standards Act. The case involved an action filed by the Secretary of Labor against an

employer alleging FLSA violations on behalf of 292 individuals. The employer moved to compel arbitration, arguing that the existence of arbitration agreements with each of the individuals also binds the DOL because it was "act[ing] on behalf" of them. The court disagreed, finding that the DOL is not bound by individual agreements to which it is not a party. The court also observed that the DOL "may still have interests independent of the aggrieved employee when seeking employee-specific relief, including deterring other employers from violating the FLSA and protecting complying employers from unfair wage competition with noncomplying ones." *Scalia v. CE Security LLC*, 2021 WL 3774198 (E.D.N.Y.),

Case Shorts:

- *Don Booth of Breland Group v. K&D Builders*, 626 S.W.3d 601 (Ky. 2021) (arbitrator did not exceed his authority by resolving issues properly before him, even if he misapplied applicable law).
- *Legacy Agency, Inc. v. Scoffield*, 2021 WL 4155238 (S.D.N.Y.) (pre-judgment interest awarded by arbitrator at rate applicable to back pay awards as used by the NLRB affirmed).

X. COLLECTIVE BARGAINING SETTING

NLRB Revised Arbitration Deferral Rule Upheld. The National Labor Relations Board adopted anew its earlier standard in its 1984 decision in *Olin Corp.* for deferring to arbitration when addressing unfair labor claims. Under that standard, the board will forgo an unfair labor practice charge hearing where it concludes that the arbitration proceedings were fair and regular, the parties agreed to be bound, the issues are parallel between the two proceedings, the arbitrator generally presented the facts relevant to resolving the unfair labor practice and the decision was not repugnant to the purposes of the NLRA. "According to the Board, deferring to an agreed-upon dispute-resolution proceeding encourages parties to the collective bargaining agreement to rely on the proceedings rather than attempting to circumvent the proceeding by taking grievances to the Board in the form of an unfair-labor-practice charge." The Third Circuit ruled that the Board's rule was rational and consistent with the mandates of the NLRA. The court concluded, however, that the Board failed to carefully consider the petitioner's claim that the dispute resolution proceeding was neither regular or fair and remanded the Board's ruling for purposes of addressing those arguments. *Atkinson v. NLRB*, Case No. 20-1680 (3d Cir. July 8, 2021).

Labor Arbitrator's Award Upheld. LeClair, a firefighter and president of his union, was accused by an African American citizen of off-the-job assault and battery and disorderly conduct. LeClair pled no contest and was sentenced to six months' probation. The fire department terminated him, but he was reinstated by an arbitrator based on his good work record and was ordered to forfeit pay for five shifts while he was on administrative leave.

The city's motion to vacate was rejected by the Nebraska Supreme Court. The Court found no evidence of bias on the part of the arbitrator and rejected the notion that adverse rulings alone evidence evident partiality. "If even serious legal or factual errors do not justify vacatur of an arbitration award, it stands to reason that those errors would have to be particularly egregious for their only possible explanation to be arbitrator bias." The Court held that no reasonable person could conclude that the arbitrator was biased against the city. The Court also rejected the city's claim that the arbitrator exceeded her authority. The Court acknowledged that the city made a credible showing of just cause but made clear that "an arbitrator does not exceed his or her powers merely by interpreting a contract differently than a court would. When it is claimed that an arbitrator acted in excess of his or her powers, the inquiry is not whether the arbitrator's interpretation was correct, but whether the arbitrator was arguably interpreting the contract at all." The Court also ruled that the arbitrator did not exceed her authority by analyzing just cause by applying the seven questions posed in the seminal *Enterprise Wire* arbitration. In doing so, the Court acknowledged that "it is difficult to assign a meaning to a term like 'just cause' without engaging in tautology." The Court found that the questions posed in *Enterprise Wire* "provide some concrete considerations for a fact finder to evaluate when an action must be supported by just cause. Further, the specific questions that are part of the *Enterprise Wire* test do not strike us as so disconnected to the concept of just cause, that we could say the arbitrator strayed from contract interpretation in using them." Finally, the Court rejected the city's claim that the arbitrator exceeded her authority by imposing a remedy of the loss of five shifts of back pay in lieu of the city's termination decision. *City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. 918 (2021).

Case Shorts:

- *International Brotherhood of Electrical Workers v. T & H Services*, 8 F.4th 950 (10th Cir. 2021) (determination of job classification under the Davis-Bacon Act within jurisdiction of federal government and is not subject to arbitration under applicable collective bargaining agreement).
- *Pena v. 220 East 197 Realty, LLC*, 2021 WL 3146031 (S.D.N.Y.) (statutory wage and hour claims subject to arbitration where collective bargaining agreement "unambiguously requires" such claims to be submitted to its grievance and arbitration procedures).
- *Arceneaux v. Internal Revenue Service*, 2021 WL 3197197 (Fed. Cir.) (arbitrator's finding that grievance was filed beyond 30-day deadline upheld despite fact that employee was not given contractual 30-day notice of termination which would render the filing timely as court cannot "reinterpret a notice that is clearly the final decision" of the respondent).

- *Independent Laboratory Employees' Union v. ExxonMobil Research and Engineering Co.*, 11 F.4th 210 (3d Cir. 2021) (labor arbitrator properly considered the overall relationship between the parties, including prior arbitration awards and statements by management, in relying on law of the shop to conclude that retention of independent contractor to staff bargaining unit positions of a member who retired).
- *Local Union 97 v. NRG Energy, Inc.,* 2021 WL 4288505 (N.D.N.Y.) (dispute relating to retirees' life insurance not arbitrable as "neither that group of retirees nor their life insurance benefits are mentioned in, or affected by" the collective bargaining agreement).
- *Sinavsky v. NBCUniversal Medial, LLC,* 2021 WL 4151013 (S.D.N.Y.) (union employee bound to arbitrate dispute where collective bargaining agreement incorporated by reference to the employer's dispute resolution program).
- *Borough of Carteret v. Firefighters Mutual Benevolent Association*, 247 N.J. 202 (2021) (arbitrator's award in public sector dispute satisfied "reasonably debatable" standard for enforcement of the award where arbitrator reasonably found that municipality effectively replaced fire captains with lieutenants at lower pay in violation of collective bargaining agreement).

XI. NEWS AND DEVELOPMENTS

Fox News Settles Alleged Violations of NYC's Human Rights Law. Fox News and the New York City Human Rights Commission announced a settlement of the Commission's sexual harassment claims under New York City's Human Rights Law (NYCHRL) against Fox News. As part of the settlement, Fox News agreed to pay a $1 million fine and agreed to exempt from mandatory arbitration, for a period of four years, any claim brought under the NYCHRL by any Fox News employee, contributor, or on-air personality.

FINRA Issues Vaccination Requirement for In-Person Participants. FINRA has issued a requirement that all in-person participants at FINRA arbitrations and mediations be vaccinated against COVID. The rule became effective October 4, 2021, and as currently drafted extends through July 1, 2022. It applies to "all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, witnesses, and others" and requires they "be fully vaccinated to attend FINRA Dispute Resolution Services arbitration hearings or mediation sessions." There is an initial phase-in period from October 4, 2021, through November 19, 2021, where in-person participants may, in lieu of being fully vaccinated, provide proof of a negative PCR test within 72 hours of the start of the hearing and every 72 hours during the course of the hearing. After November 19, 2021, in-person participants who attest that there are circumstances preventing them from being vaccinated may provide proof of a negative PCR test within 72 hours of the start of the hearing and every 72 hours during the course of the hearing. With regard to participants in all Florida locations,

the rule exempted in-person participants from attesting to being vaccinated but requires proof of a negative PCR test within 72 hours of the start of the hearing and every 72 hours during the hearing. All costs associated with COVID testing are the responsibility of the parties or individuals that incurred them.

Weinstein Accuser Can Recover Costs of Ch. 11 Mediation. Louise Geiss, the lead plaintiff in a class action against Harvey Weinstein, received approval from a Delaware bankruptcy judge to be reimbursed for $118,000 in expenses she incurred while pursuing a settlement with the company for all victims of Weinstein's sexual abuse. Geiss applied for payment of the expenses as a substantial contribution claim in the Chapter 11 case, meaning that she felt her individual efforts in the proceedings provided a measurable benefit to the estate and its creditors. In approving the stipulated agreement, Judge Walrath said, "It was clear that Ms. Geiss was not just acting on her behalf by paying the mediation expenses for, in essence, everyone." *In Re: The Weinstein Company Holdings LLC,* Case No. 18-10601 (Bankr. Ct. D. Del.).

XII. TABLE OF CASES

Cases

Affinipay, LLC v. West, 2021 WL 4262225 (Del. Ct. Ch.) 6
Allstate Insurance Company v. Harbour, 491 P.3d 374 (Alaska 2021) 28
Al-Qarqani v. Chevron Corp., 2021 WL 3557596 (9th Cir.) 6
Arceneaux v. Internal Revenue Service, 2021 WL 3197197 (Fed. Cir.) 32
Atkinson v. NLRB, Case No. 20-1680 (3d Cir. July 8, 2021) 31
Atricure, Inc. v. Meng, 12 F.4th 516 (6th Cir. 2021) 15
Baker v. Iron Workers Local 25, 999 F.3d 394 (6th Cir. 2021) 6, 21
Banc of California v. Superior Court of Los Angeles County, 69 Cal. App.5th 357 (2021) 13
Barnett v. American Express National Bank, 2021 WL 4188051 (S.D. Miss.) 10
Beijing Shougang Mining Investment Co. v. Mongolia, 11 F.4th 144 (2d Cir. 2021) 11
Borough of Carteret v. Firefighters Mutual Benevolent Association, 247 N.J. 202 (2021) 33
Boykin v. Family Dollar Stores of Michigan, 3 F.4th 832 (6th Cir. 2021) 6, 20
Brice v. Haynes Investments, 13 F.4th 823 (9th Cir. 2021) 9
BST Ohio Corp. v. Wolfgang, 2021 WL 2148497 (Ohio) 29
Burgess v. Cole ABA Solutions, 2021 WL 4295131 (S.D. Tex.) 21
Caballero v. Premier Care Simi Valley, 69 Cal. App.5th 512 (Cal. App. 2021) 21
Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204 (11th Cir. 2021) 16
Camac Fund v. McPherson, 2021 WL 2232351 (Bankr. Ct. D. MD.) 5
Capriole v. Uber Technologies, 2021 WL 3282092 (9th Cir.) 3, 5
Car Credit, Inc. v. Pitts, 2021 WL 3729658 (Mo. App.), reh'g denied (Sept. 21, 2021) 28
CDIC of NC Protected Cell v. Gottlieb, 2021 WL 2201311 (S.D. Tex.) 10
Chamber of Commerce v. Bonta, 13 F.4th 766 (9th Cir. 2021) 2
Chongqing Loncin Engine Parts Co. v. New Monarch Machine Tool, 2021 WL 3360538 (N.D.N.Y.) 4, 28
Ciccio v. SmileDirectClub, 2021 WL 262115 (6th Cir.) 7
City of Omaha v. Professional Firefighters Association of Omaha, 309 Neb. 918 (2021) ..29, 32
CLMS Management Services v. Amwins Brokerage of Ga., 8 F. 4th 1007 (9th Cir.) 5
Communication Workers of America v. AT&T, Inc., 6 F.4th 1344 (D.C. Cir. 2021) 8
Continental Casualty v. Certain Underwriters at Lloyd's of London, 10 F.4th 814 (7th Cir. 2021) 24
Cruz v. Feliu et al., 2021 WL 3725606 (N.Y. Sup. Ct. N.Y. Cty.) 22
CW Baice Ltd. v. The Wisdomobile Group Ltd., 2021 WL 3053147 (N.D. Cal.) 6

Daly v. Autofair, Inc., 2021 WL 4170139 (D. Mass.) 24
DDK Hotels v. Williams Sonoma, Inc., 2021 WL 3118947 (2d Cir.) 8
Dean v. Biggs & Greenslade, 2021 WL 2002440 (S.D. Tex.) 10
Dentons US v. Zhang, 2021 WL 2187289 (S.D.N.Y.) 21
Dodson International Parts v. Williams International Co. LLC, 12 F.4th 1212 (10th Cir. 2021) 20, 24, 29
Doe v. The Trump Corp., 6 F.4th 400 (2d Cir. 2021) 5, 17
Don Booth of Breland Group v. K&D Builders, 626 S.W.3d 601 (Ky. 2021) 31
Donelson v. Ameriprise Financial Services, 999 F.3d 1080 (8th Cir. 2021) 11, 20, 23
DotConnectAfrica Trust v. Internet Corp., 68 Cal. App.5th 1141 (2021) 11
Downing v. A&E Television Networks, LLC, 2021 WL 4131652 (S.D.N.Y.) 8
Dynasty Stainless Steel v. Hill International, 2021 WL 4398203 (E.D.N.Y.) 29
Easley v. WLCC II,, 2021 WL 4228876 (S.D. Ala.) 18
EHM Productions v. Starline Tours of Hollywood, 1 F.4th 1164 (9th Cir. 2021) 23, 25
Empire Asset Management v. Best, appeal pending, 2021 WL 2650457 (S.D.N.Y.) 9
Fisher v. Moneygram, 66 Cal. App.5th 1084 (2021) 12
Forby v. One Technologies, L.P., 13 F.4th 460 (5th Cir. 2021) 11
Foster v. Walmart, Inc., 15 F.4th 860 (8th Cir. 2021) 18
Franke v. Norfolk Southern Railway Co., 2021 WL 3737913 (N.D. Ohio) 4
Fuel Husky, LLC v. Total Energy Ventures International, 999 F.3d 257 (S.D. Tex. 2021) 20
Glacier Park Iron Ore Properties v. United States Steel Corp., 961 N.W.2d 766 (Minn. 2021) 19
Glad Tidings Assembly of God Church of Lake Charles v. Indian Harbor Insurance Co., 2021 WL 2676963 (W.D. La.) 5, 12
Government of the Lao People's Democratic Republic v. Baldwin, 2021 WL 3056871 (D. Idaho) 5
Hamrick v. Partsfleet, LLC, 1 F. 4th 1337 (11th Cir.) 3, 4
Hansen v. LMB Mortgage Services, 1 F.4th 667 (9th Cir. 2021) 4, 21
Harper v. Amazon.com Services, 2021 WL 4075350 (3d Cir) 4
Harris v. Volt Management Corp., 625 S.W.3d 468 (Mo. App. 2021) 8, 20
Hartranft v. Encore Capital Group, 2021 WL 2473951 (S.D. Cal.) 21
Hayden v. Retail Equation, Inc., 2021 WL 3044168 (C.D. Cal.) 14
Hillhouse v. Chris Cook Construction, 2021 WL 4471090 (Miss.) 23
Hodges v. Comcast Cable Communications, 2021 WL 4127711 (9th Cir.) 6
Holistic Industries of Arkansas v. Feurstein Kulick, LLP, 2021 WL 4005872 (E.D. Ark.) 21
Holsapple v. Doggett Equipment Services, 2021 WL 2210896 (W.D. Tex.) 12

Hudnall v. Smith, 2021 WL 3744580 (W.D. Tex.) 22
IMA, Inc. v. Columbia Hospital Medical City at Dallas, Subsidiary, L.P., 1 F.4th 385 (5th Cir. 2021) 16
Independent Laboratory Employees' Union v. ExxonMobil Research and Engineering Co., 11 F.4th 210 (3d Cir. 2021) 33
International Brotherhood of Electrical Workers v. T & H Services, 8 F.4th 950 (10th Cir. 2021) 32
International Energy Ventures Management v. United Energy Group, 999 F.3d 257 (5th Cir. 2021) 10
ISS Facility Services v. Fedcap Rehabilitation Services, 2021 WL 2784550 (S.D.N.Y.) 20
Ixmata v. Mogonye Land Tech, LLC, 2021 WL 3555832 (S.D. Tex.) 20
J. B. Hunt Transport v. BNSF Railway Co., 9 F.4th 663 (8th Cir. 2021) 27
Jacksen v. Chapman Scottsdale Autoplex, 2021 WL 3410912 (D. Ariz.) 11
Jackson v. Amazon.com, Inc., 2021 WL 4197284 (S.D.Cal.) 13
Jefferies, LLC v. Gegenheimer, 849 Fed. App'x 16 (2d Cir. 2021) 28
Jones Day v. Orrick Herrington & Sutcliffe, 2021 WL 4069753 (N.D. Cal.) 24
JP-Richardson v. Pacific Oak SOR Richardson Portfolio JV, 65 Cal. App.5th 1177 (Cal. App. 2021) 26
Lavvan v. Amyris, 2021 WL 3173054 (S.D.N.Y.) 5, 11
Law Finance Group v. Key, 2021 WL 324076 (Cal. App.) 5
Lee v Engel Burman Grande Care at Jericho, LLC, 021 WL 3725986 (E.D.N.Y.) 21
Legacy Agency, Inc. v. Scoffield, 2021 WL 4155238 (S.D.N.Y.) 28, 31
Lichon v. Morse, 2021 WL 3044458 (Mich.) 17
Local Union 97 v. NRG Energy, Inc., 2021 WL 4288505 (N.D.N.Y.) 21, 33
Mars, Inc. v. Szarzynski, 2021 WL 2809539 (D.D.C.) 11
McCoy v. Wal-Mart, Inc., 13 F.4th 702 (8th Cir. 20219 F.4th 1097) 10
McIsaac v. Foremost Ins. Co. Grand Rapids, Michigan, 64 Cal. App.5th 418 (2021) 18
McLaurin v. The Terminix International Co., 13 F.4th 1232 (11th Cir. 2021) 29
Meinders v. United Healthcare Services, Inc., 7 F.4th 555 (7th Cir. 2021) 16
News+Media Capital Group vs. Las Vegas Sun, Inc., 495 P.3d 108 (Nev. 2021) 29
Nii-Moi v. McAllen Hospitalist Group, 2021 WL 2139402 (E.D. Tex.) 11, 12
Patterson v. Superior Court, 2021 WL 4843540 (Cal. App.) 19
Pena v. 220 East 197 Realty, LLC, 2021 WL 3146031 (S.D.N.Y.) 20, 32
Perini Management v. Kildare Construction Consultants, 2021 WL 4523620 (S.D.N.Y.) 6
Philadelphia Insurance Indemnity Co. v. Kendall, 197 A.D.3d 75 (N.Y. App. 1st Dep't 2021) 30
Pirzada v. AAA Texas, LLC, 2021 WL 2446193 (S.D. Tex.) 12

Remedial Construction Services, LP v. AECOM, Inc., 2021 WL 2431256 (2d Dist. Cal.), as modified on denial of reh'g (July 15, 2021), review denied (September 1, 2021).....17
Ribadeneira v. New Balance Athletics, Inc., 2021 WL 4419943 (D. Mass) 27
Rizzio v. Surpass Senior Living, 251 Ariz. 413 (2021) 13
Romero v. Watkins and Shepard Trucking, Inc., 9 F.4th 1097 (9th Cir. 2021) 11
Rubicon Research Private Ltd. v. Kartha Pharmaceuticals, 2021 WL 4233887 (W.D.N.C.) 5
Selden v. AirBnB, Inc., 4 F.4th 148 (D. Cir. 2021) 19, 23, 24
Setty v. Shrinivas Sugandhalaya, 3 F.4th 1166 (9th Cir. 2021).....15
Shaffer v. PriorityOne Bank, 2021 WL 2386824 (S.D. Miss.) 26
Sha-poppin Gourmet Popcorn v. JPMorgan Chase Bank, 2021 WL 3511315 (N.D. Ill.) 8
Sinavsky v. NBCUniversal Medial, LLC, 2021 WL 4151013 (S.D.N.Y.) 33
Sitzer v. National Association of Realtors, 2021 WL 4125787 (8th Cir.).....10
Skaf v. Wyoming Cardiopulmonary Services, 495 P.3d 887 (Wyo. 2021).....6, 25
Slough v. Legacy Home Health Agency, Inc., 2021 WL 3367816 (S.D. Tex.) 3
Smith v. Board of Directors of Triad Manufacturing, 13 F.4th 613 (7th Cir. 2021) 13
Sosa v. Onfido, Inc., 8 F.4th 631 (7th Cir. 2021).....15
Southard v. Newcomb Oil Co., 7 F.4th 451 (6th Cir. 2021) 30
TCSS Environmental Technologies v. Cavortex Technology, 2021 WL 4319674 (N.D. Tex.).....24
The Application of the Fund for Protection of Investor Rights v. AlixPartners, LLP, 5 F.4th 216 (2d Cir. 2021) 4
University of Notre Dame (USA) in England v. Tjac Waterloo, 2021 WL 2827442 (D. Mass.).....29
Western Bagel Company v. Superior Court of Los Angeles County, 66 Cal. App.5th 649 (Cal. App. 2021), review filed (August 23, 2021).....22
Winns v. Post Mates, Inc., 2021 WL 3046592 (Cal. App.).....6
WM Crittenden Operations v. United Food and Commercial Workers, 9 F.4th 732 (8th Cir. 2021) 28
Wollen v. Gulf Stream Restoration and Cleaning, LLC, 2021 WL 2878703 (N.J. App.).....19