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Feliu Case Summaries:

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Contents

I. Jurisdictional Issues: General 1
II. Jurisdictional Challenges: Delegation, Estoppel, and Waiver Issues 5
III. Jurisdictional Issues: Unconscionability 6
IV. Challenges Relating to Agreement to Arbitrate 8
V. Challenges to Arbitrator or Forum 9
VI. Class, Collective, Mass Filings, and Representative Actions 13
VII. Hearing-Related Issues 14
VIII. Challenges to And Confirmation of Awards 17
IX. ADR – General 18
X. Collective Bargaining Setting 21
XI. News and Developments 22
XII. Table of Cases 24

I. JURISDICTIONAL ISSUES: GENERAL

Courts Must Stay Actions When Granting Motion to Compel. A unanimous United States Supreme Court clarified that the FAA meant what it said when requiring a court to stay proceedings when a party requests a stay. The Ninth Circuit in this case had ruled that instead a court could dismiss the action once referred to arbitration. The Court emphasized that Section Three of the FAA is titled "Stay of Proceedings Where Issue Therein Referred to Arbitration" and provides that a court "shall" stay proceedings upon application of a party and that the term "shall" creates an obligation that is not subject to judicial discretion. The Court pointed out that if a matter is dismissed under the FAA, rather than stayed, "that dismissal triggers the right to an immediate appeal where Congress sought to forbid such an appeal." The Court made the additional point that courts retain a "supervisory role" over arbitrations even after a matter is referred to arbitration. For example, courts may be required to appoint an arbitrator, enforce subpoenas, and facilitate recovery on an arbitration award. "Keeping the suit on the court's docket makes good sense in light of this potential ongoing role, and it avoids costs and complications that might arise if a party were required to bring a new suit and pay a new filing fee to invoke the FAA's procedural protections." The Court concluded that a district court must stay proceedings upon a party's request following referral of the matter to arbitration." *Smith v. Spizzirri*, 144 S. Ct. 1173 (2024).

Supreme Court Rules Courts Decide Issue of Delegation Where Terms are Inconsistent. The parties here entered into two agreements. The first provided for arbitration and delegated arbitrability issues to the arbitrator; the second required the litigation of disputes. The question raised is who decides whether the parties' dispute needs to be arbitrated – the court or an arbitrator. The answer, according to the United States Supreme Court, can be found in "basic legal principles." The key, according to the Court, is whether the parties agreed to arbitrate their dispute. The Court reasoned "before either the delegation provision or the forum selection clause can be enforced, a Court needs to decide what the parties have agreed to – i.e., which contract controls." The Court pointed to the different levels of disputes between the parties, including the underlying merits, whether those disputed issues were subject to arbitration, and who decides that question. "When we hone in on the conflict between the delegation clause in the first contract and the forum selection clause in the second, the question is whether the parties agreed to send the given dispute to arbitration – and, per usual, *that* question must be answered by a Court." The Court noted that while an arbitration provision may be severed from the underlying agreement and treated separately, challenges to both the agreement containing the arbitration provision and the delegation term require a Court determination. For these reasons, the Court held that "a Court, not an arbitrator, must decide whether the parties' first agreement was superseded by their second." *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186 (2024).

Transportation Worker Exemption Not Limited to Transportation Industry. The United States Supreme Court in *Saxon v. Southwest Airlines* ruled that the exemption in the FAA for transportation workers focuses on the work the employees perform and not on what the employer generally does. Soon thereafter the Second Circuit ruled that the FAA transportation exemption did not apply in this case because the franchisees who distributed baked goods were in the bakery industry, and not in the transportation industry. The Supreme Court rejected the Second Circuit's analysis and vacated its ruling, holding that the transportation exemption may apply to workers outside the transportation industry. The Court noted that in *Saxon* it expressly declined to adopt an industry-wide approach and instead focused on the work performed by the employee. The Court emphasized that the Second Circuit's requirement of a tie-in to the transportation industry would result in "arcane riddles about the nature of a company's services. Does a pizza delivery company derive its revenue mainly from pizza or delivery?" The Court reasoned that the Second Circuit's approach would require wasteful mini-trials on determining the transportation industry question. The Court noted that Congress, in framing the exemption, spoke in terms of seamen and railroad employees and not the industries in which they worked. As such, the Court concluded that a "transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by §1 of the Act." *Bissonnette v. Le Page Bakeries Park St.,* 601 U.S. 246 (2024).

FAA Transportation Exemption Does Not Apply to Corporate Entities. Tillman Trucking leased three trucks from RDT owned by a married couple, Edward and Natalie Desbroughs, under various agreements on an independent contractor basis. Each agreement contained an arbitration provision. A dispute arose and RDT filed for arbitration while Tillman initiated a court action. RDT moved to compel, and Tillman opposed the motion, arguing that Tillman was exempt under the FAA exemption applicable to transportation workers. The district court denied the motion, and the Sixth Circuit affirmed. The court reasoned that the transportation exemption should be applied narrowly. The court declined to apply the exemption to corporate entities, noting that other circuit courts have similarly declined to view the transportation worker exemption as applying to corporate entities. In doing so, the Sixth Circuit quoted the district court's holding that "a business entity is not a transportation worker, and that a commercial contract between two business entities is not a contract of employment." *Tillman Transportation v. MI Business, Inc.*, 2024 WL 1153970 (6th Cir.). Accord: *Fli-Lo Falcon, LLC v Amazon.com*, 97 F.4th 1190 (9th Cir. 2024) (FAA transportation worker exemption applies only to natural persons as "no business entity is similar in nature to the actual human workers enumerated by the text of the transportation worker exemption").

Warehouse Worker Covered by FAA Transportation Worker Exemption. Plaintiff Ortiz worked in a warehouse that received Adidas products from international suppliers from all around the world and then processed them for further distribution across the United States. Ortiz brought a class action in California alleging labor law violations and the employer moved to compel. The district court denied the motion, finding that Ortiz fell within Section One of the FAA, and the Ninth Circuit affirmed. Citing the Supreme Court ruling in *Saxon*, the court emphasized that "to qualify as a transportation worker, an employee's relationship to the movement of goods must be sufficiently close enough to conclude that his work plays a tangible and meaningful role in their progress through the channels of interstate commerce." The court explained that Ortiz "handled Adidas products near the very heart of their supply chain" while the goods were still moving in interstate commerce. The court acknowledged that Ortiz played a small role in the movement of the goods. Nonetheless, the court rejected the argument that Ortiz was not eligible for the exemption because his role was in fact intrastate and that he did not move goods across state lines himself. While true, the court stated that "nevertheless [Ortiz] moved them and not only did he move them, he did so with the direct purpose of facilitating their continued travel through an interstate supply chain." Finally, in anticipating the Supreme Court's subsequent ruling in the *Bissonnette* matter, the Ninth Circuit rejected the argument that Ortiz had to be in the transportation industry, and not working in a warehouse, to be covered by the transportation exemption. For these reasons, the court affirmed the district court's denial of the motion to compel. *Ortiz v. Randstad Inhouse Services, LLC*, 95 F.4th 1152 (9th Cir. 2024). Cf. *Nichols v. Austin Bridge & Road LP*, 2024 WL 1054629 (N.D. Tex.) (transportation worker exemption does not apply to dispatch coordinator who assigned drivers to lay asphalt on interstate highways).

Federal Court Lacked Jurisdiction to Confirm Award. SmartSky Networks sued DAG Wireless alleging various claims arising from their business relationship. DAG moved to stay the federal proceedings and the dispute was submitted to arbitration where SmartSky prevailed. SmartSky moved to confirm the award and the district court granted the motion. The Fourth Circuit reversed. The court made clear that under the Supreme Court ruling in *Badgerow*, a federal court must have subject matter jurisdiction independent from the FAA and such jurisdiction was lacking here. The court rejected SmartSky's claim that jurisdiction was present because the underlying dispute was submitted initially to the district court which stayed the proceeding in favor of arbitration. The court reasoned that subject matter jurisdiction under one section of the FAA "does not automatically extend" to a separate section of the Act. In doing so, the court concluded that "the district court did not have or 'retain' subject matter jurisdiction to adjudicate the Section 9 and 10 applications because it had subject matter jurisdiction to stay the action under Section Three." In reaching this conclusion, the court made clear that at "the time the parties filed their respective Section 9 and 10 applications, they were no longer litigating over their fraught business relationship -

those issues and claims have been resolved by the Tribunal. Instead, the parties' dispute focused on the enforceability of the arbitration award." For these reasons, the Fourth Circuit reversed the district court's order confirming the arbitration award. *SmartSky Networks v. DAG Wireless*, 93 F.4th 175 (4th Cir. 2024).

Time to Pay Arbitration Fees May Not be Extended Under California Law. California requires that arbitration fees be paid within 30 days of a payment's due date. Failure to do so constitutes a material breach of the arbitration agreement entitling the non-paying party to withdraw the claim from arbitration. Here, JAMS extended the employer's time to pay the outstanding fees. Plaintiff sought to withdraw the case from arbitration, but the trial court denied the motion. The California appellate court reversed. The court pointed out that plaintiff did not agree to extend the time to pay, and the statute did not authorize the arbitrator or the administrating agency to extend the time to pay. The court concluded that JAMS' "letter allowing payment until [a later date] in no way cured [defendant's] missed payment and material breach." The court also rejected the argument that the FAA preempted the California statute, reasoning that the California law furthered rather than frustrated the purposes of the FAA. For these reasons, the court granted plaintiff's motion to lift the stay of litigation and to allow her to proceed with her claim in court. *Hohenshelt v. Superior Court of Los Angeles County*, 99 Cal. App.5th 1319 (2024), review filed (April 8, 2024). See also *Reynosa v. Superior Court of Tulare County*, 2024 WL 1984884 (Cal. App.) (plaintiff appropriately withdrew from arbitration when employer failed to pay requisite arbitration fees as required by California law in a timely fashion and employee did not directly express agreement to an extension of time).

Arbitration of Insurance Dispute Under New York Convention Ordered. Bufkin Enterprises brought an action for breach of contract and related claims against domestic and foreign insurers alleging the same culpable conduct in failing to provide coverage for damages caused by Hurricane Laura. Bufkin moved to dismiss with prejudice its claims against the foreign insurers. The domestic insurers moved to compel arbitration under the New York Convention. The district court denied the motion as only claims against domestic insurers were presented, and the McCarran-Ferguson Act allowed reverse-preemption of the FAA based on applicable Louisiana law. The Fifth Circuit reversed. The court found that "Bufkin had alleged substantially interdependent and concerted conduct by the domestic and foreign insurers" and found it "of no moment that Bufkin is no longer pursuing claims against the foreign insurers." The court explained that Bufkin accused both the foreign and domestic insurers of the same malfeasance and while Bufkin was free to withdraw its claims against the foreign insurers, "the district court was not free to *disregard* them in considering the domestic insurers' motion to compel arbitration." The court rejected Bufkin's "gamesmanship" in naming and then dismissing the foreign insurers and concluded that "the arbitration agreement between the parties is subject to the Convention *through*

equitable estoppel" and ordered arbitration of the dispute despite Louisiana law barring arbitration of insurance disputes. *Bufkin Enterprises v. Indian Harbor Insurance Co.*, 96 F.4th 726 (5th Cir. 2024). See also *Apex Hospitality Group v. Independent Specialty Insurance Co.*, 2024 WL 758392 (E.D. La.) (claims against domestic insurer intertwined with foreign insurer are subject to arbitration under equitable estoppel principles and do not violate Louisiana law).

Case Shorts

- *Deaton v. Johnson*, 2024 WL 920082 (N.D. Tex.) (res judicata applied to confirmed arbitration award where all claims in subsequent court action were or could have been adjudicated in arbitration).
- *Siddiqui Enterprises v. Independent Specialty Insurance Co.*, 2024 WL 209037 (E.D. La.) (the New York Convention is not reverse preempted under the McCarran-Ferguson Act because the Convention is an international agreement and not an act of Congress which would have been reverse preempted).
- *Hoeg v. Samsung Electronics of America*, 2024 WL 640861 (N.D. Ill.) (claim that 318 of 806 claimants seeking to compel arbitration live outside of the district did not preclude finding that venue is proper as court has personal jurisdiction over respondent).
- *Simplot India v. Himalaya Food International*, 2024 WL 1136791 (D. N.J.) (court lacked personal jurisdiction for purposes of enforcing a foreign arbitration agreement where evidence was lacking that the foreign employer exercised complete domination of alleged alter ego registered to do business in the jurisdiction).
- *Simplot India v. Himalaya Food International*, 2024 WL 1136791 (D. N.J.) (mere registration by foreign corporation to do business in New Jersey insufficient to confer personal jurisdiction over foreign corporation for purposes of enforcing arbitration award against it).
- *Tilray Brands v. Dickson*, 2024 WL 810641 (W.D. Wash.) (losing party in arbitration conducted in Minnesota must demonstrate personal jurisdiction, which it failed to do, in order for federal court in the state of Washington to rule on motion, therefore action is dismissed).
- *Spanish Villa, LLC v. Certain Underwriters at Lloyd's London*, 2024 WL 1367651 (E.D. La.) (equitable estoppel applied allowing domestic insurers to compel arbitration where alleged wrongdoing under various foreign and domestic insurance policies was interdependent and concerted and where they otherwise would have been prohibited from arbitration under Louisiana law).

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

Substantial Litigation Efforts Cause a Waiver of Arbitration Rights. The question before the Massachusetts district court was whether Cultural Care, Inc., an au pair agency, waived its right to arbitration by way of its participation in court proceedings prior to making a motion to compel arbitration. The court considered, among other things, that the agency fully litigated a motion to dismiss plaintiffs' claims, which included arguments on the merits of those claims. Then, after losing its motion, the agency sought and prosecuted an interlocutory appeal to the First Circuit where it repeated the same arguments it made below. During all of this time, the agency failed to mention a claimed right to arbitrate. Rather, the only jurisdictional argument asserted was that the courts had jurisdiction to decide the issues presented. Concluding that that the agency's actions "substantially invoked the litigation machinery in this case," the court explained that "[b]oth sides - and two courts - have expended time and resources addressing arguments brought by Cultural Care Inc. on numerous aspects of this case." In addition, the agency "had ample opportunity to raise an arbitration defense yet has waited until after it attempted a full-throated attempt to win this case on the merits in federal court." As such, the agency's actions caused a waiver of any right it had to arbitrate plaintiffs' claims. *Morales Posada v. Cultural Care, Inc.*, 2024 WL 841414 (D. Mass.).

Actions "Completely Inconsistent" with Right to Arbitrate Result in Waiver. A former employee brought disability discrimination claims against UWM and although the employment agreement contained an arbitration provision, UWM did not move to compel until after it "participated in extensive discovery" for more than six months. The district court denied UWM's motion on the grounds that its conduct operated as a waiver of any arbitration right it had. On appeal to the Sixth Circuit, the circuit court recognized that the Supreme Court recently "eliminated the prejudice requirement" from the arbitration-waiver inquiry in *Morgan v. Sundance*, 596 U.S. 411 (2022). However, the court found that it was not necessary in this case to "decide whether *Morgan* did more than that because the parties agree that, once stripped of its prejudice requirement, our pre-*Morgan* caselaw remains intact. Given this posture, we assume without deciding that our precedent asking whether a party's actions are 'completely inconsistent' with reliance on arbitration survives *Morgan*." That standard was easily met. "For seven months, UWM participated in extensive discovery—producing tens of thousands of pages of documents, taking and defending depositions, and issuing third-party subpoenas—without ever mentioning arbitration." Under these facts, the appeals court concluded that UMW waived its right to arbitrate and affirmed the district court's ruling in that regard. *Schwebke v. United Wholesale Mortg. LLC*, 96 F.4th 971 (6th Cir. 2024).

Reference to AAA Rules Insufficient to Allow Delegation to Arbitration. Plaintiff brought a PAGA claim in court and his employer's motion to compel was denied by the trial court. On appeal, the employer argued that the question of arbitrability was for the arbitrator to decide. In doing so, the employer relied on the reference to the AAA Rules in the arbitration agreement. The California appellate court rejected the employer's argument, finding that the mere reference to the AAA Rules which provided that questions of arbitrability are for the arbitrator to decide to be insufficient. The court pointed out that plaintiff was an unsophisticated party with only a high school degree and that the AAA Rules did not state that only the AAA has power to adjudicate arbitrability issues; the Rules only state that the arbitrator has such authority, which is nonexclusive. The court reasoned that to find that plaintiff clearly and unmistakably delegated to the arbitrator the authority to rule on arbitrability issues, it would have to find that plaintiff found and read the delegation provision in the rules and understood its importance. "That's a lot of presumptions for a sophisticated party, let alone for a party with no legal knowledge or counsel." As a result, the court concluded that mere reference to the AAA Rules was insufficient when dealing with an unsophisticated party to constitute a clear and unmistakable delegation of the authority to the arbitrator to rule on arbitrability issues. *Mondragon v. Sunrun, Inc.*, 101 Cal. App.5th 592 (2024). Cf. *Lockhart v. BAM Trading Services*, 2024 WL 1836510 (N.D. Cal.) (incorporation of AAA Rules constitutes clear and unmistakable intent to arbitrate regardless of the parties' respective levels of sophistication); *Patrick v. Running Warehouse*, 93 F.4th 468 (9th Cir. 2024) (arbitrability issue properly delegated to arbitrator to decide under JAMS Commercial Rules).

Arbitrator, Not Court, Must Rule on Failure to Prosecute Arbitration. The trial court here compelled arbitration but plaintiff failed to initiate the arbitration. The court subsequently dismissed without prejudice the plaintiff's case for failure to prosecute. The California appellate court reversed. The court explained that once a motion to compel is granted the actions "sits in the twilight zone of abatement" with courts having only "vestigial" jurisdiction, for example, to appoint arbitrators or grant provisional relief. Otherwise, it is the arbitrator's job to resolve all issues needed to determine the controversy. The appellate court concluded that the trial court exceeded its jurisdiction by ruling on the failure to prosecute after compelling arbitration. Rather, relief was appropriately sought in the arbitration proceeding. *Lew-Williams v. Petrosian*, 101 Cal. App.5th 97 (2024).

Case Shorts

- *Lacey v. Apex Roofing and Restoration*, 2024 WL 307804 (E.D. La.) (challenge to agreement as a whole on the grounds that it is a nullity, rather than specifically challenging the delegation clause, is sufficient to defeat a motion to compel).

- *Pumphrey v. Triad Life Sciences, Inc.*, 2024 WL 69914 (N.D. Miss.) (motion to dismiss challenging the legal sufficiency of plaintiff's claim required the court to address the merits of those claims and therefore constituted waiver of right to arbitrate).
- *Montoya v. King.com, Ltd.*, 2024 WL 1680028 (E.D. Va.) (clear delegation provision requires arbitrator to decide which on-line agreement governed, either (a) the terms of use which contained arbitration requirement, or (b) or the tournament rules which did not and provided that those rules prevailed in cases of conflict between the two documents governed).
- *Carpenter v. Opportunity Fin., LLC*, 2024 WL 1209520 (9th Cir.) (arbitrator, not court, must decide application of choice of law provision in loan agreement).
- *Dembiczak v. Fashion Nova, LLC*, 2024 WL 580701 (W.D. Wash.) (arbitrability issues not delegated to arbitrator where agreement invoked nonexistent AAA rules entitled "Commercial Dispute Resolutions Procedures, Supplementary Procedures for Consumer-Related Disputes").

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Arbitration Agreement Not Unconscionable for Excessive Costs. Homebuilder moved to compel arbitration of an action filed by plaintiff, a home owner, in a Texas state court. Plaintiff opposed the motion, arguing that the arbitration agreement and its delegation provision are unconscionable because arbitration was prohibitively costly and would prevent him from pursuing his claims. The trial court denied the motion to compel, and the court of appeals affirmed. On appeal to the Supreme Court of Texas, the Court recognized that an arbitration agreement may be rendered unconscionable when the costs of arbitrating is so excessive that the arbitral forum becomes inaccessible to a party seeking to vindicate his rights. The agreement at issue here had delegated arbitrability to the arbitrator and, therefore, the unconscionability challenge presented one narrow issue for the court: "whether the party opposing arbitration has proven that the cost of arbitrating this delegated threshold issue of unconscionability is excessive, standing alone, and prevents the party from enforcing its rights. In other words, [plaintiff] must show that the delegation provision itself is unconscionable." The court found that plaintiff failed to make the required showing because, among other things, he provided no details concerning his available resources or lack of ability to pay. As to plaintiff's argument that the arbitration agreement imposed "limitless fee exposure," the court replied that neither the lack of a cap on costs nor a party's unequal bargaining power, by itself, are enough to defeat an arbitration agreement. The court therefore held that the arbitration agreement's delegation clause is not unconscionable due to prohibitive costs. *Lennar v Rafiei*, 687 S.W.3d 726 (Tex. 2024).

Arbitration Agreement Not Unconscionable Where Offensive Portion Can be Severed. In a dispute with Tesla involving claims arising out of his employment, plaintiff opposed Tesla's motion to compel arbitration on the grounds that the arbitration agreement contained in his offer letter was procedurally and substantively unconscionable. Applying the "sliding scale" analysis to determine whether the agreement was unconscionable, a California district court found that the agreement "raises only minimal concerns of procedural unconscionability, and no concerns of substantive unconscionability apart from those created by the NDIAA", a nondisclosure and assignment of inventions agreement that accompanied the offer letter. The court found that the NDIAA was "unfairly one-sided and substantively unconscionable" because it "effectively allows Tesla access to the courts for the claims it is most likely to bring, while employees are required to arbitrate all other employment disputes." Nevertheless, the court found that the unconscionability of the NDIAA could be severed from the arbitration agreement and therefore did not render the arbitration agreement unenforceable. As such, both the severance of the unconscionable terms and Tesla's motion to compel arbitration was granted. *Chee v. Tesla, Inc.,* 2024 WL 1898434 (N.D. Calif.).

Case Shorts

- *Grimm v. Professional Dental Alliance*, 2024 WL 6934 94 (Ohio App.) (grant of motion to compel reversed where trial court failed to determine whether "loser pays" provision in arbitration agreement was unconscionable).
- *Patrick v. Running Warehouse*, 93 F.4th 468 (9th Cir. 2024) (presence of a "unilateral modification provision, without more, does not render a separate arbitration clause at all substantively unconscionable").
- *California Crane School v. Google, LLC*, 2024 WL 1221964 (N.D. Cal.) (arbitration agreement which provides reasonable time to opt out bars finding of unenforceable adhesive agreement).
- *Keebaugh v. Warner Bros. Entertainment*, 100 F.4th 1005 (9th Cir. 2024) (provision limiting arbitrator's ability to provide public injunctive relief is unenforceable but did not render the arbitration agreement unconscionable as it can still be applied to other representative and class actions).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Equitable Estoppel Applied to Compel Arbitration. Plaintiffs purchased plane tickets on Cathay Pacific Airlines through a third-party booking site, ASAP Tickets. ASAP's terms and conditions required arbitration of disputes. Plaintiffs sued Cathay Pacific seeking a monetary refund for tickets canceled because of the pandemic rather than the travel vouchers offered by ASAP. Cathay moved to compel arbitration based on ASAP's contract with plaintiffs. The district court denied the motion, but the Ninth Circuit reversed. The

court found that plaintiffs' claims to be intertwined with ASAP's alleged misconduct. The court found that whether plaintiffs "can maintain their breach-of-contract claim against Cathay Pacific based on ASAP's offer of expiring travel vouchers turns on whether ASAP abided by its Terms & Conditions in its role as 'middleman.'" The court pointed out that if plaintiffs prevailed against Cathay Pacific "they would be entitled to a refund. To determine the appropriate refund amount, we would need to know how much the [plaintiffs] paid ASAP for the tickets - a transaction governed by ASAP's Terms & Conditions. It is this interconnectedness that makes equitable estoppel appropriate here." For these reasons, the court concluded that plaintiffs were equitably estopped from refusing to arbitrate its dispute with Cathay Pacific. *Herrera v. Cathay Pacif. Airways Ltd.*, 94 F.4th 1083 (9th Cir. 2024).

Arbitration Agreement Expired with Termination of Employment. Plaintiff Vasquez had two tenures with her employer, SaniSure, as an at-will employee. She signed an arbitration agreement during her first tenure, and then terminated that employment. Four months later, Vasquez negotiated a new employment offer and returned to SaniSure. This time she did not agree to arbitrate claims and the subject was not addressed with her. She filed a class action against SaniSure alleging wage and hour violations based solely on her second tenure with the firm. SaniSure moved to compel. The trial court denied the motion, and the California court affirmed. The court emphasized that an employer bears the burden of demonstrating that an employee agreed to arbitrate claims. The court pointed out that at-will employment can be terminated freely and here Vasquez terminated her employment which had the effect of revoking her commitment to arbitrate. The record supported the conclusion that arbitration was not addressed during her second tenure with SaniSure, and "claims in this lawsuit are not rooted in an employment relationship established by a contract requiring retrospective application of an employment agreement." For these reasons, the court held that "because Vasquez terminated her prior employment relationship with SaniSure in May 2021, and did not sign an arbitration agreement during her subsequent period of employment, there is no contractual language requiring arbitration of her claims." *Vasquez v. SaniSure, Inc.*, 101 Cal. App.5th 139 (2024).

Minors Are Not Parties to Arbitration Agreement. Minor children who had DNA test kits activated through their guardians' Ancestry.com accounts sued the company, alleging privacy violations. Ancestry moved to compel arbitration based on the terms and conditions that the guardians agreed to when opening their Ancestry.com accounts. The motion was denied on the grounds that the minors were not parties to the agreement and there were no equitable principles to support binding them to the terms agreed to by their guardians. The Seventh Circuit affirmed. Applying Illinois law, the court first held that the minors were not express parties to the agreement or third-party beneficiaries of it. Rather, the "plain and ordinary meaning" of the agreement's language makes clear that the only parties to the agreement are the signatory and Ancestry. The term "you" was used

throughout the agreement and there was a clause providing that the terms "are personal" to the signatory, and that the signatory "may not . . . assign or transfer any . . . rights and obligations established by them." Turning next to Ancestry's argument that the minors were bound as closely-related parties, the court cautioned that Ancestry's arguments were on "shaky legal ground, as Illinois 'recognize[s] a strong presumption against conferring contractual benefits on noncontracting third parties." That presumption is overcome only where "the implication" that the contract applies to a third party is "so strong as to be practically an express declaration." Put another way, there must be "an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the party belongs." Finding Ancestry's precedent inapposite because it dealt with corporate entities, the court opined: "[t]hough a special relationship exists between plaintiffs and their guardians, in fact and in law that relationship does not join their identities, as can be the case with parent and subsidiary corporations." Thereafter, the court concluded that none of Ancestry's arguments would support binding the minors to the agreement and affirmed the lower court's denial of Ancestry's motion to compel arbitration. *Coatney v. Ancestry.com*, 93 F.4th 1014 (7th Cir. 2024). See also *Jackson v. World Wrestling Entertainment, Inc.*, 95 F.4th 390 (5th Cir. 2024) (nephew found to have implied authority to act as uncle's agent when purchasing tickets to wrestling event and uncle therefore is bound to arbitrate negligence claims resulting from pyrotechnics blast).

Derivative Claims Covered by Arbitration Agreement. The son of a deceased resident of an assisted-living facility, as next of kin and on behalf of the resident's wrongful death beneficiaries, brought a wrongful death action against the facility. The facility moved to compel arbitration claiming that, pursuant to a power of attorney, the resident's daughter signed an arbitration agreement when the resident was admitted to the facility. The motion to compel was denied by a Tennessee circuit court and affirmed by the Tennessee Court of Appeal. On appeal to the Tennessee Supreme Court, the question was "whether [the resident's] son and other wrongful-death beneficiaries who were not parties to the arbitration agreement nevertheless are bound by it." Relying on the "plain language" of the "statutes creating the wrongful-death cause of action in Tennessee and our precedents discussing that cause of action," the Court held that in wrongful-death actions, a decedent's cause of action "passes" to his beneficiaries. Therefore, claims brought by wrongful death beneficiaries are subject to the same limitations as the decedent's claim, including any arbitration requirement. The circuit court's order denying the motion to compel was therefore reversed and the matter was remanded to the circuit court. *Williams v Smyrna*, 685 S.W.3d 718 (Tenn. 2024).

Case Shorts

- *Cullum v. Wyndham Hotels and Resorts Corp.*, 2024 WL 552494 (S.D.N.Y.) (fraudulent inducement claim going to the agreement as a whole and not merely to arbitration

provision did not defeat broad arbitration clause covering disputes including validity of agreement itself).

- *In re: JUUL labs, Inc. Antitrust Litigation*, 2024 WL 589099 (N.D. Cal.) (users of website were on inquiry notice where disclosure with hyperlinked terms and conditions was immediately below sign-in button).
- *Jones v. Solgen Construction*, 99 Cal.App.5th 1178 (2024), review denied (May 15, 2024) (motion to compel denied where 81-year-old consumer was given 38 seconds to consider 21-page agreement containing arbitration provision and was required to agree to the agreement by touching the salesperson's tablet).
- *Weeks v. Interactive Life Forms*, 100 Cal. App.5th 1077 (2024) (internet user not placed on inquiry notice where website landing page composed mostly of ads and terms of use is at the very bottom of the page in smaller type face sandwiched between the site map and privacy policy).
- *Smith v. RPA Energy*, 2024 WL 1869325 (S.D.N.Y.) (internet user was placed on inquiry notice where button linked to terms of service which included arbitration provision "was bright green on an otherwise white page without any clutter, and the user was required to scroll past the button to finalize registration").
- *Ogunyemi v. Garden State Medical Center*, 478 N.J. Super. 310 (App. Div. 2024) (run-on paragraph which "harbors within it mutually inconsistent means for dispute resolution" is confusing and poorly drafted and is so ambiguous as to be unenforceable).
- *Lockhart v. Bam Trading Services*, 2024 WL 1836510 (N.D. Cal.) (CEO may invoke arbitration despite not being signatory under agency theory where claim is that the CEO directed security fraud at issue).
- *Glavin v. JP Morgan Chase Bank*, 2024 WL 1536739 (E.D. Pa.) (third party beneficiary may move to compel arbitration where operative arbitration agreement expressly provides that third parties "involved in a claim" between signatories "must be named" as a party in the arbitration).
- *Weeks v. Interactive Life Forms*, 100 Cal. App.5th 1077 (2024) (California case law disfavoring browse wrap agreements is not preempted by the FAA).
- *Anhui Powerguard Technology Co. v. DRE Health Corp.*, 95 F.4th 1146 (8th Cir. 2024) (payment of initial installment was condition precedent for release of claims and arbitration agreement and therefore failure to make such payment warrants denial of motion to compel).
- *Hastings v. Nifty Gateway, LLC*, 2024 WL 1175196 (S.D.N.Y.) (plaintiff placed on inquiry notice of website terms and conditions containing arbitration provision where he was required to provide his name, e-mail, username and password, and click a "Sign Up" button to complete the account creation process).

- *Picha v. Gemini Trust Company*, 2024 WL 967182 (S.D.N.Y.) (mutual assent to arbitration present despite inconsistencies among various arbitration provisions as all agreements between the parties required arbitration as the means to resolve disputes between them).
- *Hegemier v. A Better Life Recovery*, 2024 WL 1710164 (Cal. App.) (arbitration agreement providing that only claims under "current law" will be subject to arbitration "excludes from the binding arbitration requirement all types of claims which, at the time of its alleged signing, were deemed by courts or otherwise to not be subject to arbitration").
- *Hughes v. Uber Technologies*, 2024 WL 707686 (E.D. La.) (non-signatory mother of Uber subscriber obligated to arbitrate dispute where rider's app's terms of service made it clear that parties intended to provide services to subscriber's guests).
- *Harrod v. Country Oaks Partners*, 15 Cal.5th 939 (2024) (agent was not empowered under health care power of attorney to execute nursing home arbitration agreement on behalf of uncle as arbitration agreement was not a "healthcare decision" under California law).
- *Swinerton Builders, Inc v. Argonaut Insurance Co.*, case no. 23-cv-04158 (N.D. Cal.) (non-party surety may compel arbitration of claims brought by general contractor alleging breach by subcontractor where liability on performance bonds turns on subcontractor's alleged breach).
- *Davis v. Nissan North America*, 100 Cal. App.5th 825 (2024) (non-signatory car manufacturer cannot compel arbitration in sales agreement with dealer for breach of manufacturer's warranty as plaintiff's claims were not based on or intertwined with terms in sales agreement).
- *Indian Harbor Insurance Co. v. Belmont Commons*, 2024 WL 962376 (5th Cir.) (arbitration term properly viewed as venue selection clause fitting under provision of Louisiana statute which exempts arbitration from statute's bar against arbitration of insurance disputes).

V. CHALLENGES TO ARBITRATOR OR FORUM

Court Appoints Umpire Where Party Arbitrators Cannot Agree. Each party appointed an arbitrator, but the party-appointed arbitrators could not agree on an umpire for this insurance dispute. The agreement expressly provided that if the party-appointed arbitrators could not agree on an umpire, either party "may request the selection be made by a judge of a New York court." The request was made, and the federal district court selected a retired magistrate judge from New York. The defendant, a Texas school district, had proposed retired Texas State court judges. The court opined that the proposed umpires were all qualified but noted that New York law applied to the dispute and that this favored the selection of a New York-based umpire as that person "more likely would be expert in the

issues of New York law that the agreement states is to apply." The court added that such an "umpire can travel more easily, and presents lesser travel and lodging costs than an out-of-state umpire." The court pointed out that, with the defendant's "professed concern about cost, that the selected magistrate judge billed at a lower rate than other candidates. The court concluded that the selected magistrate judge "is best suited to serve as umpire in this arbitration." *Certain Underwriters at Lloyd's London v. Edouch Elsa Independent School District*, 2024 WL 1514020 (S.D.N.Y.).

Independent Accountant Served as Arbitrator. The parties settled their dispute and in the settlement agreement provided an ADR provision referring all issues regarding payment obligations to an accountant designated to serve as the "Independent Party" who was to function "as an expert and not an arbitrator." The Delaware Court of Chancery was asked to enforce a settlement agreement and final determination made by the Independent Party. The question for the court was whether the underlying proceeding was an arbitration, in which case it could apply unconscionability principles, or an expert determination, in which case the court would interpret and apply the agreement. The court reviewed the distinction between an arbitration and an expert proceeding. In doing so, the court made clear that labels are not dispositive. The court, in concluding the underlying proceeding was an arbitration, noted that the Independent Party was required to make "judicial determinations of legal obligations and [to determine] the prevailing party" and employed a set of guidelines that "created the look and feel of a judicial proceeding." The court contrasted this with an expert determination where the expert employs his or her technical skills or knowledge with limited party input. The court concluded that the ADR provision called for arbitration despite its protestations to the contrary. *Cedres v. Geoffrey Services Corp.*, 2024 WL 1435110 (Del. Chanc.).

Case Shorts

- *Oppenheimer and Co. v. Mitchell*, 2024 WL 1492874 (W.D. Wash.) (FINRA arbitration permanently enjoined where claimants were not customers of FINRA member and where investments at issue were result of actions of FINRA member's employee who persuaded claimants to invest in business he owned without involvement of FINRA member).

VI. CLASS, COLLECTIVE, MASS FILINGS, AND REPRESENTATIVE ACTIONS

Court Orders Samsung to Pay Outstanding Arbitration Fees. Samsung refused to pay the AAA's administrative fees for 1,028 claimants (later reduced to 806 claimants) and the AAA closed the proceedings for non-payment. Claimants moved to compel Samsung to pay the outstanding fees and the court granted its application. The court rejected Samsung's argument that plaintiffs must refile the motion because they did not provide written notice before filing the motion as is required under Section Four of the FAA. The

court noted the "irony that [Samsung] is currently *fighting* arbitration" and that the parties "could end up in a never-ending game of cat-and-mouse: [plaintiffs] file their arbitration claims and pay the required share of fees, [the employer] fails to pay, the administrator administratively closes the case, allowing [plaintiffs] to again file and pay the required share of the fees, which [the employer] will of course fail to do, and so on . . ." The court concluded that after "nearly two years of motion practice, it is time for [plaintiffs] to have their claims arbitrated" and ordered Samsung "to pay the requisite fees as set forth by the AAA." *Hoeg v. Samsung Electronics of America*, 2024 WL 640861 (N.D. Ill.).

Arbitration Agreement Limiting ERISA Plan-Wide Relief Not Enforceable. Plaintiff here brought a class action under ERISA alleging that defendant's Plan breached its fiduciary duties and sought plan-wide equitable relief. The Plan moved to compel arbitration. The district court denied the motion to compel, and the Second Circuit, by a 2 to 1 vote, affirmed. The majority reasoned that because plaintiff's "avenue for relief under ERISA is to seek a plan-wide relief, and the specific terms of the arbitration agreement seek to prevent [plaintiff] from doing so, the agreement is unenforceable." The majority relied on the Supreme Court's direction in *Mitsubishi v. Soler Chrysler-Plymouth* that an arbitration agreement may not serve as a prospective waiver of a party's right to seek statutory remedies. Responding to the argument that the Supreme Court had enforced class action waivers, the majority pointed out that the Court has not taken a "one-size-fits-all" approach. "The Court has recognized the qualitative difference between waivers of collective-action procedures like class actions, and waivers that preclude a party from arbitrating in a representational capacity *on behalf of a single absent principal*, a point it recently drove home in *Viking River*." The majority explained that "there is a qualitative difference between arbitrating on behalf of an absent principal and arbitrating on behalf of a class of individuals . . .. The line of cases upholding the 'individualized arbitration' provisions all deal with the latter scenario. This case involves the former." For these reasons, the Second Circuit upheld the district court's denial of a motion to compel up. *Cedeno v. Sasson*, 100 F.4th 386 (2d Cir. 2024).

ERISA Claim Must be Arbitrated. Defendants filed a motion to compel arbitration of plaintiff's ERISA §502(a)(2) claim on the grounds that it was covered by the scope of the arbitration clause contained in the Plan documents. The arbitration clause had been amended shortly after plaintiff filed suit, but the court concluded that the amended clause was nevertheless valid and binding and that it covered plaintiff's claim. On close examination of the arbitration clause, the court observed that the company's amended language was a clear effort to avoid the application of the "effective vindication" doctrine, which "forbids compulsory arbitration when the statute authorizing a claim allows a given remedy, but the arbitration agreement disallows it." Before the amendment, the arbitration agreement stated that claims could not be brought in "a representative capacity" in court,

whereas the amended version stated that claims can be brought "in an individual capacity and not on a class, collective, or group basis." The court noted that this revised language "excised the injunction" against bringing claims in a representative capacity and avoided application of the effective vindication doctrine. The court reasoned "that the best reading of this language is that [ERISA] claims are not intended to be forbidden under the arbitration agreement. . . . This suggests that its drafters appreciated that a large swathe of ERISA claims are brought on behalf of the plan and attempted to avoid triggering the effective vindication exception — and the consequent shipwreck of the whole arbitration agreement — every time such claims are brought." Defendants' motion to compel arbitration was therefore granted. *Harris v Paredes*, 2024 WL 774874 (N.D. Ill.).

Waiver of Non-Individual PAGA Claim Barred. The California Supreme Court ruled in *Adolph v. Uber* that PAGA plaintiffs could be required to arbitrate their individual PAGA claims but not their non-individual claims which must be heard by a court. The district court in this case issued a ruling that granted a motion to compel both individual and non-individual claims but did so before the *Adolph* decision was issued. The Ninth Circuit reversed with respect to mandating arbitration of the non-individual PAGA claims. In doing so, the court found nothing inconsistent in *Adolph* with federal law as articulated by the Supreme Court in *Viking River v. Moriana*. For these reasons, the court affirmed the district court's granting of the motion to compel plaintiff's individual PAGA claim but reversed the district court's ruling permitting the arbitration of the non-individual PAGA claims. *Johnson v. Lowe's Home Centers*, 93 F.4th 459 (9th Cir. 2024).

Case Shorts

- *Johnson v. Lowe's Home Centers*, 93 F.4th 459 (9th Cir. 2024) (plaintiff asserting PAGA claim loses statutory standing to pursue non-individual, representative claim only upon a final determination in arbitration that individual claim is without merit).
- *McBurnie v. RAC Acceptance East, LLC*, 95 F.4th 1188 (9th Cir. 2024) (the California rule prohibiting a party from waiving the right to seek a public injunction, unlike the PAGA statute, did not have a mandatory joinder rule and is not impacted by the Supreme Court's ruling in *Viking River*).
- *Dycom Industries v. Pension, Hospitalization, and Benefit Plan of the Electrical Industry*, 98 F.4th 397 (2d Cir. 2024) (arbitrator's award relating to withdraw liability under ERISA is subject to de novo court review and is upheld as having correctly determined that ERISA exemption did not apply).
- *Patrick v. Running Warehouse*, 93 F.4th 468 (9th Cir. 2024) (arbitration agreement that permitted employee to only arbitrate claims in an individual capacity did not violate California law as arbitrator was not precluded from awarding public injunctive relief).
- *Dembiczak v. Fashion Nova, LLC*, 2024 WL 580701 (W.D. Wash.) (consumer class action seeking monetary and injunctive relief excluded from arbitration where

agreement excluded arbitration "actions" rather than "claims" for injunctive relief signaling that the entire action barred from arbitration rather than merely claims for injunctive relief).

- *California Crane School v. Google, LLC*, 2024 WL 1221964 (N.D. Cal.) (motion to compel denied as unfair competition class action seeks to benefit the general public and constitutes a public injunction action that cannot be precluded in arbitration).
- *Bryant v. Domino's Pizza*, 2024 WL 1638616 (E.D. Mich.) (amendment of collective action complaint would be futile as the four proposed plaintiffs are bound by arbitration agreements and where the challenge to the validity of the arbitration agreements is only speculative).

VII. HEARING-RELATED ISSUES

Vacatur on Evident Partiality and Bias Grounds Reversed. The trial court here vacated a $100 million award on bias and evident partiality grounds. The arbitrator was accused, among other failings, of: interfering with witness examination; reacting inappropriately to witness testimony; inappropriately excluding evidence, and; requiring parties to disclose claims of unfairness before issuing an award on the merits. While critical of the arbitrator and his handling of the proceeding, the Colorado appellate court concluded that the record did not support vacatur of the award. For example, the court noted that the arbitrator asked clarifying questions and directed counsel and witnesses to focus on specific issues but in doing so the arbitrator's actions were not so "one-sided as to suggest partiality and, if anything, demonstrated the arbitrator's preparedness and desire to move things along – which is understandable, given that the hearing was initially scheduled for two weeks but took three." The court acknowledged and sympathized that the arbitrator's "active questioning" put counsel in the awkward position of having to decide whether to object. The court could find no authority however, for the proposition that this supported a finding of evident partiality. The court was also not impressed with claims that the arbitrator shook his head in disapproval and rolled his eyes. "The arbitrator rolling his eyes or shaking his head was undoubtedly unprofessional, it doesn't lead us to conclude that he was biased. Indeed, the arbitrator's own explanation for his conduct is that he was frustrated because the witness was evading questions - something the record bears out." In response to the complaint that the arbitrator was browbeating a witness, the court observed that "while we don't disagree that the arbitrator was heavy-handed in his questioning of [the witness] on this point, his questions are fairly viewed as an attempt to manage an evasive witness and the lagging hearing." The court similarly could find no authority to vacate the award because the arbitrator expressed preliminary thoughts on the record, noting that an arbitrator may not be precluded from developing views on the merits as long as those views arise from the evidence and conduct of the parties. The court did find that the arbitrator mistakenly asserted jurisdiction over an individual named respondent but concluded that it

saw "nothing about the arbitrator's assessment of the issue indicating bias for or against any party." The court also rejected the argument that the arbitrator's limiting of the deposition of a witness to one hour evidenced bias, noting that the AAA's Commercial Rules give arbitrators the discretion to control the length of depositions. Finally, the arbitrator asked the parties during closing arguments whether they felt the proceedings were not fair and equitable. When one counsel indicated he felt that they were unfair, the arbitrator instructed counsel to put it in writing so it could be "cleared up" before the award was issued and so he would not face "some claim down the road that I have been unfair to you and your clients." A detailed letter was sent to the arbitrator who forwarded it to the AAA which declined to disqualify the arbitrator. The court rejected any resulting claim of bias, as it read the arbitrator's request as focusing on procedures employed by the arbitrator rather than any bias on his part or grounds for disqualification. "We don't see anything nefarious, or otherwise indicative of bias, about asking the parties to lodge any complaints about unfair procedures before proceeding has concluded." For all these reasons, the court reversed vacatur of the award on bias grounds and remanded the case to the trial court to reinstate and confirm the award in accordance with its ruling. *Brightstar, LLC v. Jordon*, 2024 WL 1665721 (Colo. App.).

Case Shorts

- *Thales Avionics v. L 3 Technologies, Inc.*, 2024 WL 815845 (S.D.N.Y.) (injunction in aid of arbitration issued to preserve plaintiff's contractual right of first refusal by enjoining joint venturer from selling its stake in business before ICC arbitration panel can rule on plaintiff's claim).
- *Jones v. Solgen Construction*, 99 Cal. App.5th 1178 (2024), review denied (May 15, 2024) (while "better course" would have been to conduct an evidentiary hearing on question of whether an arbitration agreement exists where allegations of fraud and sharp factual disputes are present, failure to do so did not constitute abuse of discretion).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Interim Award Reviewable Where Proceeding was Bifurcated. The parties here agreed to bifurcate liability and damages. The arbitrator then issued an interim award resolving liability issues. The losing party moved to vacate the award which was opposed on the ground that an interim award is not final, and the court therefore lacked jurisdiction to rule on the motion. The court disagreed and concluded it had subject matter jurisdiction. The court acknowledged that generally an award may only be reviewed when all issues have been resolved by the arbitrator but recognized that an "exception to this general rule applies, however, when parties expressly agree to bifurcate the issues of liability and damages." In that case, the arbitrator has both the authority and responsibility to do so and

to issue a "final partial award." The court concluded that since the parties agreed to bifurcate liability and damages and the interim award was consistent with that mandate the court had subject matter jurisdiction to rule on the motion to vacate. *Madryn Asset Management v. Trailmark*, 2024 WL 1348869 (S.D.N.Y.).

Arbitration Panel Manifestly Disregarded the Law in Issuing Award. A real estate broker petitioned to vacate an arbitration award that awarded half of the commission he earned on a real estate sale to another broker despite the fact that there was no written agreement to pay a commission with that broker. The circuit court vacated the award, stating that the arbitration panel ignored South Carolina statutory law requiring that all agreements concerning the payment of real estate commissions be in writing. The court of appeals reversed, "ruling there was a 'barely colorable' ground for the arbitration award based on a line of cases upholding oral and implied contracts for real estate commissions that, while in conflict with statutory law, had not been directly overruled." On writ of certiorari, the Supreme Court of South Carolina reversed and vacated the award. The court began by acknowledging that "[w]hen the attack on the award claims the arbitrator failed to follow controlling law, we may only vacate the award where the arbitrator knew of well-defined, explicit and clearly applicable controlling law, yet still refused to apply it . . .. In such circumstances, we have held the arbitrator exceeded his power by manifestly disregarding or perversely misconstruing the law governing the dispute. This standard is met only when the award is the product of an intentional or reckless flouting of the law, not a mere error in interpreting it." Thereafter, the court found that "the arbitration panel manifestly disregarded several statutes that governed real estate agency law in issuing the award. Moreover, the panel was "not only aware of the [statutory law], but had in hand the unappealed circuit court order dismissing similar claims arising from the same transaction on the ground that [the relevant statute] had rendered oral and implied contracts for real estate commissions enforceable." Concluding that the panel's reliance on a narrow line of cases upholding oral and implied real estate agency agreements that were superseded by the statute's insistence on written agency agreements, the court held there was no "arguably colorable" basis for the award, and the manifest disregard standard had been met. As such, the court of appeals opinion was reversed, and the arbitration award was vacated. *Waldo v. Cousins*, 2024 WL 1900583 (S. C.). See also *Madryn Asset Management v. Trailmark*, 2024 WL 1348869 (S.D.N.Y.) (arbitrator did not manifestly disregard the law in considering extrinsic evidence "to determine whether a party has violated the implied covenant of good faith and fair dealing [as] an adjudicator necessarily looks outside the four corners of a contract").

Damages Award Passes Barely Colorable Test. The arbitrator here, in awarding damages, was confronted with a "sparse record." In calculating the damages award, the arbitrator started with a market value estimate that both parties' experts endorsed. After applying a

discount to that number, the arbitrator determined the final damages award but acknowledged that the amount was "no more than a guess." In resolving a motion to vacate, the court was confronted with the question whether the arbitrator's damages award met Delaware's test of "reasonable certainty" for calculating lost profits. In upholding the damages award, the court noted that "the arbitrator relied on a figure that he understood to be acceptable to both sides' damages experts, which was the most accurate estimate offered (and indeed, the only one)." The court added that the arbitrator "was trying to faithfully apply Delaware law to a sparse record." Under these circumstances, the court concluded that "the absence of better estimates and the fact that the testimony of both sides' experts supported this figure suffices as a 'barely colorable' justification for the arbitrator's decision." *Mercantile Global Holdings v. Hamilton M&A Fund*, 2024 WL 1962314 (S.D.N.Y.).

Case Shorts

- *Sutton v. Jordan's Furniture, Inc.*, 229 N.E.3d 1091 (Mass.) (court erred by "categorically excluding time spent on settlement negotiations and mediation from the calculation of the base lodestar figure" when awarding attorneys' fees to prevailing party in statutory wage case).
- *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, 2024 WL 1071119 (D.D.C.) (arbitration panel not guilty of misconduct where party "received more - not less - process than it was due" where panel reopened record after three years of proceedings and seven days of hearing to admit additional evidence).
- *Metropolitan Municipality of Lima v. Rutas de Lima S.A.C.*, 2024 WL 1071119 (D.D.C.) (arbitration panel did not violate public policy by merely citing findings from earlier related arbitration proceeding as "the second tribunal also explicitly stated that it conducted its own independent analysis of that issue and reached the same conclusion").
- *Concierge Auctions v. ICB Properties of Miami*, 2024 WL 472341 (W.D. Tex.), report and recommendation adopted, 2024 WL 737777 (W.D. Tex.) (arbitrator's award of conditional attorneys' fees should losing party unsuccessfully challenge confirmation of award in court and on appeal -- $40,000 and $85,000 respectively -- confirmed).
- *AURC III, LLC v. Point Ruston Phase II, LLC*, 546 P.3d 385 (Wash. 2024) (payment of amount awarded by arbitrator did not render confirmation proceeding moot as "payment of the award did not prevent the trial court from providing the originally requested and effective relief of granting the confirmation motion").
- *Trustees of the IAM National Pension Fund v. M&K Employee Solutions*, 92 F.4th 316 (D. Cir. 2024) (vacatur of arbitration award under ERISA where arbitrator placed "considerable weight" on an appellate court ruling from another jurisdiction which

was neither controlling nor persuasive and was contrary to the text of the Multiemployer Pension Plan Amendments Act).

- *Heritage Construction Group v. Vest*, 2024 WL 1886422 (Tenn. App.) (arbitrator's ruling not to award attorneys' fees to party that obtained nominal recovery despite express prevailing party provision in the arbitration agreement upheld as arbitrator concluded neither party prevailed).

IX. ADR – GENERAL

Arbitration Provision Invalid Under Effective Vindication Doctrine. The "effective vindication" doctrine permits courts to invalidate, on public policy grounds, arbitration agreements that "operate as a prospective waiver of a party's right to pursue statutory remedies." The employee stock ownership plan ("ESOP") at issue in this proposed class action contained an arbitration provision requiring ERISA claims be pursued solely through individual arbitration. In determining whether the arbitration provision was invalid under the effective vindication doctrine, the court here acknowledged that nearly identical provisions were recently struck down by district courts in the Third and Tenth Circuits on the ground that they blocked plan participants from seeking plan-wide relief. The court found "that under the particular facts here, where the alleged injury is a single transaction that ostensibly harmed the assets of the plan collectively, rather than individual decisions that may have affected one or more participants based on their own particular holdings, a participant bringing a fiduciary breach claim acts in a role more akin to the representative of a single principal resolving a single claim than as the lead plaintiff in a package of claims joined together." Therefore, because the arbitration provision here blocked plaintiffs from seeking plan-wide relief provided under ERISA, it was invalid under the effective vindication doctrine. Moreover, "because the arbitration provision is by its own terms not severable, the Court invalidate[d] it in full." *Williams v. Shapiro*, 2024 WL 1208297 (N.D. Ga.).

Case Shorts

- *Mega Point Ltd. v. Villa T, LLC*, 2024 WL 1123602 (W.D. Tex.), reconsideration denied, 2024 WL 2480931 (W.D. Tex.) (party cannot challenge arbitration for failure to satisfy condition precedent, i.e., the conduct of pre-arbitration mediation, where it acted to prevent mediation from occurring).
- *Spliethoff Transport v. Phyto-Charter, Inc.*, 2024 WL 1717959 (S.D.N.Y.) (attorneys' fees awarded to prevailing party following arbitration where losing party engaged in "obstructive behavior and dilatory tactics [which] have marked every stage of this needlessly protracted litigation", including filing four separate post-award motions).
- *Musharbash v. J.P. Morgan Chase Bank*, 2024 WL 919186 (E.D. Cal.) (AAA's termination of arbitration of discrimination claim for failure of employer to make

timely payment of requisite fees under California law upheld but dismissal did not apply to nondiscrimination-related claims).

- *Piran v. Yamaha Motor Corp.*, 2024 WL 484845 (Cal. App.) (contractual provision, requiring that litigation be stayed on claims not subject to arbitration pending resolution of those claims, is not enforceable and therefore non-individual PAGA claims are stayed pending completion of arbitration).
- *Valentino S.P.A. v. Mrinalini, Inc.*, 2024 WL 779339 (S.D.N.Y.) (mere failure to pay damages awarded by arbitrator while award is being challenged not sufficient by itself to warrant award of attorneys' fees to prevailing party).
- *AURC III, LLC v. Point Ruston Phase II, LLC*, 546 P.3d 385 (Wash. 2024) (claim that only the amount awarded and not the arbitrator's reasoning constituted the "award" for purposes of confirmation proceeding rejected and no error found by court attaching full arbitration award to order confirming the award which losing party claimed contained defamatory observations).
- *Heritage Construction Group v. Vest*, 2024 WL 1886422 (Tenn. App.) (prevailing party fee provision in arbitration agreement supported award of attorneys' fees to party defending against failed motion to vacate).

X. COLLECTIVE BARGAINING SETTING

Award Finding Partial Withdrawal Liability Vacated. Employers that withdraw from multi-employer benefit plans may incur withdrawal liability if a collective bargaining agreement terminates. Crackers Demo's collective bargaining agreement with the Operating Engineers terminated. Nonetheless, Crackers continued to make contributions for the three employees covered, but the pension fund refused to accept the contributions, concluding that Crackers had withdrawn from the fund when the collective bargaining agreement terminated. As a result, the fund assessed withdrawal liability in the amount of $40,000,000. An arbitration ensued and the arbitrator sided with the pension fund and granted summary judgment on its claim. Crackers moved to vacate the award and the court granted the motion. The court noted that under federal law the "common control" test applies when an employer with multiple businesses is involved. If the multiple entities are under common control and one withdraws then all relevant entities must be treated as a single employer. The court here faulted the arbitrator for failing to address the ambiguity in the relevant agreement which "does not clearly indicate whether the agreement is a single contract or a series of separate contracts." The court concluded that because the language in the agreement "does not clearly indicate whether the agreement is one or more than one CBA, and because the available extrinsic evidence also does not conclusively resolve that question, the question may not be answered as a matter of law on the current record. It was error for the arbitrator to do so." The court acknowledged that the arbitrator's reasoning offered some support for his finding that Crackers was obligated to contribute to

the fund under multiple collective bargaining agreements and was therefore obligated to pay the assessed withdrawal liability. The court concluded however that this ruling could not be made as a matter of law and remanded the dispute back to the arbitrator for further proceedings in accordance with this ruling. *Crackers Demo, LLC v. Operating Engineers*, 2024 WL 761846 (E.D. Mich.).

Case Shorts

- *Bulk Transport Corp. v. Teamsters Union No. 142 Pension Fund*, 96 F. 4th 1027 (7th Cir. 2024), reh'g denied, 2024 WL 1729875 (7th Cir. April 22, 2024) (arbitration award finding withdrawal liability from pension fund vacated where arbitrator enforced oral agreement between employer and union that was contrary to the written agreement as "terms of pension contributions to multi-employer plans cannot be changed orally").

XI. NEWS AND DEVELOPMENTS

IBA Arbitrator Disclosure Guidelines Updated. The International Bar Association released updated disclosure guidelines that expand the field of potential conflicts to be disclosed by arbitrators. The 2024 revisions add to the list of potential conflicts to be disclosed: service as an expert for a party; serving concurrently alongside counsel or co-arbitrators on a pending matter, and; public advocacy on an issue in a case via social media or online networking or on an online networking platform. Parties are deemed to have waived conflicts not raised within 30 days of becoming aware or could have become aware based on a reasonable inquiry.

SVAMC Issues AI Guidelines. The Silicon Valley Arbitration and Mediation Center issued guidelines relating to the use of AI in arbitration proceedings. "Intended to guide rather than dictate, they are meant to accommodate case-specific circumstances and technological developments, promoting fairness, efficiency and transparency in arbitration proceedings." Users of AI in an arbitration proceeding are responsible for familiarizing themselves with the technology. Arbitrators are expected not to delegate decision-making responsibility to AI systems and must disclose any use of AI-generated information outside the record to the parties.

Ecuador Rejects Investor-State Arbitration. Voters in Ecuador rejected use of international arbitration to resolve investment disputes. Ecuador withdrew from the International Center for Settlement of Investment Disputes in 2009 and terminated its bilateral investment treaties in 2017. A new national government put the referendum to a vote in part to include arbitration in a new mining trade deal with Canada. This effort failed and reinforced Ecuador's rejection of arbitration in international disputes.

XII. TABLE OF CASES

Cases

Anhui Powerguard Technology Co. v. DRE Health Corp., 95 F.4th 1146 (8th Cir. 2024) 12
Apex Hospitality Group v. Independent Specialty Insurance Co., 2024 WL 758392 (E.D. La.) 5
AURC III, LLC v. Point Ruston Phase II, LLC, 546 P.3d 385 (Wash. 2024) 20, 22
Bissonnette v. Le Page Bakeries Park St., 601 U.S. 246 (2024) 2
Brightstar, LLC v. Jordon, 2024 WL 1665721 (Colo. App.) 18
Bryant v. Domino's Pizza, 2024 WL 1638616 (E.D. Mich.) 17
Bufkin Enterprises v. Indian Harbor Insurance Co., 96 F.4th 726 (5th Cir. 2024) 5
Bulk Transport Corp. v. Teamsters Union No. 142 Pension Fund, 96 F. 4th 1027 (7th Cir. 2024) 23
California Crane School v. Google, LLC, 2024 WL 1221964 (N.D. Cal.) 9, 17
Carpenter v. Opportunity Fin., LLC, 2024 WL 1209520 (9th Cir.) 8
Cedeno v. Sasson, 100 F.4th 386 (2d Cir. 2024) 15
Cedres v. Geoffrey Services Corp., 2024 WL 1435110 (Del. Chanc.) 14
Certain Underwriters at Lloyd's London v. Edouch Elsa Independent School District, 2024 WL 1514020 (S.D.N.Y.) 14
Chee v. Tesla, Inc., 2024 WL 1898434 (N.D. Calif.) 9
Coatney v. Ancestry.com, 93 F.4th 1014 (7th Cir. 2024) 11
Coinbase, Inc. v. Suski, 144 S. Ct. 1186 (2024) 1
Concierge Auctions v. ICB Properties of Miami, 2024 WL 472341 (W.D. Tex.), report and recommendation adopted, 2024 WL 737777 (W.D. Tex.) 20
Crackers Demo, LLC v. Operating Engineers, 2024 WL 761846 (E.D. Mich.) 23
Cullum v. Wyndham Hotels and Resorts Corp., 2024 WL 552494 (S.D.N.Y.) 11
Davis v. Nissan North America, 100 Cal. App.5th 825 (2024) 13
Deaton v. Johnson, 2024 WL 920082 (N.D. Tex.) 5
Dembiczak v. Fashion Nova, LLC, 2024 WL 580701 (W.D. Wash.) 8, 16
Dycom Industries v. Pension, Hospitalization, and Benefit Plan of the Electrical Industry, 98 F.4th 397 (2d Cir. 2024) 16
Fli-Lo Falcon, LLC v Amazon.com, 97 F.4th 1190 (9th Cir. 2024) 2
Glavin v. JP Morgan Chase Bank, 2024 WL 1536739 (E.D. Pa.) 12
Grimm v. Professional Dental Alliance, 2024 WL 6934 94 (Ohio App.) 9
Harris v Paredes, 2024 WL 774874 (N.D. Ill.) 16
Harrod v. Country Oaks Partners, 15 Cal.5th 939 (2024) 13

Hastings v. Nifty Gateway, LLC, 2024 WL 1175196 (S.D.N.Y.) 12
Hegemier v. A Better Life Recovery, 2024 WL 1710164 (Cal. App.) 13
Heritage Construction Group v. Vest, 2024 WL 1886422 (Tenn. App.) 21, 22
Herrera v. Cathay Pacif. Airways Ltd., 94 F.4th 1083 (9th Cir. 2024) 10
Hoeg v. Samsung Electronics of America, 2024 WL 640861 (N.D. Ill.) 5, 15
Hohenshelt v. Superior Court of Los Angeles County, 99 Cal. App.5th 1319 (2024), review filed (April 8, 2024) 4
Hughes v. Uber Technologies, 2024 WL 707686 (E.D. La.) 13
In re: JUUL labs, Inc. Antitrust Litigation, 2024 WL 589099 (N.D. Cal.) 12
Indian Harbor Insurance Co. v. Belmont Commons, 2024 WL 962376 (5th Cir.) 13
Jackson v. World Wrestling Entertainment, Inc., 95 F.4th 390 (5th Cir. 2024) 11
Johnson v. Lowe's Home Centers, 93 F.4th 459 (9th Cir. 2024) 16
Jones v. Solgen Construction, 99 Cal. App.5th 1178 (2024), review denied (May 15, 2024) 18
Jones v. Solgen Construction, 99 Cal.App.5th 1178 (2024), review denied (May 15, 2024) 12
Keebaugh v. Warner Bros. Entertainment, 100 F.4th 1005 (9th Cir. 2024) 9
Lacey v. Apex Roofing and Restoration, 2024 WL 307804 (E.D. La.) 7
Lennar v Rafiei, 687 S.W.3d 726 (Tex. 2024) 8
Lew-Williams v. Petrosian, 101 Cal. App.5th 97 (2024) 7
Lockhart v. Bam Trading Services, 2024 WL 1836510 (N.D. Cal.) 12
Lockhart v. BAM Trading Services, 2024 WL 1836510 (N.D. Cal.) 7
Madryn Asset Management v. Trailmark, 2024 WL 1348869 (S.D.N.Y.) 19
McBurnie v. RAC Acceptance East, LLC, 95 F.4th 1188 (9th Cir. 2024) 16
Mega Point Ltd. v. Villa T, LLC, 2024 WL 1123602 (W.D. Tex.), reconsideration denied, 2024 WL 2480931 (W.D. Tex.) 21
Mercantile Global Holdings v. Hamilton M&A Fund, 2024 WL 1962314 (S.D.N.Y.) 20
Metropolitan Municipality of Lima v. Rutas de Lima S.A.C., 2024 WL 1071119 (D.D.C.) 20
Mondragon v. Sunrun, Inc., 101 Cal. App.5th 592 (2024) 7
Montoya v. King.com, Ltd., 2024 WL 1680028 (E.D. Va.) 8
Morales Posada v. Cultural Care, Inc., 2024 WL 841414 (D. Mass.) 6
Musharbash v. J.P. Morgan Chase Bank, 2024 WL 919186 (E.D. Cal.) 21
Nichols v. Austin Bridge & Road LP, 2024 WL 1054629 (N.D. Tex.) 3
Ogunyemi v. Garden State Medical Center, 478 N.J. Super. 310 (App. Div. 2024) 12
Oppenheimer and Co. v. Mitchell, 2024 WL 1492874 (W.D. Wash.) 14
Ortiz v. Randstad Inhouse Services, LLC, 95 F.4th 1152 (9th Cir. 2024) 3

Patrick v. Running Warehouse, 93 F.4th 468 (9th Cir. 2024) 7, 9, 16
Picha v. Gemini Trust Company, 2024 WL 967182 (S.D.N.Y.) 13
Piran v. Yamaha Motor Corp., 2024 WL 484845 (Cal. App.) 22
Pumphrey v. Triad Life Sciences, Inc., 2024 WL 69914 (N.D. Miss.) 8
Reynosa v. Superior Court of Tulare County, 2024 WL 1984884 (Cal. App.) 4
Schwebke v. United Wholesale Mortg. LLC, 96 F.4th 971 (6th Cir. 2024) 6
Siddiqui Enterprises v. Independent Specialty Insurance Co., 2024 WL 209037 (E.D. La.) 5
Simplot India v. Himalaya Food International, 2024 WL 1136791 (D. N.J.) 5
SmartSky Networks v. DAG Wireless, 93 F.4th 175 (4th Cir. 2024) 4
Smith v. RPA Energy, 2024 WL 1869325 (S.D.N.Y.) 12
Smith v. Spizzirri, 144 S.Ct. 1173 (2024) 1
Spanish Villa, LLC v. Certain Underwriters at Lloyd's London, 2024 WL 1367651 (E.D. La.) 5
Spliethoff Transport v. Phyto-Charter, Inc., 2024 WL 1717959 (S.D.N.Y.) 21
Sutton v. Jordan's Furniture, Inc., 229 N.E.3d 1091 (Mass.) 20
Swinerton Builders, Inc v. Argonaut Insurance Co., case no. 23-cv-04158 (N.D. Cal.) 13
Thales Avionics v. L 3 Technologies, Inc., 2024 WL 815845 (S.D.N.Y.) 18
Tillman Transportation v. MI Business, Inc., 2024 WL 1153970 (6th Cir.) 2
Tilray Brands v. Dickson, 2024 WL 810641 (W.D. Wash.) 5
Trustees of the IAM National Pension Fund v. M&K Employee Solutions, 92 F.4th 316 (D. Cir. 2024) 20
Valentino S.P.A. v. Mrinalini, Inc., 2024 WL 779339 (S.D.N.Y.) 22
Vasquez v. SaniSure, Inc., 101 Cal. App.5th 139 (2024) 10
Waldo v. Cousins, 2024 WL 1900583 (S. C.) 19
Weeks v. Interactive Life Forms, 100 Cal. App.5th 1077 (2024) 12
Williams v Smyrna, 685 S.W.3d 718 (Tenn. 2024) 11
Williams v. Shapiro, 2024 WL 1208297 (N.D. Ga.) 21