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Feliu Case Summaries:

November 2024

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I. JURISDICTIONAL ISSUES: GENERAL

EFAA Bars Sex Harassment Claims That Accrue After Effective Date. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") bars the arbitration of sexual harassment and sex assault cases that accrue after its effective date, March 3, 2022. In this case, the alleged sexual harassment and ensuing retaliation extended continuously from 2018 until July 2022. The district court ruled that plaintiff's hostile work environment claim constituted ongoing claims subject to the continuing violation theory and, therefore, was not subject to arbitration as having accrued after the effective date of EFAA. The Second Circuit affirmed. The court focused on the application of the term "accrue". According to the court, a right accrues when it comes into existence and is actionable, that is, on the date that the statute of limitation begins to run. The court acknowledged that when an action accrues depends on the claim to be asserted and that some "causes of action accrue serially; they accrue (and reaccrue) pursuant to the continuing violation theory." Because a hostile environment claim does not occur on any one day, such claims do not accrue until the last discriminatory act occurs. In doing so, the court rejected defendant's argument that the court was improperly applying EFAA retroactively given the ongoing nature of a hostile environmental claim. The court concluded that as plaintiff alleged that defendant "engaged in acts that are part of the same course of conduct underlying her hostile work environment claims [some of which occurred after March 3, 2022], those claims have accrued after the EFAA's effective date" and therefore are not subject to arbitration. *Olivieri v Stifel, Nicolaus & Co.*, 112 F.4th 74 (2d Cir. 2024).

Dispute Arose after Effective Date of Ending Forced Arbitration Act. The Ending Forced Arbitration Act allows a person alleging conduct constituting sexual assault or sexual harassment to have those claims heard in court despite the existence of a predispute arbitration agreement. In order to invoke the protections of EFAA, the sexual assault and/or sexual harassment claim must arise or accrue on or after the effective date of the EFAA, which was March 3, 2022. The Eighth Circuit undertook a "fact-specific determination on the applicability of the [EFAA]" to determine when plaintiff's claims against her employer, which were based on allegations that the employer fostered a hostile work environment, arose. Noting that EFAA does not define "dispute", the court applied the definition provided by *Black's Law Dictionary*: "a dispute is a 'conflict or controversy, esp. one that has given rise to a particular lawsuit.'" Thereafter, the Eighth Circuit found that even though the underlying alleged misconduct occurred before EFAA went into effect, because the employee's claims were based on allegations of a hostile work environment, the claims did not arise until the employee actually filed suit. As the date of the filing was after the effective date of the EFAA, the employee's claims were covered by EFAA and the denial of the employer's motion to compel arbitration was affirmed. *Famuyide v Chipotle*, 111 F.4th 895 (8th Cir. 2024).

<u>Entire Case Barred from Arbitration Where EFAA Applies</u>. The Ending Forced Arbitration Ac bars the arbitration of sexual harassment and sexual assault cases. Must claims brought on other grounds in a case where EFAA applies which are otherwise subject to arbitration proceed in that forum or are they excluded? The California appellate court, adopting the reasoning of the lead case on this subject, *Johnson v. Everyrealm*, ruled that the entire case is barred from arbitration. The court emphasized, as did the *Johnson* court, that Congress used the word "case" rather than "claim" or the term "cause of action" when finding pre-dispute arbitration agreements unenforceable. The court found significant that the statute applies to the entire *case*, "the statute does not require that the pendant claims *arise out of* the sexual assault or sexual harassment dispute; it is enough that the case *relates to* the sexual assault or sexual harassment claims." For these reasons, the court ruled that the entire dispute must be heard in court despite an otherwise enforceable arbitration agreement. *Doe v. Second Street Corp.*, 105 Cal. App.5th 552 (2024). <u>See</u> <u>also</u> *Liu v. Miniso Depot CA*, 2024 WL 4446693 (Cal. App.) (arbitration agreement not enforceable with respect to race and sex discrimination claims under EFAA where a sex harassment claim asserted).

<u>Arbitration of Sex Discrimination Claims Not Barred by EFAA</u>. The Ending Forced Arbitration Act ("EFAA") excludes from arbitration claims of sexual harassment and sex assault. Are sex discrimination claims similarly barred? The court in this case confronted this issue under New York City's liberal Human Rights Law. The court began by noting that "state and federal courts have yet to draw a clear line between what constitutes 'sexual harassment' and what constitutes 'gender discrimination.'" This is so, the court noted, because until EFAA there was not much of a concern because both were protected by the applicable statutes. The court observed that although sexual harassment was not defined under the City Human Right Law, successful plaintiffs bringing claims under the Human Rights Law generally alleged conduct of a romantic, sexual, or lewd nature. Here, plaintiff alleged that her supervisor: mistreated her by giving male colleague's credit for her accomplishments; ignored her contributions; assigned projects unfairly to male coworkers; interrupted her during meetings; inappropriately questioned whether her pregnancy would impact her commitment to the job, and; gave her baseless performance criticisms. While acknowledging that these allegations clearly stated a claim for sex discrimination, the court concluded that plaintiff did not allege "harassing conduct or the kind of inappropriate comments that would rise to what the courts have determined constitutes 'sexual harassment' under the [City Human Rights Law]. Holding otherwise would collapse the difference between 'gender discrimination' and 'sexual harassment,' a step too far for this Court absent contrary guidance from the state courts." For these reasons, the court granted defendant's motion to compel arbitration. *Singh v Meetup, LLC*, 2024 WL 3904799 (S.D.N.Y.), <u>reconsideration</u> <u>denied</u>, 2024 WL 4635482 (S.D.N.Y.). <u>Cf</u>. *Mitchell v. Raymond James and Associates*, 2024 WL 4263151 (N.D. Fla.) (EFAA does not apply where plaintiff has failed to

allege a plausible sexual harassment claim and therefore plaintiff's sexual harassment and related retaliation claims are subject to arbitration).

<u>Arbitration Agreement Does Not Apply to Human Relations Commission's Investigation</u>. A federal court in Pennsylvania has held that an arbitration agreement in an Uber driver's contract did not operate to bar the Pennsylvania Human Relations Commission's (PHRC) investigation into the driver's allegations of discrimination. In so holding, the court distinguished between the human relations agency's right to investigate such claims, which cannot be compelled into arbitration, with claims the driver himself brings directly against the company, which may at a later time, be found to be covered by the agreement and therefore be compelled into arbitration. As such, the action Uber filed in court against the driver attempting to compel litigation, and in which PHRC intervened, was dismissed. *Uber v. Boddie*, 2024 WL 3927214 (E.D. Pa.).

<u>Case Shorts</u>

- *Ascension Data and Analytics v. Pair prep, Inc.*, 105 F. 4th 749 (5th Cir. 2024) (federal court lacks subject-matter jurisdiction to review motion to vacate even where claim was originally filed in federal court and defense to counterclaim was based on federal preemption argument).
- *Friedler, M.D. v. Stifel, Nicolaus & Co.*, 108 F.4th 241 (4th Cir. 2024) (court lacked jurisdiction to review motion to vacate where federal jurisdiction not evident on face of complaint as a "petition to vacate an arbitration award doesn't raise the merits of the underlying claim but rather the enforceability of an arbitration award").
- *Product Madness, Inc. v. Kingston*, 2024 WL 2146782 (Del. Ch.) (provision in arbitration agreement requiring confidentiality of proceeding did not require court to ignore the Court of Chancery rule requiring that court proceedings be public).
- *MBC Development v. Miller*, 316 A.3d 51 (Pa. 2024) (Pennsylvania's Limited Partnership Act requires disputes to be resolved by court and not arbitrator and did not violate the FAA as the parties' agreement is being enforced according to its terms by applying Pennsylvania law, including its Limited Partnership Act).
- *Zhongshan Fucheng Industrial Investment v. Federal Republic of Nigeria*, 112 F.4th 1054 (D.C. Cir. 2024) (Foreign Sovereign Immunities Act arbitration exception applied where commercial relationship existed that was governed by the New York Convention and where sovereign consents to arbitration).
- *Webuild S.P.A. v. WSP USA, Inc.*, 101 F. 4th 138 (2d Cir. 2024) (International Centre for Settlement of Investment Disputes did not exercise government authority as required for issuance of discovery subpoena in the United States where, for example, government funding went to the Centre itself and not to the arbitration panel in this case which was funded by the parties themselves).

- *Nextera Energy Global v. Kingdom of Spain*, 112 F.4th 1088 (D.D. Cir. 2024) (arbitration exception to the Foreign Sovereign Immunity Act applies where Spain entered into Energy Charter Treaty for benefit of private parties and ratification of Treaty provided unconditional consent to arbitrate investment disputes under Treaty).
- *TIG Insurance Co. v. Republic of Argentina*, 110 F.4th 221 (D.C. Cir. 2024) (an arbitration agreement may waive sovereign immunity under the Federal Sovereign Immunities Act's arbitration exception if it legally binds that sovereign to arbitrate with the party opposing immunity).
- *Molecular Dynamics v. Spectrum Dynamics Medical, Ltd.*, 2024 WL 3523414 (S.D.N.Y.) (United States courts lack jurisdiction to vacate arbitration awards issued in Switzerland under Swiss law as Switzerland, and not the U.S., has primary jurisdiction over the arbitration awards).
- *Caremark, LLC v. Choctaw Nation*, 104 F.4th 81 (9th Cir. 2024) (Indian tribe waived sovereign immunity when it entered into agreement with pharmacy benefit manager that included arbitration provisions in manuals incorporated by reference).
- *In Re: Ex Parte Application Pursuant to Section 204 of the Federal Arbitration Act*, 2024 WL 2078099 (D. Ariz.) (the British Columbia International Commercial Arbitration Centre, a nonprofit entity, is akin to a governmental authority for purposes of Section 1782 subpoena where the arbitration at issue is required by British Columbia regulation and therefore the subpoena in aid of support for the foreign arbitration is enforceable).
- *In re Matter of the Ex Parte Application of B&C KB Holding*, 2024 WL 3170983 (2d Cir.) (application of Section 1782 permitting discovery to be used in foreign proceeding not improper merely because discovery sought, which was for criminal proceeding, could also be used in a related arbitration proceeding).
- *Ascension Data and Analytics v. PairPrep, Inc.*, 105 F.4th 749 (5th Cir. 2024) (counterclaim for violation of federal Defend Trade Secrets Act not sufficient to confer jurisdiction on court to rule on motion to vacate).
- *Rodgers-Rouzier v. American Queen Steamboat Operating Co.*, 104 F.th 978 (7th Cir. 2024) (parties' selection of FAA constitutes enforceable choice of law provision under Indiana law and FAA's transportation exemption bars enforcement of arbitration agreement against bartender of a riverboat cruise).
- *Lopez v. Aircraft Service International*, 107 F. 4th 1096 (9th Cir.) (fuel technician who places fuel in an airplane used for foreign and interstate commerce plays a direct and necessary role in the free flow of goods across borders and is a transportation worker engaged in commerce who falls within the FAA's transportation worker exemption).
- *Nair v. Medline Industries*, 2024 WL 4144070 (9th Cir.) (warehouse operator who packaged and loaded medical supplies onto truck for interstate delivery played a

necessary and direct rule in the free flow of goods and was therefore exempt under the FAA's transportation worker exemption).

- *Chambers v. Maplebear, Inc.*, 2024 WL 3949344 (S.D.N.Y.) (FAA transportation exemption does not apply to class of shoppers who shopped for and delivered goods from local retailers or warehouses to local consumers for a web-based grocery delivery platform as they were not actively engaged in the transportation of goods in interstate commerce and do not play a direct and necessary role in the free flow of goods across borders).
- *Mathis v. Kerr*, 551 P.3d 880 (Okla. 2024) (drivers who pick up packages from Amazon warehouse and deliver them to customers are engaged in interstate commerce, even though they do not cross state lines, and are covered by the FAA transportation exemption barring arbitration of their claims).
- *Subway Franchise Systems of Canada v. Subway Developments 2000*, 2024 WL 3090480 (S.D.N.Y.) (arbitrator's order of interim relief, the payment of certain funds contemplated by arbitration provision during pendency of dispute, is final for purposes of allowing judicial review of order).
- *Mathis v. Kerr*, 551 P.3d 880 (Okla. 2024) (courts have exclusive jurisdiction of disputes under Oklahoma's Administrative Workers' Compensation Act and therefore disputes under the statute may not be arbitrated).
- *Texas Medical Association v. United States Department of Health and Human Services*, 110 F.4th 762 (5th Cir. 2024) (Department of Health and Human Services violated the No Surprises Act by issuing regulation which purports to set substantive standards for independent arbitrators to apply when resolving insurance reimbursement disputes).
- *Steines v. Westgate Palace*, 113 F.4th 1335 (11th Cir. 2024) (federal Military Lending Act displaces the FAA and bars arbitration of military loan dispute).

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

AAA Rules Not Sufficient to Require Delegation. The arbitration agreements in this dispute between merchants and major credit card companies incorporated the AAA's Commercial Arbitration Rules. The defendant credit card companies argued that the incorporation of the AAA Rules, which empower arbitrators to decide questions of arbitrability, constituted clear and unmistakable evidence that the parties agreed to delegate arbitrability disputes to the arbitrator to decide. The district court here disagreed. The court cited Second Circuit precedent for the proposition that the AAA Rules are not *per se* sufficient to delegate arbitrability disputes to the arbitrator where, as here, the agreement excludes certain types of claims from arbitration. In particular, the relevant contract language here excluded chargeback claims. As no further evidence was provided on the delegation issue, the court concluded that it was for the court to decide whether the

claims raised were covered by the arbitration agreement. *B&R Supermarket, Inc. v. Visa, Inc., et al*, 2024 WL 3823096 (E.D.N.Y.). Cf. *Work v. Intertek Resource Solutions*, 102 F.4th 769 (5th Cir. 2024) (incorporation of JAMS Employment Arbitration Rules constituted clear delegation to arbitrator to rule on question whether parties authorized class arbitration); *Illinois Casualty Co. v. B&S of Fort Wayne, Inc.*, 235 N.E.3d 827 (Ind. 2024) (AAA's rule providing "broad grant of power gives arbitrators absolute power to decide arbitrability").

Arbitration Agreement Cannot Waive ERISA Group Remedies. Participants in 401(k) retirement plans covered by ERISA filed a putative class action on behalf of the plans, themselves, and all others similarly situated, claiming that the plan fiduciaries breached their fiduciary duties owed under ERISA. They sought all losses accruing to the plans, disgorgement of all profits, and other injunctive remedies. The district court denied the fiduciaries' motion to compel arbitration under the plans' mandatory individual arbitration provisions. The Sixth Circuit agreed, holding that the individual arbitration provisions contained in the plans were invalid as a prospective waiver of statutorily guaranteed rights and remedies. In so holding, the Sixth Circuit relied on the Supreme Court's reasoning in *Mitsubishi v. Soler Chrysler-Plymouth*, where it noted, in the context of Sherman Act claims, that an arbitration agreement may not serve as a prospective waiver of a party's right to seek statutory remedies. The Sixth Circuit also observed that "four circuits" have already adopted the *Mitsubishi* reasoning to "[strike] down arbitration provisions that barred 'effective vindication' of the statutory rights guaranteed by ERISA," and noted that the "mandatory individual arbitration provisions" at issue in those cases were strikingly similar to the provisions at issue here. For instance, the plans here required that: claims be brought in an "individual capacity and not in a representative capacity"; they limit relief to a claimant's "individual Plan account", and; any other equitable or remedial relief could not "result in the provision of additional benefits or monetary relief." Finding that these individual arbitration provisions "operated to bar [plaintiff] from effectively vindicating her statutory rights under ERISA in the arbitral forum," the court held that it therefore functioned as a "prospective waiver of [her] substantive statutory remedies and is unenforceable." The court further held that because "the individual arbitration provision is non-severable" from the rest of the arbitration procedure set forth in the plans, the entire arbitration procedure was unenforceable. The district court order denying the fiduciaries' motion to compel arbitration was therefore affirmed. *Parker v. Tenneco, Inc.*, 114 F.4th 786 (6th Cir. 2024).

Waiver of Right to Arbitrate under California's Arbitration Act. California courts will find waiver of a contractual right when a party seeking to enforce the contractual right has intentionally relinquished or abandoned that right. In the arbitration context, there had been an added requirement that the party seeking to avoid arbitration must show prejudice. This "arbitration-specific" prejudice requirement was based on federal precedent that "relied

on a policy favoring arbitration over litigation as a form of dispute resolution." However, in 2022, the United States Supreme Court rejected the prejudice requirement and clarified that "the federal 'policy favoring arbitration' is about putting arbitration agreements on equal footing with other contracts, not about favoring arbitration." *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022). "Accordingly, the Supreme Court held that, under federal law, a court must apply the same rules that apply to any other contract when determining whether a party to an arbitration agreement has lost the right to enforce the agreement." The California Supreme Court had its own chance to reject the "arbitration-specific" prejudice requirement when it heard an appeal of a trial court order denying an employer's motion to compel arbitration on the grounds that the employer had waived that right. Adopting the Supreme Court's view, the Court explained "[b]ecause our state-law arbitration-specific prejudice requirement is based upon the federal precedent that *Morgan* overruled, we now abrogate it." Finding that the employer in this case engaged in litigation for over 13 months, whereby it participated in case management conferences, initiated discovery, engaged in meet and confer conferences, and took the employee's deposition for a full day, the court concluded that these actions were "markedly inconsistent with an intent to arbitrate" and, instead, demonstrated that the employer "chose not to exercise its right to compel arbitration." Holding that the employer waived its right to arbitrate, the case was remanded to the trial court for further proceedings. *Quach v. California Commerce Club, Inc.*, 16 Cal.5th 562 (2024). Cf. *Ampler Burgers Ohio v. Bishop*, 902 S.E.2d 818 (W. Va. 2024) (engagement in civil action for 10 months before moving to compel arbitration did not constitute waiver of arbitration right as arbitration was raised as an affirmative defense, no lengthy motion practice occurred, and the court was not asked to rule on any issue).

Case Shorts

- *Brothers Petroleum v. Certain Underwriters at Lloyd's*, 2024 WL 4443966 (E.D. La.) (party did not waive right to arbitration by participating in early-stage settlement processes; if that were not the case, this would strongly discourage and hinder efficient resolution of claims).
- *New York Knicks v. Maple Leaf Sports*, 2024 WL 3237563 (S.D.N.Y.) (broad arbitration clause sufficient to constitute delegation to arbitrator to rule on arbitrability issues despite lack of express provision authorizing such delegation).
- *Lower, LLC v. Amcap Mortgage, Ltd.*, 2024 WL 2784326 (E.D. Tex.) (court, not arbitrator, decides gateway arbitrability issue involving a non-signatory even where arbitration agreement contains an enforceable delegation provision).
- *Avery v. TEKsystems, Inc.*, 2024 WL 3908103 (N.D. Cal.) (employer waived the right to arbitrate by litigating class action motion and only imposing arbitration on its employees after class action motion was fully briefed, litigated by the parties, and granted by the court).

- *Gramercy Distressed Opportunity v. Bakhmatyuk,* 2024 WL 3938460 (D. Wyo.) (party's waiver of arbitration "is no one's fault but their own" for filing two motions to dismiss which go to the merits of the case).

III. JURISDICTIONAL ISSUES: UNCONSCIONABILITY

Overbroad Arbitration Agreement Ruled Substantively Unconscionable. The University of Southern California's arbitration agreement here applied to the employee's claims against the university "whether or not arising out of [e]mployee's University employment." Further, the agreement survived the termination of the employee's employment and can only be revoked if signed by the employee and the president of the university. The trial court denied the university's motion to compel, finding the agreement to be substantively unconscionable, and a California appellate court affirmed. The court acknowledged that parties with superior bargaining power like employers may allow for a "margin of safety" in their agreements granting them extra protection, if there is a legitimate commercial need for doing so. The court found no such legitimate need in the agreement here nor was one shown. The court observed that it is "difficult to see how it is justified to expect [the employee] – as a condition of her employment at the university – to give up the right to ever sue a USC employee in court for defamatory statements or other claims that are completely unrelated to [the employee's] employment." The court also concluded that the agreement's failure to provide an end date to the obligation to arbitrate to be substantively unconscionable. Finally, the court ruled that there was an unfair lack of mutuality because the employee was bound to bring her claim to arbitration against the university's related entities and employees, but those entities and employees were not obligated to arbitrate their claims against her. For these reasons, the appellate court found the agreement to be substantively unconscionable and upheld the trial court's refusal to compel arbitration. *Cook v. University of Southern California*, 102 Cal. App.5th 312 (2024), reh'g denied (June 12, 2024). See also *Ronderos v USF Reddaway, Inc.*, 2024 WL 3894525 (9th Cir.) (cost-splitting provision in employer's arbitration agreement requiring employee to share cost of arbitration and arbitrator's fees was "opaque" and unconscionable as it might cause surprise and create the impression that costs would be split evenly which likely would deter employees from filing claims). Cf. *Ampler Burgers Ohio v. Bishop*, 902 S.E.2d 818 (W. Va. 2024) (arbitration agreement that required confidentiality and limited discovery not substantively unconscionable as these constraints apply to both parties).

Pervasive Unconscionability Bars Severance of Offensive Terms. Allison Dopp sued her former employer, Now Optics, asserting various claims and Now Optics moved to compel arbitration. The trial court denied the motion and the California appellate court affirmed. Both courts found Now Optics' arbitration agreement to be both procedurally and substantively unconscionable. The procedural unconscionability was found in the fact that the arbitration agreement was one of adhesion. The substantive unconscionability terms

were more pronounced and included requiring California employees, like Dopp, to arbitrate their claims in Florida and the requirement that Dopp share both the costs of prescribed mediation and arbitration procedures, and the requirement that proceedings remain confidential, which in the court's view would undermine the confidence in the fairness of the proceedings and potentially discourage employees from pursuing their discrimination claims. As the court concluded that the unconscionability provisions "systematically operated to deprive Dopp of valuable rights and remedies of a California employee", it upheld the trial court's refusal to sever the unconscionable terms. *Dopp v. Now Optics, LLC*, 2024 WL 2265759 (Cal. App.).

Severance of Unconscionable Terms. An employer's arbitration agreement contained provisions requiring arbitration of claims commonly brought by employees but allowed for claims commonly brought by employers to be heard in court. It also shortened the statute of limitations for covered claims and required the party resisting arbitration to pay the other party's attorneys' fees. A California trial court found these provisions procedurally and substantively unconscionable and denied the employer's motion to compel arbitration. The Court of Appeal affirmed, finding additional provisions in the agreement unconscionable as well. On appeal, the California Supreme Court agreed that the provisions were unconscionable and took the opportunity to clarify that no matter how many unconscionable provisions are present in an agreement, courts must conduct a qualitative analysis to determine whether the agreement's unconscionability can be cured by severing the unconscionable provisions. "[T]he decision whether to sever unconscionable provisions and enforce the balance is a qualitative one, based on the totality of the circumstances. The court cannot refuse to enforce an agreement simply by finding that two or more collateral provisions are unconscionable as written and eschewing any further inquiry." The court remanded the case back to the trial court to determine whether severing the offending provisions is appropriate. In doing so, the court highlighted that the key question is whether "the central purpose of the contract is tainted with illegality," and noted "[i]f the unconscionability cannot be cured by extirpating or limiting the offending provisions, but instead requires augmentation to cure the unconscionability, then the court should refuse to enforce the contract." *Ramirez v. Charter*, 2024 WL 3405593 (Cal). Cf. *Ronderos v USF Reddaway, Inc.*, 2024 WL 3894525 (9th Cir.) (decision not to sever unconscionable terms upheld where arbitration agreement contained one-sided preliminary injunction carve-out, statute of limitations, and notice provisions).

Case Shorts

- *Ronderos v USF Reddaway, Inc.*, 2024 WL 3894525 (9th Cir.) (one year limitation period provision in employer's arbitration agreement unconscionable as it deprived employee of the benefit of continuing violation and discovery rule as limitations period began to run from when claim arose rather than when known to employee).

- *Guidry v. Vitas Health Care Corp.*, 2024 WL 2097903 (S.D. Cal.) (procedural unconscionability claim based on failure to explain arbitration to plaintiff rejected as failure to read agreement in arm's-length dealing did not prevent formation of agreement).
- *Hernandez v. FVE Managers, Inc.,* 2024 WL 3976860 (S.D. Tex.) (Spanish speaking employees procedural unconscionability argument rejected where he did not ask for assistance or indicate that his employer refused help if he had asked or was pressured into signing).
- *Walker v. Morgan & Morgan*, 2024 WL 4453805 (S.D. Ga.) (term in law firm's client representation agreement requiring mandatory arbitration of malpractice claims is not substantively unconscionable).
- *JLR Global v. Paypal Holding Co.*, 2024 WL 4198003 (E.D. Tex.) (claim of inability to retain affordable counsel not sufficient to establish that arbitration was prohibitively expensive).
- *Hernandez v FVE managers, Inc.,* 2024 WL 3976860 (S.D. Tex.) (substantive unconscionability claim based on limits to discovery rejected where arbitrator had authority to, and was in the best situation to, authorize additional discovery).
- *Guidry v. Vitas Health Care Corp.*, 2024 WL 2097903 (S.D. Cal.) (arbitration agreement which did not address issue of discovery found not to be substantively unconscionable because express discovery language is not required; by agreeing to arbitrate parties agreed to such procedures as are necessary to vindicate their claims).
- *National Football League v. Gruden*, 548 P.3d 775 (Nev. 2024) (procedural unconscionability claim rejected as plaintiff is "the very definition of a sophisticated party" as he is "a former Super Bowl Champion coach and long-time media personality signing the most lucrative NFL coaching contract in history, while being represented by an elite agent").
- *Ampler Burgers Ohio v. Bishop*, 902 S.E.2d 818 (W. Va. 2024) (carve out from arbitration agreement for injunctive relief not so one-sided as to rise to the level of substantive unconscionability as ability to seek emergency relief from court to protect trade secrets is not relief an arbitrator can grant).
- *National Football League v. Gruden*, 548 P.3d 775 (Nev. 2024) (while substantive unconscionability likely shown as NFL Commissioner Goodell might also serve as arbitrator, unconscionability claim fails as procedural unconscionability not shown and California requires both forms of unconscionability for challenge to succeed).
- *Meritage Homes of Texas v. De Villiers*, 2024 WL 2820106 (S.D. Tex.) (two-day limitation on each parties' presentations not unconscionable where objecting party voluntarily agreed to provision and arbitrator can amend the rule for good cause shown).

IV. CHALLENGES RELATING TO AGREEMENT TO ARBITRATE

Clickwrap Agreement Enforceable. Before a user of Uber's rideshare service can use the Uber app, they are presented with Uber's non-negotiable "terms of use" contract which includes an arbitration provision. The app prevents users from continuing through the app unless and until they click a checkbox indicating that they "reviewed and agreed" to the terms and then activate a button labeled "Confirm." The Supreme Judicial Court of Massachusetts concluded that these and other features of Uber's "clickwrap" contract formation process put plaintiff on reasonable notice of Uber's terms of use. The court explained that the app's "blocking interface included a large graphic image of a clipboard holding a document; near the bottom of the document was an 'X' alongside a graphic of a pencil poised as if to sign a legal instrument. The interface was focused and uncluttered; it clearly alerted [plaintiff] multiple times, in prominent boldface text, that the purpose of the blocking screen was to notify [plaintiff] of Uber's terms of use. It encouraged [plaintiff] to review those terms and provided an identifiable hyperlink directly to the full text of the terms of use document." The court further also concluded that "[plaintiff's] selection of the checkbox adjacent to the boldfaced text stating that he 'agree[d]' to the terms and his activation of the 'Confirm' button reasonably manifested his assent to the terms." As such, the order of the trial court denying Uber's motion to compel arbitration was reversed and the matter was remanded for entry of an order to submit the claims to arbitration. *Good v. Uber*, 234 N.E.3d 262 (Mass. 2024). See also *Domer v. Menard, Inc.*, 116 F.4th 686 (7th Cir. 2024) (defendant store's website provided proper notice of consumer's obligation to arbitrate where the "checkout page is not a visually bewildering [and] the web site provided reasonably conspicuous notice of the terms to which the consumer . . . will be bound"). Cf. *Herzog v. Superior Court of San Diego County*, 101 Cal. App.5th 1280 (2024) (reasonably prudent user of medical device not put on inquiry notice where a "user would have no reason to believe, given the context of the transaction and the content of the text on the 'Legal' screen, that by clicking the check box next to 'I agree to terms of use' they were entering into an agreement concerning any matters other than the scope of the user's privacy waiver" rather than full terms of use with binding arbitration agreement); *Marshall v. Georgetown Memorial Hospital*, 112 F.4th 211 (4th Cir. 2024) (online job application did not put user on notice of obligation to arbitrate claims despite conspicuous notice of application of South Carolina Arbitration Law where nothing called the users' attention to actual arbitration terms); *Citizen Power Initiatives for China v. Tencent America, LLC*, 2024 WL 2266070 (Cal. App.) (non-party plaintiffs seeking to enforce certain provisions of terms of service that benefit them are equitably estopped from resisting arbitration required by those same terms of service); *Jane Doe v. Morgan Stanley & Co.*, 2024 WL 3677615 (D. Mass.) (arbitration agreement "buried out of sight" on screen relating to use of personal information did not provide reasonable person with notice that they were agreeing to arbitrate claims); *Weeks v. Interactive Life Forms*, 100 Cal. App. 5th 1077 (2024) (internet user

not provided sufficient notice of arbitration agreement where user not prompted to take any affirmative action to demonstrate assent even where hyperlink with terms of use including arbitration agreement appear conspicuously on every page).

Express Repudiation of Arbitration Agreement Negates Creation of Implied in Fact Agreement. Under California law, when an employer modifies its employment policy to require employees to arbitrate their disputes and clearly communicates to employees that continued employment will constitute assent, an implied-in-fact agreement will be formed by way of the employee's performance in continuing to work for the company. Here, however, when plaintiff received the modified employee handbook, which added a mandatory arbitration agreement, he immediately notified the company's head of HR, informing her that he would not sign the Acknowledgement of Employee Handbook and would not agree to be bound by the arbitration agreement. A few weeks later he received an email message from the head of HR advising him that if he continued his employment with the company, he "will be deemed to have accepted the terms of these policies of the Employee Handbook, including the arbitration provisions, and will be bound by and held accountable to them, regardless of the fact that [he] failed to sign it, and regardless of any express objections [he] may have noted." Again, plaintiff "promptly informed [the head of HR] within minutes after she sent her [ ] email that he refused to accept the terms of the agreement." A California appellate court held that, despite plaintiff's conduct in remaining employed by the company for another 19 months, his assent to the arbitration agreement cannot be implied given his "explicit and immediate rejection" of it. Rather, "[w]here an employee promptly and unequivocally rejects an arbitration agreement as a modified term of employment, mutual assent to arbitrate is lacking" and no arbitration agreement is formed. The order denying the company's motion to compel arbitration was affirmed. *Mar v. Perkin*s, 102 Cal. App.5th 201 (2024).

Nonsignatories Successfully Apply Doctrine of Equitable Estoppel to Compel Arbitration. In this action, plaintiff alleged that H&R Block, Meta Platforms, and Google engaged in RICO violations when they improperly transmitted his sensitive tax information after he used the H&R Block online tax service. The court previously concluded that plaintiff's claims against H&R Block were governed by the arbitration provision in the H&R Block online services agreement plaintiff agreed to and granted H&R Block's motion to compel. The issue now before the court was whether plaintiff's claims against Meta and Google could likewise be compelled to arbitration even though Meta and Google were not signatories to the agreement. The district court held that they could under the doctrine of equitable estoppel. In California, "a party to an arbitration agreement can be equitably estopped from bringing a claim against a defendant who was not a party to the arbitration agreement . . . when the claims against the defendant are intimately founded in and intertwined with the underlying contract." Noting the Ninth Circuit's instruction that "the

question under California law is whether the claims 'are in *any way* founded on or bound up with the terms'" of the contract, the court observed that plaintiff's mail and wire fraud claims against Meta and Google allege fraud arising from H&R Block's "privacy and data security policy," which is contained in its Online Services Agreement. Therefore, the court concluded "those claims are intimately intertwined with the H&R Block agreements . . . [and] this close connection requires [plaintiff to] resolve his claims against Google and Meta in arbitration." *Hunt v. Meta*, 2024 WL 2503118 (N.D. Cal.). See also *Cure & Associates v. LPL Financial LLC*, 118 F.4th 663 (5th Cir. 2024) (non-signatory entities associated with principal who was subject to arbitration agreement are equitably estopped from resisting arbitration as they "deliberately sought and received benefits" from the principal's contractual relationship); *NCMIC Insurance Co. v. Allied Professionals Insurance Co.*, 110 F.4th 1072 (8th Cir. 2024) (employer's insurer could not be compelled to arbitrate claims under employee's insurance carrier policy on estoppel grounds because it did not receive any direct benefit from the employee's policy).

Authentication Requirements for Electronic Signature. A California court rejected an employer's motion to compel arbitration of an employee's claims on the grounds that the employer failed to establish the existence of an enforceable arbitration agreement. In opposition to the motion, the employee challenged the authenticity of her signature and "disput[ed] the reliability of the evidence given the differences between the arbitration agreement and other documents she signed the same day and in the same manner." The burden of proof was then shifted back to the employer to establish the existence of the agreement. The court explained that in order to establish the authenticity of an electronic signature, the evidence "must show the electronic signature 'was the act of the person,' which could be shown 'in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable . . . For example, a party may present evidence that the signatory was required to use a unique, private login and password to affix the electronic signature, along with evidence detailing the procedures the person had to follow to electronically sign the document and the accompanying security precautions." The court found that the employer here failed to carry its burden because the evidence it provided, "did not detail the security precautions regarding the use of the [onboarding system's] username and password; the arbitration agreement lacked a date, time, or IP address; and the agreement contained no indication it was created within the [onboarding] system." Therefore, having failed to authenticate the employee's signature, the court concluded no agreement to arbitrate existed and the trial court's denial of the motion to compel was affirmed. *Garcia v, Stoneledge*, 102 Cal. App.5th 321 (2024). Cf. *Pradier v. Starbucks Corp.*, 2024 WL 4346426 (E.D. La.) (applicant deemed to have accepted arbitration agreement, despite her denial of having done so and her speculation that anyone could have agreed on her behalf, where her birth date, social security number and account login information was entered into the

system along with an electronic signature); *Ramirez v. Golden Queen Mining Co.*, 102 Cal. App.5th 821 (2024), as modified (June 11, 2024) (employee deemed to have entered into arbitration agreement where, although he claims he did not recall signing the agreement, he did not challenge the signature on the handbook acknowledgment form which included an arbitration provision).

Case Shorts

- *Puerto Rico Fast Ferries v. Seatran Marine*, 102 F.4th 538 (1st Cir. 2024) (party to master contract equitably estopped from avoiding obligation to comply with mediation and forum selection provision invoked by non-signatory where party's respective claims are sufficiently intertwined with the master agreement signed by the signatory).
- *Aldea-Tirado v. Pricewaterhouse Coopers*, 101 F.4th 99 (1st Cir. 2024) (employee placed on inquiry notice of arbitration agreement where undisputed evidence shows the Lotus Notes emails, like the arbitration agreements, sent to her Lotus Notes e-mail address were forwarded to her work e-mail address which plaintiff admitted she used).
- *Wilhelm v. Bam Trading Services*, 2024 WL 2274326 (N.D. Ill.) (amended terms of service sent by e-mail deemed received where defendant produced evidence that e-mail was sent and presumed received under Illinois law in face of general denial with no facts and support).
- *Davis v. Clear Health, LLC*, 2024 WL 4041421 (N.D. Ohio) (no agreement to arbitration found where plaintiff in TCPA class action demonstrated that he did not access job search website because he did not yet obtain phone number allegedly used to access site, was not looking for a job at the time, and was driving when access allegedly occurred).
- *Jane Doe v. Morgan Stanley & Co.*, 2024 WL 3677615 (D. Mass.) (job applicant "unlikely to understand that the first step of a job application process entails acceptance of wide-reaching contractual commitments" and therefore applicant did not agree to obligation to arbitrate).
- *Jefferson-James v. Toyota Motor Credit Corp.*, 2024 WL 3625220 (W.D. La.) (plaintiff's claim that she did not read or understand arbitration agreement did not bar its enforcement where she both checked the "opt-in box" and signed right below the arbitration provision).
- *Soltero v. Precise Distribution, Inc.*, 102 Cal. App. 887 (2024) (employer cannot seek to compel arbitration based on staffing company's agreement with employee on equitable estoppel or third-party beneficiary grounds as no claim was brought against staffing company and staffing company's agreement was not the basis for imposing liability).

- *Collier Engineering Co. v. Martin*, 2024 WL 4262972 (Tenn. App.) (employee's wrongful discharge counterclaim not subject to arbitration provision in noncompete agreement upon which employer sued as counterclaim did not arise out of or relate to the noncompete agreement).
- *JES Farms Partnership v. Indigo Ag, Inc.*, 116 F.4th 733 (8th Cir. 2024) (arbitration agreement with two broad provisions performing similar functions covering both claims and counterclaims in the case and with "duplicative emphasis on capaciousness" reflects parties' belt and suspenders approach emphasizing breadth of arbitrator's authority).
- *Reid v. Cafe Habana Nola, LLC*, 2024 WL 2022954 (E.D. La.) (merely viewing and using information from a job posting on a web site which provided for arbitration of disputes not sufficient to constitute consent to arbitrate disputes).
- *Cohen v. Nelson Mullins Riley & Scarborough, LLP*, 2024 WL 3044649 (Mass. Super.) (estate of deceased law partner bound to arbitrate dispute under partnership agreement even though partner did not sign agreement as estate is seeking to enforce the agreement's terms).
- *Maxwell v. Atria Management Co.*, 105 Cal. App.5th 230 (2024) (children of deceased nursing home resident asserting wrongful death claim cannot be compelled to arbitrate under resident's agreement as they were not acting in a representative capacity but instead pursuing their own claims).
- *Lovinfosse v. Lowe's Home Centers*, 2024 WL 3732436 (E.D. Va.) (arbitration agreement illusory and unenforceable where retailer reserved the right to modify terms without notice).
- *Mahoney v. Cates*, 2024 Il. App. (4th) 240200-U (2024) (arbitration provision in law firm's operating agreement may not be employed to cause arbitration of issue arising under distinct separation agreement that lacked an arbitration provision).
- *Canteen v. Charlotte Metro Credit Union*, 900 S.E.2d 890 (N. Car. 2024) (amendment to credit union membership agreement requiring arbitration and waiving class actions did not require mutual consent where agreement allowed unilateral amendments by credit union and did not violate implied covenant of good faith and fair dealing).

V. CHALLENGES TO ARBITRATOR OR FORUM

AAA Termination of Mass Arbitration for Nonpayment Not Subject to Review. The district court directed that Samsung pay over four million dollars in arbitration fees, which it had refused to do, after the American Arbitration Association terminated the proceeding for over 35,000 consumers bringing individual claims against Samsung. The Seventh Circuit reversed, concluding that disputes regarding payment of fees were for the AAA to resolve where the AAA's Rules were adopted by the parties' arbitration agreement and its terms and

conditions. The court explained that procedural issues, such as payment of fees, are for the AAA and the arbitrator to decide where threshold arbitrability issues are delegated to the AAA and the arbitrator. "The parties thus bargained for the AAA's discretion over the payment of administrative filing fees, including the consequences that would stem from a party's refusal to pay those fees." The court noted that the consumers here could have advanced the AAA's fees and avoided the dismissal of the arbitration proceedings but declined to do so. "At that point, arbitration was complete, and the district court did not have the authority to flout the parties' agreement and disturb the AAA's judgment." The court explained that the FAA does not "grant consumers an unfettered right to arbitration", only that the arbitration proceed according to the terms agreed to by the parties. "The agreement here delegated fee issues to the procedures and rules of the AAA. And the AAA, using those rules, denied a stay, terminated the arbitration, and sent the claims to federal court after Samsung refused to pay its fees. The parties therefore fully 'arbitrated' under their agreement." For these reasons, the court concluded that the arbitration was in fact complete even though a determination on the merits had not been reached. The court added that the consumers here were not now without recourse as they could pursue their claims in court if they chose. *Wallrich v. Samsung Electronics America, Inc.*, 106 F.4th 609 (7th Cir. 2024).

Discovery Ordered on Question of Proper Arbitration Forum. The parties here disagreed as to whether their dispute, which they both agreed was arbitrable, should be submitted to the National Arbitration and Mediation or the American Arbitration Association. The defendant initially included in its terms of use the requirement that arbitration be before the AAA but then updated its terms of use to provide for arbitration before NAM. Counsel for plaintiffs attempted to reject the modified terms of use and ultimately filed individual arbitration claims before the AAA. Once notified that the modified terms of use had designated NAM, the AAA declined to administer the arbitrations filed with it but indicated its willingness to do so if defendant consented or it was ordered by a court. Both parties sued. The court concluded that it could not determine on the record before it "whether the parties' agreement to arbitrate before the AAA was later supplanted by a subsequent agreement to arbitrate before the NAM." The court ordered further discovery on the question whether plaintiffs assented to the modified terms of use and whether the rejection letter from their counsel was effective. *Brooks v. WarnerMedia Direct, LLC*, 2024 WL 3330305 (S.D.N.Y.). See also *Coleman v System One Holdings, LLC*, 117 F.4th 97 (3d Cir. 2024) (order requiring parties to conduct limited discovery into question of arbitrability does not constitute order denying motion to compel and is therefore not immediately appealable).

Case Shorts

- *Subway International, B.V. v. Subway Russia Franchising Co., LLC*, 2024 WL 2720266 (S.D.N.Y.) (AAA did not commit procedural error by assigning case on remand from the district court to the same arbitrator).
- *New York Knicks v. Maple Leaf Sports*, 2024 WL 3237563 (S.D.N.Y.) (claim that arbitrator, the Commissioner of the NBA, is biased before the arbitration was commenced is premature and "is akin to a complaint about the officiating before the game has even started").

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

Mass Arbitration Filing Failed to Evidence Agreement to Arbitrate. Arbitration demands for over 35,000 consumers bringing claims against Samsung were filed, along with a spreadsheet containing the claimants' names and addresses, copies of the applicable terms and conditions, and a determination by the AAA that its filing requirements had been met. When Samsung refused to pay the AAA's filing fees, the AAA terminated the proceedings, but the consumers successfully moved to compel arbitration, including an order requiring that Samsung pay the AAA's fees. Samsung appealed and the Seventh Circuit reversed. The court made clear that the party moving to arbitrate must first demonstrate the existence of an enforceable arbitration agreement. The court concluded that the consumers here failed to do so. The court explained that the arbitration demands "are nothing more than allegations" signed by counsel. "No claimant submitted any declaration or otherwise attested under the penalty of perjury to the facts alleged in the arbitration demands." Samsung's arbitration agreement and its terms and conditions, the court noted, "are simply copies found in any Samsung device or on Samsung's website, not terms and conditions reviewed and received by specific consumers. Without more, those copies do nothing to show that any of the consumers purchased a Samsung device." Finally, the court reasoned that the AAA's determination that its filing fees were met is not a substantive determination as to whether an enforceable agreement is present and "adds nothing to support the consumers' bare allegations that they purchased Samsung devices or otherwise entered into arbitration agreements with Samsung." The court observed that the consumers could have submitted sales receipts or purchase numbers or a declaration that might have sufficed to prove the existence of a valid arbitration agreement with Samsung, but they did not. As the consumers had the opportunity to but did not present their evidence of the existence of an arbitration agreement, the court concluded that it had no choice but to reverse and dismiss their claims. *Wallrich v. Samsung Electronics America, Inc.*, 2024 106 F.4th 609 (7th Cir. 2024).

Incorporation of AAA Rules Allows for Mass Arbitration Proceeding. The relevant arbitration agreement provision here adopted the American Arbitration Association's Rules

but made no mention of the AAA's Mass Arbitration rules. Ninety-one employees filed mass claims against a former employer and sought to compel arbitration; the former employer objected to the abrogation of the claims, arguing it did not agree to apply the Mass Arbitration Rules. The Delaware Chancery Court rejected the employer's contention and ordered the employees' claims to arbitration under the AAA rules. The court noted that the AAA instituted its multiple case filing rules in 2021 after the arbitration agreements in this case were entered into. The court reasoned that an "agreement's incorporation of AAA rules incorporates all future AAA amendments and supplements to those rules that would be in force and effect at the time the arbitration petition is submitted." The court pointed to the AAA rules that applied when the arbitration agreements were executed which made clear that the rules, as they may be amended, are to be applied as they are in effect when the demand for arbitration is filed. As the claims were filed after adoption of the AAA's Mass Arbitration Rules, those rules are to be applied to the claims raised in this case, the court concluded. The court further ruled that the parties delegated arbitrability issues to the arbitrator and no special reference to mass arbitration needed to be made for the delegation designation to be enforceable. The court distinguished class arbitration which may have required a more specific delegation provision. "Mass claims arbitration is meaningfully different than class action arbitration and presents none of the traits of class action arbitration that have given courts pause in delegating class arbitrability" as mass claims arbitration "is not representative and so does not present these concerns." The court explained that the AAA uses "mass claims arbitration for procedural and administrative reasons only." The court pointed to the AAA's separate set of class action arbitration rules from mass arbitration rules. It highlighted that unlike a class arbitration, mass arbitration did not present concerns about class number nor "does it present the concerns of one arbitrator deciding substantive issues for multiple claimants, or of saddling an arbitrator with complex representative procedural questions." For these reasons, the court concluded that an "agreement to delegate substantive arbitrability includes a delegation of mass arbitrability to the extent that question is one of substantive arbitrability." *Buzzfeeed Media Enterprises v. Anderson*, 2024 WL 2187054 (Del. Chanc. Ct.).

<u>Case Shorts</u>

- *Canteen v. Charlotte Metro Credit Union*, 900 S.E.2d 890 (N. Car. 2024) (amendment to credit union membership agreement requiring arbitration and waiver of class actions did not require mutual consent where agreement allowed unilateral amendments by credit union and did not violate implied covenant of good faith and fair dealing).
- *Netzel v. American Express Co.*, 2024 WL 3493285 (9th Cir.) (arbitration agreement limited to individual claims only did not prohibit employees from also seeking public injunctive relief and therefore did not violate California's PAGA rights).

- *Aguilar v. Santa Catalina Health Care*, 2024 WL 2967852 (Cal. App.) (while as a "pre-dispute categorial PAGA claim waiver was and is unenforceable", claimant's individual PAGA claim is nonetheless arbitrable).
- *Diaz v. Macy's West Stores, Inc.*, 101 F. 4th 697 (9th Cir. 2024) (employee maintained standing to pursue non-individual PAGA claims even though her individual claim was subject to arbitration).
- *Lumbo v. Kelly Services Global*, 2024 WL 3886275 (Cal. App.) (arbitration agreement provision barring all representative proceedings serves as a waiver of all PAGA claims whether on individual or representative bases).
- *Kramer v. Coinbase, Inc.*, 105 Cal. App.5th 741 (2024), review filed (October 23, 2024) (investors' claims that crypto currency platform misrepresented its security to entice consumers into doing business on the platform and failed to protect accounts from hackers in violation of unfair competition and other statutes sought public injunctive relief which was not subject to arbitration).
- *Avery v. Teksystems, Inc.*, 2024 WL 3908103 (N.D. Cal.) (employer's imposition of mandatory arbitration after class action motion was briefed and its disparaging of class claims in communication of its policy precludes granting of motion to compel).

VII. HEARING-RELATED ISSUES

Arbitrator's Evidentiary Rulings Upheld. The arbitrator ruled in favor of purchasers of a home and awarded damages relating to undisclosed defects. In doing so, the arbitrator made evidentiary rulings which the respondents cited as grounds for vacatur of the award. For example, the arbitrator excluded from evidence a responsive document that respondent failed to produce until the evening before the arbitration. The court reasoned that there was sufficient evidence in the record for the arbitrator to exclude the exhibit. The arbitrator also precluded testimony from an expert that went beyond topics for which the expert had been designated and about which he testified in his deposition. Further, the expert was not made available for a supplemental deposition after disclosure that he would be addressing additional topics. Under these circumstances, the court concluded that the arbitrator did not abuse her discretion in excluding the expert's supplemental testimony. For these reasons, the motion to vacate was denied and the award was confirmed. *Valencia v. Mendoza*, 103 Cal. App.5th 427 (2024), review denied (October 16, 2024).

Case Shorts

- *Subway International, B.V. v. Subway Russia Franchising Co., LLC*, 2024 WL 2720266 (S.D.N.Y.) (arbitrator's reliance on the objective intent of the parties as reflected in contract terms over self-serving subjective after the fact testimony found to be within arbitrator's permissible discretion).

- *University of Rhode Island Board of Trustees v. Hellenic Society Paideia*, 316 A.3d 1265 (R.I. 2024) (arbitrator's remedy was in direct response to questions posed by parties and "constitutes a permissible exercise of the arbitrator's authority pursuant to American Arbitration Association Rules, which permit the arbitrator to order specific performance" and therefore is not in manifest disregard of the law).

VIII. CHALLENGES TO AND CONFIRMATION OF AWARDS

Partiality Argument Waived. The issue before the court was whether an insurer waived its objections to an appraiser's partiality by not objecting to the appraiser's disclosure until after the appraisal was issued. Westchester, the insurer here, issued a property-insurance policy to Biscayne Beach. After suffering storm-related damage to its property, Biscayne Beach demanded an appraisal of its losses. The district court abated Biscayne Beach's action, and the parties retained individual appraisers, who then selected an umpire to complete the panel. The day the panel met for final negotiations, Biscayne Beach's appraiser disclosed for the first time – 15 months after his retention – that he may have a financial stake in the award on account of a contingency-fee retainer. Westchester did not object, and the panel issued its award over a month later. Westchester later moved to reopen the action and to vacate the award on the ground that the appraiser had acted partially. The district court denied the motion, ruling in part that any objection to the appraiser's partiality was waived by not objecting sooner and therefore confirmed the award. The Eleventh Circuit affirmed. Likening the appraisal proceeding to an arbitration and noting that there is no basis to distinguish the two, the court explained: "The 'general rule' is that a party who knows of an arbitrator's bias must object to his partiality before the award issues. When a party discovers an arbitrator's conflict, it must contest the partiality at that time or else waive the right to object in the future. The party may not sit idle, see whether the award is favorable, and then collaterally attack the proceedings on a ground that it declined to flag sooner." Here, the court found that Westchester's actions ran contrary to the general rule and found there were no "exceptional circumstances" justifying Westchester's delay in objecting to the appraiser's partiality. The court concluded that "Westchester had its chance to challenge [the appraiser's] partiality, chose to wait and see how the appraisal turned out, and now asks the court to restart the process—all while claiming that it would be wasteful to have objected any earlier." Holding that Westchester "waived the right to object," the denial of Westchester's motion to vacate and the trial court's confirmation of the award were affirmed. *Biscayne Beach Club Condominium Ass'n v. Westchester Surplus Lines Ins. Co.*, 111 F.4th 1182 (11th Cir. 2024).

Arbitrators' Decide Whether Computational Error Present. The ICC Rules allow arbitrators to "correct the clerical, computational or typographical error or any errors of similar nature contained in an award." The panel here issued an Addendum reducing its partial final award by over four million dollars on the ground that it had "miscalculate[d] the

appropriate relief . . . by factoring two calculations that the claim did not encompass." In doing so, the panel concluded that under the broad language of the applicable ICC Rule, it had the authority to correct this computational error. The trial court vacated the panel's Addendum, but the Fifth Circuit reversed. The court reasoned that "the Tribunal not only had the contractual authority to correct computational errors, but it also had the authority to determine what constituted a computational error in the first instance." The court explained that "the parties' agreements gave the Tribunal authority to construe the meaning of the ICC Rules themselves – including [contrary] arguments, whether an error is truly 'computational' or not." It concluded that it did and for these reasons overturned the trial court's decision to vacate. *RSM Production v. Gaz du Nord Cameroun, S.A.*, 2024 WL 42318855 (5th Cir.).

Award Remanded to Arbitrator for Clarification. The arbitrator awarded over $100 million in a contract dispute, including over $43 million in punitive damages based on a finding that an affiliate of the losing party, Levona Holdings, violated the injunction issued during the proceedings. The court, in an earlier ruling, concluded that the arbitrator had exceeded his authority because the "affiliate caused the commencement of a bondholder litigation against [Levona] and filed an involuntary bankruptcy petition" against it. The court, which found the award ambiguous, upon reconsideration directed his award to "specify the portion of the lump-sum punitive damages award that was based on the violations of the Status Quo Injunction, which the Court determined exceeded the ambit of the arbitrator's authority . . .." The court acknowledged that in refining its remand direction it was attempting to ensure "that it does not violate the functus officio doctrine or require the Arbitrator to substantively modify the Award." *Eletson Holdings, Inc. v Levona Holdings Ltd.*, 2024 WL 2963719 (S.D.N.Y.). See also *Trustees of the New York State Nurses Association Pension Plan v. White Oak Global Advisors*, 102 F.4th 572 (2d Cir. 2024) (remand to arbitrator to clarify award is required with respect to calculating profits awarded where such determination "far exceeds mere computation and raises numerous legal and factual questions that must be resolved by the arbitrator").

Parties Authorized Appellate Review for Legal Error. Arbitrators' awards may not be vacated under existing law based on legal or factual errors. May the parties alter that standard and permit a court to overturn an award based on an error of law? The California appellate court here ruled that they could. The parties agreed that the arbitrator "shall not have the power to commit errors of law or legal reasoning and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." In this case, the court determined that the arbitrator failed to correctly apply California law strictly limiting the enforceability of restrictive covenants in the employment setting. The court did this while acknowledging that no case had previously addressed the narrow issue here, namely, whether a restrictive covenant imposed as part of a partial sale of an interest in a

business is subject to a per se or reasonableness standard. The court concluded that the arbitrator's ruling was prejudicial by applying a *per se* rule precluding enforcement of the noncompete provision when he should have applied the reasonableness standard instead. *Samuelian v. Life Generations Healthcare, LLC*, 104 Cal. App. 5th 331 (2024), as modified (September 16, 2024), review denied (September 30, 2024).

Case Shorts

- *Global Industrial Investment Ltd. v. 1955 Capital Fund I GP, LLC*, 2024 WL 3250369 (9th Cir.) (award affirmed as the arbitrator's interpretation controls, "however good, bad, or ugly" and even if there is a better interpretation than applied by arbitrator).
- *Shenzchen Lanteng Cyber Technology Co. v. Amazon.com Services*, 2024 WL 4356307 (2d Cir.) (alleged failure by arbitrators to provide enough reasoning to support their conclusions did not evince manifest disregard the law).
- *Subway International, B.V. v. Subway Russia Franchising Co., LLC*, 2024 WL 2720266 (S.D.N.Y.) (claim that arbitrator "ignored critical facts" defeated because arbitrator's conclusions shown to be substantively reasonable).
- *Zimmer Biomet Holdings v. Insall,* 108 F.4th 512 (7th Cir. 2024) (public policy exception, while not limited to labor arbitration awards, not applicable here as arbitrators correctly interpreted that royalty payments were not tied to patents).
- *Gate Gourmet Korea Co. v. Asiana Airlines, Inc.*, 2024 WL 3058268 (C.D. Cal.) (award in favor of airline catering company confirmed and public policy challenge by airline rejected based on claim that award was tainted by criminal actions of airline's CEO, not the prevailing catering company, who was found guilty of embezzlement).
- *McDonald v. Branscomb, P.C.*, 2024 WL 3897237 (Tex. App.) (party may not collaterally attack jurisdiction of arbitrator after issuance of award where such challenge, otherwise permitted under the AAA's Employment Rules, was not raised before the arbitrator).
- *Commodities & Minerals Enterprise v. CVG Ferrominera Orinoco C.A.,* 111 F.4th 1294 (11th Cir. 2024) (public policy challenge under New York Convention fails where claim of fraud and corruption apply to the underlying facts decided by the arbitration panel and not to the procurement of the award itself).
- *Shenzchen Lanteng Cyber Technology Co. v. Amazon.com Services*, 2024 WL 4356307 (2d Cir.) (public policy challenge to arbitration award rejected where challenge goes to the validity of the underlying agreement rather than to alleged unenforceability on public policy grounds of the arbitration award itself).
- *United States Trinity Energy Services v. Southeast Directional Drilling*, 2024 WL 3738879 (5th Cir.) (appellate court lacked jurisdiction to confirm arbitration award where district court denied motion to vacate but did not rule on motion to confirm).

- *Boston Teachers Union v. School Committee of Boston*, 240 N.E. 3d 223 (Mass.) (court must confirm award despite fact that losing party did not dispute award's validity as award is not self-enforcing and party is entitled under the law to confirm the award).
- *Commodities & Minerals Enterprise v. CVG Ferrominera Orinoco C.A.,* 111 F.4th 1294 (11th Cir. 2024) (failure to move to vacate award in a timely fashion under New York Convention did not preclude party from opposing later motion to confirm).

IX. ADR – GENERAL

Award of Attorneys' Fees as Sanctions Upheld. According to the Seventh Circuit, defendant Sun Holdings had offered "one feeble excuse after another" during the arbitration hearing as it delayed the proceedings. It is no surprise that the panel ruled against Sun Holdings as a result. The panel went further and awarded $175,000 in attorneys' fees as sanctions for raising frivolous defenses. Sun Holdings challenged the sanctions as exceeding the arbitrators' authority. In particular, Sun Holdings referenced language in the arbitration agreement prohibiting the "award of damages in excess of compensatory damages" and argued that the panel violated that provision. The district court, and now the Seventh Circuit, disagreed. The Seventh Circuit held that the sanctions were a compensatory award designed to place the prevailing party in the position it would have been but for Sun Holdings' "frivolous tactics." While acknowledging that under the American Rule each party bears its own fees, the court emphasized that "the American Rule is not understood to forbid sanctions for frivolous litigation." The court was also not persuaded by the contract provision requiring each party to bear its own fees. "An arbitration clause delegates interpretive powers to the arbitrators. We do not ask whether they read the contractual language *correctly*, it is enough that they tried to apply the contract that the parties signed." The court added that "whether the arbitrators were right or wrong is none of our business." The court, clearly frustrated with Sun Holdings, concluded that it had "followed up a frivolous defense during the arbitration with a frivolous strategy in court" and added that arbitration "cannot expedite and reduce the cost of dispute resolution if the parties must litigate once before the arbitrators and again in court." The court directed Sun Holdings to show cause why sanctions against it should not be awarded for submitting this frivolous appeal to court. *American Zurich Insurance Co. v. Sun Holdings, Inc.*, 103 F.4th 475 (7th Cir. 2024).

California Court Says FAA Pre-Empts California's "Employer-Pays" Mandate. California courts have strictly enforced the California Arbitration Act's "Employer-Pays" mandate found at Section 1281.97 of the California Code of Civil Procedure. This provision imposes forfeiture of the right to arbitrate where an employer fails to make timely payment of arbitration fees. After the employer here paid the requisite arbitration fees one week after the 30-day statutory deadline, the employee petitioned a California trial court to allow him to withdraw from arbitration and to lift the stay of the court case. The trial court granted

the motion, finding that the employer's late payment of the arbitration fees was a material breach of the arbitration agreement. The employer appealed on the grounds that the arbitration agreement was governed by the FAA and that the FAA preempted Section 1281.97. The California appellate court agreed. After initially noting that the arbitration agreement at issue expressly provided that it was governed by the FAA and that the Federal Rules of Civil Procedure would apply to any arbitration proceeding, the court concluded California's Section 1281.97 was not applicable. Nevertheless, the court went on to hold that even if Section 1281.97 applied, it would be preempted by the FAA. The court explained this is because the FAA requires "equal treatment" of all contractual agreements, including arbitration agreements, and that all such agreements may only be invalidated by generally applicable contract defenses. Because Section 1281.97 mandates that a material breach and resulting waiver of the right to arbitrate must be found when an employer makes late payment of arbitration fees, and this mandate does not generally apply to all contracts, it violates the FAA's equal treatment principle. This recent holding created a split of authority within the California Courts of Appeal which ultimately may require resolution by the California Supreme Court. *Hernandez v. Sohnen*, 102 Cal. App.5th 222 (2024), <u>reh'g denied</u> (June 3, 2024). <u>But</u> <u>see</u> *Keeton v. Tesla, Inc.*, 103 Cal. App.5th 26 (2024) (FAA did not preempt provisions of California Arbitration Act that required employer to pay arbitration fees within 30 days and failure to do so in this case allowed employee to proceed with discrimination claim in court).

<u>Confidentiality in Collaborative Law Process</u>. This case presents a cautionary tale about the importance of carefully drafting alternative dispute resolution agreements when parties intend to keep the process confidential. Here, Petitioner and her then-husband attempted to use a collaborative law process, which is a non-judicial alternative dispute resolution process, to dissolve their marriage. They executed a collaborative law agreement pursuant to California's collaborative law statute. On its first page, the agreement states, in plain language, that it creates no enforceable legal rights or contractual obligations: "Each of us understands that this document does not give either of us enforceable legal rights that we did not already have. We both understand that these good faith undertakings set out in this document are not legally enforceable contractual obligations." The agreement then goes on to describe the collaborative process and addresses the confidentiality of the collaborative proceedings: "Communications related to collaborative matters made during the collaborative process are confidential and may not be disclosed to third parties." The parties ultimately ended up in family court where the husband sought to admit testimony about statements the wife made during the collaborative sessions. The wife objected, arguing that the confidentiality clause shielded her statements from disclosure. The court disagreed, finding that the agreement, as well as its confidentiality clause, was unenforceable. "It is not a contract. It doesn't give [the parties] any other duties other tha[n] what is provided in law. I think they went in knowing that while confidentiality is an

important part in establishing trust and participating in collaboration, they also knew it was not enforceable that this confidentiality could be maintained." On appeal, the California appellate court noted that California's collaborative law statute "includes no confidentiality protection" and found that the agreement likewise did not confer any protections on the parties. Observing "the agreement's multiple statements that it creates no enforceable rights or obligations", the court concluded that the agreement merely "sets ground rules for how the parties intended to proceed." Finding the agreement unenforceable, the court held that the family court properly admitted the wife's testimony. *Mueller v. Mueller*, 102 Cal. App.5th 593 (2024), reh'g denied (June 20, 2024), review denied (August 21, 2024).

Case Shorts

- *Anoke v. Twitter, Inc.*, 105 Cal. App.5th 153 (2024), as modified (September 18, 2024) (California statute requiring prompt payment of arbitration fees not violated where petitioner's attorney mistakenly but timely made payment of arbitrator's fees, and arbitrator refunded that payment and issued a second invoice which was paid by respondent).
- *Nieves v. Mount Sinai Queens Hospital*, 216 N.Y.S.3d 845 (N.Y. Sup. Ct. 2024) (settlement agreement in mediation vacated on mutual mistake grounds where neither party in the medical malpractice action knew of a substantial Medicare subrogation lien).

X. COLLECTIVE BARGAINING SETTING

Arbitrator Manifestly Disregarded Law by Failing to Apply CBA Terms. The collective bargaining agreement here was ratified on October 5th and executed on January 5th. It required that grievances be filed within 10 days and made clear that time was of the essence. The union's grievance here arose within days of ratification but was only filed after the collective bargaining agreement was executed. The arbitrator ruled that the grievance was timely filed. The district court granted the employer's motion to vacate, and the Third Circuit affirmed. The appellate court noted that the agreement was final when ratified and therefore the grievance was untimely. In so ruling, the court found that the "arbitrator's holding was not based on anything in the Agreement." For this reason, the court concluded that the award was in manifest disregard of the law and therefore the award "cannot stand because it ignores the grievance procedure [which] was mandatory at ratification." *Stonemor, Inc. v. International Brotherhood of Teamsters*, 107 F. 4th 160 (3d Cir. 2024).

Public Policy Does Not Require Vacatur of Reinstatement Involving Alleged Domestic Violence. Grievant, the director of student conduct at a state university, was terminated following disclosure of a domestic dispute with his wife. In particular, his wife informed police that he had grabbed her and attempted to strangle her while their children slept in the house. When the police came, the grievant disclosed that he had guns, but he would

not hurt anybody. He was later arrested. All criminal charges were later dismissed. The university conducted its own investigation and concluded it had just cause to terminate grievant's employment. The union challenged the termination, and the arbitrator concluded that the university's investigation failed to establish by clear and convincing evidence that grievant's off-duty conduct warranted termination. The trial court granted the university's motion to vacate the award on public policy grounds. The Connecticut Supreme Court reversed. As framed by the Court, "the sole issue before us is whether public policy is violated by the arbitration award reinstating the grievant to employment after a court had dismissed his criminal charges stemming from off-duty conduct and he had successfully completed a six-month therapeutic domestic violence offender program." The Court recognized that the termination implicated "explicit, well-defined and dominant public policies of protecting victims of violence, including authorizing protective orders . . . , protecting children . . . , and preventing interference with or endangering the police." The Court pointed out that the university could not point to any law or regulation requiring the termination of the grievant. "Similarly, although [applicable Connecticut law] manifests a public policy of protecting victims of domestic violence and is a very important tool to accomplish that purpose, there is nothing in that statute that recommends or mandates the termination of employment of an individual who is subject to a protective order." The Court emphasized that the issue before it was not whether grievant's off-duty behavior violated public policy, but rather whether the arbitrator's decision violated public policy. It concluded that it did not. While recognizing the strong public policy against domestic violence and in support of child safety, "those strong public policies do not provide explicit support for the narrower public policy that the state seeks to invoke here: a policy against reinstatement of a long-term employee with no disciplinary history following off-duty conduct leading to an arrest and charges that have been dismissed." For these reasons, the Court reversed the trial court and confirmed the arbitrator's award reinstating the grievant. *State of Connecticut v. Connecticut State University Organization of Administrative Faculty*, 314 A.3d 971 (Conn. 2024).

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- *Allied Painting and Decorating v. International Painters and Allied Trade Industry Pension Fund*, 107 F.4th 190 (3rd Cir. 2024) (award under Multi-Employer Pension Plan Amendment Act vacated where demand for withdrawal liability was made 12 years after its employer's withdrawal and violated the statutory mandate that such a demand be made "as soon as practicable" after withdrawal from pension fund).
- *Odell v. Kalitta Air, LLC*, 107 F.4th 523 (6th Cir. 2024) (statutory discrimination claims must be submitted to arbitration as required by the Railway Labor Act where decision maker must interpret the collective bargaining agreement in adjudicating claims).

- *Bryant Electric Co. v. International Brotherhood of Electrical Workers*, 110 F.4th 1196 (10th Cir. 2024) (presumption of arbitrability under Labor-Management Relations Act and arbitration award upheld where interest arbitration clause was validly formed and unambiguously covered both mandatory and permissive subjects of bargaining).
- *Sysco Indianapolis LLC v. Teamsters Local 135*, 114 F.4th 918 (7th Cir. 2024) (presumption of arbitrability under labor laws not defeated here where grievance was facially arbitrable, arbitration clause was broad, and no category of dispute was excluded from arbitration), petition for reh'g *en banc* denied (October 31, 2024).
- *International Union, United Mine Workers of America v Consol Energy, Inc.,* 111 F.4th 1232 (D.D.C. 2024) (the Labor Management Relations Act authorizes suits for alleged existing contract violations only and therefore court lacks subject matter jurisdiction to confirm arbitration award which prohibited a future contract violation).
- *Teamsters Local 337 v. Sysco Detroit, LLC*, 2024 WL 3974962 (E.D. Mich.) (union pension plan dispute not related to collective bargaining agreement and therefore was not subject to arbitration provision in that agreement).

XI. NEWS AND DEVELOPMENTS

Supreme Court to Decide Whether Minimum Contacts Required to Enforce Foreign Award. The Supreme Court has agreed to hear a pair of cases requiring it to clarify whether a plaintiff in a Foreign Sovereign Immunities Act case must prove for due process purposes that a foreign state and/or state instrumentality has minimum contacts with the United States sufficient to enforce a foreign arbitration award. The Ninth Circuit ruled in a pair of cases that minimum contacts were required before a district court could enforce an award. The Ninth Circuit decisions arguably conflict with other circuit courts which have ruled that the minimum contacts are not required. *CC/Devas Ltd. v. Antrix Corp. Ltd.*, No. 23-1201, 2024 WL 4394121 (October 4, 2024), and *Devas Multimedia Pvt. Ltd. v. Antrix Corp. Ltd.*, No. 24-17, 2024 WL 4394120 (October 4, 2024).

Supreme Court to Rule on Jurisdiction to Vacate Award Following Voluntary Dismissal. The Supreme Court has agreed to decide whether a party may reopen a case that had been dismissed without prejudice in favor of arbitration so that party may move to vacate the ensuing arbitration award. The Tenth Circuit in this case held that a plaintiff who voluntarily dismissed a judicial proceeding "without prejudice" in favor of arbitration cannot later reopen that proceeding to vacate the arbitration award. The court reasoned that a voluntary dismissal without prejudice is not a final judgment, order, or proceeding, and therefore the court did not have the ability to reopen the case. The panel recognized that its decision conflicted with decisions to the contrary issued by the Third, Fifth, and Seventh Circuits. *Waetzig v. Halliburton Energy Svcs., Inc.*, No. 23-971, 2024 WL 4394126 (October 4, 2024).

London Court Orders Reconsideration of Award Based on Failure to Disclose. An arbitrator in the United Kingdom failed to disclose that she had served as an expert witness and prepared expert declarations for clients of one of the law firms in a pending case. A court in London concluded that, despite the arbitrator's disclosure of two arbitral appointments in cases involving that same law firm, the arbitrator's failure to disclose her service as an expert constituted "apparent bias." The court ordered the panel to reconsider its award even though the arbitrator in question had been removed from the panel before the award was issued.

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