Roundup of 2021 Employment Arbitration Law Developments

Annual Report

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Employment Law Committee

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Jerome A. Diekemper, Principal Author

Introduction

This Roundup is not comprehensive. It covers only recent developments of interest to NAA members who hear, or are interested in, employment arbitrations.

Topic 1

Pending Cases at the U.S. Supreme Court that May Impact Employment Arbitration.

A. *Badgerow v. Walters*, et al., Case No. 20-1143, oral argument November 2, 2021, opinion expected in late June, before the end of the term.

> **The question presented is:** "Whether federal courts have subject matter jurisdiction to confirm or vacate an arbitration under Sections 9 and 10 of the Federal Arbitration Act (FAA) where the only basis for jurisdiction is that the underlying dispute involved a federal question?"

The answer to this question will also control the jurisdiction under the FAA, Section 11 (9 U.S.C Section 11). Section 9 covers confirmation of an Arbitration Award. Section 10 covers the vacation of an award. Section 11 covers the modification or correction of an Award.

As background, Badgerow sued in the Louisiana State Court to vacate the FINRA Arbitration Award with the investment firm where she worked. The firm removed the case to Federal Court asserting federal-question jurisdiction and moved to confirm the

Award, (Section 9). Badgerow moved to vacate, (Section 10). The district court confirmed the award. The Fifth Circuit affirmed, 975 F.3d 469 (5th Cir. 2020).

Two prior Supreme Court cases have resulted in confusion and a split in the Circuit Courts about federal jurisdiction when a federal district court is asked to either confirm, vacate, modify, or correct an arbitration award under the FAA.

In *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), the Court held that the FAA does not confer federal-question jurisdiction, but that there needed to be an independent jurisdictional basis to consider a case under the FAA.

In *Vaden v. Discovery Bank*, 556 U.S. 49 (2009), the Court held that a federal court could compel arbitration under the unique language of Section 4 of the FAA if it found, on a "look through" basis, that the dispute to be arbitrated would be subject to federal jurisdiction if the matter had been filed in federal court. District courts were directed that they "should assume the absence of the arbitration agreement and determine if it would have jurisdiction ... without it." See 556 U.S. at 66.

How to apply *Vaden* caused a muddle in lower courts and a circuit split.

> The First, Second, Fourth, and Fifth Circuits apply the "look through" approach to applications to confirm or vacate an Arbitration Award, but the Third and Seventh Circuits do not. See *Ortiz-Espinosa v. BBVA Securities of Puerto Rico*, 852 F.3d 36 (1st Cir.

2017), *Landau v. Eisenberg*, 922 F.3d 495, 498 (2d Cir. 2019), *McCormick v. America Online, Inc.*, 909 F.3d 677 (4th Cir. 2018), and *Quezada v. Bechtel OG& C Construction Services, Inc.*, 946 F.3d 837 (5th Cir. 2020), versus *Magruder v. Fidelity Brokerage Services, LLC*, 818 F.3d 285 (7th Cir. 2016), and *Goldman v. Citigroup Global Markets, Inc.*, 834 F.3d 242 (3rd Cir. 2016).

At oral argument, *Badgerow* took a narrow position that the "look through" exception applies only to the specific language of Section 4 and does not apply to Sections 9 and 10. If the Supreme Court accepts her position there would be no federal jurisdiction and her case would be remanded to the Louisiana State Court to rule on her vacature claim.

The firm also took a narrow position. It argued that in all federal cases the "look through" exception should apply. If the firm's position is accepted, the judgment would be affirmed because the underlying claims of gender discrimination under federal law would not result in the court "looking through" the claims to find federal-question jurisdiction.

The Justices' asked questions focusing on several broader issues: including whether the Court should adopt a uniform, predictable system for the role of federal courts in enforcing and vacating awards; it would be an odd result that federal courts could compel arbitration, but not confirm or vacate the award in the same case; is the award about the underlying federal-question or enforcing the state law agreement to arbitrate the dispute; will federal court dockets swell; how

would federal courts constantly "looking through" the jurisdiction issue impact the supposedly streamlined dispute-resolution process the parties contracted for.

At oral argument Justice Breyer and Chief Justice Roberts engaged in a (tongue in cheek) colloquy:

"JUSTICE BREYER: All right, but, if that's the main argument, what we are doing here normally is we are having, let's call him an arbitration rat. There is the guy who loves arbitration and then there is the rat who hates it, although he agreed to it, okay?

Now he will express his ratitude in many different ways. First, he will not want to go in the first place. Then, if you make him go in the first place, he's not going to want the other guy to get any witnesses. And then, if you go and get that, he's not going to want anybody to enforce this thing which he lost in the third place.

So, of course, these don't all just always follow. It depends on which of these provisions the guy can use and invoke in order to stop what he agreed to, which is the arbitration. ...

"CHIEF JUSTICE ROBERTS: So you could call them an arbitration rat or a judicial lion, I suppose."

Will the Court "ratify" the "ratitude" of the "arbitration rats" or will they "lionize" them?

In the end, the Court will have to deal with the lack of clear textual answers and the currently disjointed system where the lower federal courts have jurisdiction to compel arbitration, but not necessarily to confirm, vacate, modify, or correct arbitration awards.

B. *Hughes v. Northwestern University*, Case No. 19-1401, oral argument on December 6, 2021, opinion filed January 24, 2022.

The question presented is: "Whether allegations that a defined-contribution retirement plan paid or charged its participant's fees that substantially exceeded fees for alternative available investment products or services, or are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA 29 U.S.C. Section 1104(a)(1)(B)."

Northwestern University offered two Employee Retirement Income Security Act of 1974 (ERISA) defined-contribution retirement plans, the Retirement Plan, and the Voluntary Savings Plan. The participants were employees and former employees of the University. Participants were allowed to select among the investments offered by each plan's fiduciary and have their money invested in the option(s) of their choice. The University was the administrator and designated fiduciary of both plans. Each plaintiff participated in one or both plans.

Plaintiffs sued alleging the plan administrators violated their ERISA duty to make prudent decisions. They filed a request for a jury trial and a Motion to File a Seconded Amended Complaint with four new counts six days before the closure of a year-long discovery period.

The district court granted the University's motion to dismiss for failure to state a claim, to strike the request for a jury trial, and to not allow the filing of the Second Amended

Complaint. The Seventh Circuit affirmed. *Divane Northwestern University*, 953 F.3d 980 (2020).

Three plaintiffs who were participants in both plans, collectively referred to as Hughes, filed a Petition for a Writ of Certiorari seeking a review of only the grant of the motion to dismiss.

On January 24, 2022, Justice Sotomayor delivered the unanimous opinion of the Supreme Court, (with Justice Barrett not participating in the case). The Court reversed the Seventh Circuit. It pointed out that the "prudent man" standard applies to this case as pled, citing Section 1104 (d)(1)(B) of ERISA. The Court found the Seventh Circuit's reasoning was "flawed." The Seventh Circuit held the Petitioners' claims of violations of the duty of prudence in offering needlessly expensive investment options and paying excessive recordkeeping fees failed as a matter of law in that Seventh Circuit's determination that Petitioners' preferred type of low-cost investments were available plan options open to them.

The Court looked at three specific allegations for the violation of the duty of prudence.

> First, Respondent's allegedly failed to monitor and control the fees they paid for recordkeeping, resulting in unreasonably high costs to plan participants. Second, Respondent's allegedly offered a number of mutual funds and annuities in the form of "retail" share classes that carry higher fees than those charged by otherwise identical "institutional" share classes of the same investments, which are available to certain large investors. App. 83-84,

> 171. Finally, Respondent's allegedly offered too many investment options -- over 400 in total for much of the relevant period -- and thereby caused participant confusion and poor investment decisions.
> (See, 595 U.S. ____ (2022), slip opinion 3.)

The Court cited its opinion in *Tibble v. Edison International*, 575 U.S.C. 523 (2015). *Tibble* held "a fiduciary is required to conduct a regular review of its investments," *Id.* at 528, and "a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 530.

The Court stated, "*Tibble's* discussion of the duty to monitor plan investments applies here." (595 U.S. ____ (2022), slip opinion 4.)

The Court faulted the Seventh Circuit's reasoning that the Plaintiffs could avoid the costs they complained about through their own choices of investments that had lower costs and lower recordkeeping fees.

The Court concluded:

> Given the Seventh Circuit's repeated reliance on this reasoning, we vacate the judgment below so that the court may reevaluate the allegations as a whole. On remand, the Seventh Circuit should consider whether Petitioners have plausibly alleged a violation of the duty of prudence as articulated in *Tibble*, applying the pleading standard discussed in *Ashcroft v. Iqbal*, 556 U.S. 544 (2007), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Because the content of the duty of prudence turns on "the circumstances ... prevailing" at the time the fiduciary acts, § 1104(a)(1)(B), the appropriate inquiry will necessarily be context-specific." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). At times,

> the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and Courts may give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise.
> (595 U.S. ____ (2022), slip opinion 6.)

While *Hughes* is a case involving what is required to be pled in an ERISA case alleging breach of fiduciary duties, it is important for cases where the plan documents or individual employment agreements require arbitration of such disputes. See, Topic 3 below.

C. *Morgan v. Sundance, Inc.*, Case No. 21-326, Cert. granted November 15, 2021. Amicus Brief of NAA filed on January 6, 2022. Oral argument is set for March 21, 2022. The Court is expected to rule before the end of the term.

> **The question presented is:** Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice, violate this Court's instruction that lower courts must "place arbitration agreements on an equal footing with other contracts?" *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Morgan sued Sundance in September 2018 for failing to pay her and other similarly situated employee's overtime in violation of the Fair Labor Standards Act. In November of 2018, Sundance moved to dismiss her complaint under the "first-to-file" rule, pointing to a Michigan case. The district court

denied the motion in March 2019. Sundance filed an answer but did not assert a right to arbitrate Morgan's claims. In May 2019, after a after a stay for a mediation in the Michigan case, in which Morgan participated, there was no settlement as to Morgan's claims. Sundance filed a motion to compel arbitration.

The district court held that Sundance waived its right to arbitrate based on its participation in the lawsuit. The motion to compel was denied. Sundance appealed to the Eighth Circuit. *Morgan v. Sundance, Inc.*, 992 F.3d 711 (8th Cir. 2021). In a 2-1 decision issued on March 30, 2021, the majority held:

> A party waives its right to arbitration if it: "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." *Messina,* 821 F.3d at 1050, (internal quotation marks and citation omitted). Utilizing this test, we conclude the district court erred in determining Sundance waived its right to arbitrate because Sundance's conduct, even if inconsistent with its right to arbitration, did not materially prejudice Morgan. (992 F.3d at 713-714.)

The majority said the District Court should not have focused on Sundance's failure to raise its right to arbitrate earlier, but it should have considered the nature of Sundance's motion to dismiss, which raised the "first-to-file" rule and did not address the merits of the dispute. It opined that a delay in seeking to compel arbitration "does not in itself constitute prejudice," citing *Messina v. North Central Distributing, Inc.*, 821 F.3d 1047, 1050 (8th Cir. 2016).

The dissent pointed out that by raising its preference for the Eastern District of Michigan over the Southern District of Iowa, Sundance was raising a venue issue and arguing dismissing the case would avoid "conflicting rulings and duplicative discovery" by staying or dismissing this case. When the district court denied its motion, Sundance filed an answer with fourteen affirmative defenses but did not mention arbitration. The dissent stated, "This conduct by Sundance amounts to a waiver of its right to arbitrate." 942 F.3d at 715. The dissent regarded seeking a transfer of venue to another court as an action inconsistent with arbitration. It demonstrated, "an effort to play 'heads I win, tails you lose,' -- a game that is inconsistent with exercising a right to arbitration." 992 F.3d at 716.

At this point, nine federal courts of appeals require a finding of at least some prejudice to establish a waiver of the right to arbitrate. The other three (7th, 10th, and D.C.) have held that prejudice is not an essential element of proving a waiver.

Most states require a showing of prejudice to establish a waiver. At least four state supreme courts (Alaska, Florida, Maryland, and West Virginia) share the minority federal view that a showing of prejudice is not required.

The NAA amicus brief urges that a party asserting a right to arbitrate should have to raise it in court at the earliest

possible time. In the last paragraph of its brief, the NAA suggests:

> Finding waiver without prejudice, just as Federal Rule 12(h) specifies for venue objections, not timely raised, fosters efficiency in litigation and arbitration -- and seeks to hold all parties to their arbitration bargain. As an organization comprised of arbitrators, Amicus is interested in maintaining the appeal of arbitration as an effective alternative to litigation and not turning arbitration into a device that is utilized for gamesmanship and delay. "Ultimately, the prospect of waiving their right to arbitrate should compel parties to choose a forum at the earliest possible stage." Jack Wright Nelson, *Waiving the Right to Arbitrate in the United States*: *Should the Prejudice Requirement be Discarded*? Kluwer Arbitration Blog (May 22, 2015). Allowing a party to participate in litigation until they cause prejudice leads to games and inefficiencies and should be soundly rejected.

The opinion of the Supreme Court will determine whether gamesmanship will continue or whether the streamlined process chosen by the parties will continue to be faster and more effective. If the Court requires some prejudice to be shown, how much is needed, when, and must it be "material prejudice”? The failure to define lines that must be crossed to waive arbitration will generate more litigation, not less.

A bright line of "no prejudice" (as suggested in the NAA amicus brief) would eliminate almost all gamesmanship and speed up the arbitration process, which the parties believed would be faster and cheaper than going to court.

D. *Viking River Cruises, Inc., v. Moriana,* Case No. 20-1573, Cert. granted December 15, 2021. Oral argument was not set as of December 31, 2021.

The question presented is: Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act.

The California Private Attorneys General Act (PAGA), Cal. Lab. Code Section 2698 *et. seq.* allows employees to seek an award for violations of state labor laws on their own behalves and on behalf of other similarly situated employees. Suit was filed in state court by Moriana, and Viking asked the court to compel arbitration under the agreement she signed before starting her employment as a sales representative. The agreement contained a waiver of class and representative actions and provided only for individual relief.

As background, the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th. 348 (2014), held that waivers of an employee's right to file a PAGA suit were violative of the state public policy and were unenforceable. *Iskanian* also held the FAA did not preempt PAGA because the dispute in a PAGA case is between the state and the employer. The employee merely serves as the state's proxy. A year later, the Ninth Circuit in *Sakkab v. Luxottica Retail*

North America, 803 F.3d 425 (9th Cir. 2015), in a 2-1 decision held that the FAA did not preempt PAGA suits.

Since then, the California courts have uniformly followed *Iskanian*, and the U.S. Supreme Court has denied several petitions seeking review, including recently in October 2021. See, *DoorDash, Inc., v. Campbell*, Case No. 21-220, Cert. denied October 12, 2021. *Viking* was docketed on May 13, 2021, and *DoorDash* was docketed on August 16, 2021.

In *Moriana v. Viking River Cruises, Inc.*, B297327 (Cal. Ct. App. September 18, 2020) (unpublished Opinion), the Court of Appeals affirmed the superior court's decision denying the motion to compel. The California Supreme Court denied further review.

In its petition to the U.S. Supreme Court, Viking contends the Court's ruling in *Epic Systems Corps. V. Lewis*, 138 S. Ct. 1612 (2018), trumps *Iskanian* and that PAGA is preempted by the FAA.

With the new composition of the Supreme Court, the granting of review in *Viking* may have sounded the death knell for PAGA.

E. *Southwest Airlines, Company v. Saxon*, Case No. 21-309, Cert. granted December 10, 2021.

> **The question presented is:** Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport

such goods themselves, are interstate "transportation workers" exempt from the Federal Arbitration Act?

In *Eastus v. ISS Facility Services, Inc.*, 963 F.3d 207 (5th Cir. 2020), ISS employed Eastus as an account manager to supervise 25 part-time and 2 full-time ticketing and gate agents for ISS's customer Deutsche Lufthansa, AG., Inc., at the George Bush International Airport in Houston, Texas. The agents Eastus supervised ticketed passengers, accepted or rejected baggage and goods, issued tags for baggage and goods, and placed baggage and goods on conveyor systems. As needed, Eastus would handle passengers herself.

Eastus brought employment discrimination claims against ISS and Deutsche Lufthansa. They moved to compel arbitration and Eastus claimed she was exempt as a transportation worker under the FAA. The Court said that at most, Eastus was involved in loading and unloading airplanes, not in the actual movement of airplanes in interstate commerce. She was compared to longshoremen who unload and load ships and warehousemen who do the same with trucks. She was held not exempt. (960 F.3d at 212.)

Saxon was employed as a Cargo Ramp Supervisor at Chicago's Midway Airport. She alleged she regularly assisted her team of ramp agents in loading and unloading airplane cargo that was to be transported interstate. The district court applied a narrow construction of the "transportation worker" exemption in Section

1. It found the exemption did not apply to a Cargo Ramp Supervisor at Midway.

The Seventh Circuit reversed and attempted to distinguish *Eastus*. *Saxon v. Southwest Airlines Company*, 993 F.3d 492 (7th Cir. 2021). The Court reasoned that while Saxon did not personally transport goods or people in interstate commerce, she was an essential link in the interstate commerce chain.

The Supreme Court could well hold that airport employees who do not travel on planes are not exempt. It will be hard for Saxon to distinguish herself from longshoremen and warehousemen.

Topic 2

Worker's Exempt From Coverage Under

Section 1 of the Arbitration Act (FAA).

A. 9 U.S.C. § 1 Limits the coverage of the FAA. It says, in the relevant part of Section 1:

> ... but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

The exceptions for seamen and railroad employees have seemed clear. The exception for "any other class of workers engaged in foreign or interstate commerce" continues to be litigated.

In *New Prime, Inc. v. Oliveira*, 586 U.S. ____, 139 S. Ct. 532 (2019), the contractor agreement delegated arbitrability determinations to the arbitrator. The Court had to determine who decides if the Section 1 exemption applies, and whether the "transportation workers" exemption applies to an "independent contractor" truck driver engaged in interstate hauling. The Court determined a court decides the Section 1 question and that the drivers were exempt.

B. Post Oliveira Developments

FAA exemption does not impact arbitration agreements that reference state laws or even those that only contain a reference to the FAA.

In 2020, two New Jersey Supreme Court cases addressed whether arbitration agreements exempt under the FAA would be enforceable under the New Jersey Arbitration Act (NJAA) 2A: 23B-1-36, which does not contain a transportation worker exemption. Both cases, *Arafa Health Express Corporation*, and *Colon v. Strategic Delivery Solutions, LLC*, were decided in the same opinion. 243 N.J. 147 (2020).

The New Jersey Supreme Court recognized federal preemption of any state rule discriminating on its face against arbitration, but also recognized that the FAA permits states to regulate contracts with arbitration agreements, under general contract principles.

In both cases, the Court found an express invocation of the NJAA in the arbitration agreement was unnecessary to establish a meeting of the minds because "the NJAA is applied automatically as a matter of law to all non-exempted arbitration agreements from the January 1, 2003, effective date," and later said, "No express mention of the NJAA is required to establish a meeting of the minds ... its application is automatic."

Because each state has its own arbitration statutes, some the Uniform Arbitration Act, some the Revised Uniform Arbitration Act, and some *sui generis*, litigants in each state may face inconsistent decisions when transportation workers are considered exempt under Section 1 of the FAA. Workers in states like New Jersey or Virginia, which have no transportation worker exemption, might be arbitrating their employment disputes when workers performing the exact same duties in a bordering state may remain in court.

C. Workers on the Borderline Between Exempt and Nonexempt Under Section 1 of the FAA.

It is clear that long-haul truck drivers are exempt transportation workers under Section 1 of the FAA. It is less clear for other transportation workers. Amazon employs "last-mile" local drivers who go to centralized Amazon warehouses to pick up packages shipped interstate and then deliver them to local customers. Most of those drivers never cross state lines.

They all sign Independent Contractor Arbitration Agreements

with class action waivers. When "last-mile" drivers brought wage and hour lawsuits in two cases, the First and Ninth Circuits held the transportation worker exemption of the FAA applied to them: *Waithaka v. Amazon.com*, 966 F.3d 10 (1st Cir. 2020), and *Rittman v. Amazon.com*, 971 F.3d 904 (9th Cir. 2020).

In the wake of *Waithaka* and *Rittman*, other circuit courts began to decide who was within the Section 1 exemption and who was not. The Seventh Circuit in *Wallace v. Grubhub Holdings, Inc.*, 709 F.3d 798 (7th Cir. 2020), (opinion written by then Judge Amy Coney Barrett), the Court ruled that Grubhub drivers were not in the class of "transportation workers" "engaged in foreign or interstate commerce." These drivers engaged in taking meal orders, contacting the restaurant to prepare the meals, and then the customer would either pick up her meal or ask the Grubhub driver to deliver it. Because Plaintiffs did not show that "the interstate movement of goods is a central part of the job description of the class of workers to which they belonged" (790 F. 3d at 802-803), the Court held they were not within the exemption. 960 F.3d at 212.

Next on appeal from the district court, the First Circuit reversed the lower court's ruling that Lyft drivers were within the "transport worker" exemption. It said,

> "They are among a class of workers engaged primarily in local intrastate transportation, some of whom infrequently find themselves crossing state lines, and are thus fundamentally unlike seamen and railroad

> employees when it comes to their engagement in interstate commerce."
> slip opinion at 18-19. *Cunningham v. Lyft, Inc.*, ____ F. 4th ____, Case No. 20-1373, 20-1379, (Slip opinion 18, November 5, 2021).

The Court compared Lyft drivers to Uber drivers and cited *Capriole v. Uber Techs, Inc.*, First Circuit 7 F.4th. 854 (9th Cir. 2021), where the Ninth Circuit held that the Uber drivers were outside the exemption, and stated in its analysis,

> The critical factor [is] not the nature of the item transported in interstate commerce (person or good), or whether that Plaintiffs themselves crossed state lines, but rather '[t]he nature of the business for which a class of workers perform[ed] their activities,'" (7 F.4th. at 861, citations omitted).

In another case involving "last-mile" delivery drivers, a plaintiff used his personal car to deliver parts received from out-of-state at Lakeland and Tampa, Florida warehouses, and going to local Advance Auto Parts retailers. The district court found the Plaintiff to be a "transportation worker" exempt under Section 1 of the FAA. The Eleventh Circuit reversed with instructions, *Hamrick v. Partsfleet, LLC.*, ____ F.4th 1337 (11th Cir. June 22, 2021). Based on precedent, the Court articulated a two-part test for determining who is a "transportation worker." First, the worker "must be in a class of workers 'employed within the transportation industry.'" Second, the class of workers "must in the main 'actually engage' in the transportation of goods in interstate commerce," 2021 LW. 254605 at 7. Finding the lower court had not applied the test

correctly, the Court remanded to the lower court to do so appropriately.

In yet another last-mile case, *Harper v. Amazon.com Services, Inc.*, ____, F.4th. ____, Case No. 20-2614 (3rd Cir. September 2021), the three-judge panel generated three separate opinions by Judges Schwartz, Porter, and Matey. Judge Porter wrote the opinion in which Judge Matey concurred and Judge Schwartz dissented.

> Plaintiff runs deliveries for Amazon under the "Amazon Flex" Program. Amazon's Flex supplements Amazon's traditional delivery space. Interested drivers used an app to sign up to drive packages from Amazon warehouses, affiliated grocers, and participating restaurants to home shoppers. (Slip opinion 4.)

The Third Circuit's test requires courts to resolve a motion to compel "under a Rule 12(b)(6) standard without discovery's delay" when only facts alleged in the complaint are sufficient as a matter of law. The Court said:

> In challenges to arbitrability under § 1, that creates a three-part framework. At step 1, using the traditional tools of statutory interpretation to analyze the facts of the complaint, a court must consider whether the agreement applies to a class of transportation workers who "engaged directly in commerce" or "worked so closely related thereto as to be in practical effect part of it." If the class is outside that definition, then § 1 does not apply and cannot serve as a defense to a motion to compel arbitration. If that analysis leads to murky answers, a court moves to step 2 and assumes § 1 applies, taking the FAA out of the agreement. But the court then considers whether the contract still requires arbitration under any applicable state law. (Slip opinion 15, citation omitted).

The Court remanded the case to the district court to apply the proper framework. Judge Matey offered his thoughts, saying:

> Nearly a century has passed since Congress codified the ancient practice of arbitration. Since then, federal courts have engaged in a tug of war that expands both the reach of and the exceptions to, the Federal Arbitration Act (FAA). The result is uncertainty, with the text drafted by Congress replaced by presumptions that encourage unpredictability and foster rising costs. Respectfully, since the courts created this problem, we should help clean it up.
> (Slip Opinion 12.)
>
> "Perhaps, the time has come for a different approach to arbitration than the framework Congress created in 1926. If so, that change must come from Congress. While that question is considered, respectfully, courts can return the FAA to its ordinary meaning and give ordinary workers the benefits and obligations of arbitration written into law."
> (Slip opinion 13.)

In her dissent, Judge Schwartz noted:

> Once again, given the TOS's (Terms of Service), language, our sister circuits (9th, *Rittman* and 1st, *Waithaka*) first considered whether the parties' chosen law -- the FAA -- applied before turning to state law.
> (Dissent slip opinion 6.)

She concluded:

> The District Court, relying on and acting in accordance with this body of authority, followed suit. It correctly examined the agreement, observed that the agreement exclusively selected the FAA as the law that applied to the arbitration provision, sought to determine whether the FAA governed the class of workers to which Harper belongs, concluded that the factual record was insufficient to make such a conclusion, ordered the parties to engage in limited discovery consistent with *Singh*, and declined to reach

> whether or which state law applied pending resolution of whether the expressly selected law -- the FAA -- governed. Because the District Court's ruling fully comported with the plain language of the parties' agreement and the binding precedent, I would affirm in all respects. (Dissent slip opinion 6-7.)

Questions: Is there now a circuit split with the First and Ninth Circuits on one side and the Eleventh on the other, (and possibly the Third after remand)? Will the Supreme Court "clean up" the issues leftover from its interpretations of the FAA? Will Congress amend the FAA to apply to workplaces now so different from many when the Act was passed in 1925, and clarify open issues?

Topic 3

ERISA Arbitration

Arbitration of ERISA claims may appear to be old news or a foregone conclusion. But the intersection of ERISA and the FAA raises novel legal questions, at least some of which are likely to present themselves in otherwise routine cases. This Report introduces some background principles governing arbitration of statutory claims and identifies two potential challenges to mandatory arbitration of ERISA Claims.

In *Hughes,* the Supreme Court settled what needs to be pled in breach of fiduciary duty cases, (see, Topic 1, B above). Other issues still need to be resolved.

A. When Can a Court Order ERISA Cases to Arbitration?

In 1962 a multi-employer vacation trust fund was created. The fund had three employer trustees and three union trustees. In 2017, the employer trustees reviewed the vacation plan to ensure the fund complied with the tax code. They became convinced there were two reasons that might jeopardize the fund's tax-exempt status; the frequency with which employees received distributions and employees' use of their vacation money for non-vacation purposes. The trustees reached an informal agreement to change the plan in 2019 and the employer trustee then signed the 2017 tax return.

When 2019 came and no changes were being made on the tax return issue, the employer trustees put the issue on the agenda for several months. No formal vote was ever held so a majority of the trustees could approve any amendments to the plan document concerning tax returns. At one meeting a quorum was not achieved when the union trustees failed to attend. The employer trustees filed suit in the district court to get authority to amend the tax return. The union trustees intervened and argued that the dispute belonged in arbitration. The district court agreed and dismissed the suit.

In Baker v. Iron Workers Local 25, 999 F.3d 394 (6th Cir. 2021), the Court of Appeals affirmed. It held when the trustees are deadlocked, arbitration is required by the law and by the Trust Agreement.

In the *Taft-Hartley* amendments to the National Relations Act, union representatives were prohibited from receiving or requesting any money or thing of value from an employer representative, (29 U.S.C. Section 146(a)(b). Section 146(c)(8) provides an exception for contributions paid by an employer to a trust fund for "pooled vacation ... benefits." It provided: "that the requirements of Clause (B) of the proviso to Clause (5) of this subsection shall apply to such trust funds."

Section 146 (c)(5)(B) requires a written agreement and equal representation of employer and union trustees, and permits neutral trustees. In the event of a "deadlock" with no neutral trustee(s) to break it, the trustee(s) "shall agree on an impartial umpire to decide" the dispute. If the two sides cannot agree on an impartial umpire in a "reasonable period of time" either group may petition a district court to appoint an impartial umpire. In the Trust Agreement, there were steps that were required to be followed in resolving a perceived deadlock. First, the employer trustees needed to "notify the remaining trustees in writing that a deadlock existed." Second, they needed to meet with the Union trustees to appoint the "impartial umpire." Only at that point could "any of the trustees" go to federal court, which only had the authority to appoint the umpire (arbitrator).

The Court held that the employer trustees had not complied with 29 U.S.C. Section 146(c). The Court also stated:

> Apart from this defect in the lawsuit, there is another problem with it. ERISA makes these claims premature. Before invoking ERISA in federal court, as the employer trustees do in their complaint, they had an obligation to exhaust remedies under the plan. The point of this exhaustion requirement is to reduce frivolous lawsuits, minimize costs, prevent premature judicial intervention into decisions by the board of a trust fund, and allow trustees to correct errors of their own making. *Costantino v. TRW, Inc.*, 13 F.3d 369, 975 (6th Cir. 1994). Not one of these objectives is missing from this dispute ... 999 F.3d at 398-399.

The Court cited similar Second and Third Circuit cases handled in a similar fashion.

Because ERISA trusts must have a deadlock procedure, arbitration of disputes among trustees will usually be headed to arbitration.

B. Disputes Not Solely Involving Trustees

There seems to be a trend to not order that ERISA claims be arbitrated unless the trust document provides for arbitration of beneficiary claims or disputes.

In *Cooper v. Ruane Cunniff & Goldfarb, Inc.*, 990 F. 3d 173 (2d Cir. 2021), in a 2-1 decision the Court held that a third-party investment advisor to the company's PSA (Profit Sharing Account Plan), that was managed by the plan with instructions to the advisor firm was not a proper party under the plan's arbitration procedure. The participants-employees of DTS Systems, Inc., filed suit against multiple parties, including the Ruane advisor firm and DTS for a breach of fiduciary duties under ERISA, 29 U.S.C. Section 1132(a)(2).

The employees signed arbitration agreements with DTS to arbitrate "all legal claims arising out of or relating to employment." The parties did not contend that the claims "arose out of" employment. The Ruane firm argued the claims "related to" employment.

After not being subject to DST investment guidance from 1973 until November 2015, the firm was alleged to have incurred huge losses before the complaint was filed.

The claim at issue alleged that the firm violated its fiduciary duty by holding 30% of the fund's total assets of more than $1.4 billion in Valeant Pharmaceuticals stock. By March 4, 2016, the share price had dropped dramatically from a 52-week high worth $414.7 million to $97 million.

Under 29 U.S.C. Section 1132(a)(2) a suit is brought on behalf of the plan by the Secretary of Labor or by plan participants, as here.

The district court found that the claims "related to" the employment. But for their employment, the plaintiffs would never have received PSA benefits as part of their compensation. The district court also held that even though the firm never signed the arbitration agreement, plaintiffs were equitably estopped from raising that issue and were required to arbitrate their claims against the firm.

After a long exegesis of the text of the arbitration agreement, the Court held that the claims brought on the plan's

behalf did not "relate to" the employees' employment and they reversed the dismissal and remanded for proceedings consistent with the opinion. (990 F.3d 185.)

The dissent would have affirmed on the "related to" issue and on requiring arbitration with a non-signatory to the arbitration agreement.

C. The "Effective Vindication" Exception

In *American Express Company. v. Italian Colors Restaurant*, 570 U.S. 228, 235-236 (2013), the Supreme Court observed:

> The "effective vindication exception" may offer a more viable threshold challenge, depending on the contours of the arbitration agreement and the ERISA remedies sought by the would-be litigant. A particular litigant cannot be compelled to arbitrate unless she is permitted to effectively vindicate her statutory rights, and if the arbitration agreement includes a "prospective waiver of a party's right to pursue statutory remedies," then it will be unenforceable. (Citations omitted.)

In *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th. 1097, (7th Cir. September 10, 2021), the Seventh Circuit became the first Court of Appeals to adopt the "effective vindication exception" to invalidate an arbitration agreement in an ERISA case.

In the district court, the motion to compel was denied because the arbitration provision that set out arbitration of ERISA claims was "in the [beneficiary's] individual capacity and not in a representative capacity, or on a class, collective, or group basis," and it prohibited "any remedy which has the

purpose or effect of providing additional benefits or monetary relief to any eligible employee, [participant] other than the Claimant." *Smith v. GreatBanc Trust Company*, No. 20C2350, 2020 WL, 4926560 at 2 (N.D. Ill. August 21, 2020), the district court assumed *arguendo* that ERISA claims are generally arbitrable but agreed with the plaintiff that this arbitration clause eliminated his plan-wide statutory remedies expressly granted in ERISA, 29 U.S.C. Section 1132(a)(2).

The underlying facts were stated by the Court:

> Triad's Board of Directors, including shareholders David Caito, Robert Hardie, and Michael McCormick, created a plan for its employees in early December 2015. The Plan Number 20-2708 provides that "[t]he Primary Sponsor reserved the right at any time to modify or amend or terminate the [plan] in whole or in part."

The primary sponsor, per the plan, is Triad through its Board. On December 17, 2015, Caito, Hardie, and McCormick sold all of Triad's stock to the plan, which at $58.05 per share totaled more than $106 million. Triad's Board appointed GreatBanc Trust Company as plan trustee on December 21, 2015, and GreatBanc approved the transaction in short order, seemingly after it had already occurred. Notably, the plan's holdings consisted entirely of Triad's stock. Triad's share price then dropped to $1.85 on December 31, 2015, according to the plan's financial statements. What had been valued at over $106 million plummeted in two weeks to just under $4 million. But under the

plan's provisions, no participant could sell their shares until they vested -- at the earliest, on December 31, 2016, for some employees. As of December 31, 2018, Triad's share price dipped to less than 1 dollar per share. (Slip opinion 3.)

According to the Court:

> Caito, Hardie, and McCormick, though, seemed to have benefitted from the transaction. The plan financed its purchase of their shares through loans provided by the three men. Triad guaranteed these loans, charged against the Company's equity that had just been purchased by the plan. The plan also required Triad to make retirement contributions in amounts no less than necessary to service the loan payments. (Slip opinion 3.)

On July 17, 2018, Triad's Board amended the plan to include an arbitration provision with a class action waiver. Smith's employment had ended in 2016. The district court held there was no evidence that Smith had notice of the plan amendment and it considered Smith's consent, not the plan's consent, was what mattered.

The Seventh Circuit did not rely on the district court's reasoning. It said, "Joining every other circuit to consider the issue, we recognize that ERISA claims are generally arbitrable." (Citing cases from the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits. (See, Slip opinion 12.)

The Court cited *Italian Colors* for the proposition that the exception "would certainly cover a provision in an arbitration

agreement forbidding the assertion of certain statutory rights." 570 U.S. at 236.

The Court found remedies expressly contemplated for the plan as a whole (see ERISA Section 1109(a)), like removing a trustee, would go beyond an individual remedy for Smith and extend to the entire plan, "falling exactly within the ambit of relief forbidden under the plan.... To reiterate, the problem with the plan's arbitration provision is its prohibition on certain plan-wide remedies, not plan-wide representation." (Slip opinion at 15.) "In that sense, the conflict in need of harmonization is not between the FAA and ERISA; it is between ERISA and the plan's arbitration provision, which precludes certain remedies that § § 1132(a)(2) and 1109(a) expressly permit." (Slip opinion 17.)

In conclusion, the Court said:

> In closing, we note the limits of our holding, as well as its lessons. We express no view on whether Smith consented to the arbitration provision, whether he received notice of that provision, or even whether a plan's sponsor can unilaterally amend the plan to include such a provision. In addition, Smith does not parcel out what relief he seeks under § 1132(a)(2) and what relief he seeks under § 1132(a)(3). In this case, we hold only that the "effective vindication" exception bars application of the plan's arbitration provision to claims under § 1132(a)(2). Whether Smith's claims, and those of other plan participants, under § 1132(a)(3) are barred is a question that's left for another day ... In the end, the "effective vindication" exception may be rare, but it applies here. (Slip opinion 17, citation omitted).

In *Cooper*, supra at Topic 3, B, the Second Circuit did not rely on the "effective vindication" exception, but it expressed concern that individualized arbitration was inconsistent with the "representational nature of Section 505(a)(2), (29 U.S.C. Section 1132(a)(2)) right of action." 990 F.3d at 184. Future Second Circuit Panels may find it difficult to reject the application of the exception.

Because many of the cases are 2-1 decisions, and large amounts of damage are alleged to be caused by violations of the breach of fiduciary duties, these factors may cause further careful parsing of the language of plan arbitration agreements and ERISA.

Seyfarth Shaw, a management labor law firm annually reports on workplace class action litigation. The 2021 report shows record class action settlements during the year. They were $3.62 billion in 2021, compared with $1.58 billion in 2020, and $134 billion in 2019. One of the reasons cited by the firm was that "both ERISA and wage and hour settlements more than doubled in 2021." The top ten ERISA settlements totaled $839.3 million in 2021, a huge increase over 2020's total of $380.1 million.

ERISA litigation is big business, and employers and plans will continue to push these cases to arbitration.

Seyfarth predicts that 2022 will bring more ERISA preemption challenges as well as challenges to mortality assumptions built into retirement plans. Several of the latter

cases have been filed but no court has reached the merits on any of them.

Question: Is there now a circuit split between the Seventh and Ninth Circuits, and possibly the Second?

Topic 4

Various Waivers in Employment Arbitration.

Topic 1, C discussed the issue of waiver by litigating and whether prejudice needs to be shown, currently pending before the Supreme Court in *Morgan v. Sundance, Inc*. The Circuit Courts of Appeals have continued to deal with waiver issues in employment arbitration in 2021.

A. *Romero v. Watkins & Shepard Trucking, Inc*., 9 F.4th. 1097 (9th Cir. 2021), considered whether a truck driver, properly found to be engaged in interstate, could by contract waive the FAA's exemption of the driver's class of employees.

Romero was an intrastate driver who delivered furniture and carpets to retail stores in California, which often originated outside the state. Watkins and its parent, Schneider National Carriers, operated an interstate trucking business.

After being employed by Watkins from 1997 to 2019, on April 19, 2019, Romero agreed to the Schneider Mediation and Arbitration Policy (Policy) which required that "all employment-related disputes" be arbitrated on an individual basis, waiving any right to bring or participate in a class action. Under the

"Governing Law" section of the Policy, it says it is "expressly subject to and governed by" the FAA. The Policy also purports to "waive the application or enforcement of any provision of the FAA which would otherwise exclude [the Policy] from its coverage." (9 F.4th. at 1099.)

In August 2019, Watkins announced it would close its operations and that Romero, among other employees, would be laid off. He was terminated on August 23, 2019.

In September 2019, Romero filed a putative class action against Watkins in the San Bernardino Superior Court, asserting claims under the California WARN Act, Cal. Labor Code Section 1401, and the Federal WARN Act, 29 U.S.C. Section 2102 *et. seq.*, which requires advance notice to be given to employees before being laid off. He sought to represent both a California and a nationwide class of similarly situated ex-Watkins employees who were terminated in August 2019. Watkins removed the case to federal court and then moved to compel arbitration of Romero's claims. The district court granted the motion. Among other things, it determined that the FAA did not apply to the Policy because the statute exempts workers who are engaged in interstate commerce, a provision that cannot be waived by the terms of a private agreement. Romero appealed.

In dealing with Watkins' argument that the FAA applied, but that the parties agreed to waive "the application or enforcement

of any provision of the FAA which would otherwise exclude the [Policy] from its coverage," the Court opined:

> However, § 1 of the FAA exempts from the Acts' coverage all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118-19 (2001). The district court concluded that Romero, a truck driver who did not himself cross state lines but delivered goods that had once crossed state lines, fell within "any other class of workers engaged in interstate commerce," thereby sweeping his contract within the scope of the exemption. The district court is correct. (9 F.4th. at 1100).
>
> ... Because the parties have chosen to forgo the § 1 exemption, Watkins argues the FAA should govern. The district court disagreed. It held that the arbitration Policy's attempted waiver of § 1 is unenforceable. According to the district court, the FAA affords courts the power to enforce arbitration agreements, but not when they involve transportation workers engaged in interstate commerce pursuant to § 1. Section 1 acts as a limit on the Court's power and thus, cannot be waived. Again, the district court is correct. (9 F.4th. at 1100).

The Ninth Circuit found support in the Supreme Court's decision in *New Prime, Inc. v. Oliveira*, 586 U.S. ____, 139 S. Ct. 532 (2019).

> The "nothing herein" language indicates that Section 1 retains the very authority of courts to send the parties to arbitration, rather than serving as a waivable right. Indeed, *New Prime* consistently describes Section 1 as providing the contours of judicial "authority" or "power." *New Prime* defines "a court's authority under the [FAA] to compel arbitration" as "considerable" but not "unconditional." *Id.* at 537. It "doesn't extend to all private contracts, no matter how emphatically they may express a preference for arbitration," because

> "antecedent statutory provisions limit the scope of the court's powers to order arbitration." *Id.* Section 1 is one of those provisions. When it is applicable, it prohibits a court from staying litigation and ordering the parties to arbitration. *Id.* In line with that reasoning, *New Prime* directs courts to decide for themselves whether the exemption applies. *Id.* "After all, to invoke its statutory powers ... a court must first know whether the contract itself falls within or beyond the boundaries of" Section 1. *Id.* A private agreement cannot change this. In fact, a "private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the act authorizes a court to stay litigation and send the parties to an arbitral forum." *Id.* at 537-38.

The Ninth Circuit concluded:

> For the foregoing reasons, the district court correctly concluded that the FAA is not the controlling law. Nevertheless, for the reasons stated in the Memorandum Disposition filed concurrently with this opinion, the district court correctly granted Watkins' motion to compel arbitration. (9 F.4th at 1101.)

Some things cannot be waived by the parties.

B. In *Beckley Oncology Associates* [BOA] *v. Abumasmah* [Dr. A], 993 F.3d 261 (4th Cir. April 8, 2021), the Court considered the finality of an arbitrator's decision where the Employment Agreement (EA) provided for broad arbitration, that the arbitrator's decision "shall be final, and conclusive, and enforceable in any court of competent jurisdiction <u>without any right of judicial review or appeal</u>." (Emphasis added by the Court).

Dr. A worked for BOA from 2012 until June 25, 2015. He earned a base salary of $275,000 per year. He was also paid an

incentive bonus compensation after the first year based on gross receipts. Dr. A timely received his first two bonuses of $141,000 and $242,000. When BOA terminated Dr. A, on his last day they presented him with a severance agreement that specified he would receive a bonus of $72,994 paid in June of 2015. Dr. A did not agree to the bonus and several other provisions of the Severance Agreement. Dr. A generated more revenue in each successive year, bringing in $7.1 million from 2014 to 2015.

Dr. A filed for arbitration claiming a $328,070.57 incentive bonus should have been paid. The arbitrator ruled that Dr. A was entitled to a bonus, but not on the same basis as the first two years. After additional briefing, the arbitrator awarded a bonus of $167,030, taking Dr. A's compensation for the year to $442,030(base pay $275,000, plus a bonus of $167,030).

BOA filed a complaint to vacate the award. The district court granted Dr. A's motion to dismiss and confirmed the award.

The Court explained the lower court's reasoning and then went on to decide the issue of first impression in the Fourth Circuit:

> The [district] court held that the clause prohibiting judicial review of the arbitration award was unenforceable under the Federal Arbitration Act ("FAA") because enforcing such clauses would upset the balance between the FAA's mechanisms for enforcing arbitration awards and permitting courts to substantively review the arbitral process and associated awards. *Id.* at 264. But the Court ultimately upheld the arbitrator's award because "[n]othing in the Arbitrator's rulings suggest[ed] that he refused to heed a clearly defined legal

> principle or deliberately disregarded the contract language." *Id.* at 264.
>
> While BOA raises several challenges to the arbitrator's award, the threshold issue is whether it validly waived "any right of ... appeal" following the district court's confirmation of the award. J. A. 31. The validity of an appellant waiver in an arbitration agreement under the FAA is a matter of first impression in this Circuit. But the Tenth Circuit has evaluated such a waiver and deemed it enforceable. See, *MACTEC, Inc. v. Gorelick*, 427 F. 3d 821, 830 (10th Cir. 2005). We agree with our sister circuit. (993 F.3d at 264.)

The Court went on to point out that parties may waive the right to appeal decisions involving statutory and even constitutional rights.

> "If defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute." *United States v. Clark*, 865 F. 2d. 1433, 1437 (4th Cir. 1989).
>
> A party's right to seek appellate review of a district court's confirmation of an arbitration award is wholly a creature of statute. See, 9 U.S.C. Section 16(a)(1)(D), ("an appeal may be taken from ... an order ... confirming or denying confirmation of an award"). (993 F.3d at 265.)

In its conclusion, the Court held BOA to its promise in the Policy that it waived its right to appeal.

> Indeed, we think enforcing the waiver in this context furthers the FAA's policy objective. As another panel of this Court recently lamented, "[t]his genre of almost reflexive appeal of arbitration awards seems to be an increasingly common course, leading to arbitration no longer being treated as an alternative to litigation, but as its precursor." *Tecnocap, LLC v. United Steel Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service*

> *Workers International Union, AFL-CIO/CLC, Local Union No. 152M*, No. 19-1263, 2021 WL 164677 at 4 (4th Cir. January 19, 2021) (unpublished) (per curiam).
>
> The reflexive appeal of an arbitration award is all the more lamentable when the parties have expressly waived that right. Finding no cause here to reject the parties' agreement, we dismiss the appeal. (993 F.3d at 266-267.)

Based on the reasoning of the district court, and holdings in other cases, it would seem that waiver of rights contained in Sections 9, 10, and 11, which permit district courts to confirm, vacate, or correct Arbitration awards would have to be non-waivable to preserve the ability to have basic due process to review awards. Arbitration awards are not self-enforcing. The right to waive appeal beyond the district court faces no statutory conflict with the FAA.

For an extreme example of waiver by litigation, see *International Energy Ventures Management [IEVM] v. United Energy Group*, 999 F.3d 257 (5th Cir. 2021), where a seven-year-old case that had bounced back and forth between three courts and two arbitrations, and IEVM was held to have waived its right to compel arbitration.

C. In another non-employment case the Oklahoma Supreme Court decided a case of first impression where the lower courts held defendants' failure to plead arbitration under the parties' agreement as an affirmative defense waived the defendants' rights to compel arbitration.

The case is *Howell's Well Service, Inc. v. Focus Group Advisors* [FGA], 2021 OK. 25, ____ P. 3rd. ____, (May 5, 2021). (The Court's opinion was published with numbered paragraphs and will be cited by paragraph numbers rather than page numbers, e.g., para. 7.)

The Court opened its opinion saying:

> We granted Certiorari to address this first impression issue of whether the right to compel arbitration is waived when it is not raised as an affirmative defense in a responsive pleading. As discussed further herein, we hold it is not. Additionally, because we did not deem the failure to raise the arbitration defense in their answer fatal to the motion to compel, we must also address whether other factors exist which would constitute a waiver of the right. After balancing the facts in this matter as a whole, we find no waiver. Para. 1.

The Court related the background of the case. Plaintiffs/Appellees (P's) were investors and Defendant FGA was an investment advisory firm. Two of its members, Nettles and Vise, were also sued. (The firm and its members will be referred to collectively as FGA).

P's sued FGA on May 2, 2013, but waited more than seven months before issuing a summons. FGA filed an Entry of Appearance and Answer on February 12, 2015. FGA did not mention the arbitration agreement in its Answer. Over the next seventeen months "very little activity occurred in the case" until FGA filed a motion to compel arbitration. P's requested a Scheduling Conference which was set. The Settlement Conference

was later canceled, and the case was stayed pending a mediation in the Michigan case that P's also participated in. P's claims were not resolved. (See, paras. 2, 3, and 4). None of the interim "minimal case activity" was initiated by or involved FGA.

The case sat dormant for two more years until P's filed a Request for Status Conference. At the conference, the trial court set a briefing schedule for the motion to compel. After hearings, the trial court denied the motion holding that FGA waived the right to seek arbitration by not raising it as an affirmative defense in the Answer. The trial court also held that the late assertion of the right would be prejudice to P's. (See, para. 4).

FGA appealed and the Court of Civil Appeals (COCA), and Division III affirmed. COCA relied solely on the affirmative Defense Rule, 12 O.S. Supp. 2014, Section 2008 (C). (See, para. 5).

The Supreme Court had to first resolve a possible conflict between the state pleading rules (specifically, 12 O.S. Supp. 2014, Section 2008(C) and the Oklahoma Uniform Arbitration Act (OUAA) 12 O.S. 2011, Sections 1851-1881.

The Court stressed the strong public policy in Oklahoma favoring arbitration of disputes. It further observed:

> Over the years, we have recognized that arbitration agreements are designed to preclude court intervention into the merits of disputes when arbitration has been

> provided for contractually and any doubts concerning the arbitrability of a particular dispute should be resolved in favor of coverage. Although a party may waive its contractual right to compel arbitration, such waiver "is not easily inferred" and the party asserting waiver has a heavy burden of proof to overcome the strong presumption in favor of arbitration. (Para. 8, citations omitted).

FGA specifically argued:

> (1) Section 1856(A) of the OUAA requires the right to compel arbitration to be raised by motion, and COCA erroneously relied upon 12 O.S. 2011, at Section 2008, to find waiver; and (2) Plaintiffs/Appellees failed to meet their burden of proving Defendants/Appellants' actions in the underlying litigation weigh in favor of waiver. (Para. 9).

The Court pointed out there is no requirement under OUAA that arbitration be raised in a responsive pleading. And OUAA in Section 1856(A) states, an application for judicial relief "must be made by application and motion to the court and heard in the manner provided by law or rule for making and hearing motions."

While COCA had found the listed affirmative defense of "arbitration and award" determinative, the Supreme Court cited federal and state cases, and Wright & Miller, *Federal Practice and Procedure,* Section 1270 at 562, that the words "arbitration and award" that appear in Federal Rule 8(c)(1) apply only if "the dispute has already been resolved by an arbitration and award."

The Court said, "Any other interpretation would contradict both the OUAA, which specifically provides for arbitration rights to be raised by motion (without mention of responsive pleadings), as well as Oklahoma's strong public policy favoring arbitration of disputes." (Para. 13).

Having held that a right to arbitrate is not an affirmative defense that needs to be pled, the Court went on to consider whether FGA's participation in the litigation was sufficient to constitute a waiver that prejudiced P's. Basically, the Court noted that very little of the time expended was on issues involving FGA. Also, very few of the hundreds of pages in the Court file had anything to do with FGA. The file was thickened by P's and other Defendants that had no arbitration agreements.

Regarding prejudice, the Court stated:

> While it is true Defendants/Appellants could have raised their right to compel arbitration in a more timely manner, Plaintiffs/Appellees have failed to prove that this delay caused them any harm as required by the *Northland* test. Although it is not a practice we would encourage, many courts have found that the mere passage of time without a showing of resulting prejudice does not amount to a waiver of arbitration rights under applicable law. (Para. 19).

The analysis of the Oklahoma Supreme Court will likely be followed in future Oklahoma cases, including employment arbitration cases.

Topic 5

<u>California v. Arbitration</u>

Is the State of California at war with arbitration? Many California statutes have been found preempted by the FAA. A. One Ninth Circuit Judge, in her dissent, said this to describe the state's antipathy to arbitration:

> Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA. This time, California has enacted AB-51 which has a disproportionate impact on arbitration agreements by making it a crime for employers to require arbitration provisions in employment contracts. Cal. Lab. Code §§ 432.6(a) -(c), 433; Cal. Gov't Code § 12953. (See, *Chamber of Commerce v. Bonta*, 13 F.3d at 782, Judge Ikuta dissenting.

Assembly Bill 51 (AB-51) was passed in 2019 and signed by Governor Gavin Newsom on October 10, 2019. AB-51 codified a new provision in the California Labor Code, Section 432.6. The new law was slated to take effect on January 1, 2020. The Chamber of Commerce and a coalition of business organizations sued to block enforcement on the grounds that AB-51 was preempted by the FAA.

Under AB-51 a "person" could not, as a condition of employment, require any applicant or employee "to waive any right, forum, or procedure" for any violation of the California Fair Employment and Housing Act (CFEHA), or the Labor Code, and an "employer" could not "threaten, retaliate or discriminate, or terminate" any applicant or employee for a "refusal to consent

to the waiver of any right, forum, or procedure for a violation of the CFEHA or this Code (the Labor Code)."

On the eve of the effective date of January 1, 2020, the district court issued a TRO. On February 6, 2020, the district court granted a Preliminary Injunction reported at 438 F. Supp. 3d 1078 (E. D. Cal. 2020).

The trial court took judicial notice of the published legislative history of AB-51. That history revealed the legislators' concerns with waivers, arbitration agreements, and frustrations with Governor Brown's previous vetoes of the three Acts having similar purposes. The legislative analysis recognized that given the Supreme Court's decision on FAA preemption "there is little doubt that, if enacted, [AB-51] would be challenged in court and there is some chance ... that it would be found preempted."

The grant of the Preliminary Injunction was appealed to the Ninth Circuit. On September 15, 2021, the Ninth Circuit issued its opinion in *Chamber of Commerce v. Bonta*, 13 F4th 766 (9th Cir. 2021).

The district court in granting the Preliminary Injunction found that AB-51 was preempted by the FAA because it put arbitration agreements on an "unequal footing with the other contracts." It had the impact of disfavoring arbitration contracts. It also found that the civil and criminal sanctions violated the FAA.

The majority of the Ninth Circuit found AB-51 was not preempted because it applies "only in the absence of an agreement to arbitrate" (13 F.4th at). The majority held there was no existing precedent that "preempted a rule that regulated pre-agreement behavior." But the majority found the civil and criminal penalties were in direct conflict with Section 2 of the FAA. "A state law that incarcerates an employer for six months for entering into an arbitration agreement 'directly conflicts with § 2 of the FAA.'..." (13 F.4th at 781). The Preliminary Injunction was vacated.

The dissent argued that AB-51 should be completely preempted. Judge Ikuta noted as one perverse effect of the majority decision that "This holding means that an employer's attempt to enter into an arbitration agreement with employees is unlawful, but a completed attempt is lawful." (13 F.4th at 791).

This case marks another 2-1 circuit court split decision in an employment arbitration case. It is unlikely that this is the end of the AB-51 story.

A motion for rehearing or rehearing *en banc* for a petition for review in the Supreme Court could still be in the works. As argued in the dissent, there is now a circuit split between the Ninth Circuit and the First and Fourth Circuits.

B. In 2017 the California Supreme Court decided *McGill v. Citibank NA*, 2 Cal.5th 945, 393 P.3d 85 (2007) and held that any

arbitration clause that bars a plaintiff from seeking "public injunctive relief" in any forum is unenforceable.

The *McGill* court defined "public injunctive relief”:

> public injunctive relief ... is relief that has "the primary purpose and effect" of prohibiting unlawful acts that threaten future injury to the general public ... [r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff -- or to a group of individuals similarly situated to the plaintiff -- does not constitute public injunctive relief. 393 P.3d at 90.

In 2019, the Ninth Circuit held that the FAA did not preempt the so-called "*McGill Rule*" that had gained wide acceptance in California class actions, and individual claims. (Blair v. Rent-A-Center, Inc., 928 F.3d 819, 822)(9th Cir. 2019).

In 2020, the Supreme Court denied a petition for review.

In 2021, the Ninth Circuit, in two cases, clarified its view of what constitutes "public injunctive relief" and whether the *McGill Rule* applies if a plaintiff does not seek such relief. *Hodges v. Comcast Cable Communications, LLC*, (Hodges) (12 F.4th. 1108, 9th Cir. September 10, 2021) and *Cottrell v. AT&T, Inc*., (Cottrell) (Case No. 20-16162, Lexis 32093, 9th Cir. October 26, 2021).

In *Hodges*, yet another 2-1 decision, the majority ruled the district court erred in considering that the remedy sought involved public injunctive relief. The putative class action challenged Comcast's privacy and data collection practices. It

sought a variety of monetary and equitable remedies, including statewide public injunctive relief. Comcast moved to compel arbitration based on its subscriber agreements with customers which waived class actions and class relief. The district court denied the motion because the plaintiff class requested public injunctive relief.

The majority reversed. As to what constitutes non-waivable public injunctive relief, the majority opined:

> Accordingly, we affirm that non-waivable "public injunctive relief" within the meaning of *McGill* is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole, as opposed to a particular class of persons, and that do so without the need to consider the individual claims of any non-party. (12 F.4th at 1120.)

The majority further explained that the *McGill* case provided a "paradigmatic example" of such relief, an injunction banning the use of false advertising to promote a credit protection plan.

The court contrasted "public" and "private injunctive relief." The latter would be relief being sought "for the benefit of a discreet class of persons ..."

The *Hodges* court held the relief sought was not "public." The requested forms of relief, including forward-looking prohibitions of future violations of law, was held to only be a benefit to Comcast subscribers, not the general public. For the

violations to occur, the beneficiary would need to be or become a subscriber.

Plaintiff argued, relying on two recent California state cases that any request for an injunction that protects any California consumers from violations of the consumer protection laws, was seeking public relief. The court stated that any such rule was "inherently incompatible" with the streamlined procedures the FAA seeks to protect. Such rules, if enforced, would be preempted by the FAA. The Court held the arbitration agreement should have been enforced and reversed the district court's denial of Comcast's motion to compel.

Judge Berzon starts her nine-page dissent with this statement:

> The majority concludes, contrary to our precedent and to recent decisions of the California Court of Appeals, that a forward-looking injunction protecting the privacy rights of millions of cable consumers is not "public injunctive relief" under California state law. I disagree. (12 F.4th at 1122).

She would have affirmed the district court's denial of the motion to compel.

In late October, the plaintiff filed a petition for rehearing *en banc*. In early November, several consumer groups filed amicus briefs.

On October 26, 2021, the Ninth Circuit issued its opinion in *Cottrell*, supra. The district court had denied AT&T's motion to compel and found that plaintiff had requested public

injunctive relief. In the alternative, it held a consumer need not actually pursue public injunctive relief to invoke the *McGill Rule*.

The Ninth Circuit reversed both holdings finding the requested relief primarily for customers, "suffered from the same flaw" as that in *Hodges*.

In *Cottrell,* the opinion was marked "NOT FOR PUBLICATION".

C. In response to class action waivers being made enforceable under the FAA, plaintiffs' lawyers developed a "mass arbitration" strategy. Using this strategy, the plaintiffs' lawyers filed hundreds or thousands of individual arbitrations against a single company. The company is then forced to pay filing fees to the arbitration services provider named in the arbitration agreement. These filing fees can amount to very significant sums, (hundreds of thousands of dollars, and even over $1 million).

If the arbitration administrator is JAMS, it charges an initial filing fee of $1,500 for consumer claims and $1,350 for employee claims (such as FLSA claims). If the average recovery for a particular FLSA violation might be $1,000 and 100 arbitration claims were filed at the same time, the filing fees alone could exceed the recoverable damages in the case (100 X 1,000 = $100,000 in claims; 100 X $1,350 = $135,000 in filing fees). In consumer cases assuming average claims that might be worth $50 each, if 1,000 plaintiffs are recruited the filing fee

expense is even more extreme ($50 X $1,000 = $50,000 in claims, 1,000 X $1,500 = $1,500,000 in filing fees). This amounts to a 30-1 ratio of filing fees exposure to claims). Courts have been generally unsympathetic to defendants who have attempted to end mass arbitrations. Some judges regard this as "poetic justice" according to one law firm's blog.

The "mass arbitration" tactic has resulted in plaintiffs having early leverage to press for settlements for all class members, whether their claims are valid or frivolous. Some companies have tried to develop strategies with their providers to lessen the costs or delay paying filing fees.

Once again, the California Assembly has waded into the fray. The California legislature has added new sections to the arbitration statute to address the failure of "drafting parties" to pay the fees required (expressly or by state or federal law) for an arbitration to proceed. If, within 30 days after their due date, a drafting party fails to pay fees required for the arbitration to proceed it is in material breach of the arbitration agreement and has waived its right to compel arbitration. The other party gets to proceed in court or have the drafting party compelled to arbitration and obliged to pay the other party's attorney fees and costs for the arbitration. CCP §1281.97 There are

additional mandatory and discretionary sanctions against the drafting party in material breach. CCP §1281.99

Of particular interest to arbitrators is CCP §1281.98, which provides that the drafting party is in material breach if, during the pendency of the arbitration, it fails to pay "fees or costs required to continue the arbitration proceeding…" That includes arbitrator fees billed by the administering agency. The remedies include the other party's right to petition a court to compel payment of the fees and to receive attorney's fees for the motion. In addition, the arbitrator "shall impose appropriate sanctions on the drafting party," including "monetary," "issue," "evidence," or "terminating sanctions." In at least one case, in a tentative order the court ordered the drafting party to pay the arbitrator's retainer and awarded attorney fees.

What will California think of next to slant the playing field to be more in favor of claimants?

Topic 6

Litigation and the Future of Employment Arbitration.

Candidate Joe Biden pledged to be "the strongest labor President you have ever had." The Protecting the Right to Organize Act (PRO Act) was a cornerstone of his election platform.

In 2021, the PRO Act was reintroduced in this session of Congress. In 2020, it was passed in the House of Representatives but never was voted on by the Senate. If passed, the PRO Act would overrule the Supreme Court's decision in *Epic Systems, Corps. v. Lewis*, 484 U.S. ____, 138, S. Ct. 612 (2018), and provide a widespread overhaul of the NLRA for the first time in over seventy years. As it relates to arbitration, it would prohibit employers from using mandatory arbitration agreements with employees.

Another bill previously passed by the House, the Forced Arbitration Injustice Repeal Act (FAIR Act), was reintroduced on February 11, 2021. The proposed Act would ban mandatory, pre-dispute arbitration agreements in cases of employment, consumer, antitrust, and civil rights disputes.

On November 19, 2021, the House passed the Build Back Better Act (H.R. 5376), an ambitious climate protection/social spending bill. Inside this massive bill were provisions that would have prohibited employers from adopting class and collective action waivers in employment arbitration disputes. The bill would amend the NLRA and provide that it is an unfair labor practice for a covered employer to require employees to agree not to engage in collective or class action suits or to join such litigation.

On December 11, 2021, the Senate Committee on Health, Education, Labor, and Pensions released its version of the bill

on provisions within the Committee's jurisdiction. Notably, the updated bill does not contain the provision on class or collective waivers. The updated bill still includes significant penalties for unfair labor practices and FLSA. Negotiations are ongoing in the Senate. Further changes are likely before the Build Back Better Act comes up for a final vote.

Another bill, "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," (S. 2342), co-sponsored by Senators Gillibrand (D-NY) and Lindsey Graham (R-SC), with ten other Democrats and seven other Republicans. S. 2342 was approved by voice vote after being approved by a bipartisan majority, 335-97, in the House of Representatives (H.R. 4445), which was sponsored by fourteen Democrats and five Republicans. The bill bans forced arbitration in cases involving sexual misconduct and allows victims the option of bringing up the dispute in federal, tribal or state court. At the time of this writing, the bill was heading to President Biden for his signature, and the White House had expressed full support for the measure.

Topic 7

Miscellaneous Employment Arbitration Issues.

A. In *Walsh v. Arizona Logistics, Inc.*, 998 F. 3d 993 (9th Cir. 2021), the court held the Secretary of Labor was not bound by arbitration agreements between the company and the employee for which the Secretary was seeking monetary relief. The court

relied on the U.S. Supreme Court holding in *EEOC v. Waffle House*, 543 U.S. 279 (2002), that the EEOC could not be compelled to arbitrate anti-discrimination claims the Agency pursued on behalf of employees who had signed arbitration agreements.

The Ninth Circuit held the DOL was not a party to any arbitration agreement and that the DOL acted in the public interest even if it was only seeking monetary relief for employees who signed arbitration agreements. The Court also held the Secretary and the employees were not in privity with one another.

B. In *Ahlstrom v. DHI Mortgage Company, Ltd., L. P.* (DHI), ____ F. 4th ____, Case No. 20-15114 (9th Cir. December 29, 2021), the court held the plaintiff did not sign an employment agreement with DHI, but rather with the parent company D. H. Horton, Inc. The court ruled that it had jurisdiction to rule on the contract formation issue. It held that his employer was DHI and that he had no employment with D. H. Horton despite the fact the arbitration agreement recited that plaintiff was a D. H. Horton employee. The court distinguished between the parent and the subsidiary as separate legal entities. It said:

> Put simply, the MA (Mutual Arbitration), as drafted, describes and governs a relationship between Ahlstrom and D. H. Horton that does not exist, and thus does not constitute a properly formed agreement to arbitrate. (Slip opinion at 11.)

The court reversed the trial court order compelling arbitration and remanded for further proceedings.

C. *In Reeves v. Enterprise Products Partners, L. P.*, ____ F. 4th ____, Case No. 20-5020 (10th Cir. November 9, 2021), the court held that the two plaintiffs were hired by two separate staffing agencies and signed arbitration agreements with their respective staffing agencies. In their complaint, they alleged they performed services for Enterprise and that Enterprise paid them a flat daily rate in violation of the overtime provisions of the FLSA.

The district court denied the motion to compel based on the fact that Enterprise was a non-signatory to either arbitration agreement, and that the Oklahoma equitable estoppel law did not require a different result.

The Tenth Circuit disagreed. It held that where the complaint raises allegations of "substantially interdependent and concerted misconduct by both the non-signatory and the signatory to the contract that equitable estoppel allows a non-signatory to enforce an arbitration agreement."

In this case, the Oklahoma Supreme Court had not addressed the equitable estoppel issue in an arbitration case. This left the Court of Appeals determining what the state Supreme Court would do if it had faced that issue. Based on two state Court of Appeals' decisions, the Tenth Circuit ruled the Supreme Court of Oklahoma would apply equitable estoppel to compel arbitration

in the pending action. The Court reversed the district court's denial of the motion to compel.

D. In *Sanfilippo v. Match Group, LLC*, ____ F. 4th ____, Case No. 20-55819, 2021 U.S. App. Lexis 29263 (9th Cir. September 28, 2021) (A "NOT FOR PUBLICATION" Memorandum Opinion). Plaintiff worked for Tinder. She complained to Human Resources about sexual harassment by her coworkers and supervisors around mid-July 2017. Tinder merged into Match Group on July 13, 2017. Match Group sent its employees a mandatory mediation agreement which the plaintiff signed. She complained again in January 2018, and she was discharged in March 2018.

Plaintiff sued in California state court for sexual harassment and retaliation. Match Group removed to federal court and moved to compel. Plaintiff argued that the agreement was unconscionable and did not cover her claim that pre-dated the arbitration agreement. The district court denied the motion to compel. (Slip opinion 4.)

The arbitration agreement provided that, "all claims and controversies arising from or in connection with [the plaintiff's] application with, employment with, or termination from the company" were subject to arbitration. The Ninth Circuit had no hesitancy in deciding the before/after issue. It held the reference to "all claims and controversies" necessarily included the claims that pre-dated the agreement. (Slip opinion 6.)

Regarding unconscionability, plaintiff argued the portion of the agreement that allowed Match Group to modify the agreement unilaterally made the agreement unconscionable and unenforceable. The Court ruled that while the provision would be substantively unconscionable, Match Group had not amended the agreement, but was seeking to enforce the agreement as written. Moreover, assuming the provision was substantively unconscionable, it did not make the entire agreement unenforceable. (Slip opinion 5.)

The Court reversed the denial of the motion to compel. E. In a state court case, the court held the Employee Guide that gave an employer the "unfettered right" to unilaterally modify the arbitration provision at any time made the promise to arbitrate "illusory," and thus unenforceable. *Harris v. Volt Management Corp*., 625 S.W. 3d 468, (Mo. Ct. App. E. D., May 18, 2021).

The court's opinion is explained in the following excerpts from the opinion:

> The Missouri courts have recognized that "limiting an employer's unilateral right to amend an arbitration agreement to amendments that [(1)] are prospective in an application and [(2)] about which employees have been afforded reasonable advance notice may prevent an employer's mutual promise from being rendered illusory." *Patrick v. Altria Grp. Distribution, Co*., 570 S.W. 3d 138, 144 (Mo. App. 2019).
>
> *In Bristol Care, Inc*., (quoting *Baker)* the Supreme Court of Missouri expressly recognized that a promise to arbitrate "is illusory when one party retains the unilateral right to amend the agreement and avoid its

obligations." 450 S.W. 3d 770, 776 (Mo. Banc 2014). An illusory promise does not make valid consideration. *Id.* In this case, Appellants explicitly stated that the information in the Employee Guide "reflects current policies, procedures, practices, and benefits." (Emphasis added.) They then reserved the unilateral right to "change, interpret or cancel any of its rules, policies, benefits, procedures or practices at [their] discretion, upon reasonable notice where practicable" -- including the arbitration agreement and delegation provision. (Emphasis added.) This reservation renders "Appellants' promises illusory and fails to bind them to either the delegation provision or arbitration agreement located within the Employee Guide. Therefore, the circuit court did not err in denying the motion to compel because both the delegation provision and the arbitration agreement lack consideration.(Slip opinion 10.)

In their own words, Appellants explicitly retain an unfettered right to unilaterally modify any and all parts of their Employee Guide at any time and without notice, including the arbitration agreement and the delegation provision that they seek to enforce. Appellants reiterate that they retained this unilateral right throughout the Employee Guide, including on the very Acknowledgement page that they asked Respondent to sign. At any moment, Appellants could decide that they want to change the rules or even eliminate the delegation provision or the arbitration agreement entirely. ... However, when one party "retains unilateral authority to amend the agreement retroactively, its promise to arbitrate is illusory and is not consideration." *Baker*, 450 S.W. 3d at 77677; accord *Esser*, 567 S.W. 3d at 652. By retaining their unilateral right to modify the delegation provision at any time and without notice, Appellants' purported promise to Respondent is "fatally illusory." *Morrow v. Hallmark Cards, Inc.*, 273 S.W. 3d 15, 30 (Mo. App. W. D. 2008) (Ahuja, J. concurring). The same rationale applies to the arbitration agreement in the Employee Guide more broadly.(Slip opinion 10-11.)

In sum, Appellants retain the unilateral right to modify any and all parts of the Employee Guide without

> notice and at any time, which includes both the agreement to delegate and the agreement to arbitrate. This makes Appellants' promises illusory, such that they are not bound by them. Such illusory promises provide no valid consideration. See, *Baker*, 450 S.W. 3d at 776.(Slip opinion 14.)
>
> The court affirmed the judgment of the circuit court.

F. In a case involving a securities law arbitration, the Eighth Circuit ruled on several issues touched on elsewhere in this report. See, *Donelson v. Ameriprise Financial Services*, 999 F.3d 1080 (8th Cir. 2021).

Donelson signed an Account Application that incorporated by reference an arbitration agreement. The arbitration clause was contained in the Client Agreement and provided in large capital letters that arbitration would include: "ALL CONTROVERSIES THAT MAY ARISE BETWEEN US ..., WHETHER ARISING BEFORE, ON OR AFTER THE DATE THIS ACCOUNT IS OPENED," except for "PUTATIVE OR CERTIFIED CLASS ACTION[S]." (See, 999 F.3d at 1086.)

After Donelson signed the Account Application, financial advisor Sachse badly mishandled Donelson's investment account by, among other things, misrepresenting the account value, trading on margin when expressly instructed not to, and misrepresenting reparations Ameriprise would make for problems with Donelson's account. In response, Donelson filed suit against the defendants, bringing three counts against them. (See, 944 F.3d at 1086.)

Count 1 alleged violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78j(B). Count 2 alleged violations of Section 20 of the same Act, 15 U.S.C. Section 78t(a). Count 3 alleged a breach of fiduciary duties under Section 206 of the Investment Advisors Act, 15 U.S.C. Section 806-6. In this count, Donelson and other clients of broker Sachse claimed they suffered similar improprieties, and Donelson sought to represent them in a class action.

Defendants responded by filing simultaneous motions to compel arbitration and to strike the class action allegations. The district court denied the motions and the defendants appealed.

The Eighth Circuit ruled it had to decide four issues: jurisdiction, whether defendants waived the right to arbitrate, whether an arbitrator should have decided the issue of arbitrability, and whether a valid arbitration agreement exists and encompasses the dispute between the parties.

Regarding the denial of the motions to compel, and to strike the class action allegations, the court dealt with the motion to compel first.

The district court denied the motion to compel because it found the absence of a mutual agreement to arbitrate and the absence of consideration, either of which would make the arbitration clause invalid.

There was mutuality because:

> Though Sachse did not provide Donelson with a copy of the Client Agreement which contained the arbitration clause, Donelson still agreed to the arbitration clause because he was presented with and signed the Account Application, which expressly incorporated the arbitration clause in the Client Agreement. (999 F.3d at 1090.)

There was consideration because as long as some consideration flows from each side to the other, the contract is valid. The Court held:

> The arbitration clause was supported by consideration because Ameriprise provided a Client Account to Donelson....But if two considerations are given for a promise, one ... legally sufficient ... and the other not ..., the promise is enforceable." *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. 2014). (999 F.3d at 1090.)
>
> Relying on *Baker*, Donelson argued that the arbitration agreement lacks consideration because Ameriprise retained the unfettered right to amend the Client Agreement containing the arbitration clause.... But *Baker* is inapposite here because the source of consideration supporting the arbitration clause is not illusory and because Ameriprise does not have the unilateral right to amend the Client Agreement.... Though this provision permits modification of the Client Agreement, it also specifies that "use of your account ... shall constitute your acknowledgment and agreement to be bound thereby." Thus, the amendment provision presupposes that an account will still be provided, which constitutes consideration. ... In addition, unlike in *Baker*, Ameriprise does not have the right to unilaterally change the Client Agreement. See, *id.* at 773. Rather, any change requires "acknowledgment and agreement" by Donelson in the form of "use of [his] account." (999 F.3d at 1090-1091.)

The arbitration clause was held to not be unconscionable because:

Unconscionability is defined as an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an explanation of the inequality of it." *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. 2015) (internal quotation marks omitted). The unconscionability doctrine "guards against one-sided contracts, oppression, and unfair surprise." *Id.* But the fact that an arbitration provision applies to one party but not the other does not itself render the provision unconscionable. *Id.* at 433-34. Therefore, even assuming that the arbitration provision applied only to Donelson, it would not be unconscionable.... Because the arbitration clause was supported by mutual consent, was supported by consideration, and was not unconscionable, it is valid and enforceable. (999 F. 3d at 1091.)

Because the arbitration clause is valid, we must consider whether it "encompasses the dispute between the parties." ... Thus, whether the arbitration clause encompasses this case turns on whether the class action allegations should be stricken, as Defendants argued they should.... Accordingly, we consider whether the district court abused its discretion when it denied Defendants' motions to strike Donelson's class action allegations. (Citations omitted, 999 F.3d at 1091.)

Federal courts are split as to whether class action allegations may be stricken under Rule 12(f) prior to the filing of a motion for class action certification when certification is a clear impossibility. Some courts permit this. See, *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011)....

We agree with the Sixth Circuit that a district court may grant a motion to strike class action allegations prior to the filing of a motion for class action certification. (999 F.3d at 1092.)

The Court ruled:

We conclude it was an abuse of discretion for the district court to deny the motions to strike the class action allegations. We reached this conclusion because not only was it apparent from the pleadings that Donelson could not certify a class but also the class allegations were all that stood in the way of compelling arbitration. (999 F.3d at 1092.)

The Court reversed the denial of the motions to strike and to compel arbitration and remanded for entry of orders striking the class action allegations and compelling arbitration.

G. In *Boykin v. Family Dollar Stores of Michigan*, 3 F. 4th 832 (6th Cir. 2021), a plaintiff who certified that he "unequivocally did not consent to sign, acknowledge or authorize any type of arbitration agreement" with his employer, created a genuine issue of fact regarding the formation of a contract under the FAA requiring targeted discovery and a trial on the question.

H. The Puerto Rico Supreme Court reinforced Puerto Rico's strong public policy favoring arbitration agreements in *Aponte Valentin v. Pfizer Pharmaceuticals*, CC-2018-748 (November 10, 2021), finding continued employment served as implicit consent for such agreements under Puerto Rican law. (The only opinion found in this case was a 59-page opinion in Spanish. Your reporter *no habla espanol*. This subtopic is reported based on what are thought to be reliable sources.)

In May 2016, Pfizer provided arbitration agreements to its employees by email. Per the agreement, the employees would be subject to mandatory arbitration as a condition of employment and/or continued employment. As to current employees, they were advised that if they continued to work for 60 days after receiving the agreement, their continued employment would be

considered consent to the agreement. The plaintiffs received agreements, and all continued working more than 60-days after receipt.

Later the plaintiffs were dismissed and filed a suit for wrongful termination in violation of PR Act No. 80-1976, Pfizer moved to dismiss and to compel arbitration.

The trial court granted the motion to dismiss despite plaintiffs' claims that they never consented to arbitrate their claims. That court held an arbitration agreement needed to be in writing but that the parties' physical signatures were not required.

The Court of Appeals reversed the lower court's dismissal. Pfizer sought review, which the Supreme Court granted.

The Supreme Court made the following points in its decision: a mandatory arbitration agreement needs to be in writing; by agreeing to arbitrate a statutory claim, a party does not forgo the substantive right afforded by the statute; it only submits to the resolution in an arbitral rather than a judicial forum. But for a few exceptions, the FAA extends to transactions in interstate commerce and as a rule will prevail over conflicting state provisions against arbitration under the Supremacy Clause.

The FAA does not require the execution of a formal arbitration agreement to be valid, and depending on the language in the agreement, the continued employment may provide tacit

consent. Those who continued working after the 60 days provided in the agreement gave the necessary consent and claimants were then estopped from challenging their consent to the agreement. The fact that a mandatory arbitration agreement may be an adhesion contract is insufficient to challenge these findings.

Some states hold that continued employment is not sufficient consideration by itself to support the validity of arbitration agreements. Other states disagree. Parties should determine what state law will govern an arbitration contract and what that state says about continued employment as sufficient consideration.

I. In *ADT, LLC v. Richmond*, ____ F. 4th ____, Case No. 21-10023 (5th Cir. November 10, 2021), the Court took on the issue of who the parties are for purposes of federal jurisdiction in a FAA Section 4 motion to compel arbitration. ADT employee Aviles installed ADT home security systems. It was discovered that Aviles began spying on customers with cameras he set up. Over 200 customers were impacted. After Aviles was fired, Kamala Richmond believed she and her family were victims of the spying. They sued Aviles and ADT in Texas state court seeking over $1 million in damages.

Richmond's contract with ADT contained an arbitration provision. ADT moved to compel arbitration. Jurisdiction was based on diversity of citizenship, Richmond lived in Texas. ADT was a "citizen" of Florida and Delaware.

The district court had to "look-through to the parties' underlying controversy" to decide if it could hear an action "arising from that 'whole controversy.'" (See, *Vaden v. Discover Bank*, 556 U.S. 49 (2009), at 62, and 67-70.)

Based on *Vaden*, the district court looked through ADT's federal action to the Richmonds' Texas court complaint. Aviles was a Texas resident and the district court held his presence in the dispute deprived the court of diversity jurisdiction. (Slip opinion 1)

The Court of Appeals held the district court went an analytical step too far and should have confined its "look-through" to only the parties to the federal action who were diverse in their citizenship. Section 4 of the FAA applies to "a party aggrieved by the failure ... of another to arbitrate under a written agreement for arbitration." The arbitration issue was only between ADT and the Richmonds. They were the only "parties" referred to in Section 4. (Slip opinion 8.)

In his concurring opinion, Judge Haynes took the position that the "Vaden look-through test" did not apply in diversity cases and that courts should just "look at" the parties to the Section 4 proceeding.

A remaining "wrinkle" is what will happen on remand if Aviles is actually an indispensable person in the dispute, and therefore, be "indispensable" to arbitral proceedings to which he never agreed.

Judge Haynes agreed the "indispensable party" determination was an appropriate issue on remand.

J. In a case involving an arbitration agreement contained in an Employment Letter between a lawyer and his client, the Fifth Circuit tackled a question that the Circuit had not definitively decided i.e., the quantum of proof needed to establish that an arbitration agreement exists. *Gallagher v. Vokey*, ____, F. 3d ____, Case No. 20-11000, 2021 WL 2772825 (5th Cir. July 1, 2021).

Gallagher was a former Navy Seal on trial before the U.S. Navy for alleged war crimes committed during his 2017 deployment to Iraq. Gallagher and his wife met with attorney Vokey on October 10, 2018, and alone with Vokey and his associate attorney Riley on October 13, 2018. The case involved a factual dispute between Gallagher and Vokey. Gallagher contends he does not remember seeing or signing the Engagement Letter, and never met with Vokey on the date on the letter, October 11, 2018. Vokey and Riley signed sworn affidavits that Gallagher signed the Engagement Letter on October 13, 2018, and that the October 11 date was a typographical error.

When the relationship between Gallagher and Vokey deteriorated, Gallagher terminated Vokey's representation. Vokey submitted a statement for his services up to the date of termination. Gallagher did not pay. Vokey then sued in Texas state court to compel arbitration.

Gallagher removed the case to federal court and on the same day filed a declaratory judgment action to include declarations that the Engagement Letter was invalid, that he was not obliged to arbitrate, and that he did not owe Vokey any fees.

The district court held that Gallagher raised a factual issue for a trial, referring to the date discrepancy and the "I don't remember" claim. The court denied the motions to stay and to compel arbitration. Vokey appealed.

The Fifth Circuit panel in relevant excerpts below explained its reasoning.

Section 4 of the FAA provides in pertinent part that a court must:

> Hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue ... make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ... If the making of the arbitration agreement ... be an issue, the court shall proceed summarily to the trial thereof. (Slip opinion 5.) The parties do not dispute that Gallagher refused to participate in arbitration; they dispute only whether Gallagher agreed to arbitrate in the first place. The question for us, therefore, is whether the making of an agreement to arbitrate is "in issue". (Slip opinion 4-5.)
>
> Several of our sister Circuits apply the summary judgment standard of Rule 56 -- a party resisting arbitration must produce enough evidence to create a genuine dispute of material fact as to whether the parties agreed to arbitrate. (See, e.g., *Century Indem. Co., v. Certain Underwriters at Lloyd's London*, 584 F. 3d 513, 528 (3rd Cir. 2009); *Aliron Int'l., Inc., v. Cherokee Nation Indus., Inc.*, 531 F. 3d 863, 865 (D.C. Cir. 2008); Magnolia Cap. *Advisors, Inc., v.*

Bear Stearns & Co., 272 F. App'x 782, 785-86 (11th Cir. 2008) (per curiam); *Bensadoun v. Jobe-Riat*, 316 F. 3d 171, 175 (2d Circuit 2003); *Tender v. Pinkerton Sec.*, 305 F. 3d 728, 735 (7th Cir. 2002). (Slip opinion 5.)

This circuit has not articulated precisely what quantum of evidence is necessary to prove or disapprove the existence of an agreement to arbitrate, but we have explained that "[t]he party resisting arbitration bears 'the burden of showing that he is entitled to a jury trial under Section 4 of the Arbitration Act.'" (Slip opinion 5.)

Further, "the party must make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations prove to be true ... [and] he must produce at least some evidence to substantiate his factual allegations." "To put the making of the arbitration agreement 'in issue,'" a party is "required to 'unequivocal[ly] den[y]' that he agreed to arbitrate and produce 'some evidence' supporting his position." Although "some evidence" standard may appear similar to the summary judgment standard predominant in our sister Circuits, we need not -- and do not -- decide whether the 9 U.S.C § 4 standard in this Circuit is congruent with the summary judgment evidentiary standard of Rule 56. It is sufficient that, where competent evidence showing the formation of an agreement to arbitrate has been presented, Section 4 requires a party resisting arbitration to produce some contrary evidence to put the matter "in issue."

Here, Gallagher has presented no such evidence. Although Gallagher insists that the only evidence supporting the formation of a contract is Vokey's "self-serving" declaration, this argument is neither conclusive nor accurate. It is inconclusive because we have held that an uncontroverted affidavit, even when supplied by a party or a party's employee, can establish the existence of an agreement to arbitrate. (See, e.g., *Banks v. Mitsubishi Motors Credit of Am.*, 435 F. 3d 538, 540-41 (5th Cir. 2005). It is inaccurate because, in addition to two sworn declarations from Vokey himself, Vokey also provided a sworn declaration from a disinterested third party and

> a copy of *a signed contract.* (Emphasis in original) (Citations omitted, Slip opinion 5-6.)

The disinterested third party was attorney Riley, who at the time of signing his declaration was no longer an associate of the Vokey firm and was serving as an Officer in the Marine Corps. (See, footnote 2, slip opinion 6.)

> The *Wright* court further noted, "that a party is not required to produce evidence to establish the genuine nature of a signature on an arbitration agreement in the absence of a sworn challenge to the signature." *Id.* at 752. The signed Engagement Letter, combined with Vokey's and Riley's sworn declarations attesting to having personally witnessed Gallagher sign the document, are strong evidence that the contract is genuine. (Slip opinion 7.)
>
> In response, Gallagher has produced no evidence whatsoever. It is axiomatic that "pleadings are not summary judgment evidence." *Wallace v. Tex. Tech Univ.*, 80 F. 3d 1042, 1047 (5th Cir. 1996). Nor is a mere pleading sufficient to resist arbitration. (Slip opinion 7.)
>
> [T]here is an important conceptual difference between "I don't remember" and "I didn't sign it," and the latter – backed by evidence – is what would be required to overcome Vokey's proffer of a signed contract. (Slip opinion 8.)
>
> The uncontroverted evidence proved that the document was genuine and had been signed by Gallagher, so the court erred in failing to credit it as a genuine document. (Slip opinion 9.)
>
> The court concluded:
>
> Vokey provided adequate evidence to establish that he and Gallagher had entered into an enforceable arbitration agreement and that their billing dispute fell within the scope of that agreement. Gallagher produced no evidence to contradict the enforceability of the agreement or put the formation of an agreement "in issue." The district court erred in denying

> Vokey's motion to compel arbitration, so we REVERSE and REMAND.

K. In *Banister v. Marinidence Opco, LLC*, 64 Cal. App. 5th, 541 (November 5, 2021), the court held an employer failed to prove the employee electronically signed an arbitration agreement.

The California Civil Code, Section 1633.9, subdivision (a), governs the authentication of electronic signatures. It provides that an electronic signature may be attributed to a person if "it was the act of the person." Further, [t]he act of the person may 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." (*Id.*) For example, a party may establish that the electronic signature was "the act of the person" by presenting evidence that a unique login and password known only to that person was required 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.

Maureen Banister worked in the administrative offices at a skilled nursing facility for approximately thirty years before Marinidence Opco, LLC (Marinidence) purchased the facility. One year after the purchase, Marinidence terminated Banister.

Thereafter, Banister filed a lawsuit against Marinidence alleging discrimination, retaliation, and defamation. Marinidence filed a motion to compel arbitration, alleging that

when it purchased the facility, Banister electronically signed an arbitration agreement when completing the paperwork for new Marinidence employees. Banister opposed the motion asserting that she never saw or electronically signed the arbitration agreement during the onboarding process and presented evidence to that effect.

The trial court held that Marinidence failed to prove that Banister signed the arbitration agreement and denied its motion to compel arbitration. Marinidence appealed.

On appeal, the Court noted that Marinidence presented evidence that Banister signed the arbitration agreement during the onboarding process, including that the employees had to enter their first and last names and Social Security numbers in order to access the onboarding portal, and had to complete the W-4 tax withholding form and emergency contact form before accessing the arbitration agreement. Marinidence also presented two declarations from employees Barbara Matson and Brian Ullrich, who asserted that they sat next to Banister for 30 to 45 minutes while she completed the entire onboarding process on the computer. Matson and Ullrich did not affirmatively state they witnessed Banister click "I accept" or electronically sign the arbitration agreement.

However, Banister presented evidence that she did not touch the computer during that process and never reviewed or signed any arbitration agreement. Banister asserted that Matson

completed the onboarding process herself on her laptop for employees without their participation, and was able to do so because she had access to employees' first and last names and Social Security numbers from their personnel files. Banister further asserted that Matson asked Banister for her information, including her tax withholdings and emergency contacts, and did not show her the laptop screen as she entered the information or provide her any copies of documents. Banister also asserted that as Matson completed the onboarding process for Banister and other employees, she did not inform them about an arbitration agreement, nor did she have them click "I agree" or otherwise electronically sign the arbitration agreement. Banister presented evidence through emails between herself and Matson that Matson continued to complete the onboarding process for employees remotely, from her office in Utah, after leaving the facility.

The Court found that substantial evidence supported the trial court's conclusion that Marinidence failed to authenticate the electronic signature on the arbitration agreement as Banister's, and that the trial court reasonably held that Matson’s and Ullrich's declarations did not establish that Banister herself electronically signed the arbitration agreement. The Court noted that Banister was not "assigned a unique, private username and password such that she is the only person who could have accessed the onboarding portal and signed

the agreement; instead, the evidence showed ... Matson had access to the information necessary to access the onboarding portal via employee personnel records."

The Court affirmed the trial court's ruling and conclusion that Marinidence failed to meet its burden of proving the existence of an arbitration agreement by a preponderance of the evidence. Marinidence failed to show that the signature on the arbitration agreement was put there by Banister, and Banister's evidence showed that she was not the only person who could have executed the arbitration agreement.

California, like many states, has statutes that control the use of electronic signatures, which are becoming more common. There is a dearth of case law related to electronic signatures and the issues that may arise related to the authenticity of electronic signatures. The safest and most conservative course is to require signatures on hard copies of contracts. If parties use electronic signatures on documents, they should implement measures to verify and prove that the person whose electronic signature appears on the contract is the person who actually "signed" the contract.

L. **FINRA Issues Vaccine Requirement for In-Person Participants.**

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

Many arbitration service providers and some individual arbitrators have their own COVID rules. Some go by the local

rules as they travel for in-person hearings. Arbitrators should ask the parties what rules apply, if any, at the hearing location, and make sure all parties and hearing attendees are aware of the rules and abide by them.