

Arbitration: Cases and Materials

Third Edition

2017 Supplement

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A Note to Users of ARBITRATION: CASES & MATERIALS:

This *2017 Supplement to Arbitration: Cases & Materials* presents key developments in arbitration law and scholarship since the 2011 publication of the third edition of *ARBITRATION: CASES & MATERIALS* (Carolina Academic Press).

Since 2012, the U.S. Supreme Court has issued eight commercial arbitration decisions. *Infra*. Recall that from 2006 to 2011, the Court also issued ten decisions. By our count, the Court has issued fifty commercial arbitration decisions since *Wilko v. Swan* in 1953. The attached Appendix of U.S. Supreme Court Arbitration Decisions attempts to identify all such decisions. The litigation over the private process of arbitration certainly is ironic. We emphasize in our courses that arbitration mostly works! However, the federal policy favoring the privatized adjudication of disputes does raise important policy, fairness, and practices issues which we address throughout the casebook.

Significantly, the Court's decision in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), continues to reinforce the pro-arbitration enforcement and FAA preemption themes in arbitration jurisprudence. For October 2017, the Supreme Court is poised to hear *Epic Systems v. Lewis*, a consolidated appeal, pitting the National Labor Relations Act against the Federal Arbitration Act on the viability of class waivers in employment arbitration agreements.

Congress, state legislatures, as well as federal and state courts have been similarly concerned with arbitration legal issues. This **2017 ARBITRATION SUPPLEMENT** focuses primarily on recent U.S. Supreme Court decisions and federal arbitration legislation developments.

Many of the arbitration decisions address multiple issues which are not easily compartmentalized for purposes of studying a particular arbitration issue. For example, the big questions about unconscionability or class arbitration are addressed by the Court under the more technical questions of arbitrability, whether an arbitrator or court decides those questions, or FAA preemption. Many of the recent Supreme Court cases arguably raise more questions than they answer. We attempt to highlight these questions herein.

We welcome your comments as we prepare our next edition of *Arbitration: Cases & Materials*. We would also like to announce that we are fortunate to have Professors Kristen Blankley, University of Nebraska College of Law, and Jill Gross, Elisabeth Haub School of Law at Pace University, as new co-authors for the next edition of our casebook, which will be retitled **ARBITRATION LAW, POLICY, & PRACTICE** (forthcoming Fall 2018, with Carolina Academic Press).

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2017 SUPPLEMENT

ARBITRATION: CASES AND MATERIALS (3rd ed. 2011)

Stephen K. Huber & Maureen A. Weston

Chapter 1 THE NATURE AND SCOPE OF ARBITRATION

D. Arbitration Legislation

1. The Federal Arbitration Act

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“Since 1983, the Supreme Court has decided an average of more than one arbitration decision per year.” The attached **Appendix I** provides a list of U.S. Supreme Court arbitration decisions (1960-2017).

From 2012 to 2017, the U.S. Supreme Court has issued eight commercial arbitration decisions.¹ Recall that from 2006 to 2011, the Court also issued ten decisions.² By our count, the Court has fifty commercial arbitration decisions since *Wilko v. Swan* in 1953. The attached Appendix of U.S. Supreme Court Arbitration Decisions attempts to identify all such decisions.

Most significantly, the Court’s decision in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), continues to reinforce the pro-arbitration enforcement and FAA preemption themes in arbitration jurisprudence. The hope for a “vindication of rights” exception was basically dashed for the merchants who sought to avoid class bans in *American Express v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). For October, 2017, the Supreme Court is poised to hear the consolidated appeal in *Epic Systems v. Lewis*, pitting the National Labor Relations Act against the Federal Arbitration Act on the viability of class waivers in employment arbitration agreements.

2. Proposed Federal Arbitration Fairness Legislation.

In response to concerns that arbitration may be forced on individuals in disparate bargaining situations, legislators in both houses of Congress have proposed the *Arbitration Fairness Act of 2017* (AFA), Sen. 537³ (introduced by Sen. Franken); H.R. 1374, 115th Cong. (2017), versions of which have been introduced in Congress nearly annually since 2007. The AFA seeks to prohibit enforcement of pre-dispute arbitration agreements in employment, consumer, antitrust or civil rights matters. The Findings of the proposed AFA state that:

¹ *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012); *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. – (2012); *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *Oxford Health Plans, LLC v. Sutter*, 569 U.S. --, 133 S.Ct. 2064 (2013); *BG Group PLC v. Republic of Argentina*, - U.S. --, 2014 WL 838424 (2014); *DirectTV, Inc. v. Imburgia*, 577 U.S. -- (Dec. 2015); *Kindred Nursing Centers LLP v. Clark*, 581 U.S. – (May 17, 2017).

² From 2006-2011, six Supreme Court decisions were issued: *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011); *KPMG v. Cocci*, 132 S.Ct. 23 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 2010 U.S. LEXIS 4981 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

³ Arbitration Fairness Act of 2017, Sen. 537; H.R. 1344, 115th Cong. (2017) (AFA), available at <https://www.congress.gov/bill/115th-congress/senate-bill/537>.

(1) The Federal Arbitration Act . . . was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power; (2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress; (3) [m]ost consumers and employees have *little or no meaningful choice* whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights; (4) [m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions; and (5) [a]rbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

By recent count, the bill has only a small chance of passing. Does the proposed legislation revive the traditional “ouster of jurisdiction” and judicial hostility concerns the FAA was intended to reverse? Should the FAA apply to these types of transactions? States may also seek to enact protective legislation. **Chapter 2** examines application of the federal preemption doctrine on the viability of state law that may be more restrictive than the FAA.

3. **Federal Agency Regulation.** Authorized by the Dodd-Frank Wall Street Reform Act and Consumer Protection Law, the Consumer Financial Protection Bureau (CFPB) engaged in an extensive three year study on the use of arbitration in consumer financial contracts. In its study the CFPB evaluated: (1) the prevalence and features of arbitration agreements; (2) consumer understanding of arbitration agreements; (3) how arbitration procedures differ from judicial procedures; (4) the types and resolutions of claims in arbitration; (5) the types and resolutions of claims in litigation; (6) suits brought in small claims courts; (7) the value of class action settlements; (8) the relationship between public enforcement and class actions; and (9) whether arbitration clauses lower prices for consumers. The Bureau issued its ARBITRATION STUDY: REPORT TO CONGRESS (March 2015) reporting, *inter alia*, that nine out of ten consumer financial contracts contain class/representative waivers and that few consumers file arbitration cases or even understand what arbitration is or means regarding waiving rights to go to court.

In July 2017, the CFPB issued its Final Rule on Arbitration Agreements, 12 C.F.R. 1040, which applies to banks and other financial services companies and which (1) prohibits class action waivers in pre-dispute arbitration provisions in certain consumer financial product and service contracts, and (2) requires providers involved in consumer financial contractual arbitration to submit arbitral and court records. The Rule is effective September 2017, but continues to be challenged by the business community as unconstitutional, arbitrary, and unwelcomed by the new Administration. Stay tuned for developments. Is the CFPB rule necessary? See <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/arbitration-agreements/>

Page 11 State Arbitration Law

1. Uniform Arbitration Acts

As of 2017, the RUAA had been enacted in eighteen states (Alaska, Arizona, Arkansas, Colorado, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington, and West Virginia) and in the District of Columbia. Massachusetts, Pennsylvania, Kansas and Connecticut have introduced bills to adopt the RUAA in 2017. Although absent from this list, major commercial states, such as California and New York, have developed their own arbitration statutes. For an update on RUAA enactments, see Uniform Law Commission, Arbitration Act (2000), <http://www.uniformlaws.org>.

2. State Contract Law

While state, national, and international laws provide the legal framework for arbitration, the basis for the law to enforce arbitration is the parties' agreement to choose arbitration instead of litigation to resolve a dispute. Consider the following "contractual" elements:

a. **The Arbitration Agreement.** A valid arbitration agreement triggers operation of arbitration legislation. Step one in the analysis is thus to determine that a valid arbitration agreement exists and that the concerned parties are bound by that agreement. *See Chapter 2.* Arbitration affords parties the flexibility and certainty about how disputes will be resolved. An arbitration agreement thus can also designate where the arbitration will be conducted, who will administer the arbitration, procedural rules, and the substantive law applicable to the merits of the arbitrated dispute. Consider why these matters would be set forth in a pre-dispute arbitration clause, as opposed to the parties deciding these matters later.

b. **Private Institutional Administration and Rules.** A number of domestic and international organizations have developed procedural rules that provide a framework for conducting an arbitration and also provide services to administer arbitration. While these rules are not public legislation, parties may contract to abide by these procedural rules to govern their arbitration. Arbitration clauses frequently specify an administering institution and application of a particular institution's procedural rules. Organizations that have published institutional rules and provide arbitration administrative functions, including assisting with arbitrator appointment and case management, include the American Arbitration Association (AAA), JAMS, the Financial Industry Regulatory Authority (FINRA), the International Court of Arbitration (ICC), the London Court of Arbitration, as well as the Court of Arbitration for Sports (CAS). Parties may choose to have their arbitration administered by an arbitral institution or proceed in a self-administered *ad hoc* arbitration. What might be the advantages or disadvantages of these options?

c. **Choice of Law Governing Merits of the Case.** Parties are free to contract under the laws of a particular state. Thus, an arbitration agreement may also contain a choice-of-law clause, specifying the substantive law to be applied in determining the merits of the underlying dispute. For example, a clause may state "This agreement is governed and shall be construed in accordance with the laws of [State A]." This may be particularly important for transactions involving parties from different states or countries. The impact of choice-of-law clauses in arbitration agreements is explored in **Chapter 3.** *See Direct TV v. Imburgia*, 577 U.S. – (2015).

Chapter 2: DISPUTES SUBJECT TO ARBITRATION

B. Arbitrability and the Division of Authority between Courts and Arbitrators

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3. Comments & Questions --- Who Decides?

a. The Supreme Court has applied the same *First Options/Howsam* analytical framework for the “who decides” question in labor arbitration. A court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

b. For that rare arbitration not subject to the FAA, the RUAA adopts that same framework. See RUAA, § 2(b). In international arbitration, the standard expression for the arbitrability question is “competence about competence” (also called “kompetenz-kompetenz”). See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic*, 12 ARB. INT’L 137 (1996).

c. ***BG Group PLC v. Republic of Argentina***, 134 S.Ct. 1198 (2014), involved an investor-state arbitration held in Washington, D.C. that arose out of a bilateral investment treaty (BIT). BG invoked arbitration under treaty between UK and Argentina. BG ignored the treaty precondition to bring claim in local Argentinean courts and was awarded \$185 million in damages in arbitration. Argentina sought vacatur of the award under the FAA, arguing that the panel had exceeded its powers by ignoring the treaty “local litigation” precondition to arbitration. The D.C. Circuit reversed district court’s refusal, ruling that the court, not the arbitration panel, decide whether BG was permitted to submit its dispute directly to the arbitration panel.

Issue: Whether, in disputes involving a multi-staged dispute resolution process, a court or the arbitrator determines whether a precondition to arbitration has been satisfied.

Held: Local litigation requirement in arbitration provision of treaty was a procedural condition precedent to arbitration, whose interpretation and application, was a matter of contractual interpretation for the arbitrator. BIT was treated as an ordinary contract, and court defers to the arbitrator’s interpretation. As a treaty- contract between nations – here, not a “condition of consent” (which a court would review *de novo*).

Sotomayor (concur)” A “party plainly cannot be bound by an arbitration clause to which it does not consent.” “[I]t is no trifling matter” for a sovereign nation to ‘subject itself to international arbitration’ proceedings. The purpose of the BIT is to “relieve investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and their own government.”

Chief Justice Roberts & Kennedy – dissenting. Treaty between two sovereign nations: UK & Argentina – not an ordinary contract between private parties. No investor is party to the agreement. Purpose of BIT to encourage UK investors to invest within its borders. Treaty itself was not an agreement to arbitrate with an investor. Local litigation requirement is a condition to the formation of the agreement... first principle that underscores all of our arbitration decisions: Arbitration is strictly a ‘matter of consent.’ Article 8 “Settlement of Disputes Between an Investor and the Host State” – step 1 to submit to local courts, then arbitration only after 18 months elapsed and no final decision rendered or otherwise agreed.

In *BG Group*, the Supreme Court ruled that arbitrators, not a court, decide whether the parties met a condition precedent to arbitration. In *BG Group*, the condition precedent at issue was the treaty's provision that disputes arising out of the treaty should be submitted to a local court first, and then, if eighteen months passed without a final decision from that court, the dispute could be arbitrated. The arbitrators had decided that compliance with the litigation requirement was excused because of a series of Argentinian laws that would block any lawsuit by the investor. The Supreme Court, applying the *First Options/Howsam* framework, held that courts should presume that "parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." Thus *BG Group* held that the local litigation requirement in the arbitration provision of the treaty was a procedural condition precedent to arbitration, whose interpretation and application, was a matter of contractual interpretation for the arbitrator. Do you think the result in *BG Group* is consistent with the *First Options/Howsam* framework?

C. THE SEPARABILITY DOCTRINE: *PRIMA PAINT* AND ITS PROGENY

KPMG LLP v. Cocci, 132 S.Ct. 23 (2011) ("when a complaint contains both arbitrable and nonarbitrable claims, the Act requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'")

D. ARBITRABILITY OF STATUTORY CLAIMS

1. Federal Securities Laws
2. Employment Discrimination Claims

a. *Gilmer v. Interstate/Johnson*, 500 U.S. 20 (1991) set forth several arguments against arbitration of his statutory age discrimination claim, such that arbitration is inconsistent with the statutory framework, that arbitration will undermine the role of the EEOC in enforcing the statute, and that compulsory arbitration deprives claimants of a judicial forum provided in the ADEA. He also asserted that arbitration panels will be biased, limit discovery and restrict access to evidence, and result in unequal bargaining power, ineffective appellate review, and stifle the development of law. The majority rejected these arguments. Why? Do you agree? Note that the arbitration institution in *Gilmer* is the New York Stock Exchange, which at the time was regulated by the SEC similar to the regulation of the NASD forum at issue in *McMahon*. Both of those arbitration forums merged to form FINRA Dispute Resolution.

b. The Age Discrimination in Employment Act (ADEA) provides that: "any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in [Section 626(f)(1)] have been met, the party asserting the validity of a waiver **shall** have the burden of proving in a **court of competent jurisdiction** that a waiver was knowing and voluntary." 29 U.S.C. § 626(f)(3) (emphasis added). In *McLeod v. General Mills, Inc.*, 854 F.3d 420 (8th Cir. 2017), the Eighth Circuit concluded that the ADEA does not grant employees the substantive right to a jury trial or to a class action, but only provides procedural rights that can be waived(.

c. FAA § 1 states that "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." Despite the argument that a plain reading of the statute exempts employment contracts, the Supreme Court, in a 5-4 decision, held that the exemption applied only to workers involved in transportation in interstate commerce and does not exclude all employment contracts. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Do you have any concerns regarding mandatory arbitration of employment claims?

Oliveira v. New Prime, Inc., 2017 WL 1963461 (1st Cir. 2017) (refusing to compel arbitration of a class action of independent truckers, finding them exempt under FAA Sec. 1).

3. Antitrust and Ineffective Vindication of Rights Challenges

When can or does arbitration prevent a party from effective vindication of statutory rights?

a. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)

Another defense to arbitrability asserted by reluctant parties is that a court should not enforce an arbitration agreement because enforcement would prevent them from vindicating their statutory rights. In June 2013, the Supreme Court decided *Italian Colors Restaurant*. In that case, the Court enforced a pre-dispute arbitration clause containing a class action waiver in American Express merchants' credit card processing agreements. The Court rejected a claim that the class action waiver was unenforceable because it precluded plaintiff merchants from vindicating their statutory rights under the federal antitrust laws based on the high costs of litigating federal antitrust claims individually.

The effective vindication doctrine derives from the Supreme Court's pronouncement in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute [providing that cause of action] will continue to serve both its remedial and deterrent function. Until this decision, lower courts had interpreted the "vindicating statutory rights" or "effective vindication" doctrine to provide that a disputant could argue that an arbitration agreement is unenforceable because an unfair aspect of the arbitration process precluded that party from vindicating its federal statutory rights.

In the 5-3 majority opinion authored by Justice Scalia, the Court recognized the validity of the "effective vindication" doctrine generally, but held that, in this case, the "fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." Because the class action waiver in the merchants' credit card services agreement with American Express did not eliminate the *right to pursue* individual claims under the antitrust laws, the Court deemed the waiver enforceable. Justice Scalia wrote:

The "effective vindication" exception to which respondents allude originated as dictum in *Mitsubishi Motors* where we expressed a willingness to invalidate, on "public policy" grounds, arbitration agreements that "operat[e] ... as a prospective waiver of a party's *right to pursue* statutory remedies" (citation omitted) (emphasis added). Dismissing concerns that the arbitral forum was inadequate, we said that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. ..."

As we have described, the exception finds its origin in the desire to prevent "prospective waiver of a party's *right to pursue* statutory remedies," *Mitsubishi Motors*. That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to

make access to the forum impracticable. See *Green Tree Financial Corp.–Ala. v. Randolph* (2000) (“It may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights”). “But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”

Italian Colors, 133 S.Ct. at 2311.

Even though *Italian Colors* sharply limited the use of the effective vindication doctrine to strike down class action waivers, several courts have refused to enforce other aspects of arbitration agreements under the effective vindication doctrine. See, e.g., *Hayes v. Delbert Services Corp.*, 811 F.3d 666 (4th Cir. 2016) (plaintiffs brought a putative class action against a payday lending company asserting that the company’s lending practices violated various state and federal lending laws. The PDAA in the parties’ loan agreement provided that the agreement was subject only to Indian law and not applicable state and federal law. The Fourth Circuit concluded that the clause, which expressly forbid plaintiffs from invoking protections guaranteed to them under federal law, was unenforceable under the effective vindication doctrine); *Nesbitt v. FCNH, Inc.*, 811 F.3d 371 (10th Cir. 2016) (a massage therapy student brought a putative class action in federal district court against the operator of massage therapy schools for violations of the Fair Labor Standards Act (FLSA) for failing to pay students for performing massages on customers. The student enrollment agreement contained a PDAA providing for arbitration at the American Arbitration Association pursuant to its commercial arbitration rules. Those rules provide, among other things, that each party bears its own arbitration expenses. The PDAA also stated that each party would bear its own attorney’s fees).

The district court denied defendants’ motion to compel arbitration, and the Tenth Circuit affirmed under the effective vindication doctrine. The Court of Appeals noted that plaintiff’s affidavit stated that she could not afford the forum fees. The court also noted that the arbitration agreement was ambiguous as to whether the arbitrators were permitted to ignore the fee-shifting provisions of the FLSA. The court concluded that “it is unlikely that an employee in [the plaintiff’s] position, faced with the mere possibility of being reimbursed for arbitrator fees in the future, would risk advancing those fees in order to access the arbitral forum.” As a result, the court held that the arbitration agreement precluded plaintiff from vindicating her statutory rights and was thus unenforceable.

b. Comments and Questions

i. The Supreme Court has yet to invalidate an arbitration agreement under the “effective vindication” doctrine. Thus, it remains to be seen precisely what type of right-stripping provision in an arbitration agreement the Court would view as rendering the agreement unenforceable. Can you envision one? What factors might a lower court consider when deciding a challenge to an arbitration clause under the doctrine as articulated in *Italian Colors*?

ii. Fifth Amendment challenges. Other defenses to arbitrability that reluctant parties have unsuccessfully asserted include challenges based on the U.S. Constitution. However, courts routinely strike down challenges under the Due Process Clause of the Fifth Amendment, as private arbitration institutions are private and not state actors. See, e.g., *Elmore v. Chicago &*

Illinois Midland Ry. Co., 782 F.2d 94, 96 (7th Cir.1986) (“[T]he fact that a private arbitrator denies the procedural safeguards that are encompassed by the term ‘due process of law’ cannot give rise to a constitutional complaint.”); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir.1995) (finding securities industry arbitration proceeding did not constitute state action because it was the creature of a voluntary contractual agreement).

iii. Likewise, courts routinely reject arguments that arbitration clauses in an adhesive contract violate the Seventh Amendment’s right to a jury trial. Rather, courts find that reluctant parties knowingly waived their Seventh Amendment right by agreeing to the PDAA. *See, e.g., Cooper v. MRM Inv. Co.*, 367 F.3d 493, 506 (6th Cir. 2004); *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 743 (7th Cir. 2010).

4. Other Statutory Claims

a. **Consumer Protection Laws.** In *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100-01 (2012), the Court emphasized that courts are to presume a federal statutory claim is arbitrable, absent an explicit “contrary Congressional command.” The *CompuCredit* plaintiffs filed a class action lawsuit against a credit card marketing company and issuing bank alleging deceptive practices by a “credit repair organization” under the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679, a consumer-protection statute. After the district court denied defendants’ motion to compel arbitration and the Ninth Circuit affirmed, the Supreme Court ruled that CROA claims are arbitrable.

Justice Scalia’s 6-3 majority opinion concluded that the CROA’s disclosure provision requiring credit repair organizations to notify consumers that they “have a right to sue a credit repair organization that violates the Credit Repair Organization Act” does not reflect congressional intent to preclude arbitration of claims arising under the Act. The Court similarly concluded that the Act’s nonwaiver provision, which voids enforcement of a consumer’s waiver of protections and rights under the CROA, did not render unenforceable an arbitration agreement that waives the right to bring CROA claims in court. These two provisions—disclosure and nonwaiver—did not create a consumer’s right to bring a CROA claim in court; they created only a consumer’s right to receive the statutory notice. Thus, the provisions did not constitute a “contrary congressional command” sufficient to overcome the default rule that federal statutory claims are arbitrable. Such a command must be far more explicit. What language in a statute is sufficient to constitute a “contrary Congressional command”?

b. **Contrary Congressional Command.** *CompuCredit* cited a few examples of Congressional language more explicit than that in the CROA, including: “No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section,” 7 U.S.C. § 26(n)(2), which applies to whistleblower claims under the Commodities Exchange Act. Other examples where Congress has expressly banned pre-dispute arbitration agreements include provisions in the Military Lending Act of 2007 (in consumer credit contracts with military personnel), and the Dodd-Frank Wall Street Reform and Protection Act of 2010 (for whistleblower claims arising under the Sarbanes-Oxley Act of 2002 as well as residential mortgage loans). What if Congress delegated to an administrative agency the power to regulate arbitration of disputes relating to its field of regulation, and the agency adopted a rule banning PDAAAs for those disputes? Is that a sufficient command?

E. CONTRACT FORMATION: ARBITRATION PROVISIONS

a. Mutual Assent and Online/Buried Arbitration Terms in Consumer Contracts

i. In *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012), plaintiffs filed a class action lawsuit against the defendant, an online company that sells online programs and discount coupons to “members” who pay a monthly fee for the service. The named plaintiffs became enrolled in this “service” after clicking on a “cash back” offer after making a large purchase online. The notice had a link to “terms and conditions,” which included an arbitration agreement whose terms also prohibited class action arbitration. The plaintiffs brought this suit after noticing monthly charges on their credit card statements for services they were allegedly unaware of requesting. The district court found no agreement to arbitrate due to lack of notice to the plaintiffs. The Second Circuit affirmed, holding that the court, in the first instance, determines whether an arbitration agreement has been made. The circuit court found no notice of the arbitration term in the e-mail following enrollment, distinguishing this case from the “shrink wrap” cases on the basis that the relationship was different than one in which the parties would expect additional terms inside of a box.

ii. When evaluating a challenge to a consumer contract on the ground of lack of mutual assent, courts now distinguish among types of agreements depending on how the company claimed to obtain assent from the customer. Why do you think the courts treat these types of adhesive arbitration agreements differently from each other?

One federal judge described the categories as follows:

“The ‘**shrinkwrap**’ license’ gets its name from the fact that retail software packages are covered in plastic or cellophane ‘shrinkwrap’, and some vendors ... have written licenses that become effective as soon as the customer tears the wrapping from the package.” Although it was not always the case, courts now generally enforce shrinkwrap agreements “on the theory that people agree to the terms by using the [product] they have already purchased.” While shrinkwrap agreements, as the name suggests, formally apply only to tangible goods, agreements entered into online for both tangible goods and intangible goods and services have developed a body of terminology that borrows the word’s suffix.

“**Browsewrap**” agreements or licenses are those in which “the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not.” Browsewrap agreements have been characterized as those “[w]here the link to a website’s terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it.” Normally, in a browsewrap agreement, “the website will contain a notice that — merely by using the services of, obtaining information from, or initiating applications within the website — the user is agreeing to and is bound by the site’s terms of service.”

By contrast, a “**clickwrap**” agreement is an online contract “in which website users are required to click on an ‘I agree’ box after being presented with a list of terms and conditions of use.” Courts view the clicking of an “I agree” or “I accept” box (or similar mechanism) as a requirement that “the user manifest assent to the terms and conditions expressly” before she uses

the website or services covered by the agreement. Clickwraps differ from browswraps with respect to their enforceability under contract principles because, “[b]y requiring a physical manifestation of assent, a [clickwrap] user is said to be put in inquiry notice of the terms assented to.” Clickwrap agreements permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box. As a result, “[b]ecause the user has ‘signed’ the contract by clicking ‘I agree,’ every court to consider the issue has held clickwrap licenses enforceable.”

... “**Sign-in-wrap** couples assent to the terms of a website with signing up for use of the site's services.” In a sign-in wrap, a user is presented with a button or link to view terms of use. It is usually not necessary to view the terms of use in order to use the web service, and sign-in-wrap agreements do not have an “I accept” box typical of clickwrap agreements. Instead, sign-in-wrap agreements usually contain language to the effect that, by registering for an account, or signing into an account, the user agrees to the terms of service to which she could navigate from the sign-in screen.

Cullinane v. Uber Techs., Inc., No. CV 14-14750-DPW, 2016 WL 3751652, at *5–6 (D. Mass. July 11, 2016) (internal citations omitted; emphasis added).

Other courts are slowly adopting this terminology as a means to analyze the enforceability of arbitration clauses contained in these wrap contracts. *See Noble v. Samsung Electronics America, Inc.*, 682 Fed.Appx. (3d Cir. 2017) (Arbitration clause located on page 97 of health and safety and warranty guide contained in package was not valid contractual term due to lack of mutual assent); *James v. Global Tellink Corp.*, 852 F.3d 262 (3d Cir., 2017) (refusing to compel arbitration of prison inmates claim against telephone service provider where consent was procured, not by website clickthrough, but by telephone Audio notice that “your account...[is] governed by the terms of use at [defendant’s website].”

Do you think that these are meaningful legal distinctions?

ii. The explosion of arbitration clauses contained in customer agreements for downloaded apps has brought this issue to the forefront in hundreds of court decisions in recent years. The arbitration clause in the app for the ride-sharing service Uber alone has generated dozens of decisions, some focusing on the mutual assent issue. *See generally* Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 Y.B. ON ARB. & MED. __ (2017).

iii. Where the parties expect to have repeat dealings, notably banking and financial services, contracts also provide for unilateral change of the agreement by the provider institution. The institution provides notice to the customer of unilateral changes that will go into effect in the near future (usually 30 days), and that by engaging in an account transaction the customer has accepted the changes. The addition of an arbitration clause or alteration of an existing arbitration regime is a common unilateral change. That an arbitration agreement was signed electronically is not itself a defense. Under the Electronic Signatures in Global and National Commerce Act, “[a] contract ... may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.” 15 U.S.C. § 7001(2).

iv. For additional commentary on electronic contract formation, see Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitation on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099 (2010); Theodore Eisenberg, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010); James J. White, *Warranties in the Box*, 46 SAN DIEGO L. REV. 733 (2010).

Chapter 3: INTERACTION OF FEDERAL AND STATE LAW

C. COMMERCE CLAUSE PREEMPTION OF STATE LAW

1. State Law and Public Policy

The U.S. Supreme Court has held that the FAA preempts state public policy decisions in three recent decisions.

a. In *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012) the Court ruled that the FAA preempted a West Virginia Supreme Court of Appeals rule that voided as against public policy pre-dispute arbitration clauses in nursing home contracts with respect to negligence claims.

b. *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. – (Nov. 26, 2012) vacated a decision by the Oklahoma State Supreme Court, which held that non-competition agreements in two employment contracts were invalid under state law and held that the FAA, not state law, governs enforceability of arbitration clause (severable) from employment contract containing non-competition provision.

c. *Kindred Nursing Centers LLP v. Clark*, 581 U.S. – (May 17, 2017) (holding that Kentucky’s “clear statement rule” requiring power of attorney specific authorization to enter arbitration in Nursing Home Arbitration K violates FAA by singling out arbitration agreements for disfavored treatment).

2. Unconscionability

AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (April 27, US 2011) held that the FAA preempts California’s judicial rule invalidating class action waivers as unconscionable. According to the court, the anti-waiver rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in the FAA]”. After *Concepcion*, a rubber-stamp effect seemed to ensue in the courts addressing the enforceability of class action waivers in arbitration agreements. Courts largely considered their rulings bound to follow *Concepcion*, even where state law would invalidate the contractual bans. See e.g., *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1206–07 (11th Cir. 2011).

3. State Administrative Procedures

The U.S. Supreme Court addressed the interaction of federal and state administrative law in *Preston v. Ferrer*, 552 U.S. 346 (2008), holding that “[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.” What is the impact of *Preston v. Ferrer* on state administrative schemes? Which controls: arbitration contract or administrative agency review?

- a. *Wage Claims and State Labor Commissioner. Sonic Calabassas v. Moreno*, 311 P.3d 184, 57 Cal.4th 659 (Cal. 2013) (*Sonic II*), *cert. denied* (2014). The California Supreme Court had ruled that the FAA did not preempt state Labor Code entitling employees in wage claims to an administrative (“Berman”) hearing before the Labor Commissioner, as the result from the labor hearing could be appealed to arbitration. It held that the right to a Berman hearing is not waivable, as waiver would be contrary to an important public policy favoring prompt payment of wages. The right to a Berman hearing is not pre-empted by the FAA, as it would apply equally to a nonarbitration waiver and it does not preclude arbitration, but simply affects the timing, distinguishing *Preston v. Ferrer*, 552 U.S. 346 (2008) because it involved the question of whether the Labor Commissioner or an arbitrator initially would decide the Talent Agency Act question and not a challenge to the arbitration clause, and likening this case to *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), in that the Labor Commissioner is more a prosecutor than an adjudicator.

The U.S. Supreme Court vacated and ordered a remand “in light of AT&T”. In *Sonic II*, the California Supreme Court conceding that the FAA preempts state administrative wage hearing process, but remanded the case for an unconscionability assessment: “[t]he fact that the FAA preempts *Sonic I*’s rule requiring arbitration of wage disputes to be preceded by a Berman hearing does not mean that a court applying unconscionability analysis may not consider the value of benefits provided by the Berman statutes, *which go well beyond the hearing itself*.⁴ See Maureen A. Weston, *The Clash: Mandatory Arbitration and Administrative Agency Access*, 89 So. Cal. L. Rev. (2015).

Possible Exceptions -- Cases Limiting AT&T

4. State Private Attorney General Actions

Iskanian v. CLS Transp. Los Angeles, -- P.3d ---, 2014 WL 2808963 (Cal. June 2014) (holding that FAA does not preempt state law permitting individual employee from asserting representative claims for violations of employment laws in a Private Attorney General Act (PAGA) lawsuit); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 856 (Cal. Ct. App. 2011) (holding that *Concepcion* does not apply to representative actions under the state Private Attorney General Act of 2004 (PAGA)).

5. FAA Preemption and Competing Federal Statutory Claims

a. The “Vindication of Rights Doctrine”

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (J. Scalia) (5-3-1 Sotomayor recused) (rejecting the argument that FAA enforcement of an

⁴ *Id.* (emphasis added) (“Moreno has asserted an unconscionability defense, whose merits should now be determined by the trial court in the first instance in light of our decision today.”). See also *Iskanian*, at *6 (stating that *Sonic II* “established an unconscionability rule that considers whether arbitration is an effective dispute resolution mechanism for wages claimants [and] . . . recognized that the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration.”).

arbitration class waiver denies a party's "effective vindication" of their federal statutory rights by removing their economic incentive to bring the antitrust claims).

b. National Labor Relations Act

The National Labor Relations Board (NLRB) relied upon federal labor law in invalidating a class action waiver in *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at *16–17 (Jan. 3, 2012). The three-member panel ruled that class action waivers in employment agreements violate the National Labor Relations Act (NLRA), which guarantees employees the "right to engage in concerted action for mutual aid or protection." *D.R. Horton v. Nat'l Labor Relations Bd.*, 737 F.3d 344 (5th Cir. 2013) (overruling NLRB's decision that the right to collective action under the NLRA invalidates the class action waiver but agreeing that the employer's arbitration clause impermissibly suggested that the employee waived all rights to report unfair labor practices to the Board). Since *D.R. Horton*, federal circuits have split on the effect of NLRA on class waivers. The Fifth, Second, and Eighth Circuits have upheld waivers over NLRB objections. See e.g., *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Sutherland v. Ernst & Young, Inc.*, 726 F.3d 290 (2d Cir. 2013), and *Cellular Sales of Missouri v. NLRB* (8th Cir. 2016). However, in a 2016 case, a panel of the Second Circuit wrote that, "if we were writing on a clean slate, we might be persuaded" to the contrary. See *Patterson v. Raymours Furniture* (2d Cir. Sept. 2, 2016). By contrast, the Seventh and Ninth Circuits have held that the class waiver bans violate the NLRA. *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285 (Jan. 13, 2017); *Ernst & Young LLP v. Morris*, (9th Cir. Aug. 22, 2016). The Sixth Circuit joined the Ninth and Seventh Circuit in upholding NLRB decision in *National Labor Relations Board v. Alternative Entertainment, Inc.*, No. 16-1385, 2017 WL 2297620 (6th Cir. May 26, 2017).

The consolidated appeal in *Epic Systems v. Lewis*, pitting the National Labor Relations Act against the Federal Arbitration Act on the viability of class waivers in employment arbitration agreements, is set for oral argument before the U.S. Supreme Court in October 2017. The issue before the court is: "Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act?"

c. Fair Labor Standards Act (FLSA)

Federal courts have interpreted the FAA as not conflicting with employee rights under the FLSA, holding that such claims can be vindicated in arbitration.

Sutherland v. Ernst & Young, 726 F.3d 290 (2nd Cir. 2013) (ruling that an employee's ability to proceed collectively under the FLSA can be waived in an arbitration agreement and was not rendered invalid even though her claim -- potential recovery of \$1,900 -- was not economically worth pursuing individually where her attorneys' fees and expert costs would likely reach \$200,000). See also *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. Mar. 21, 2014) (noting that the 2nd, 8th, 5th and 4th Circuits have upheld class waivers of

FLSA claims on the grounds that the FLSA contains no contrary Congressional command to override the FAA).

d. Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act (ADEA) provides that “any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in [Section 626(f)(1)] have been met, the party asserting the validity of a waiver **shall** have the burden of proving in a **court of competent jurisdiction** that a waiver was knowing and voluntary.” 29 U.S.C. § 626(f)(3) (emphasis added).

McLeod v. General Mills, Inc., 2017 WL 1363797 (8th Cir. Apr. 14, 2017) held that the ADEA does not grant employees the substantive right to a jury trial or to a class action, but only provides procedural rights that can be waived. Recall that *Gilmer*’s claim was under the ADEA.

6. FAA Preemption and Federal Agency Rules

a. FINRA Securities Rules Ban Class Waivers.

One instance in which federal agency authority won out over FAA preemption involved the Financial Industry Regulatory Authority (FINRA), which regulates the securities industry. After *AT&T*, brokerage company Charles Schwab & Co. revised its pre-dispute arbitration contracts to preclude class actions against the firm. FINRA is delegated authority by the Securities Exchange Commission to regulate broker-dealer transactions for the protection of investors. FINRA rules require arbitration of individual disputes through a FINRA arbitration procedure; however, the rules do not permit waivers on class actions in securities brokerage contracts.⁵ Schwab initially sought to challenge the FINRA rule as preempted by the FAA “as written” mandate, but was ordered to exhaust administrative remedies.⁶

A FINRA Disciplinary panel ruled that Schwab’s actions violated FINRA rules, but that, under *AT&T*, the FAA preempted those rules.⁷ In an administrative appeal, the FINRA Board of Governors reversed, holding that the FINRA rules, including those barring class action waivers, constituted a “Congressional command” sufficient to override the FAA’s mandate. It reasoned that the FINRA was delegated authority, via the SEC and Securities Exchange Act, to regulate broker-dealers’ arbitration agreements for the protection of investors and thus FINRA’s

⁵ FINRA Decision, *Department of Enforcement v. Charles Schwab & Co.*, complaint no. 2011029760201 (April 24, 2014) (reversing disciplinary panel’s ruling that the FINRA rules were preempted by Federal Arbitration Act).

⁶ *Charles Schwab & Co. Inc. v. Fin. Indust. Regulatory Auth.*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012) (dismissing because of the duty to exhaust administrative remedies, as a jurisdictional prerequisite, noting the benefits of this process included “the expertise and intimate familiarity with complex securities operations which members of the industry can bring to bear on regulatory problems, and the informality of self-regulatory procedures.”).

⁷ FINRA Rule 2268(d)(1) and (3) (effective Dec. 5, 2011) (prohibiting member firms from placing “any condition” in a pre-dispute arbitration agreement that “limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement.”). *See also* *Gomez v. Brill Securities, Inc.* 943 N.Y.S.2d 400, N.Y.A.D. 1 Dept. (2012) (holding that brokers could not be required to arbitrate their class action claims for alleged violations of state wage laws parties’ because the arbitration agreement incorporated FINRA rules, which precludes bans on judicial class actions.).

rules barring class action waivers and mandating that investors be able to bring class claims in court were enforceable.⁸ Schwab did not appeal this ruling.

Chapter 4: GETTING TO ARBITRATION

Chapter 5: THE ARBITRATION PROCESS

D. MODIFICATION AND CORRECTION OF ARBITRATION AWARDS: *FUNCTUS OFFICIO*

An interesting switch up to the “functus officio” doctrine involved disgraced cyclist Lance Armstrong when his former sponsor SCA sought to re-open and vacate a 2006 Arbitration Award in favor of Armstrong and against the insurer which refused to pay Armstrong \$6 million in prize money due to suspicions of his doping. In 2015, SCA filed a motion for sanctions before the same panel of arbitrators who presided in the 2004 arbitration. As part of the 2004 arbitration award, the arbitrators inserted a “continuing jurisdiction” provision for the arbitrators to hear any disputes related to the award or settlement between the parties. After Armstrong was banned from cycling for doping, SCA re-opened the case seeking \$10 million against Armstrong for his “perjury” in the 2004 arbitration. The Arbitrator Decision (2-1), which stated that “Perjury must never be profitable. Justice in courts of law and arbitration is impossible when parties feel free to deliberately deceive judges or arbitrators” awarded SCA the requested amount. See *In the Arbitration Between Lance Armstrong and Tailwinds Sports Corp., and SCA Promotions, Inc., SCA Insurance Specialists Inc.*, (Feb. 4, 2015) <http://online.wsj.com/public/resources/documents/armstrong02162015.pdf>

Chapter 6: THE ARBITRATOR — SELECTION AND CONDUCT

E. “EVIDENT PARTIALITY” AND RELATED GROUNDS FOR DISQUALIFYING AN ARBITRATOR

Evident Partiality – can disclosure alone right all neutrality wrongs?

Thomas Kinkade Co. v. White, ___ F.3d ___, 2013 WL 1296238 (6th Cir. April 2, 2013).

Arbitrator had disclosed the financial ties between his firm and the other parties and arbitrators (and the AAA refused to disqualify), as if transparency alone made him neutral.

6th Circuit: Finding **evident partiality** where five years into the arbitration proceedings, after closing arguments in the hearing but before the award, panel arbitrator’s law firm took on two significant new matters from the [party W] and their appointed arbitrator. Although arbitrator informed the parties of these new financial ties between his firm and the defendant, and claimant objected, but the AAA denied request to disqualify arbitrator.

⁸ See Jill Gross, Brief of Professors (arguing that preemption of agency rule here could pose a “crippling blow to the authority of FINRA and the SEC to adopt arbitration rules that balance the benefits of arbitration with the need to protect investors.” See also Gross, Arbitration Update 2013 (noting that in reversing the Disciplinary Panel, the FINRA Board focused upon the contrary congressional command and did not buy agency expertise argument).

“the harm was done” as soon as the disclosure was made, because the disclosure placed [other party] in a lose-lose situation. “If [he] object[s], [he] run[s] the risk of offending the neutral; if [he doesn't] object, [he] appear[s] to condone a clear conflict.”

G. LIABILITY OF ARBITRATORS AND ARBITRAL ORGANIZATIONS

Owens v. American Arbitration Association, Inc., 2016 WL 6818858 (8th Cir. Nov. 18, 2016) (recognizing that arbitrators, like judges, have immunity, and extends to “organizations that sponsor arbitrations” and all of the acts within the arbitral process).

Chapter 7: REMEDIAL POWERS OF ARBITRATORS

Chapter 8: JUDICIAL REVIEW OF ARBITRATION AWARDS

Oxford Health Plans, LLC v. Sutter, 569 U.S. -- , 133 S.Ct. 2064 (June 10, 2013) (holding that the arbitrator, who ordered class arbitration based on contractual interpretation, despite contractual silence on the issue, does not necessarily “exceed powers” under FAA §10(a)(4)). Demonstrating strong deference, court stated “Where an arbitrator bases a decision on the text of the parties’ agreement, her “construction holds, however good, bad, or ugly.”

F. CONTRACT-BASED STANDARDS FOR JUDICIAL REVIEW

The ability of parties to contract beyond the grounds for judicial review in the FAA was limited in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). One issue that remains unresolved is the viability of non-statutory grounds for vacatur.

E. NON-STATUTORY GROUNDS FOR VACATING ARBITRATION AWARDS

3. Manifest Disregard of the Law (and similar theories)

All of the circuit courts of appeal have considered the issue: the Fifth, Eighth, and Eleventh Circuits have held that *Hall Street* ends the “manifest disregard” ground for vacatur.⁹ In contrast, seven other (the Second, Fourth, Sixth, Seventh, Ninth, Tenth, Federal, and D.C. Circuits) have held that manifest disregard survives *Hall Street*.¹⁰ Although it has held that

⁹ *McVay v. Halliburton Energy Servs., Inc.*, 2015 WL 1810950, at *2 (5th Cir. Apr. 22, 2015); *Medicine Shoppe v. Turner*, 614 F.3d 485 (8th Cir. 2010); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Campbell's Foliage, Inc. v. Federal Crop Ins. Corp.*, 562 Fed. Appx. 828, 831 (11th Cir. 2014).

¹⁰ The Sixth Circuit held that *Hall Street* applied only to contractual expansions of the grounds for review. *Coffee Beanery, Ltd. v. WW, LLC*, 300 Fed. Appx. 415, 418-19 (6th Cir. 2008). The Second, Seventh and Ninth Circuits concluded that “manifest disregard” was shorthand for § 10(a)(4), which authorizes vacatur where the arbitrators exceeded their powers. *Singh v. Raymond James Fin. Servs., Inc.*, 633 F. App'x 548, 551 (2d Cir. 2015); *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567 (7th Cir. 2015); *Improv West Assocs. v. Comedy Club, Inc.*, 553 F.3d 1277, 1290 (9th Cir. 2009). The Fourth and Federal circuits have not decided whether it is an independent ground or a judicial gloss on a statutory ground. *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 482 (4th Cir. 2012) (“Although we find that manifest disregard continues to exist as either an independent ground for review or as a judicial gloss, we need not decide which of the two it is because Wachovia’s claim fails under both”); *Bayer CropScience AG v. Dow Agrosciences LLC*, No. 2016-1530, 2017 WL 788321, at *5 (Fed. Cir. Mar. 1, 2017). The

manifest disregard is not available as a *non-statutory* ground for review,¹¹ the Fifth Circuit recently declined to decide whether it could be a *statutory* ground for review.¹² The First, Third, have expressly declined to decide the issue. Despite the split on whether manifest disregard of the law remains a ground for vacating an arbitration award, very few cases actually are vacated on such grounds, even in jurisdictions that recognize the exception. *See Dewan v. Walla*, 544 Fed. Appx. 240, 248 (4th Cir. 2014); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F. 3d 1277, 1289-90 (9th Cir. 2009).

See also Jason Steed, *Appealing Arbitration Awards and the Circuit Split over "Manifest Disregard of the Law,"* Am. Bar. Ass'n, Litigation (May 10, 2016), available at <http://apps.americanbar.org/litigation/committees/appellate/articles/spring2016-0516-appealing-arbitration-awards-circuit-split-manifest-disregard-law.html>

Chapter 9: MULTIPLE FORUMS, PARTIES, AND PROCEEDINGS

C. THIRD PARTY ISSUES: NON-PARTIES ENFORCEMENT OF AND SUBJECT TO ARBITRATION AGREEMENTS

1. Does a litigant who is not a signatory to an arbitration agreement have standing to request a stay of litigation under FAA, 9 U.S.C. § 16(a)(1)(A) or to seek interlocutory review from a denial of a motion to stay litigation pending arbitration? Is interlocutory review available?
2. ***Oxford Health Plans, LLC v. Sutter***, 569 U.S. -- , 133 S.Ct. 2064 (June 10, 2013)

E. GETTING MULTIPLE PROCEEDINGS AND PARTIES INTO A SINGLE FORUM PART II: CLASS ARBITRATION

1. New Life for Class Arbitration and Deference to the Arbitrator?

Oxford Health Plans, LLC v. Sutter, 569 U.S. -- , 133 S.Ct. 2064 (June 10, 2013) (unanimously holding that an arbitrator who orders class arbitration based on contractual interpretation, despite contractual silence on the issue, does not necessarily “exceed powers” under FAA §10(a)(4)). In *Oxford*, the parties agreed to allow the arbitrator to decide the issue.

Deferential Standard of Review: Where an arbitrator bases a decision on the text of the parties’ agreement, her “construction holds, however good, bad, or ugly.”

Cf. Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758, 1766 (U.S. 2010) (holding that arbitrator exceeds powers or acts in manifest disregard of the law in ordering class

D.C. Circuit has agreed that the standard survives, but in dictum. *See Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App’x 4, 5 (D.C. Cir. 2012) (assuming without deciding that manifest disregard of the law standard survived *Hall Street*); *Adviser Dealer Servs., Inc. v. Icon Advisers, Inc.*, 557 Fed. Appx. 714, 717 (10th Cir. 2014)..

¹¹ *See Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 352 (5th Cir. 2009).

¹² *McKool Smith, P.C. v. Curtis Int’l, Ltd.*, 650 F. App’x 208, 212 (5th Cir. 2016) (“While we have yet to explicitly decide whether the bases for vacatur asserted by Curtis can be statutory grounds for vacatur, we need not decide this issue today”).

arbitration where there is no contractual basis for concluding that the parties agreed to class arbitration).

F. PRECLUSION: RES JUDICATA AND COLLATERAL ESTOPPEL

Manganella v. Evanston Ins. Co., 700 F.3d 585 (1st Cir. 2012): This lawsuit concerns an insurance coverage dispute over a workplace claim of sexual harassment. Plaintiff Manganella was the alleged harasser, and the defendant insures the company for which he works. An arbitrator in a case between plaintiff and his employer found that he violated the company's code of conduct by harassing four employees. Subsequently, one of the victims filed a claim for harassment. The trial court used **issue preclusion from the arbitration** to determine certain facts in the instant coverage dispute, notably, that the conduct fell within the insurance policy's exclusion for wanton misconduct. The Circuit affirmed, conducting the traditional test for issue preclusion: "(1) the issues raised in the two actions are the same; (2) the issue was actually litigated in the earlier action; (3) the issue was determined by a valid and binding final judgment; and (4) the determination of the issue was necessary to that judgment."

Chapter 10: INTERACTION OF THE FAA AND OTHER STATUTES

3rd Circuit –No to Private Courts in Public Court System

Strine v. Delaware Coalition for Open Government, Inc., __ F.3d __, 2013 WL 5737309 (3d Cir. Oct. 23, 2013) (holding that state court could not offer its judges' services as neutral arbitrators in its court system, unless those arbitrations were open to the public).

APPENDIX I

2017 UPDATE – ARBITRATION CASES & MATERIALS

UNITED STATES SUPREME COURT COMMERCIAL ARBITRATION DECISIONS¹⁵

	NAME/DATE	SUBJECT(S)	SUMMARY
1.	Wilko v. Swan, 346 US 427 (1953)	Arbitrability of Statutory Claims	
2.	Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)	Separability Doctrine	
3.	Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968)	Arbitrator Neutrality	
4.	Alexander v. Gardner-Denver (1974) 94 S.Ct. 1011.	Application of external law in arbitration. Title VII	
5.	Scherk v. Albert-Culver Co, 417 U.S. 506 (1974)	Arbitrability of statutory claims	
6.	Barrentine v. Arkansas-Best (1981) 101 S.Ct. 1437	Application of external law in arbitration. Limited by <i>Gilmer</i> .	
7.	Moses Cohn v. Mercury Const. Corp., 460 US 1, 24 (1983)	Presumption of arbitrability	
8.	Southland Corporation v. Keating (1984) 465 U.S. 1.	Preemption.	
9.	Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., (1985). 473 U.S. 614	Arbitrability.	
10.	<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985)	Arbitrable and nonarbitrable claims	
11.	<i>AT&T Technologies v. CWA</i> , 106 S.Ct. 1415 (1986)	Arbitrability	
12.	Shearson/American Express, Inc. v. McMahan , 482 U.S. 220 (1987)		
13.	<i>Perry v. Thomas (US 1987)</i> .	Preemption.	
14.	<i>United Paperworkers v. Misco (1987) 108 S.Ct 364</i>	Judicial Review.	
15.	Rodriguez de Quijas v. Shearson//American Express, Inc. 490 U.S. 477 (1989)		
16.	<i>Volt Information Sciences, Inc. v. Stanford</i> (1989) 109 S.Ct. 1248.	Preemption.	

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 Weston/arbitrationlawupdates/ArbitrationSCT & Calif.Cases1960-2017

17.	<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991) .	Application of external law in arbitration ADEA Limits <i>Gardner-Denver</i> , <i>Barrentine</i> , <i>McDonald</i> .	
18.	<i>Mastrobuono v. Shearson Lehman Hutton, Inc.</i> , 514 U.S. 62 (1995)	Punitive Damages.	
19.	<i>Allied Bruce Terminex Co. v Dobson</i> , 513 U.S. 265 (1995)	Preemption	
20.	<i>First Options of Chicago v. Kaplan</i> , 514 U.S. 538 (1995)	Arbitrability	
21.	<i>Doctor's Assoc., Inc. v. Casarotto</i> , 517 U.S. 681 (1996)	Preemption	
22.	<i>Wright v. Universal Maritime</i> (1998) 525 U.S. 70.	Arbitration and Collective Bargaining	
23.	<i>Cortez Byrd v. Harbert Construction Company</i> (2000) 529 U.S. 193.	Venue for action to confirm, vacate, or modify.	
24.	<i>Eastern Assoc. Coal v. United Mine Workers of America</i> (2000) 531 U.S. 57	Judicial review.	
25.	<i>Green Tree v. Randolph</i> (2000) 531 U.S. 79	Finality Appeal Attorney fees and costs	
26.	<i>C & L Ent. Inc v. Potawatomi Indian Tribe</i> (2001) 121 S.Ct. 1589	Arbitration and sovereign immunity	
27.	<i>Circuit City v. Adams</i> (2001) 532 U.S. 105	Application of FAA to employment contracts. FAA § 1 exemption.	
28.	<i>Major League Baseball Players Association v. Garvey</i> (2001) 121 S.Ct. 1724.	Judicial review of arbitration awards.	
29.	<i>EEOC v. Waffle House, Inc.</i> 122 S.Ct. 754 (2002)	Arbitration as the Exclusive Forum	
30.	<i>Howsam v. Dean Witter Reynolds</i> , 537 U.S. 79 (2002)	Arbitrability Deferral to arbitrator	
31.	<i>Green Tree Financial Corp. v. Bazzle</i> , 123 S. Ct. 2402 (2003)	Class action silence	
32.	<i>Pacificare Health Systems, Inc. v. Book</i> , 538 U.S. 401 (2003)	Punitive damages	
33.	<i>Citizens Bank v. Alfabco, Inc.</i> , 123 S.Ct. 2037 (2003)	Interstate Commerce under FAA	
34.	<i>Hall Street Associates, L.L.C. v. Mattel, Inc.</i> , 552 U.S. 576 (2008).	FAA 10 Vacatur	
35.	<i>Preston v. Ferrer</i> , 552 U.S. 346, 359 (2008)	Preemption	

36.	Vaden v. Discover Bank, 556 U.S. 49 (2009) (5-4).	Federal Court Jurisdiction	
37.	Arthur Anderson LLP v. Carlisle, 129 US. 1896 (2009)		
38.	<i>Rent-A-Center, W., Inc. v. Jackson</i> , 561 U.S. 63 (2010)	Arbitration Agreements	
39.	<i>Granite Rock v. Int'l Teamsters</i> , 561 US 287 (2010)	Arbitrability	
40.	<i>Stolt-Nielsen SA v. Animal Feeds Int'l Corp.</i> , 130 S.Ct.1758 (2010)	Class Arbitration.	
41.	<i>KPMG LLP v. Cocci</i> , 132 S.Ct. 23 (2011)	Arbitrability	
42.	<i>AT&T Mobility v. Concepcion</i> , 131 S.Ct. 1740 (April 27, US 2011)	Preemption	
43.	<i>CompuCredit Corp. v. Greenwood</i> , 132 S.Ct. 665 (2012)		
44.	<i>Marmet Health Care Center, Inc. v. Brown</i> , 132 S.Ct. 1201 (2012)	Preemption	
45.	<i>Nitro-Lift Technologies, LLC v. Howard</i> , 568 U.S. – (2012)		
46.	<i>American Exp. Co. v. Italian Colors Restaurant</i> , 133 S.Ct. 2304 (2013)	Vindication of Rights	
47.	<i>Oxford Health Plans, LLC v. Sutter</i> , 569 U.S. -- , 133 S.Ct. 2064 (2013)		
48.	<i>DirectTV, Inc. v. Imburgia</i> , 577 U.S. -- (Dec. 2015)	Preemption	
49.	<i>BG Group PLC v. Republic of Argentina</i> , - U.S. -- , 2014 WL 838424 (2014)	Deference to arbitrator	
50.	<i>Kindred Nursing Centers LLP v. Clark</i> , 581 U.S. – (May 17, 2017)	Preemption	
51.	<i>Epic Systems, Corp. v. Lewis</i> , (7 th Cir. 2016), <i>cert. granted</i> (Jan. 2017)	NLRA v. FAA	Oral Argument Set for October 2, 2017.