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"[A] transportation worker need not work for a company in the transportation industry to fall within the FAA's exemption from coverage for any 'class of workers engaged in foreign or interstate commerce.'"

ADR Quarterly Case Update – 3 SCOTUS Cases

July 3, 2024

U.S. Supreme Court holds that a transportation worker need not work in the transportation industry to fall within the arbitration exemption of Section 1 of the FAA.

In *Bissonnette v. LePage Bakeries Park St., LLC*, 144 S.Ct. 905 (S. Ct. Apr. 12, 2024), Plaintiffs Neal Bissonnette and Tyler Wojnarowski owned the rights to distribute Flowers products (like Wonder Bread) in certain parts of Connecticut. To purchase those rights, they entered into contracts with Flowers that required any disputes to be arbitrated under the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.* After petitioners sued Flowers and two of its subsidiaries for violating state and federal wage laws, Flowers moved to compel arbitration. Plaintiffs responded that they were exempt from coverage under the FAA because they fell within an exception in Section 1 of the Act for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The District Court dismissed the case in favor of arbitration, concluding that Plaintiffs were not "transportation workers" exempt from the Act under Section 1. The Second Circuit ultimately affirmed on the ground that the Section 1 exemption was available only to workers in the transportation industry, but that Plaintiffs were in the bakery industry. The Supreme Court granted Certiorari because of a split among Circuits.

Vacated and remanded. In a unanimous decision, the Supreme Court, Chief Justice Roberts, held that a transportation worker need not work for a company in the transportation industry to fall within the FAA's exemption from coverage for any "class of workers engaged in foreign or interstate commerce." A transportation worker is one who is "actively engaged in transportation of … goods across borders via the channels of foreign or interstate commerce." *Southwest Airlines Co. v. Saxon*, 596 U.S 450, 458 (2022). Here, the Supreme Court observed that the Second Circuit formulated its transportation-industry requirement without any support in the text of Section 1 or its precedents. Instead, it created a test that would turn on "arcane riddles about the nature of a company's services," such as whether a pizza company derives its revenue from pizza or the delivery of pizza. The Supreme Court also rejected Flowers' argument that the exemption would sweep too broadly without an implied transportation-industry requirement. Section 1's construction is limited by the requirement that a transportation worker "must at least play a direct and 'necessary role in the free flow of goods' across borders." Ultimately, the Supreme Court held that transportation workers need not work in the transportation industry to fall within the Section 1 exemption.

U.S. Supreme Court holds that the FAA compels courts to issue a stay rather than dismissing the action.

In *Smith v. Spizzirri*, 144 S.Ct. 1173 (S. Ct. May 16, 2024), petitioners, current and former employees of an on-demand delivery service, brought an action in state court against their employer for allegedly violating state and federal employment laws by, among other things, misclassifying them as independent contractors, failing to pay them required minimum and overtime wages, and failing to provide paid sick leave. Following removal to district court, the employer successfully moved to compel arbitration under the Federal Arbitration Act (FAA) and to dismiss. Employees appealed. The Ninth Circuit affirmed, holding that under the FAA, the district court could dismiss rather than stay suit after determining all claims were subject to arbitration. The Supreme Court granted certiorari.

"[W]hen a federal court finds that a dispute is subject to arbitration and a party has requested a stay of the court proceeding pending arbitration, the FAA compels the court to stay the proceeding and not dismiss it."

Reversed and remanded. In a unanimous opinion, the Supreme Court, Justice Sotomayor, held that when a federal court finds that a dispute is subject to arbitration and a party has requested a stay of the court proceeding pending arbitration, the FAA compels the court to stay the proceeding and not dismiss it. Statutory text, structure, and purpose all point to this conclusion. The plain text of § 3 requires a court to stay the proceeding upon request. The statute's use of the word "shall" "creates an obligation impervious to judicial discretion," and does not mean dismiss. An attempt to read "stay" to include "dismiss" cannot be squared with the surrounding statutory text, which anticipates that the parties can return to federal court if arbitration breaks down or fails to resolve the dispute. The Supreme Court's decision resolves a split among Circuits and abrogates those decisions holding that the district court could dismiss the action. (See, *Green v. SuperShuttle Int'l, Inc.*, 653 F. 3d 766, *Bercovitch v. Baldwin School, Inc.*, 133 F. 3d 141, *Alford v. Dean Witter Reynolds, Inc.*, 975 F. 2d 1161, and *Sparling v. Hoffman Constr. Co.*, 864 F. 2d 635.

U.S. Supreme Court holds that it was for the court to decide whether a subsequent contract with a forum selection clause superseded an earlier agreement delegating questions of arbitrability to the arbitrator.

"[W]here parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs."

In *Coinbase v. Suski*, 144 S.Ct. 1186 (S. Ct. May 23, 2024), Respondents were users of the cryptocurrency exchange that Petitioner, Coinbase, Inc., operated to buy and sell cryptocurrency on Coinbase's platform. In order to do so, Respondents were required to create an account and agree to Coinbase's User Agreement that included an arbitration clause with a delegation clause that empowered the arbitrator to decide questions of arbitrability. In June 2021 some users entered a Coinbase sweepstakes for a chance to win cryptocurrency. When those users submitted entries to the sweepstakes, they agreed to the Official Rules for the contest, which contained a forum selection clause specifying California courts with sole jurisdiction over controversies related to the contest. Following the sweepstakes, some of the contest participants filed a class action against Coinbase in district court claiming the sweepstakes violated California law. Coinbase moved to compel arbitration under the User Agreement. The district court denied the motion, finding the question of which contract governed was for the court to decide. Coinbase appealed and the Ninth Circuit affirmed. Coinbase appealed to the U.S. Supreme Court. Certiorari was granted.

Affirmed. In a unanimous opinion, the Supreme Court, Justice Jackson, held that where parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs.

Ninth Circuit holds that Section 1's transportation worker exemption does not extend to delivery services contracts between business entities.

In *Fli-Lo Falcon LLC v. Amazon.com, Inc.*, 97 F.4th 1190 (9th Cir. Apr. 10, 2024), Plaintiffs were business entities that entered into Delivery Service Program Agreements ("DSP Agreements") with Amazon to deliver packages to Amazon customers. The DSP Agreements included arbitration clauses. After Plaintiffs filed a federal class action, Amazon moved to compel arbitration. Plaintiffs opposed the motion, arguing they were transportation workers and, therefore, exempt from arbitration under the transportation worker exemption in Section 1 of the Federal Arbitration Act, 9 U. S. C. § 1 *et seq*. The trial court disagreed and compelled arbitration.

"Here, the Ninth Circuit rejected Plaintiffs' claims that they, as business entities, were "transportation workers," observing that the category refers to employees playing a direct and necessary role in the free flow of goods across borders."

Affirmed. Section 1 of the FAA contains the transportation worker exemption that exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The residual clause ("any other class of workers") should be construed narrowly and be interpreted to give effect to the preceding terms "seamen" and "railroad employees." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). Here, the Ninth Circuit rejected Plaintiffs' claims that they, as business entities, were "transportation workers," observing that the category refers to employees playing a direct and necessary role in the free flow of goods across borders. It further held that "contracts of employment" in the transportation worker exemption do not extend to commercial contracts like the DSP Agreements. To fall under Section 1 as a "contract of employment," a contract must have a qualifying worker as one of the parties. Since the Section 1 exemption did not apply, the District Court correctly compelled arbitration.

Ninth Circuit holds that hyperlink with terms of service on game's start screen was sufficient to compel arbitration.

In *Keebaugh v. Warner Bros. Entertainment, Inc.*, 100 F.4th 1005 (9th Cir. Apr. 26, 2024), several individuals sued Warner Bros. Entertainment for alleged consumer law violations related to its *Game of Thrones: Conquest* (GOTC) mobile app. Warner moved to compel arbitration, claiming that plaintiffs agreed to arbitrate by pressing the "Play" button on the start screen. Users could only progress to the game by pressing the Play button. A hyperlink with the full Terms of Service was below the Play button. Users were told that by pressing the Play button, they agreed to the Terms of Service regardless of whether they individually viewed or accepted the Terms before pressing Play. The Terms contained an arbitration clause and a class action waiver. The district court denied the motion, finding no agreement to arbitrate because Warner failed to give conspicuous notice of its Terms. Warner appealed.

Reversed and remanded. Contracts are formed when there is actual or constructive notice to agree and the parties mutually assented. With sign-in wrap

agreements, manifestation of assent is shown when the terms' notice was reasonably conspicuous, and the user unambiguously manifested consent. Determining sufficient notice is done in the context of the entire transaction and the notice's placement. Here, Warner met both requirements that the transaction's context and notice's placement reasonably notified users they were going to be bound by the Terms of Service. Terms may be disclosed through hyperlinks if readily apparent, which was the case here. Instead, the district court improperly focused on whether the transaction placed plaintiffs on notice they were agreeing to the Terms, and concluded the notice was insufficient because users were not considering a continuing relationship that required terms and conditions. However, this conclusion was erroneous because GOTC's mobile app required users to download the app, an action that contemplated a continuing relationship. Because GOTC's app satisfied the necessary notice requirements, the district court erred in denying Warner's request to arbitrate.

"With sign-in wrap agreements, manifestation of assent is shown when the terms' notice was reasonably conspicuous, and the user unambiguously manifested consent."

However, website's clickwrap agreement did not create an enforceable arbitration agreement because it failed to provide reasonable conspicuous notice of its terms.

In *Herzog et al. v. Superior Court (Dexcom, Inc.)* (May 16, 2024) 101 Cal.App.5th 1280, Petitioners were several users of the Dexcom G6, a wearable blood sugar monitor. They sued Dexcom, Inc., alleging a purported malfunction of the device. Dexcom successfully moved to compel arbitration based upon an arbitration provision in its "Terms of Use." Although not required to use the device, the G6 smartphone app required prospective users to sign up and log in to a Dexcom account. During the registration process, users were presented with a screen containing legal information, including "By ticking the boxes below you understand that your personal information, including your sensitive health information, will be collected, used and shared consistently with the Privacy Policy and Terms of Use." Underneath this language were two clickable boxes to indicate agreement to the "Terms of Use" and "Privacy Policy," which were accompanied by hyperlinks to separate webpages for optionally viewing those terms. The Terms of Use hyperlink contained the arbitration clause. After the trial court compelled arbitration, Petitioners sought a writ of mandate with the appellate court.

Writ granted. Contract formation requires unambiguous manifestation of mutual assent to the contractual terms. However, an offeree is not bound by inconspicuous provisions of which he or she is unaware. Establishing mutual assent to form an internet contract requires proving the contractual terms were presented in an unambiguous way that made it apparent the consumer was assenting to those very terms by proceeding to act. Here, Dexcom's arbitration agreement was presented in a clickwrap format that is generally considered enforceable by virtue of the user clicking the agree or accept button. Nevertheless, notice of the terms being assented to were presented in an ambiguous manner. Users clicking on the agree boxes could have reasonably believed they were agreeing only to terms regarding the collection, use, and sharing of their personal information. Dexcom's failure to notify users in an unambiguous way that by clicking the boxes would also commit them to other contract provisions, including the arbitration clause, rendered it unenforceable.

"Establishing mutual assent to form an internet contract requires proving the contractual terms were presented in an unambiguous way that made it apparent the consumer was assenting to those very terms by proceeding to act."

Ninth Circuit holds that district court erred by compelling arbitration of non-individual PAGA claims.

In *Diaz v. Macys West Stores, Inc.*, 101 F.4th 697 (9th Cir. May 10, 2024), Plaintiff Yuriria Diaz sued her employer, Macys West Stores, Inc., under the Private Attorneys General Act for Labor Code Violations. Macys moved to compel arbitration of Diaz's individual claims pursuant to an arbitration agreement Diaz had signed, which included a waiver precluding arbitration of "consolidate[d] claims of different Associates" and "class or collective action[s]." Macys also sought dismissal of the non-individual claims. In her opposition, Diaz argued that none of her PAGA claims were subject to arbitration, and sought a stay pending the California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104. The district court ordered arbitration of both the individual and non-individual claims. Diaz appealed.

"The Federal Arbitration Act does not mandate the arbitration of all claims, only those subject to privately negotiated arbitration agreements."

Vacated in part. The Federal Arbitration Act does not mandate the arbitration of all claims, only those subject to privately negotiated arbitration agreements. Here, the district court found that the parties agreed to arbitrate only Diaz's individual claims. However, they did not contemplate that the non-individual PAGA claims would be subject to their agreement. Therefore, the Ninth Circuit vacated the district court's order to the extent it compelled arbitration of the non-individual PAGA claims, and remanded to the district court to address those claims consistent with *Adolph*.

Employee may withdraw from arbitration upon learning employer failed to timely pay fees, even though his counsel participated in the proceeding for a time.

In *Reynosa v. Superior Court (Advanced Transportation Services, Inc.)* (May 6, 2024) 101 Cal.App.5th 967, Petitioner Andrew Reynosa and real party in interest Advanced Transportation Services, Inc. (ATS) initiated arbitration in 2019 pursuant to an employment arbitration agreement. On March 20, 2023, Reynosa filed a motion to withdraw from arbitration with the Tulare County Superior Court. Citing Code of Civil Procedure section 1281.98. He argued ATS twice failed to pay the fees and costs required to continue arbitration within 30 days after the due date and therefore waived the right to compel him to proceed with arbitration. On April 18, 2023, the superior court issued an order denying the motion. Reynosa sough a writ of mandate with the Appellate Court.

"Reynosa was entitled to unilaterally withdraw from the arbitration, even though his counsel continued to participate in the arbitration for a time because Reynosa was unaware of ATS's breach."

Writ granted. An employer's failure to timely pay arbitration fees is a material breach of the arbitration agreement and entitles the employee to withdraw from the arbitration. Any extension of a due date for fees must be by mutual agreement. Here, arbitrator posted two invoices to ATS, both marked due upon receipt. Although the parties apparently agreed to extend one invoice, they did not agree to extend the second. As a result, ATS was in material breach of the arbitration agreement. Reynosa was entitled to unilaterally withdraw from the arbitration, even though his counsel continued to participate in the arbitration for a time because Reynosa was unaware of ATS's breach. A party is not entitled make an election of remedies until all circumstances are known.

“Therefore, the FAA preempted the provisions of section 1281.97 that mandate findings of breach and waiver.”

Reaching a contrary result, trial court’s refusal to compel arbitration due to employer’s late payment of fees reversed because Federal Arbitration Act preempted California law.

In *Hernandez v. Sohnen Enterprises, Inc.* (May 22, 2024) 102 Cal.App.5th 222, Massiel Hernandez signed an arbitration agreement with her employer, Sohnen Enterprises, that stated it would be governed by the Federal Arbitration Act (“FAA,” 9 U.S.C. § 1 et seq.) and Federal Rules of Civil Procedure. After she sued Sohnen, the parties stipulated to stay the trial court proceedings and arbitrate the dispute. Sohnen failed to pay arbitration costs within 30 days of the due date. Hernandez filed a motion to withdraw from arbitration and litigate in state court as permitted under California Code of Civil Procedure section 1281.97. The trial court found the employer breached the arbitration agreement and granted the motion. Sohnen appealed, contending the FAA governed the parties’ arbitration agreement and preempted Code of Civil Procedure section 1281.97.

Reversed. In a divided opinion, the Court of Appeal concluded that an order granting a motion under section 1281.97 to withdraw from arbitration and proceed in court was appealable. Second, the court found the arbitration agreement in this case was governed by the FAA, including both the substantive and procedural provisions of the FAA, rather than California's arbitration laws. As a result, the procedures of section 1281.97 did not apply. The majority further stated that, even if section 1281.97 applied, the arbitration agreement fell within the scope of the FAA and did not expressly adopt California arbitration laws. Therefore, the FAA preempted the provisions of section 1281.97 that mandate findings of breach and waiver. Thus, the trial court’s order denying the motion to compel arbitration was reversed.

Justice Baker dissented. He would affirm the trial court’s denial of the motion to compel arbitration because, in his opinion, a state statute requiring prompt payment of arbitration fees is not inconsistent with the FAA.

The majority’s opinion creates a split of authority that may have to be resolved by the California Supreme Court (See, *Hohenshelt v. Superior Court* (2024 99 Cal. App. 5th 1319).

Employer waived right to arbitrate claims by waiting until nine months after *Viking River* to file motion to compel.

In *Semprini v. Wedbush Securities, Inc.* (Apr. 18, 2024) 101 Cal.App.5th 518, Plaintiff Joseph Semprini brought individual and class claims against his former employer, Wedbush Securities, Inc. The parties stipulated to arbitration of the personal claims. Following class certification, the parties litigated the case for several years, conducting extensive discovery, motion practice, and trial preparation. In June 2022, the United States Supreme Court issued its decision in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, holding that, contrary to prior California Supreme Court authority, an employer may enforce an employee's agreement to arbitrate individual PAGA claims. Second, in the wake

of *Viking River*, Wedbush asked its workforce to sign arbitration agreements, and two dozen class members, including the second named plaintiff, Bradley Swain, agreed to do so in September and October 2022. In March 2023, just five months before trial, Wedbush filed a motion to (1) compel the named plaintiffs to arbitrate their individual PAGA claims under *Viking River*, and (2) compel to arbitration Swain and the 23 other class members who signed arbitration agreements in the fall of 2022. The trial court denied Wedbush's motion, finding it had waived its right to compel arbitration.

"Wedbush waited too long to make its motion, particularly in light of the looming trial date."

Affirmed. Even if *Viking River* or the fall 2022 arbitration agreements gave Wedbush a new right to move to compel certain claims to arbitration, Wedbush waited too long to make its motion, particularly in light of the looming trial date. *Viking River* was decided in June 2022; the 24 class members signed arbitration agreements in September and October 2022; but Wedbush waited until March 2023 to file its motion to compel arbitration. During that interim period Wedbush propounded discovery and filed other motions. Wedbush did not attempt to enforce its alleged arbitration rights until nine months post-*Viking River* and five to six months after select class members signed the new arbitration agreements. The record therefore supported the trial court's finding that Wedbush waived its right to compel arbitration.

Employer's motion to compel arbitration denied since previous arbitration agreement did not survive employee's second employment stint with company.

In *Vasquez v. SaniSure* (Apr. 3, 2024) 101 Cal.App.5th 139, Jasmin Vasquez initially worked for SaniSure through a staffing agency in July 2019. She was hired directly by the company as an at-will employee that November. As part of her hiring, SaniSure provided Vazquez with onboarding documents, including agreements to "utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to [her] employment." Vazquez terminated her employment with SaniSure when she resigned in May 2021. Four months later, she negotiated a new employment offer and returned to work for the company. During negotiations the parties did not discuss whether Vazquez would be required to sign arbitration agreements again or whether claims related to her employment would be subject to arbitration. Vazquez's second stint of employment with SaniSure ended in July 2022. In October, Vazquez filed a class action complaint alleging that SaniSure failed to provide accurate wage statements during her second stint of employment. SaniSure moved to compel arbitration. The trial court denied the motion, finding that all the claims in Vazquez's complaint arose out of her second stint of employment with SaniSure. SaniSure appealed.

"The party seeking to compel arbitration carries the heavy burden of proving that an arbitration agreement exists."

Affirmed. The party seeking to compel arbitration carries the heavy burden of proving that an arbitration agreement exists. Because arbitration provisions are tethered to the underlying contract containing the provision, termination of the contract also terminates the arbitration provision. Here, Vazquez terminated her employment with SaniSure in May 2021 and later negotiated a new employment offer. And during those negotiations she did not sign arbitration agreements. Nor was she told that the agreements she signed during her previous employment with SaniSure would apply to any new term of employment. SaniSure failed to

meet its burden of proving an arbitration agreement existed. The trial court properly denied SaniSure's motion to compel arbitration.

Employer could not compel arbitration because it failed to establish authenticity of arbitration agreement.

In *Garcia v. Stoneledge Furniture LLC* (May 17, 2024) 102 Cal.App.5th 41, Isabel Garcia became employed by RAC Acceptance East, LLC, a company that offers financing for purchases. On her first day of work she completed onboarding paperwork using Taleo, a third-party electronic workforce management platform used by RAC. Garcia worked at an RAC kiosk located inside an Ashley HomeStore operated by Stoneledge Furniture LLC, and later reported a sexual assault by a store manager. She filed suit against RAC, Stoneledge, and others related to the assault. RAC moved to compel arbitration based upon an arbitration agreement it claimed Garcia electronically signed as part of her onboarding paperwork. Garcia opposed the motion, arguing no agreement existed since she never signed the purported arbitration agreement. She also noted several suspect aspects of the purported agreement, including the fact that it did not have an IP address underneath the electronic signatures, like other documents she was not contesting. The trial court found that although RAC met its initial burden of producing an arbitration agreement, Garcia's denial of signing the document shifted the burden back to RAC to prove the authenticity of her electronic signature. Because RAC failed to show by evidentiary preponderance that Garcia did sign the agreement, the trial court declined to compel arbitration. RAC appealed.

"Authentication of an electronic signature requires proving that the security procedure used to determine the electronic signer's identity was effective and valid."

Affirmed. Authentication of an electronic signature requires proving that the security procedure used to determine the electronic signer's identity was effective and valid. Here, RAC relied solely on its Human Resources Information Systems Analyst's declaration to prove that Garcia signed the arbitration agreement. However, the Analyst's declaration was insufficient to establish that only Garcia could have placed the electronic signature. He did not attest to seeing her sign the form. Instead, he concluded she must have before exiting Taleo. In light of conflicting evidence that could support the opposite conclusion – differences between the purported signed arbitration agreement versus other documents Garcia admitting signing, and no indication it was created within Taleo – the trial court did not err as a matter of law in finding there was no agreement to arbitrate and denying the motion to compel arbitration.

An employee who promptly rejects an employer's modification to its dispute policy to require arbitration will not be bound, even if he continues working for the company.

In *Mar v. Perkins* (May 22, 2024) 102 Cal.App.5th 201, Plaintiff Winston Mar sued Lawrence Perkins and SierraConstellation, LLC, asserting a cause of action for the buyout of his partnership interest. Defendants moved to compel arbitration based upon a provision in the company's employee handbook, which stated that employees agreed to arbitrate all disputes even if they did not sign the agreement or acknowledge receipt of the policy. Mar opposed the motion on the grounds that he promptly, explicitly, and repeatedly refused to assent to the policy and, therefore, was not bound to it. The trial court found the Defendants failed to meet their burden to establish the existence of an arbitration agreement

because Mar clearly stated that he refused to sign the arbitration agreement and Defendants could terminate his employment if they objected. Defendants appealed, contending the trial court erred because they notified Mar that his continued employment constituted assent to the arbitration agreement, and Mar continued his employment for 19 months before he left the company and filed his lawsuit.

"However, where, as here, the employee promptly rejects the arbitration agreement and makes clear he or she refuses to be bound by the agreement, there is no mutual assent to arbitrate and the employer may not compel arbitration."

Affirmed. The Defendants were correct that where an employer modifies its employment policy to require employees to arbitrate their disputes and clearly communicates to employees that continued employment will constitute assent to an arbitration agreement, the employees will generally be bound by the agreement if they continue to work for the company. However, where, as here, the employee promptly rejects the arbitration agreement and makes clear he or she refuses to be bound by the agreement, there is no mutual assent to arbitrate and the employer may not compel arbitration.

Employment arbitration agreement's indefinite scope and duration rendered it unconscionable and unenforceable.

In *Cook v. University of Southern California, et al.* (May 24, 2024) 102 Cal.App.5th 312), Pamela Cook sued the University of Southern California and others for claims based upon employment discrimination and harassment. USC moved to compel arbitration based upon the agreement Cook signed when first employed. Cook opposed the motion on the grounds that the agreement was of infinite duration that required an employee to arbitrate all claims against USC, its agents, affiliates, and employees irrespective of whether they arose from the employment relationship. The trial court agreed with Cook, finding the agreement substantively unconscionable because it lacked mutuality and its scope and duration were infinite. For example, if Cook had surgery at a USC hospital, potential claims would be subject to arbitration. The trial court denied the motion to compel, finding procedural unconscionability due to the adhesive nature of the agreement, and determined the unconscionable provisions could not be severed from the agreement. USC's appealed.

"Employment agreements without defined duration and scope lean toward a finding of unconscionability."

Affirmed. Employment agreements without defined duration and scope lean toward a finding of unconscionability. While employers are entitled to some leeway if a legitimate commercial need necessitates latitude, it must be explained in the agreement itself or, alternatively, established factually before the trial court. Here, the arbitration agreement did not delineate reasons for its expansive nature, and USC's attempt at justification on appeal was insufficient. To alleviate post-termination concerns, USC could have limited the agreement's scope to only those claims arising out of or related to Cook's employment or termination. Instead, casting the widest legal net possible, created an inordinate imbalance resulting in an unconscionable and unenforceable agreement.

After compelling arbitration, trial court lacks jurisdiction to dismiss plaintiffs' claims for failure to prosecute.

In *Lew-Williams v. Petrosian* (Apr. 3, 2024) 101 Cal.App.5th 97, Plaintiffs Wilbur William, Jr., M.D. and Wilbur Williams, M.D., Inc. filed suit alleging Defendants embezzled $11.5 million from their corporate bank accounts. The trial court granted Defendants' motion to compel arbitration. After Plaintiffs failed to initiate

arbitration proceedings, the trial court set a hearing on an order to show cause regarding dismissal for failure to prosecute. The court subsequently dismissed Plaintiffs' claims without prejudice. On appeal, Plaintiffs contended their failure to initiate the arbitration was excused because they did not have sufficient funds, and the trial court erred in compelling arbitration because the parties' agreement to arbitrate was unconscionable and unenforceable. The Court of Appeal requested the parties to submit supplemental briefing on whether the trial court had jurisdiction to dismiss the claims against the Defendants after they had been compelled to arbitration.

"If a party fails to diligently prosecute an arbitration, the appropriate remedy is for the opposing party to seek relief in the arbitration proceeding …"

Reversed. Once the trial court granted the Defendants' motion to compel arbitration and stayed the action, it retained only vestigial jurisdiction over the case as provided in the California Arbitration Act (Code Civ. Proc., § 1281 et seq.), and the trial court did not have the power to dismiss the claims for failure to prosecute. If a party fails to diligently prosecute an arbitration, the appropriate remedy is for the opposing party to seek relief in the arbitration proceeding (and, if necessary, the opposing party may need to initiate the arbitration for this purpose).

Evidence that the parties intended to delegate to the arbitrator (instead of the court) the question of arbitrability must be "clear and unmistakable."

In *Mondragon v. Sunrun, Inc.* (Apr. 23, 2024) 101 Cal.App.5th 592, Angel Mondragon signed an arbitration agreement with his former employer, Sunrun, Inc. The agreement covered most disputes relating to Mondragon's employment, but it excluded claims brought "as a representative of the state of California as a private attorney general under" the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.). After his employment ended, he filed a complaint asserting several causes of action under PAGA. Sunrun filed a motion to compel arbitration of Mondragon's claims, and argued the arbitration agreement excluded only PAGA claims based on violations involving other employees, not Mondragon's "individual" PAGA claims. Sunrun also claimed the question of arbitrability was for the arbitrator and not the court in light of a delegation clause in the agreement. The trial disagreed and denied the motion. Sunrun appealed.

"The parties may agree to delegate authority to the arbitrator to decide arbitrability, but given the contrary presumption, evidence that the parties intended such a delegation must be 'clear and unmistakable' before a court will enforce a delegation provision."

Affirmed. Under both federal and state law, courts presume that the parties intend courts, not arbitrators, to decide the question of arbitrability, including whether an arbitration clause in a concededly binding contract applies to a particular type of controversy. The parties may agree to delegate authority to the arbitrator to decide arbitrability, but given the contrary presumption, evidence that the parties intended such a delegation must be "clear and unmistakable" before a court will enforce a delegation provision. The "clear and unmistakable" test reflects a "*heightened* standard of proof" that reverses the typical presumption in favor of the arbitration of disputes. Here, the case involved an unsophisticated party, who did not clearly and unmistakably delegate authority to decide the specific arbitrability question at issue here—whether the arbitration agreement excluded Mondragon's individual PAGA claims. Multiple federal circuit courts have held that, even where an agreement's incorporation of arbitration rules may otherwise constitute a clear and unmistakable delegation, the rules do not apply where the arbitration agreement creates a carve-out for certain claims and the arbitrability dispute is whether the carve-out covers the claims at issue. Finally,

that the parties did not clearly intend for the issue to be decided by only the arbitrator was evidenced by the arbitration agreement's inclusion of a severability provision allowing the court to decide some arbitrability issues. For those reasons, the trial court correctly denied the motion to compel.

Behavioral health provider may compel arbitration since it was not a "health service plan" nor required to meet Health and Safety Code Section 1363.1's disclosure requirements.

" However, USB was not a 'health service plan' under Health and Safety Code Section 1345, which is defined as an entity that arranges, pays for, or reimburses health care providers rendering services to enrollees or subscribers in return for a charge paid on behalf of that enrollee or subscriber."

In *Dougherty v. U.S. Behavioral Health Plan* (Apr. 24, 2024) 101 Cal.App.5th 682, Christine Dougherty enrolled herself and her son, Ryan, in a UnitedHealthCare HMO health plan. She signed an enrollment form that included an arbitration clause. Immediately below the signature line was a disclaimer advising that behavioral health services would be provided by U.S. Behavioral Health Plan (USB). Dougherty was also given a Behavioral Health Supplement that included an arbitration provision. Ryan admitted himself into a drug treatment facility. USB initially provided coverage and then concluded Ryan could receive further treatment at home. After Ryan was discharged, he fatally overdosed. Dougherty then sued USB, which moved to compel arbitration. Dougherty opposed the motion, claiming USB failed to comply with the disclosure requirements of Health and Safety Code Section 1363.1. The trial court agreed and denied the motion. USB appealed.

Reversed. In order to compel arbitration, health service plans must meet the disclosure requirements under Section 1363.1. However, USB was not a "health service plan" under Health and Safety Code Section 1345, which is defined as an entity that arranges, pays for, or reimburses health care providers rendering services to enrollees or subscribers in return for a charge paid on behalf of that enrollee or subscriber. Only UnitedHealthCare HMO met that definition, not USB. Therefore, USB was entitled to compel arbitration without meeting the disclosure requirements of Section 1363.1. Accordingly, the trial court should have granted USB's motion to compel arbitration.

Trial court erred by denying nursing facility's petition to compel arbitration as to decedent's parent's wrongful death cause of action.

"Pursuant to Ruiz v. Podolsky *… and Code of Civil Procedure section 1295, the parents are bound by the arbitration agreement signed by Skyler."*

In *Holland et al. v. Silverscreen Healthcare, Inc.* (May 10, 2024) 101 Cal.App.5th 1125, Jonie A. Holland and Wayne D. Womack filed suit against Silverscreen Healthcare, Inc., doing business as Asistencia Villa Rehabilitation and Care Center (Asistencia), a skilled nursing facility, following the death of their son, Skyler A. Womack, alleging survivor claims for dependent adult abuse and negligence on behalf of Skyler as well as their own claim for wrongful death. Asistencia moved to compel arbitration of the entire complaint pursuant to an arbitration agreement between Skyler and Asistencia. The trial court granted Asistencia's motion as to the survivor claims, but denied the motion as to the wrongful death cause of action on the ground that the parents did not have an enforceable arbitration agreement with Asistencia. Asistencia appealed.

Reversed and remanded. Pursuant to *Ruiz v. Podolsky* (2010) 50 Cal.4th 838), and Code of Civil Procedure section 1295, the parents are bound by the arbitration agreement signed by Skyler. Therefore, the parents' wrongful death

claim is subject to arbitration and the trial court should have granted the motion to compel.

Trial court retained jurisdiction to enforce settlement agreement because cross-complaint was still pending.

In *Eagle Fire and Water Restoration, Inc. v. City of Dinuba et al.* (May 30, 2024) 102 Cal.App.5th 448, Plaintiff Eagle Fire and Water Restoration, Inc. entered into a construction contract with the city of Dinuba to reroof the police station and courthouse. A rain storm caused damage to the building's interior. The City withheld approximately$319,000 from Eagle to offset damage and cleanup costs. Eagle and the City reached an oral settlement on the record, but a dispute over the scope of the claims settled arose before the City dismissed its cross-complaint against Eagle. To resolve that dispute, the City filed a motion under Code of Civil Procedure section 664.6 to enforce the settlement agreement. The trial court granted the motion and filed a judgment dismissing both Eagle's complaint and the City's cross-complaint with prejudice. Eagle appealed, contending that (1) the trial court could not enforce the purported settlement because the court did not properly retain jurisdiction under section 664.6 over the complaint and defendant Jason Watts after Eagle voluntarily dismissed its complaint; (2) the purported settlement agreement failed due to uncertainty; (3) the court made improper factual determinations in the absence of jurisdiction; and (4) the court misinterpreted the settlement agreement when it found claims not pleaded in Eagle's complaint were released.

"Trial court had subject matter jurisdiction and personal jurisdiction over Eagle and the City when it enforced the settlement because the City's cross-complaint had not been dismissed and, therefore, this case was "pending litigation" for purposes of section 664.6, subdivision (a)'s first sentence."

Affirmed. Trial court had subject matter jurisdiction and personal jurisdiction over Eagle and the City when it enforced the settlement because the City's cross-complaint had not been dismissed and, therefore, this case was "pending litigation" for purposes of section 664.6, subdivision (a)'s first sentence. As a result, the subdivision's second sentence addressing the retention of jurisdiction did not apply to the facts of this case. Also, the court did not need personal jurisdiction over Watts because the judgment did not require Watts to do anything. With respect to the existence and scope of an enforceable settlement agreement, substantial evidence supported the trial court's findings that an oral settlement agreement was formed and that the agreement resolved all claims arising from the construction project, whether or not included in the parties' pleadings. Therefore, the appellate court affirmed the trial court's order granting the motion and the judgment enforcing settlement.

Party challenging authenticity of signature on arbitration agreement must provide admissible evidence to raise factual dispute in order to avoid arbitration.

In *Ramirez v. Golden Queen Mining Co.*(June 11, 2024) 2024 WL 2932565, Carlos Ramirez filed a class action against his former employer, Golden Queen Mining Company, LLC, alleging various Labor Code violations. Golden Queen moved to compel arbitration. The motion was accompanied by a declaration from its human resources manager, which included copies of the arbitration agreement, a handbook acknowledgement, and other documents that had been purportedly signed by Ramirez. Ramirez opposed the motion, arguing that Golden Queen could not prove an arbitration agreement existed because he did not recall ever being presented with an agreement or signing one. The trial court

denied the motion to compel, finding that Golden Queen failed to demonstrate the existence of an executed arbitration agreement. Golden Queen appealed.

Reversed and remanded. Once a party seeking to compel arbitration has made prima facie showing of the existence of a written arbitration agreement, the burden shifts to the party opposing arbitration to identify a factual dispute as to the agreement's existence that is supported by admissible evidence. Despite a split of authority regarding what creates a factual dispute over a signature, this court chose to adopt the First Appellate District's rule that distinguished between electronic and handwritten signatures. With electronic signatures, the inability to recall signing electronically *may* be considered evidence the party did not sign. Conversely, with handwritten signatures, a person is assumed capable of recognizing their own signature. Thus, if they do not deny the handwritten personal signature is theirs, the failure to remember signing does not create a factual dispute. Here, Ramirez's declaration did not reveal whether he inspected the arbitration agreement and other documents; did not state whether he examined any of the handwritten signatures or initials on the documents; or whether those signatures or initials were forged or authentic. Therefore, Ramirez failed to provide any admissible evidence creating a dispute over the authenticity of his signature on the arbitration agreement. Accordingly, the trial court should have granted Golden Mining's motion to compel arbitration.

"Conversely, with handwritten signatures, a person is assumed capable of recognizing their own signature. Thus, if they do not deny the handwritten personal signature is theirs, the failure to remember signing does not create a factual dispute."

Employer may not compel arbitration of former employee's claim under doctrine of equitable estoppel because employer was a nonsignatory to arbitration agreement while staffing agency that signed agreement was not a party to lawsuit.

In *Soltero v. Precise Distribution* (June 18, 2024) 2024 WL 3039929, Nelida Soltero applied for employment with Real Time Staffing Services, a temporary staffing agency. As part of the onboarding process, she electronically signed the Spanish language version of its Arbitration Agreement. The Agreement was between Soltero and "the Company" "and all related entities," but did not mention Defendant Precise Distribution. Real Time placed Soltero on a temporary work assignment with Precise from October 2017 through January 2021. In February 2022, Soltero filed a class action complaint against Precise for its alleged wage and hour violations under the California Labor Code. Soltero did not name Real Time as a defendant. Precise filed a motion to compel arbitration under the Agreement between Soltero and Real Time. Precise argued that even as a nonsignatory to the Agreement, it was entitled to compel arbitration based on theories of equitable estoppel, third-party beneficiary, and agency. Soltero opposed the motion. After a hearing, the trial court denied Precise's motion to compel arbitration. Precise appealed.

"Equitable estoppel prevents parties from taking advantage of their own actions or representations to the detriment of another party. In the arbitration context, a plaintiff's claim must be inextricably intertwined with the underlying contract containing the arbitration agreement."

Affirmed. The trial court correctly denied Precise's motion because it was not a party to the arbitration agreement between Soltero and Real Time, and it could not compel arbitration based on theories of equitable estoppel, third-party beneficiary, or agency. Equitable estoppel prevents parties from taking advantage of their own actions or representations to the detriment of another party. In the arbitration context, a plaintiff's claim must be inextricably intertwined with the underlying contract containing the arbitration agreement. Here, the doctrine did not apply. Soltero was not attempting to impose liability on Precise based on the terms of her employment agreement with Real Time. Rather, she was suing Precise based on its actions for allegedly violating the Labor Code.

Because Soltero's claims against Precise did not actually rely on the contractual agreement between Soltero and Real Time, Precise could not use the Arbitration Agreement to compel arbitration of Soltero's claims.

Ninth Circuit affirms district court's order compelling arbitration of the Choctaw Nation's dispute over agreement to facilitate insurance reimbursements of pharmacy costs.

In *Caremark LLC v. Choctaw Nation*, 104 F.4th 81 (9th Cir. June 11, 2024), the Choctaw Nation, and pharmacies that it owns and operates (collectively, the Nation), entered into agreements with Defendant Caremark to facilitate insurance reimbursements for the Nation's costs for pharmacy services for its members. The Nation filed suit in federal court, alleging that Caremark unlawfully denied pharmacy reimbursement claims in violation of the Recovery Act, 25 U.S.C § 1621e, a provision of the Indian Health Care Improvement Act. Caremark moved to compel arbitration under an arbitration provision in the agreement. The district court granted the motion in light of the arbitration provision that included a delegation clause directing the arbitrator to decide issues of enforcement. The Nation appealed, arguing the agreements were unenforceable.

"Thus, the question here – whether there had been a waiver of tribal sovereign immunity – was for the arbitrator to decide."

Affirmed. In *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir 2022), the Ninth Circuit concluded that the Chickasaw Nation formed enforceable contracts with Caremark that included arbitration and delegation clauses. Thus, the question here – whether there had been a waiver of tribal sovereign immunity – was for the arbitrator to decide. In short, the arguments advanced by the Nation were precluded by precedent and the district court's judgment was affirmed accordingly.

In divorce case, costs incurred in voluntary mediation to resolve discovery dispute are not recoverable as part of expenses awarded in motion to compel that discovery.

"Here, the fees and costs Covington incurred in mediation as meet and confer attempts, after her discovery motions were already filed, were not compensable as discovery sanctions because they were not incurred as part of the necessary costs of bringing the motions."

In *Marriage of Moore* (June 25, 2024) 2024 WL 3158992, Plaintiff Monique Covington Moore (Covington) and defendant Charles Moore were married from 1998 until March 2020 when Covington commenced divorce proceedings. Covington claimed the largest portion of the marital estate was an ownership interest in Acendi Interactive Company. Her counsel served deposition subpoenas for production of business records on Acendi and a related company, Rocket Lawyer, Inc. Both companies asserted objections and refused to comply with most of the subpoenas' demands, Covington filed a motion to compel their compliance under Code of Civil Procedure section 2025.480. The trial court granted the motion in substantial part and ordered appellants to each pay Covington $25,000 in monetary sanctions. Appellants appealed, raising numerous claims of error regarding the trial court's rulings on the timeliness of Covington's motion against Rocket Lawyer, the sufficiency of her attempts to meet and confer with Acendi, and the reasonableness of the monetary sanctions award, among other matters.

Reversed in part and remanded with instructions. Pursuant to the Civil Discovery Act, meet and confer expenses may be compensable expenses included in discovery sanctions. However, they must have been incurred in bringing the motion to compel discovery. Here, the fees and costs Covington incurred in

mediation as meet and confer attempts, after her discovery motions were already filed, were not compensable as discovery sanctions because they were not incurred as part of the necessary costs of bringing the motions. Accordingly, the Appellate Court reversed the orders in part and remanded for redetermination of the sanctions awards.

Tesla waived right to compel arbitration because its payment of arbitration deposit was three days late.

In *Keeton v. Tesla* (June 26, 2024) 2024 WL 3175244, Dominique Keeton sued Tesla, Inc. for race-based discrimination, harassment, and related claims. The matter was submitted to arbitration pursuant to Keeton's employment agreement that required arbitration of all disputes. After Tesla failed to pay its arbitration fees within the 30-day window established by Code of Civil Procedure section 1281.98(a), Keeton moved to vacate the order submitting the dispute to arbitration. The trial court granted the motion, finding that Tesla's failure to timely pay fees constituted a material breach of the parties' arbitration agreement, thereby allowing Keeton to proceed with her lawsuit in court. Tesla appealed.

"Although Tesla made its payment only a few days after the 30–day window, the Legislature intended the statute 'to be strictly applied.'"

Affirmed. Under section 1281.98, if arbitration fees are not paid within 30 days after the due date, the agreement's drafter is in material breach and therefore waives the right to compel further arbitration proceedings. Although Tesla made its payment only a few days after the 30–day window, the Legislature intended the statute "to be strictly applied." The appellate court rejected Tesla's argument that the parties had an agreement to delegate to the arbitrator the section 1281.98 issues. Accordingly, the trial court did not err in granting Keaton's motion to vacate, and she was allowed to proceed with her claims in court.

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