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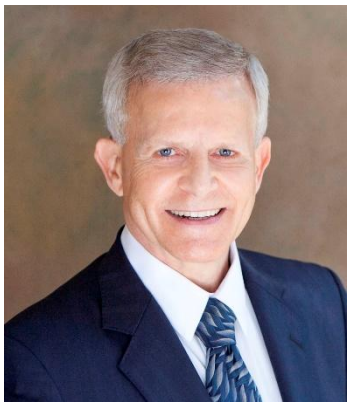

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ADR Quarterly Case Update – FAA does not preempt CCP § 1281.98

July 2, 2025

FAA does not preempt CCP § 1281.98's strict 30-day time limit for employer to pay arbitration fees.

In *Sanders v. Superior Court (Edward D. Jones & Co., L.P.)* (May 5, 2025) 110 Cal.App.5th 1304, Mone Yvette Sanders filed a putative class and representative action against her former employer, Edward D. Jones & Co., L.P., alleging wage and hour claims under the Labor Code as well as a cause of action under the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.). Pursuant to the parties' arbitration agreement, the trial court granted Edward Jones's motions to compel arbitration of Sanders's individual Labor Code and PAGA claims and stayed the representative PAGA cause of action pending completion of the arbitration. Sanders initiated the arbitration, and the arbitrator set an arbitration hearing date, but Edward Jones failed to pay $54,000 in fees and costs billed by the arbitrator within 30 days of the payment-due date as mandated by Code of Civil Procedure section 1281.98, subdivision (a)(1). Sanders then filed a motion in the trial court to vacate the order compelling arbitration and to proceed in the trial court. Subdivision (b)(1) provides with respect to an employment or consumer arbitration that upon a failure of the party that drafted the arbitration agreement to pay the required fees and costs under subdivision (a) within the 30-day deadline, "the employee or consumer may unilaterally elect to do any of the following," including to "[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction." The court denied the motion, finding section 1281.98 was preempted by the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.).Sanders filed a petition for writ of mandate.

Petition granted with instructions. Numerous courts of appeal have concluded section 1281.98 furthers the goal of the FAA to require expeditious arbitration of disputes and, accordingly, the section is not preempted by the FAA. Moreover, contrary to Edward Jones's contention, the California Supreme Court in its recent decision in *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562) did not expand the scope of FAA preemption to encompass all state arbitration-specific rules, including those that favor arbitration. Rather, the court in *Quach* invalidated a judicially created waiver requirement that a party seeking to avoid arbitration show it was prejudiced. (*Id.* at p. 569). By contrast, section 1281.98 is a procedural rule contained in the California Arbitration Act, which the parties implicitly agreed in their arbitration agreement would apply to their arbitration.

The Appellate Court also reject Edward Jones's contention that under the arbitration agreement Sanders was required to submit to the arbitrator the issue whether Edward Jones was in default. The plain language of section 1281.98 vests in the employee or consumer the unilateral right upon the drafting party's failure to timely pay fees to withdraw from the arbitration and proceed in

court. Accordingly, the trial court erred in denying Sanders's motion to withdraw from arbitration and proceed in court. Her petition for writ of mandate was granted.

Unconscionable terms of employment agreement render separate and contemporaneous arbitration agreement unenforceable.

In *Silva v. Cross Country Healthcare, Inc.* (June 13, 2025) 2025 WL 1671621, Isabel Silva, Alejandro Garcia, and Janai Velasco were former or current employees of Cross Country Staffing, Inc., a health care staffing company. At the time Plaintiffs started their employment with Cross Country Staffing, each signed the same two contracts— an "Arbitration Agreement" and an "Employment Agreement." The Arbitration Agreement provided that binding arbitration would be the exclusive means of resolving all claims. The Employment Agreement included provisions pertaining to confidentiality, trade secrets, and a non-solicitation clause, and stipulated that the employee "acknowledges *and* agrees" that the terms were necessary and breach would cause irreparable harm. It also stated that if injunctive relief was ordered, the employee waived the statutory bond requirement for such an injunction. Finally, the Employment Agreement specified that it constituted the entire agreement between the parties and superseded all prior and contemporaneous agreements, written or oral.

"Under California law, an adhesive agreement to arbitrate is unconscionable, and therefore unenforceable, if it 'compels arbitration of the claims more likely to be brought by ... the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by ... the stronger party,' and if it obligates the weaker party to consent to the entry of an injunction in the stronger party's favor as well as to waive the statutory bond requirement for such an injunction."

Plaintiffs filed a wage and hour class action. Defendant moved to compel arbitration. Plaintiffs argued that the Arbitration Agreement, when read with the Employment Agreement, was unconscionable and hence unenforceable in its entirety. The trial court agreed and denied the motion to compel. Defendant appealed.

Affirmed. Civil Code section 1642 provides that "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." The trial court properly read both agreements together. They were executed by the same parties on the same day, pertaining to the same matters. It was not necessary for the agreements to have the same consideration.

Under California law, an adhesive agreement to arbitrate is unconscionable, and therefore unenforceable, if it "compels arbitration of the claims more likely to be brought by ... the weaker party, but exempts from arbitration the types of claims that are more likely to be brought by ... the stronger party," and if it obligates the weaker party to consent to the entry of an injunction in the stronger party's favor as well as to waive the statutory bond requirement for such an injunction. Here, the trial court correctly deemed the Arbitration Agreement unconscionable because it sought to compel arbitration of claims more likely to be brought by the weaker party (wage and hour claims brought by Plaintiffs), but exempted from arbitration the types of claims more likely to be brought by the stronger party (trade secret and non-solicitation claims brought by Defendant). Therefore, the Arbitration Agreement was unenforceable and the motion to compel arbitration correctly denied.

Arbitration provision in employment agreement unenforceable because Plaintiff was confused and pressured to sign.

In *Velarde v. Monroe Operations, LLC* (June 6, 2025) 2025 WL 1601401, Karla Velarde was hired as a care coordinator for Monroe Operations, LLC, doing business as Newport Healthcare (Newport), a nationwide behavioral healthcare company. Newport required Velarde to sign an arbitration agreement as a condition of employment. It later terminated her employment. Velarde filed a lawsuit alleging, among other things, discrimination, retaliation, and violation of whistleblower protections against Newport. Newport filed a motion to compel arbitration that the trial court denied, ruling that Newport pressured Velarde to sign the agreement, which she did not want to do. Newport appealed.

"Most problematically, in response to Velarde's statements that she was uncomfortable signing the arbitration agreement as she did not understand it, false representations were made by Newport's HR manager to Velarde about the nature and terms of the agreement."

Affirmed. There was extensive evidence of procedural unconscionability, with an adhesive contract, buried in a stack of 31 documents to be signed as quickly as possible while a human resources manager waited, before Velarde could start work that same day. Most problematically, in response to Velarde's statements that she was uncomfortable signing the arbitration agreement as she did not understand it, false representations were made by Newport's HR manager to Velarde about the nature and terms of the agreement. These representations, which specifically and directly contradicted the written terms of the agreement, rendered aspects of the agreement substantively unconscionable. Those procedural and substantively unconscionable aspects, taken together, rendered the agreement unenforceable.

Plaintiff's individual claim under PAGA not subject to arbitration because agreement specifically excluded all PAGA claims.

In *Ford v. The Silver F, Inc.* (April 8, 2025) 110 Cal.App.5th 553, Plaintiff Billy Ford worked as a full-time security guard. Upon his hiring, he signed an arbitration agreement, pursuant to which he agreed to arbitrate any employment-related disputes. However, the arbitration agreement expressly did not apply to "representative claims" under the Private Attorneys General Act of 2004 (Labor Code, § 2698 et seq. [PAGA]). In February 2022, Ford filed a complaint against his employer alleging a single cause of action under PAGA for Labor Code violations suffered by him and by other employees. Ford specifically alleged that Defendants unlawfully required its employees to undergo mandatory, off-the-clock health screenings prior to the start of their work shifts and, consequently, issued inaccurate wage statements and failed to pay all the wages due to its employees. Defendants moved to compel arbitration of Ford's "individual" PAGA claims (i.e., those arising from Labor Code violations that Ford personally sustained) and to dismiss Ford's "representative" PAGA claims (i.e., those arising from Labor Code violations suffered by other employees). Defendant's motion was based on *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 648-649, which established that PAGA claims are divisible into "individual" and "representative" components, with the individual claims being subject to arbitration. Ford opposed the motion, arguing that the agreement expressly excluded *all* PAGA claims—both individual and nonindividual—from the scope of arbitration. The trial court agreed and denied the motion to compel arbitration. Defendants appealed.

Affirmed. Generally, arbitration agreements are analyzed under contract law principles and courts will interpret them to best effectuate the parties' intent at the time of contract formation. Here, Defendants' attempt to avoid the agreement's provision excluding PAGA claims was rejected. First, the language was unambiguous - it listed specific employment–related claims including PAGA claims. That the contract stated "representative" claims was of no import. The arbitration agreement was entered into well before *Viking River* was decided and, therefore, the concept of separating claims into "individual" and "representative" components would not have been contemplated. PAGA case law at that time only involved representative actions with no split or differentiation. Therefore, despite the *Viking River* decision, the court of appeal determined that the trial court was correct. The parties intended the phrase "representative claims under [PAGA]" to refer broadly to all PAGA claims, regardless of whether they were brought for oneself or on behalf of other employees. Denial of the motion to compel arbitration was proper.

"The arbitration agreement was entered into well before Viking River was decided and, therefore, the concept of separating claims into "individual" and "representative" components would not have been contemplated."

Plaintiff waived right to compel arbitration where he sought injunctive relief and a jury trial, opposed a demurrer, and sought over 700 discovery requests.

In *Hofer v. Boladian* (May 9, 2025) 111 Cal.App.5th 1, Stephen Hofer, an attorney who founded Aerlex Law Group, specializing in aviation law, hired Vicky Boladian as a part-time contract attorney. Later, they formed Aerlex Tax Services, LLC, which would provide "tax-related services" to the Group's clients and "others within the aviation industry." Hofer had a 55 percent equity interest in the tax LLC; Boladian, a 45 percent interest. Hofer and Boladian had a falling out, which resulted in litigation. They settled their dispute and agreed to mediate and then arbitrate any future disputes. Boladian asked Hofer to change the business form of the tax LLC to an LLP to avoid the potential of having a limited liability company engaged in the unauthorized practice of law. Shortly thereafter, Hofer and Boladian dissolved the tax LLC and shifted its assets to Aerlex Tax Services, LLP —with the same 55/45 percent split of ownership. Two weeks later, Boladian formed the Boladian Aviation Law Group, APC (BALG). She then withdrew from the tax LLP, removing what she represented to be 45 percent of the physical office furniture and nearly all of the tax LLP's clients. Hofer filed suit against Boladian and BALG, alleging 13 causes of action, demanding a jury trial, and seeking injunctive and other forms of relief. The parties litigated Hofer's motions for a TRO, preliminary injunction, and Boladian's demurrer. Hofer also posted jury fees, set the depositions of Boladian and third-party witnesses, and propounded over 700 requests. Boladian then filed a cross-complaint, and Hofer moved to compel arbitration. The trial court denied the motion, concluding Hofer waived his right to compel arbitration. Hofer appealed.

"[A] waiver occurs under the Act if, by clear and convincing evidence, it is shown that a party has "intentionally relinquished or abandoned" its known right to compel arbitration."

Affirmed. Under the California Arbitration Act (Code Civ. Proc., § 1280 et seq.) a party with a contractual "right to compel arbitration" of a dispute may "waive[ ]" that right. (§ 1281.2, subd. (a).) In *Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562), the California Supreme Court overruled the arbitration-specific definition of waiver embraced in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, in favor of the "generally applicable" definition of waiver. (*Quach*, at p. 578.) *Quach* held that a waiver occurs under the Act if, by clear and convincing evidence, it is shown that a

party has "intentionally relinquished or abandoned" its known right to compel arbitration. (*Id.* at pp. 569, 584.) In this case, the litigants seeking to compel arbitration initiated the lawsuit by filing a complaint in court and, while in the judicial forum, sought two forms of preliminary injunctive relief, opposed a demurrer, propounded more than 700 discovery requests, demanded a jury trial in their case management conference statement and represented they would be litigating substantive motions, and posted jury fees. It was not until Boladian filed a cross-complaint that Hofer filed the motion to compel arbitration—more than six months into the litigation in court. Under those facts, the trial court correctly concluded that Hofer's conduct constituted a waiver under *Quach*. Accordingly, the trial court's order denying the motion to compel was affirmed.

Because Plaintiffs were not on inquiry notice of the agreement to arbitrate, no contract was formed when they were automatically subscribed and charged monthly for Defendant's web services (9th Cir.).

In *Godun v. JustAnswer LLC*, 135 F.4th 699 (9th Cir. April 16, 2025), Kseniya Godun and several other Plaintiffs filed a class action against JustAnswer LLC, the owner of a website that charges customers for answers from experts. Once consumers were charged and initial fee for their first answer, they were automatically enrolled into a monthly subscription of about $50 per month. Plaintiffs allege that JustAnswer's actions violated several consumer protection laws. JustAnswer sought to compel arbitration, arguing that the subscribers had assented to arbitrate any claims when they agreed to its Terms of Services (TOS). The TOS agreement was a hyperlink that appeared on the payment page in a small font, sometimes by a pre-checked box. Reading the actual TOS required first clicking on the hyperlink. Clicking the "Connect Now" button at the bottom of the payment page would not only complete the sign-up process, but also confirm the subscriber's agreement to the TOS. The district court declined to compel arbitration, reasoning no contract was formed because Plaintiffs did not receive sufficient notice that they were agreeing to arbitrate given that the TOS advisals were inconspicuous.

"Under [the inquiry] theory, contracts are formed when: conspicuous notice of the terms are provided on the website; and the consumer actively manifests his or her ascent in some way such as clicking a button or checking a box."

Affirmed. Where the consumer is not required to separately indicate they read or agreed to certain terms before using a company's services, the inquiry theory of notice applies. Under that theory, contracts are formed when: conspicuous notice of the terms are provided on the website; and the consumer actively manifests his or her ascent in some way such as clicking a button or checking a box. Whether the notice is conspicuous is a fact-intensive inquiry taking into account, for example, the visual prominence of the advisal and the context of the transactional method of agreement. Here, Plaintiffs were not put on inquiry notice that use of the website constituted consent to the TOS. Because each Plaintiff was presented with different visuals and means of assenting to the TOS, the Ninth Circuit went through each Plaintiff's situation to outline the reasons. Examples included the advisal's unreadability due to color and font size. Moreover, it noted that because automatic renewals were involved, Plaintiffs required further clarity as to whether it was a one–time purchase or ongoing. The district court correctly declined to compel arbitration.

Since purported Ponzi-scheme victims were not customers of a Financial Industry Regulatory Authority member, they could not compel arbitration (9th Cir.).

In *Oppenheimer & Co., Inc. v. Mitchell*, 135 F.4th 837 (9th Cir. April 24, 2025), Defendants-Appellants Steven and Dori Mitchell and Jerome and Lori Hopper were retired pilots and their spouses who invested in an alleged Ponzi scheme perpetrated by Oppenheimer & Co., Inc., employee, John Woods. They sought arbitration against Oppenheimer under the Financial Industry Regulatory Authority dispute resolution process because Oppenheimer was a FINRA member. Oppenheimer filed suit in district court seeking a declaration that it was not required to arbitrate with Defendants since they were not "customers" under FINRA Rule 12200. The district court agreed, finding that because Defendants had not purchased their investments from or through Woods or Oppenheimer, they were not customers of Oppenheimer. Defendants appealed, contending that, despite no direct interaction with Oppenheimer, they were still Oppenheimer customers under Rule 12200 because they made their investments *through* Woods, who acted as an Oppenheimer associate.

Affirmed. Individuals who transact with "associated persons" of FINRA members are "customers" of those FINRA members for purposes of FINRA Rule 12200. Therefore, Defendants could be entitled to arbitrate their claims against Oppenheimer if they could demonstrate that they transacted with Woods. However, as the district court found, Defendants did not transact with Woods because they purchased their investments from Woods's associate, Michael Mooney, and not from Woods himself. Apart from a single phone conversation between the Mitchells and Woods in 2016, Defendants had no direct contact or relationship with Woods. Accordingly, in light of the lack of a customer connection between Woods and Defendants, Rule 12200 did not apply, and Oppenheimer was not required to arbitrate Defendants' claims.

"Individuals who transact with 'associated persons' of FINRA members are "customers" of those FINRA members for purposes of FINRA Rule 12200."

Union's request to arbitrate grievances against school district fell outside the scope of its collective bargaining agreement where core issues were superseded by other laws.

In *Los Angeles Faculty Guild v. Los Angeles Community College District* (May 2, 2025), 110 Cal.App.5th 1201, the Los Angeles College Faculty Guild, AFT Local 1521, sought to compel arbitration of three grievances against the Los Angeles Community College District. The grievances concerned incomplete facilities projects, non-renewal of an instructor's contract, and retirement service credit. The trial court declined to compel arbitration, reasoning the dispute fell outside the scope of the collective bargaining agreement's arbitration clause. Plaintiff appealed.

Affirmed. The Educational Employment Relations Act (Government Code §§ 3540-3549.3) governs collective bargaining agreements between school districts and their union representatives. Under the Act, collective bargaining is limited to terms and conditions of employment and specifically delineates which aspects fall within its scope and those that do not. The Act may not supersede the Education Code and only those disputes that fall within the scope of the Act may

be arbitrated. Here, Plaintiff's argument as to the arbitrability of each grievance failed because it was contrary to the appellate court's earlier decision in *Los Angeles College Faculty Guild 1521 v. Los Angeles Community College District* (2022) 83 Cal.App.5th 660, where the appellate court considered a similar dispute between the same parties and the same collective bargaining agreement. There, the appellate court held that the dispute between the union and school district was outside the scope of the arbitration provision in their collective bargaining agreement. Similarly, in the case at bar, the appellate court held that Plaintiff's grievances were again beyond the scope of the parties' arbitration agreement. Although the grievances touched upon and were tangentially related to employment issues, they were actually governed by other statutes, including the Construction Bond Act, the Education Code, and the Public Employee's Retirement Law. Therefore, the trial court's denial of the motion to compel arbitration was correct and affirmed.

"The [Educational Employment Relations] Act may not supersede the Education Code and only those disputes that fall within the scope of the Act may be arbitrated."

District court improperly asserted diversity jurisdiction when confirming arbitration award - face of petition did not establish $75,000 in controversy (9th Cir.);

In *Tesla Motors, Inc. v. Balan*, 134 F.4th 558 (9th Cir. April 14, 2025), Cristina Balan had worked for Tesla Motors, Inc. as an automotive design engineer. As part of her employment, she signed an employment agreement that included an arbitration clause. Later, after her employment ended, the Huffington Post published an article about her. She alleged that, after seeing the article, Tesla responded by publishing defamatory statements about her including accusations that she stole company money and resources while she was employed by Tesla. Accordingly, she filed a complaint for defamation against Tesla in district court. Tesla moved to compel arbitration. After the court compelled arbitration, Balan added an additional claim to include Elon Musk, Tesla's founder, based upon a separate statement he allegedly made. The arbitrator ultimately issued an award in favor of Tesla and Musk based upon the statute of limitations under California law. They petitioned the district court to confirm the arbitration award, and the court granted the petition. Balan appealed.

"The face of a Section 9 petition must reflect $75,000 in controversy. Here, it was a zero-dollar arbitration award and the district court was prohibited from "looking through" the petition to the underlying substantive dispute."

Vacated and remanded. The district court lacked subject matter jurisdiction to confirm the award on the ground that the Supreme Court's opinion in *Badgerow v. Walters*, 596 U.S. 1 (2022), prohibits looking past the face of a petition under 9 U.S.C. § 9 to establish jurisdictional facts. The face of a Section 9 petition must reflect $75,000 in controversy. Here, it was a zero-dollar arbitration award and the district court was prohibited from "looking through" the petition to the underlying substantive dispute. Therefore, the order confirming the arbitration award was error and the matter was remanded to the district court with instructions to dismiss for lack of jurisdiction.

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