RECENT FEDERAL COURT DECISIONS HOLDING ARBITRATION CLAUSES PARTIALLY OR ENTIRELY UNENFORCEABLE

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A. FORMATION

1. *GGNSC Omaha Oak Grove, LLC v. Payich*, No. 4:12CV3040, 2012 WL 2021868 (D. Neb. June 5, 2012): Personal injury case against nursing home. Patient and patient's estate not bound by arbitration term accepted by patient's power-of-attorney, where power of attorney lacked legal authority to bind patient (POA's authority had not yet gone into effect when he signed purported arbitration agreement) and, absent a lawful contract, patient and estate could not be bound under a third-party beneficiary theory.

2. *Shaffer v. HSBC Bank Nevada, Nat. Ass'n*, No. 5:12–cv–00968, 2012 WL 1832893 (S.D. W. Va. May 18, 2012): "Defendants cannot realistically expect the Court to enforce the provision referring to 'terms and conditions of the Cardholder Agreement and Disclosure Statement (which includes an arbitration provision) which shall be sent to you with the credit card' when the Plaintiff was not provided the terms of the arbitration provision at the time of the initial purchase and there is no evidence that he subsequently received or ratified its terms. Put simply, there is no evidence that a 'meeting of the minds' occurred with respect to the undisclosed terms of the arbitration clause. Moreover, the Court cannot enforce an arbitration clause, the terms of which have not been provided to the Court. Therefore, the Court finds HBN failed to meet its burden to show the parties had a valid and enforceable arbitration clause based on the Application and the Original Cardholder Agreement."

3. *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11–CV–05405, 2012 WL 1604851 (N.D. Cal. May 7, 2012): In employment dispute, court rejects argument that continued employment after promulgation of arbitration term implied acceptance of arbitration term – "Nothing in the Arbitration Agreement or accompanying material expressly states that continued employment will constitute acceptance of the terms of the Dispute Resolution Policy, . . . and Defendants do not assert that Morvant agreed to arbitrate because he failed to affirmatively opt-out . . . . Given the facts of the instant case, continued

employment does not prove acceptance of the terms of the Arbitration Agreement."

4. *Douglas v. Johnson Real Estate Investors, LLC*, No. 11–15261, 2012 WL 1450014 (11th Cir. Apr. 27, 2012): ADEA claim. Under Massachusetts law, arbitration term was illusory where – according to policy that was expressly incorporated as part of the arbitration term - modifications can be made only "in writing and signed by an authorized representative of [employer]," conferring on employer the unilateral power to change arbitration policy.

5. *Ashbey v. Archstone Property Management, Inc.*, No. SACV 12–0009 DOC (RNBx), 2012 WL 1269122 (C.D. Cal. Apr. 13, 2012): Fired employee claims violations of California state labor law. Employer cannot enforce an arbitration provision in an employee handbook where, *inter alia*, the employer represented to its employee that the handbook "does not … create any contractual rights," thus disaffirming any inference that employer made offer to enter into contract. Alternatively, there was no waiver of judicial forum where term did not mention the key term of the purported contract ("arbitration").

6. *Bonnant v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Nos. 10–2310, 11–0742, 2012 WL 739363 (2d Cir. Mar. 8, 2012): Attorney did not unambiguously make himself party to arbitration agreement by creating brokerage account for client and twice signing the papers on the client's behalf; summary judgment reversed.

7. *Grosvenor v. Quest Corp.*, No. 09–cv–02848–MSK–KMT, 2012 WL 602655 (D. Colo. Feb. 23, 2012): Subscriber agreement held to be illusory where arbitration term could be unilaterally changed by defendant, *i.e.*, "Qwest may . . . modify the Service and/or any of the terms and conditions of this Agreement."

8. *Noohi v. Toll Bros., Inc.*, No. RDB–11–00585, 2012 WL 273891 (D. Md. Jan. 30, 2012): Finding lack of mutuality rendered term unenforceable – "[The arbitration term] mandates that buyers, or in this case Plaintiffs, promise to (1) submit all disputes against seller to binding arbitration, (2) notify Defendants of each claim before they initiate arbitration proceedings, (3) give Defendants a reasonable opportunity to cure the default, and (4) waive the right to proceed in a court of law. (quotations omitted). Conversely, Defendants do not make any promises to Plaintiffs in this provision. The clause does not state 'Buyer and Seller,' or even 'the parties' and thus does not impose any obligations on the Defendants. It only refers to 'Buyers' and their obligations."

9. *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202 (5th Cir. 2012): FLSA case. Arbitration term in employee handbook that could be changed by employer alone, retroactively, was illusory contract and hence unenforceable,

noting "the unfairness of a situation where two parties enter into an agreement that ostensibly binds them both, but where one party can escape its obligations under the agreement by modifying it. Requiring notice alone does not fully address this concern: if an employer provided for 10–day notice of any change to its arbitration provision, this could still arguably allow it to avoid its promise to arbitrate as to claims that were already in progress, unless there were some provision preventing changes from applying to in-progress disputes. This concern is heightened under the facts presented here, because 24 Hour Fitness does not provide a definite notice window. Indeed, it appears that amendments could become binding almost instantaneously upon 'official written notice.'"

10. *Kwan v. Clearwire Corp.*, No. C09–1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012): Consumer case. Rejecting on-line "browsewrap" arbitration term that consumer never acknowledged. "Clearwire has presented no evidence that Ms. Resaonover ever clicked on its 'I accept terms' button [on website]. Indeed, Ms. Reasonover has testified that when she was presented with this webpage, she abandoned the page, specifically deciding not to accept the [term]."

11. *Alvarez v. T-Mobile USA, Inc.*, No. CIV. 2:10–2373 WBS GGH,.2011 WL 6702424 (E.D. Cal. Dec. 21, 2011): California state law consumer, unfair competition and false advertising claims concerning mobile-phone contracts. Setting bench trial for hearing over whether consumer consented to arbitration term by activating phone for first time - "there is a dispute as to whether or not Alvarez can be said to have entered into an agreement to arbitrate when he activated his cellular phones. T–Mobile has submitted a Service Agreement signed by Alvarez that incorporates the Terms and Conditions, gives him instructions on how to obtain a copy of the Terms and Conditions, and expressly advises him of the arbitration provision contained in those Terms and Conditions and of the opportunity to opt out of that provision. Alvarez, however, claims that he has never seen this agreement. According to Alvarez, nothing that he saw ever alerted him to the existence of an arbitration agreement or to the incorporation of T–Mobile's Terms and Conditions. There is clearly a dispute as to whether the parties formed an agreement to arbitrate."

12. *Bayer v. Neiman Marcus Holdings, Inc.*, No. CV 11–3705 MEJ, 2011 WL 5416173 (N.D. Cal. Nov. 8, 2011): Employee did not accept arbitration term where "(1) on four different occasions between July 2007 and September 2008, he refused to sign arbitration-related forms; (2) at least four times, he told his supervisors that he was refusing to agree to or be bound by Defendant's arbitration program, and that he was refusing to sign any arbitration documents; (3) he delivered two different letters to Defendant which explained why he was refusing to sign any arbitration forms and why he was refusing to be a party to, or agree to, the Arbitration Agreement; (4) he filed a charge with the EEOC, claiming that Defendant's conduct in trying to 'coerce' him to enter into an arbitration agreement was illegal under the ADA; and (5) he filed

multiple charges with the EEOC, alleging that Defendant's arbitration program was illegal and unconscionable."

13. *Willis v. Debt Care, USA, Inc.*, No. 3:11–cv–430–ST, 2011 WL 7121288 (D. Or. Oct. 24, 2011): "By not having the Global Agreement to review when signing the Global Application, the Willises were not presented with an opportunity to decide whether to execute a document binding them to those terms. The boilerplate acknowledgement of receipt in the Global Account Application is of no consequence considering that the Global Account Agreement had not been received at that time."

14. *Chavez v. Bank of America*, No. C 10–653 JCS, 2011 WL 4712204 (N.D. Cal. Oct. 7, 2011): Consumers claim that they were unwillingly subscribed in identity theft program and charged for service without their consent. Court orders bench trial on whether consumer did not consent to arbitration term. "There is additional evidence beyond Mr. Albaugh's mere denial of receipt [of mail notice]. Mr. Albaugh states that when he did in fact reach Privacy Assist to complain[] about the unauthorized charges, he was told on the telephone that his address was incorrect."

15. *Hergenreder v. Bickford Senior Living Group, LLC*, 656 F.3d 411 (6th Cir. 2011): ADA action. Employee did not assent to arbitration term under Michigan law; while employee signed acknowledgment of receipt of employee handbook, which referred to arbitration, handbook specifically stated that it was not a contract, employee was never provided employer's dispute resolution procedure as provided in arbitration term, and she never manifested intent to be bound by offer. "Were Hergenreder required to read, or even notified of the importance of reading, the DRP, the analysis here might be different. But this court's inquiry is focused on whether there is an objective manifestation of intent by Bickford to enter into an agreement with (and invite acceptance by) Hergenreder, and we are not convinced that there is any such manifestation made by Bickford in the record in this case."

16. *Stagner v. Luxottica Retail North America, Inc.*, Nos. C 11–02889 CW, C 11–03168 CW, 2011 WL 3667502 (N.D. Cal. Aug. 22, 2011): Wage and hour case. Employee who signed acknowledgment of receipt of Associate Guide, but not that "Acceptance of Agreements" which specifically referred to the Dispute Resolution Agreement did not manifest intent to be bound to term.

17. *Butto v. Collecto Inc.*, 802 F. Supp. 2d 443 (E.D.N.Y. Aug. 15, 2011), *reh'g denied*, No. 10–cv–2906 (ADS)(AKT), 2012 WL 603785 (E.D.N.Y. Feb. 23, 2012): Collection agency that was not a party to arbitration term between customer and cell phone company could not demand arbitration in customer action under Fair Debt Collection Practices Act and New York state law claims.

18. *Lawson v. Life of the South Ins. Co.*, 648 F.3d 1166 (11th Cir. 2011): Scope of agreement did not cover credit life insurer - "The scope of the arbitration clause in the loan agreement between the car dealership and the Lawsons is broad, even expressly referring to disputes involving the Lawsons' 'insurer,' but the right to enforce that clause is clearly limited to the Lawsons, the car dealership, Chase Manhattan, and any assignees of the car dealership or Chase Manhattan. (Life of the South does not contend that it is an assignee.) The arbitration clause in the loan agreement is not mandatory; it does not require that every dispute falling within its scope be arbitrated. Instead, the clause provides that '[i]f any Dispute arises, either you or we may choose to have the Dispute resolved by binding arbitration.' On its face, the loan agreement grants only 'you' (defined as the Lawsons) and 'we' (defined as he car dealership, Chase Manhattan, and their assignees) the right to elect to arbitrate. Life of the South is neither a 'you' nor a 'we.' Instead, in pronoun terms, Life of the South is an unmentioned 'it,' and the face of the arbitration clause does not show an intent to give 'it' theright to compel arbitration. The loan agreement does not show, on its face or elsewhere, an intent to allow anyone other than the Lawsons, the car dealership, Chase Manhattan, and the assignees of the dealership or Chase Manhattan to compel arbitration of a dispute, and Life of the South is none of those."

19. *Hartford Fire Ins. Co. v. Henry Bros. Const. Management Services, LLC*, No. 10–cv–4746, 2011 WL 3563138 (N.D. Ill. Aug. 10, 2011): Contract dispute. Standard form of agreement between parties expressly excluded arbitration term. Defendant barred from asserting equitable estoppel to enforce arbitration term from a separate contract - "To allow Defendant to invoke an arbitration clause set forth in a contract to which it was not a party when the contract to which Defendant was a party specifically disclaims arbitration would lead to an unfair and unjust result . . . . By specifically and broadly disclaiming in the CM Contract arbitration for any dispute about its involvement in the Project, Defendant has waived any equitable estoppel-based argument that might have permitted it to enforce the arbitration provision in the Performance Bond as a non-signatory."

20. *DAC Surgical Partners, P.A. v. United Healthcare Services, Inc.*, No. H–11–1355, 2011 WL 3503066 (S.D. Tex. Aug. 10, 2011): Physician associations sued insurance providers for negligent misrepresentation, breach of an "implied-in-fact" contract, violations of the Texas Insurance Code, *quantum meruit*, and promissory estoppel. Associations were not bound by agreements (containing arbitration terms) signed by individual doctors who practiced with associations, nor was there evidence that associations sought and obtained direct benefits under the agreements, so as to support estoppel.

21. *RDP Technologies, Inc. v. Cambi AS*, 800 F. Supp. 2d 127 (D.D.C. 2011): Holding that there was lack of a definite offer under D.C. law. "Although the agreement itself did not contain the word 'proposal' in its title, it did have blank signature lines for both Cambi and RDP, thereby indicating that Cambi contemplated additional action would be necessary on its part before a valid, binding contract could be formed. . . . Second, the interaction between RDP and Cambi at the Oregon conference suggests that each party viewed the December 2008 agreement as a working document, rather than as an operative offer. As alleged in the complaint, Christy (on behalf of RDP) 'raised several questions and concerns regarding the proposed' agreement, and Kleiven (on behalf of Cambi) responded that 'those issues were open to discussion.' . . . . That is a preliminary negotiation, not an operative offer and acceptance."

22. *Sager v. Harborside Connecticut Ltd. Partnership*, No. 3:10cv1292 (JBA), 2011 WL 2669240 (D. Conn. July 7, 2011): Power-of-attorney of nursing home patient did not sign both lines on form agreement with arbitration term – "Assuming that Plaintiff executed other agreements as the decedent's legal representative and had durable power of attorney, the undisputed fact remains that Plaintiff did not sign the Arbitration Agreement in that capacity, as the Arbitration Agreement *explicitly* requires: 'Resident's Legal Representative must sign on *both lines* above containing the phrase 'Resident's Legal Representative" (emphasis in original). As Plaintiff's counsel noted during oral argument, where implied authority was sufficient for the other agreements signed by Plaintiff in a representative capacity, this Arbitration Agreement required actual authority, since it was the only agreement that expressly required signatures in two capacities individual—and representative—and required the signature of a witness attesting to the decedent's grant of authority to her representative. Lacking these required formalities, the parties did not properly execute the Arbitration Agreement, and Plaintiff is not required to arbitrate this dispute."

23. *Lucy v. Bay Area Credit Svc LLC*, 792 F. Supp. 2d 320 (D. Conn. 2011): Fair Debt Collection Practices Act (FDCPA) and Connecticut Unfair Trade Practices Act claims. Under Connecticut law, collection agency was not creditor's "agent" under creditor's wireless service agreement with its debtor, and thus, agency was precluded from compelling arbitration under service agreement in action brought against it by debtor. "In the arbitration clause of the Wireless Service Agreement, Lucy expressly permits specific classes of non-signatories to invoke arbitration pursuant to the Wireless Service Agreement. Specifically, the arbitration clause allows AT & T's 'subsidiaries, affiliates, agents, employees, predecessors in interest, successor, and assigns' to compel arbitration. Wireless Service Agreement, at 6. Because the arbitration agreement delineates which non-signatories may compel arbitration, Lucy cannot fairly be considered to have consented to arbitration with any other entities."

B. UNCONSCIONABILITY

1. *Elite Logistics Corp. v. Hanjin Shipping Co. Ltd.*, No. CV 11–02961 DDP (PLAx), 2012 WL 2366403 (C.D. Cal. June 21, 2012): Challenging late pick-up/drop-off fees to haulers for use of cargo containers, alleged to violate California state law. Arbitration term struck down under California law: "Here, the burdens of the arbitration procedures fall inordinately on the invoiced party. If Elite believes it has been improperly charged, it must provide written notice of the dispute to Hanjin within thirty days, at pain of forfeiting any defense to such charges, regardless of whether the charges are proper. This thirty-day notice period operates as a statute of limitations shorter than the four-year claim period available under California law, and works solely to Hanjin's benefit . . . . While both parties could theoretically initiate an arbitration, the burden is always on the invoiced party to initiate a dispute . . . . Though an invoiced party may receive any number of invoices in a given thirty day period, it may not dispute more than five invoices in a single arbitration . . . . The invoiced party must articulate its arguments with a clarity bordering on prescience, for it has no right to discovery and will have no opportunity to rebut the invoicing party's response (notwithstanding the possibility that the arbitration panel 'may' initiate a conference call). Finally, even if the invoiced party receives a favorable determination, the arbitration panel lacks the power to enjoin the invoicer's wrongful conduct, leaving the invoice free to repeat the offense." *Accord Unimax Exp., Inc. v. APL, Ltd.*, No. CV 11–02955 DDP (PLAx), 2012 WL 2366401 (C.D. Cal. June 21, 2012); *Unimax Express, Inc. v. Cosco North America, Inc.*, No. CV 11–2947 DDP, 2011 WL 5909881 (C.D. Cal. June 21, 2012);

2. *Trompeter v. Ally Financial, Inc.*, No. C 12–00392 CW, 2012 WL 1980894 (N.D. Cal. June 1, 2012): Finding arbitration term substantively unconscionable where "(1) a party does not waive the right to arbitrate by using self-help remedies or filing suit; (2) if the arbitrator's award against a party is in excess of $100,000, that party may request a new arbitration by a three-arbitrator panel under the rules of the arbitration organization; (3) if the arbitration award includes injunctive relief, the enjoined party may demand a re-arbitration by the three-arbitrator panel; and (4) the appealing party requesting a new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs."

3. *Simmons v. Morgan Stanley Smith Barney, LLC*, No. 11cv2889 WQH–MDD, 2012 WL 1900110 (S.D. Cal. May 24, 2012): Tile VII religious discrimination and state law claims. "The Court finds that Plaintiff has demonstrated that the arbitration provisions are substantively unconscionable

because the rules of FINRA may require Plaintiff to pay hearing session fees in excess of what Plaintiff would pay in this Court."

4. *Smith v. Americredit Financial Services, Inc.*, No. 09cv1076 DMS (BLM), 2012 WL 834784 (S.D. Cal. Mar. 12, 2012): Finding substantively unconscionable four clauses in the arbitration provision that limits appeals to awards that exceeds $100,000, or involve injunctive relief; requires pre-payment of "the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs"; and exempts repossession from arbitration while requiring that a request for injunctive relief be submitted to arbitration.

5. *Rajagopalan v. NoteWorld, LLC*, No. C11–05574BHS, 2012 WL 727075 (W.D. Wash. Mar. 6, 2012): "Court finds that the validity of the arbitration clause is suspect because it potentially impairs a plaintiff's ability to bring suit to enforce consumer protection laws of Washington State. NoteWorld is a Washington corporation, which Plaintiff alleges has violated Washington's CPA and Debt Adjusting Act . . . . Washington State has a strong interest in enforcing its laws against its businesses, lest the state 'become a harbor for businesses engaging in unscrupulous practices out of state.' . . . [T]he Court notes that the arbitration clause calls for the application of Florida law, under which recovery of fees and costs would be left to the discretion of the arbitrator, contrary to what the Washington statutes at issue provide. For the foregoing reasons, the Court finds that the arbitration clause is substantively unconscionable."

6. *Antonelli v. Finish Line, Inc.*, No. 5:11–cv–03874 EJD (N.D. Cal. Feb. 16, 2012): Store manager placed secret video cameras in bathroom and dressing room; current and former employees claim violations of California state law. Arbitration term found unconscionable where, *inter alia*, employee could be held responsible for $10,000 or more of arbitration fees (which must be paid in advance), arbitrations must be held in Indianapolis even though store is in San Jose, and employer alone has right to terminate term with 60 days notice to employee.

7. *Lau v. Mercedes-Benz USA, LLC*, No. CV 11–1940 MEJ, 2012 WL 370557 (N.D. Cal. Jan 31, 2012): Contract action. Arbitration term unconscionable where, *inter alia*, consumer "would have to advance: (1) one-half of the arbitrator's hourly fee based on a reasonable estimate of time required to hear the matter; (2) an administrative initial filing fee in the amount of $4,350.00; (3) a final fee in the amount of $1,750.00 to proceed to a hearing; and (4) additional fees for the arbitrator's preparation, research, and writing of the opinion." Moreover, manufacturer alone reserved right of appeal for awards in excess of $100,000, while consumer had right to appeal only if he received $0.

8. *Palmer v. Infosys Technologies Ltd. Inc.*, 832 F. Supp. 2d 1341 (M.D. Ala. 2011): Agreement found unconscionable under California law for lack of mutuality - "Here, the arbitration agreement requires that all disputes between Infosys and Palmer, regardless of who asserts the claim, shall be decided by an arbitrator. The agreement then lists the types of claims to be decided by an arbitrator, all of which rely on antidiscrimination or labor statutes protecting employee rights. See Arbitration Agreement, Doc. No. 4–1, at 7. However, the arbitration agreement provides that either party may seek injunctive relief in court for claims relating to intellectual property or trade secrets. While these provisions are fair on their face, it is obvious that the types of claims that must be arbitrated are those most commonly brought by an employee, while those likely initiated by an employer can be filed in court."

9. *Urbino v. Orkin Services of California, Inc.*, No. 2:11–cv–06456–CJC(PJWx), 2011 WL 4595249 (C.D. Cal. Oct. 5, 2011): Arbitration term that purports to require arbitration of actions under Labor Code Private Attorneys General Act of 2004 ("PAGA"), held unconscionable because "it both deprives the individual of the right to bring a representative action and deprives the LWDA the benefits of the enforcement action brought by aggrieved employees."

C. VINDICATION OF SUBSTANTIVE RIGHTS

1. *In re Electronic Books Antitrust Litigation*, 11 MD 2293 (S.D.N.Y. June 27, 2012): Consumer litigation alleging Sherman Act price-fixing violations in sale of eBooks. Arbitration term in Amazon.com/Barnes & Noble contracts unenforceable - "given the complexities of proving this particular antitrust violation, plaintiffs can expect at most a median recovery of $540 in treble damages, and face several hundred thousand dollars to millions of dollars in expert expenses alone. Plaintiffs have also demonstrated that they are likely to incur significant expenses in securing, organizing, and maintaining documents, deposing witnesses, and in attorneys' fees, and that they face no guarantee of recovering any or all of these expenses."

2. *In re American Exp. Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011), *on reh'g*, 667 F.3d 204 (2d Cir.), *reh'g en banc denied*, 681 F.3d 139 (2d Cir. 2012): Clayton Act antitrust tying class action. Enforcement of class-action waiver in arbitration would prevent plaintiffs from vindicating substantive rights, as supported by expert testimony on high expense of pursing individual antitrust cases - "The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Accord Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011) (wage and hour case), *reh'g denied*, No. 10

Civ. 3332 (KMW) (MHD), 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012), *on appeal*, No. 12-304 (2d Cir.).

3. *Raniere v. Citigroup Inc.*, No. 11–civ–2448, 2011 WL 5881926 (S.D.N.Y. Nov. 22, 2011), *on appeal*, No. 11–5213 (2d Cir.): Putative FLSA collective action. Because the right to bring a collective action under the FLSA is statutory, 29 U.S.C. § 216(b), it cannot be waived in arbitration. *Accord Owen v. Bristol Care, Inc.*, No. 11–04258–CV–FJG, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) *But see De Oliveira v. Citicorp North America, Inc.,* No. 8:12–cv–251–T–26TGW, 2012 WL 1831230 (M.D. Fla. May 18, 2012) (rejecting *Raniere*).

4. *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394 (S.D.N.Y. 2011), *reh'g denied*, No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813 (S.D.N.Y. July 7, 2011), *on appeal*, No. 11-5229 (2d Cir.): Title VII pattern-or-practice gender discrimination case, alleging putative class action. Holding under *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), that arbitration term that was silent as to class or collective arbitration, and thus failed to provide a class arbitration mechanism. But because Title VII pattern-or-practice case could only be brought in the framework of a class, arbitration term was incompatible with substantive rights and could not be enforced. [Author is co-counsel for plaintiffs in this case.] *But see Karp v. CIGNA Healthcare, Inc.*, No. 11–10361–FDS, 2012 WL 1358652 (D. Mass. Apr. 18, 2012) (rejecting *Chen-Oster*).

D. WAIVER AND ESTOPPEL

1. *Haskins v. First American Title Ins. Co.*, No. 10–5044 (RMB/JS), 2012 WL 1599998 (D.N.J. May 4, 2012): Homeowners who were allegedly overcharged for title insurance benefitting lenders were not bound by equitable estoppel to arbitration clause between insurer and lenders: "Plaintiffs are not knowingly exploiting any terms in their insurance policies, they did not receive a direct benefit from the policies, and they are not seeking to enforce terms of their policies or claims that must be determined by reference to their policies.."

2. *Barkwell v. Sprint Communications Co., L.P.*, No. 4:09–CV–56 (CDL), 2012 WL 112545 (M.D. Ga. Jan. 12, 2012): Consumer overcharge litigation. Firm that waited two years after litigation commenced to demand arbitration, after court had already ruled against it on a dispositive motion, forfeited right to enforce term. Intervening decision in *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), insufficient cause for delay.

3. *Different Drummer LLC v. National Urban League, Inc.*, No. 11 Civ. 4982(KBF), 2012 WL 406907 (S.D.N.Y. Feb. 7, 2012): Plaintiff in breach of contract case not estopped to deny arbitrability under Consultant Contract and Master Services Agreement between defendant and consultant, where claims

for breach of contract were not intimately founded in or intertwined with those agreements, nor did it derive a specific benefit from those agreements.

4. *Martinez v. Welk Group, Inc.*, No. 09cv2883 AJB, 2012 WL 112535 (S.D. Cal. Jan. 12, 2012): "The Court concludes that by actively proceeding with litigation for two years while fully aware of these arbitration clauses, Defendants have waived their right to compel arbitration. The purpose of the FAA, and arbitration in general, is to promote quick, informal, and streamlined resolution of issues between parties. *AT & T Mobility*, 131 S. Ct. at 1749. It is not to be used as a back-up plan for litigation strategies."

5. *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices and Products Liability Litig.*, 828 F. Supp. 2d 1150 (C.D. Cal. 2011): Manufacturer waives right to invoke arbitration term where it had knowledge of its right to compel arbitration, vigorously litigated action for nearly two years including in extensive discovery, filed motions with court, and negotiated and sought protective orders. Despite intervening decision in *Concepcion*, manufacturer waited over six months before filing motion to compel arbitration. *Accord In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability Litig.*, No. 8:10ML 02151 JVS (FMOx), 2012 WL 826854 (C.D. Cal. Mar. 12, 2012).

6. *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444 (3d Cir. 2011): Claims that defendant breached option agreement, tortiously interfered with existing contractual relationships, was unjustly enriched and engaged in civil conspiracy. Defendant waived right to invoke arbitration term where it waited ten months after commencement of litigation to make demand, had already litigated (and lost) motion to dismiss, participated in live hearing on motion for preliminary injunctions, mediated the claims and conducted discovery. Plaintiff suffered the prejudice of two-year delay in performance of contract and forced to endure expense of having to litigate the case.

7. *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063 (C.D. Cal. 2011): Defendant waived arbitration term where it waited 13 months to move to compel, during which it "actively participated in the court litigation by (1) removing the case from state to federal court, (2) seeking and receiving a transfer of venue from the Southern District of California to the Central District of California, (3) participating in meetings and scheduling conferences to establish case management dates, and (4) negotiating and entering into a protective order signed by the Court."

8. *Rota-McLarty v. Santander Consumer USA, Inc.*, No. WDQ–10–0908, 2011 WL 2133698 (D. Md. May 26, 2011): "Santander has waived its contractual right to arbitrate. It moved to compel arbitration six months after Rota–McLarty sued, and five months after filing an answer directed to the

merits of her complaint. It also engaged in discovery about Rota–McLarty's allegations of hidden finance charges, which included exchanging hundreds of pages of documents, serving and responding to interrogatories, and taking Rota– McLarty's deposition on all allegations. Santander's fear that an arbitrator would have compelled class arbitration is not a legitimate reason for engaging in litigation rather than immediately seeking arbitration. Further, Santander has not answered Rota–McLarty's assertion that it sought arbitration only after litigation had enabled it to fully evaluate her case." [Citations, footnotes omitted.]

9. *Bryant v. Service Corp. Intern.*, 801 F. Supp. 2d 898 (N.D. Cal. 2011): Employees who waited three years after commencing litigation to demand arbitration forfeited their rights.

E. MISCELLANEOUS

1. *Grant v. Capital Management Services, L.P.*, No. 10cv2471 WQH (BGS), 2012 WL 2152052 (S.D. Cal. June 12, 2012): Arbitration term that expressly excluded class-actions from its scope ("Actions eligible for small claims court, class actions, or actions filed on behalf of the general public under applicable state statutes are not eligible for arbitration") did not cover consumer case that was filed as a putative class action.

2. *Balasanyan v. Nordstrom, Inc.*, 2012 WL 1944609, Nos. 11–cv–2609–JM–WMC, 10–cv–2671–JM–WMC (S.D.N.Y. May 30, 2012): Striking down arbitration terms in wage-and-hour case that employer obtained through unauthorized class communications, under authority of *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).

3. *AmeriCorp, Inc. v. Hamm*, No. 2:11–cv–677–MEF, 2012 WL 1392927 and *McCallan v. Hamm*, No. 2:11–cv–784–MEF, 2012 WL 1392960 (M.D. Ala. Apr. 23, 2012): Enforcement of arbitration agreement incompatible with Chapter 7 bankruptcy procedure.

4. *In re Jiffy Lube Intern., Inc., Text Spam Litig.*, Case No. 11–md–2261–JM–JMA, 2012 WL 762888 (S.D. Cal. Mar. 9, 2012): Sales contract provided that "Jiffy Lube® and you agree that any and all disputes, controversies or claims between Jiffy Lube® and you (including breach of warranty, contract, tort or any other claim) will be resolved by mandatory arbitration according to the terms of this Mandatory Arbitration Agreement ('Agreement')." Court holds that "any and all" language does not reach an anti-spam claim under the Telephone Consumer Protection Act. "The language of the arbitration agreement is incredibly broad. It purports to apply to 'any and all disputes' between Jiffy Lube® and Cushnie, and is not limited to disputes arising from or related to the transaction or contract at issue . . . . [Under such

language,] if a defendant murdered the plaintiff in order to discourage default on a loan, the wrongful death claim would have to be arbitrated."

5. *Clary v. Helen of Troy, L.P.*, No. EP–11–CV–284–KC, 2011 WL 6960820 (W.D. Tex. Dec. 20, 2011): Claim under Jury Act, 28 U.S.C. § 1875, for retaliation against employee who fired her for answering federal jury summons, is non-arbitrable - "There is an inherent conflict between arbitration and the Jury Act. Binding arbitration agreements take the power to protect the integrity of the jury system out of the hands of the courts and places it into the hands of private parties."

6. *Christie v. Loomis Armored US, Inc.*, No. 10–cv–02011–WJM–KMT, 2011 WL 6152979 (D. Colo. Dec. 9, 2011): Armored-car driver falls within FAA exemption of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1.

7. *Klima v. Evangelical Lutheran Good Samaritan Soc.*, No. 10–cv–1390–JAR–JPO, 2011 WL 5412216 (D. Kan. Nov. 8, 2011): Case against nursing home for negligence in death of patient. Where selection of specific arbitral forum was integral to agreement, and that forum was no longer available for consumer cases, term was not severable from arbitration term and entire term was unenforceable - "The exclusive references to the NAF, the selection of the NAF rules, the requirement to pay the NAF, the mandatory language of the contract, and the absence of any provision allowing for a substitute arbitrator all support the conclusion that the NAF is the exclusive arbitrator and that the selection of the NAF is integral to the parties agreement to arbitrate. As such, the Court cannot use § 5 of the FAA to appoint a substitute arbitrator, and the entire arbitration agreement is unenforceable because the NAF no longer arbitrates consumer disputes. The Court therefore will not compel arbitration."

8. *In re American Exp. Financial Advisors Securities Litig.*, 672 F.3d 113 (2d Cir. 2011): Settlement of class action superseded investors' right to demand arbitration of securities fraud claim.

9. *AT & T Mobility LLC v. Fisher*, No. DKC 11–2245, 2011 WL 5169349 (D. Md. Oct. 28, 2011): Same law firm filed over 1000 individual demands for arbitration challenging AT&T Mobility's acquisition by T-Mobile (Clayton Act). Company obtained preliminary injunction against enforcement of arbitration term because Clayton Act claim by its nature was class-based and not individual - "a proper Clayton Act claim must assert the interests of the public in fostering competition. The courts that have already enjoined identical arbitrations have similarly concluded that, despite the absence of a label as 'representative' or 'class action' based, the claim is not simply 'individual.'"