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# *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)

Putative Florida state class action complaining of usurious interest rates on post-dated check loans: Contract with customers contained a broad arbitration provision. Plaintiffs argued that their challenge to the legality of the contract should be resolved in court rather than the arbitrators.

- Key issue: Must a challenge to the validity of a contract containing an arbitration clause be resolved in court before it reaches the arbitral forum?
- Holding: Arbitration clauses are presumptively severable, so a challenge to the contract as a whole does not void the arbitration clause.
- Holding: Federal law, not state law, determines the issue of severability.
- *Southland Corp. v. Keating* (1984) holding that the FAA applies in state court not challenged.

# *Preston v. Ferrer*, 552 U.S. 346 (2008)

“Judge Alex” and his agent were in a dispute. The contract between them contained an arbitration clause. California law required that disputes between entertainers and their agents be heard before the California Labor Commissioner.

- Key issue: Does the FAA pre-empt state laws giving exclusive jurisdiction to a state administrative agency?
- Holding: Yes it does. There’s no fundamental difference between the FAA’s pre-emptive power over cases in state court and those in state administrative agencies
- *Volt Information v. Stanford* (1989) seemingly limited to the unusual facts of an arbitrable dispute being delayed while court litigation over related disputes with entities not subject to arbitration proceeded.

# *Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)*

“Dispute regarding whether the tenant or landlord was responsible for environmental clean up costs at an industrial facility. The arbitration agreement purported to give the District Court authority to set aside the arbitrator’s award if it lacked “substantial evidence” or “the arbitrator’s conclusions of law are erroneous.”

- Key issue: Are the grounds set forth in Sections 10 and 11 of the FAA (corruption, misconduct, arbitrators exceeded powers, etc.) exclusive and not amenable to change by contract?
- Holding: Statutory grounds are exclusive and may not be amended by contract. Statutory language makes clear that they are not open to change. Allowing parties to make changes would undercut federal policy favoring finality of arbitral decisions.
- Dictum: Court seemed to call into question the language in *Wilko v. Swan*, 346 U.S. 427 (1953) that arbitral decisions are reviewable for “manifest disregard of the law.”

# *Vaden v. Discover Bank*, 556 U.S. 49 (2009)

Bank brought an action against cardholder for about \$10,000 in unpaid charges. Cardholder brought a counterclaim determined to rest on federal law. Bank brought an action in federal court under Section 4 of the F.A.A. to compel arbitration.

- Key issue: In determining whether there is jurisdiction for a Section 4 motion to compel, should a district “look through” the petition to determine whether there is federal subject matter jurisdiction?
- Holding: Yes, a district should look through to see if there would be federal jurisdiction over the claim sought to be arbitrated, either on federal question or diversity grounds.
- Holding: No federal jurisdiction was present here, however, as the amount in controversy on the original claim was under \$75,000 and the federal question entered only by way of counterclaim. State courts, however, are bound by the F.A.A. and would have to enforce arbitration clause absent a defense to enforcement of the arbitration clause.

# *14 Penn Plaza LLC v. Pyett, 556* *U.S. 247 (2009)*

Discharged employees covered by a CBA sought to avoid arbitration for their age-discrimination claims. The CBA included language that clearly required discrimination claims to be arbitrated.

- Key Issue: Does the ADEA's anti-waiver provision forbid enforcement of arbitration provision?
- Holding: The claims must be arbitrated. Sending such claims to arbitration does not involve a waiver of a right but merely a choice of forum.
- Dictum: Broad language in earlier cases that seemed to forbid arbitration of statutory claims is disapproved as resting on a "mistaken" view of arbitration. *Mitsubishi Motors* pointed to as the key case showing a change of attitude.

# *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624 (2009)

Business owners used a tax shelter to try to minimize tax consequences of the sale of the business. The IRS determined it was not a legal shelter, but offered conditional amnesty to taxpayers, but it was alleged that AA and other entities failed to inform them of this option, and the owners wound up paying all tax along with penalties and interest. Owners filed suit in federal court. AA sought a stay under Section 3 of the FAA, even though AA was not a party to any arbitration agreement, though there were arbitration clauses in the various agreements to create the LLP's that were party of the shelter.

- Key Issue #1: May a non-party to an arbitration agreement seek a stay and get an interlocutory appeal?
- Yes, plain language of FAA allows.
- Key Issue #2: May non-parties compel arbitration under appropriate circumstances?
- Yes, if standard rules of contract law (third party beneficiary, estoppel, etc.) would allow.

# *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662 (2010)

Small shipper customer commenced a class action antitrust action against maritime charterers for horizontal price fixing. It was determined that the antitrust action fell within the scope of the arbitration clause. Customer then brought a purported class arbitration against charterers. Clause made no reference to class arbitration. Parties agreed that the arbitrators would first make a determination as to whether the clause allowed for class arbitration. Arbitrators said “yes.”

- Key Issue: Did the arbitral panel “exceed its powers” as defined in Section 10(a)(4) of the FAA by deciding that the clause allowed for class arbitration?
- Holding: Yes, the panel exceeded its powers, because the rationale rested on public policy desirability of class arbitration, not the parties’ intent. A clause “silent” on class arbitration generally signals no agreement to allow it, as class arbitration would be so different from normal bilateral arbitration.

# *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662 (2010) – cont'd.

Case deals with difficult issue of class arbitration. In the Supreme Court's splintered decision in *Bazze v. Green Tree Financial Corp.* (2002), there was no majority opinion as to whether the decision about whether the clause allows for class arbitration goes to the court or the arbitrator first. In *Stolt-Nielsen*, however, the parties agreed that the arbitrators should get the first crack.

Court continues to play coy about whether “manifest disregard of the law” is a basis for vacating arbitral awards and, if so, whether it is independent or merely a paraphrase of other bases, such as arbitrators “exceeding their powers.”

# *Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63 (2010)*

Employment discrimination suit. Clause in employment contract covered the dispute and also explicitly assigned to the arbitrator “exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including [whether] . . . this Agreement is void or voidable.” Jackson challenged the agreement as being unconscionable and wanted that issue decided by a court.

- Key issue: Was this “delegation” provision giving authority the arbitrator immune from an unconscionability attack?
- Holding: Yes. Under *First Options*, the delegation was “clear and unmistakable” so arbitrator must decide, presumably subject to the limited review allowed for by the FAA.

# *AT&T Mobility LLC v. Conception,* 131 S. Ct. 1740 (2011)

Customers got a “free” phone by signing up for AT&T cellular service, but were charged \$30 in sales tax. They brought suit in California alleging fraudulent advertising and joined a class action against AT&T. Their contract with AT&T called for arbitration and specifically forbade class arbitration. California Supreme Court’s so-called *Discover Bank* rule prohibited class arbitration waivers as unconscionable. Conceptions resisted arbitration invoking the *Discover Bank* rule and the FAA’s “save upon” clause in Section 2.

- Key Issue: Is the *Discover Bank* rule pre-empted by the FAA?
- Holding: Yes. The “save upon” clause requires that a contractual defense be general in nature and not discriminate against arbitration agreements. *Discover Bank* rule does so.

Case is generally considered the most significant decision on arbitration in the past decade. Retailers can considerably reduce their exposure by including arbitration and class arbitration waiver provisions in their form contracts.

# *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011)

In a dispute regarding purchase of partnership interests, plaintiffs brought four causes of action against defendant accounting firm. Florida state court determined that two of the causes of action fell within the scope of the arbitration clause and two did not. On that basis, the state court refused to compel arbitration.

- Key Issue: Does the existence of some non-arbitrable claims prevent a court from granting a motion to compel arbitration under the FAA?
- Holding: No, a court is under a duty to compel arbitration on those claims that are subject to it, even if this leads to piecemeal litigation with some claims before the arbitrator and some before the court.

# *Compucredit Corp. v. Greenwood,* 132 S. Ct. 665 (2012)

Plaintiffs who signed up for a “credit repair” credit card sued the issuer under the “Credit Repair Organizations Act.” The agreement with the issuer contained a broad arbitration clause. Card issuer sought to compel arbitration. Plaintiffs argued that a “right to sue” and “anti-waiver” provision in the CROA prohibited arbitration, because cardholders were giving up their right to sue.

- Key Issue: Did these provisions in the CROA trump the FAA ?
- Holding: No, many federal statutes are written this way and arbitration has been compelled nonetheless. Arbitration agreement treated as a forum selection clause, not a waiver.

# *Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012)*

Plaintiffs were families of nursing home residents who died allegedly as a result of negligence and filed in West Virginia state court. They were subject to an arbitration clause broad enough to cover the dispute. The West Virginia Supreme Court held that as a matter of public policy that pre-dispute arbitration agreements in negligence actions were unenforceable.

- Key Issue: Is the West Virginia rule pre-empted by the FAA?
- Holding: Yes, violates the plain terms of the FAA. Per curiam GVR.

# *Nitro-Lift Techs., L.L.C. v. Howard,* 133 S. Ct. 500 (2012)

Oklahoma Supreme Court held as a matter of public policy that arbitration clauses in non-competition agreements were unenforceable as a matter of public policy.

- Key Issue: Is the Oklahoma rule pre-empted by the FAA?
- Holding: Yes, plainly pre-empted by the FAA. Per curiam GVR.

# *Oxford Health Plans LLC v. Sutter,* 133 S. Ct. 2064 (2013)

Physician entered into a fee-for-services agreement with a health plan and filed a class action in New Jersey Supreme Court alleging late payments. Contract contained an arbitration clause reading: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association.” The parties agreed that it was up to the arbitrator to decide whether this clause called for class arbitration. He ruled that it did based on the “civil action” language. As the case was on appeal, *Stolt-Nielsen* was decided and the health plan asked him to reconsider. He stuck to his interpretation of the clause. Health plan challenged his interpretation under Section 10(a)(4) as “exceeding his powers.”

- Key Issue: Does the arbitrator’s interpretation survive the limited review under the FAA?
- Holding: Yes, it survives. All that was required was that he attempted to interpret the clause. Even a grave error of legal interpretation cannot be set aside, and the Court made clear that they didn’t agree with the arbitrator’s interpretation. *Stolt-Nielsen* distinguished as being a case in which the parties agreed that there was no agreement regarding class arbitration.

# *OXFORD HEALTH PLANS LLC V. SUTTER, 133 S. CT. 2064 (2013)*

- Dictum: Decision of the parties to stipulate that this was the arbitrator's call in the first place was crucial. Court suggested in a long footnote that if the parties had treated it as a threshold "question of arbitrability" it would have been for a court in the first instance to interpret the clause.
- Implications: Unclear again whether "manifest disregard of the law" is a basis for setting aside arbitration awards. Practical significance of the decision may be limited as after *Conception* parties are likely to draft clauses that specifically exclude class arbitration.

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

Restaurant accepted American Express cards under a contract that included an arbitration clause and a *Conception*-style waiver of class arbitration. Restaurant brought an antitrust class action arguing that AMEX was engaged in an illegal tying arrangement. Undisputed testimony was that maximum individual recovery (after trebling) was about \$40K but expert economic testimony to prove that theory would be at least 10 times that amount.

- Key Issue: Did the combination of a class waiver and prohibitive costs amount to a de facto illegal prospective waiver of a right to pursue a Sherman Act claim?
- Holding: No, the case is controlled by *Conception*. Nothing in the Sherman Act guarantees an economically rational path to enforcement. Restaurant still has a right to pursue the action, even if economically irrational to do so. Distinguished hypothetical case where irrationally high filing fees might actually prevent “pursuing” the action.
- Dissent: Majority is blind to the reality that the clause effectively insulates AMEX from antitrust liability. In effect, alleged monopolist is using its monopoly position to prevent anyone from proving that it holds a monopoly.
- Implications: Confirms the importance of *Conception*.

# *BG Group v. Republic of Argentina, 134 S. Ct. 1198 (2014)*

British company invested in a natural gas distribution consortium in Argentina. Company claimed that currency regulations in response to an economic crisis effectively expropriated its investment without fair compensation. A BIT between the U.K. and Argentina contained an arbitration provision, but required as a pre-condition that the aggrieved party bring suit in local courts and go to arbitration only if the case was not decided within 18 months. British company went directly to arbitration, claiming that going to court would be futile in light of various executive orders staying litigation in the Argentine courts. Arbitration held in the U.S. and the arbitrators ruled that the “local litigation” provision was excused under the circumstances.

- Key Issue: Is the “local litigation” provision a question of arbitrability (which would presumptively be reviewed *de novo*) or is it a procedural provision which the arbitrators should decide (and thus be reviewed deferentially)?
- Holding: The “local litigation” provision is procedural, and not an issue of arbitrability, and thus must be reviewed deferentially.
- Implications: The category of questions of “arbitrability” is very narrow. It apparently only includes questions of contract defenses directed at the clause itself (and not the whole contract), questions of the scope of the arbitration clause, and whether a party (say a claimed third party beneficiary) can enforce the clause.