TO BE A DEBT COLLECTOR UNDER THE FAIR DEBT COLLECTION PRACTICES ACT, ENTITY MUST MEET STATUTORY TEST

Davidson v. Capital One Bank, ____F.3d____ (11th Cir. 2015).

FACTS: HSBC Bank Nevada, N.A. ("HSBC") filed suit against Keith Davidson ("Davidson") to collect on a credit card account. The parties entered into a settlement agreement, whereby Davidson agreed to pay $500 to HSBC Bank Nevada, N.A. ("HSBC") to dismiss its collection action. Davidson defaulted on the payments and the loan was later acquired by Capital One Bank (USA), N.A. ("Capital One"). Capital One filed suit against Davidson to collect on the same credit card account alleging the account was delinquent $1,149.96. Davidson responded by filing a class action suit claiming that Capital One's activities violated the FDCPA.

Capital One moved to dismiss Davidson's action for failure to allege that Capital One was a "debt collector" for the purposes of the FDCPA. The district court dismissed the action, stating that whether the account was in default at the time it was acquired had no bearing on whether Capital One satisfied the statutory definition of a "debt collector," but they did not meet the definition of debt collector under the FDCPA. Davidson appealed.

HOLDING: Affirmed.

REASONING: The court began with the definition of "debt collector" under § 1692a(6) of the FDCPA. The Act defines "debt collector" to mean: (1) "any person who uses any instrumentality of interstate commerce or the mail in any business the principal purpose of which is the collection of any debts," or (2) any person "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." The court defined a "creditor" as "any person to the extent that he receives an assignment or transfer of debt in default solely for the purpose of facilitating collection of such debt for another." Davidson argued based on the exclusion under the FDCPA, that if the debt was in default at the time it was acquired, the entity is a "debt collector", but if the debt was not in default at the time it was acquired, the entity is a "creditor."

The court rejected Davidson's argument stating where a person does not fall within any of the six statutory exclusions under the FDCPA, he is not deemed a "debt collector," and the statutory definition of "debt collector" applies without regard to the default status of the underlying debt. Davidson failed to plausibly allege that Capital One was a "debt collector" under the FDCPA and the "principal purpose" of Capital One's business was debt collection. Therefore, Captial One was not subject to liability under the FDCPA.

ARBITRATION

IS ARBITRATION A "DARLING OF FEDERAL POLICY?"

Andermann v. Sprint Spectrum L.P, 785 F.3d 1157 (7th Cir. 2015).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2015/D05-11/C:14-3478:J:Posner:aut:T:fnOp:N:1549408:S:0

FACTS: Plaintiffs, ("the Andermanns"), obtained mobile phone service from U.S. Cellular in 2000 under a renewable two-year contract that was last renewed in 2012. The contract contained a arbitration clause providing that all disputes arising out of the contract would be resolved by binding arbitration and that the arbitration agreement would survive termination of the agreement. The contract also provided that U.S. Cellular could assign the agreement without notifying the Andermanns. In May 2013, U.S. Cellular assigned the contract to Defendant, ("Sprint") without notice to the Andermanns. Sprint sent the Andermanns a letter informing them of the sale and that their mobile phone service agreement would be terminated on January 31, 2014 due to the incompatibility of Sprint's network with the Andermanns' phones. Sprint followed the letter with six calls.

The Andermanns brought suit in federal district court alleging that these calls contained unsolicited advertisements in violation of the Telephone Consumer Protection Act ("TCPA"). Sprint responded by asking the court for an order to arbitrate based on the contract and the presumption in favor of arbitration. The district court denied Sprint's motion to compel arbitration. Sprint appealed.

HOLDING: Reversed and Remanded.

REASONING: The district court ruled for the Andermanns on the grounds that the dispute arose after the contract was terminated, thus, the dispute regarding the legality of the calls could not have arisen out of the contract. The Seventh Circuit, ruled that Sprint was entitled to arbitrate, finding that the service agreement allowed the assignment leading to the incompatibility of the Andermann's phones and the ultimate reason for the disputed calls. The court reasoned that the calls were necessary in Sprint's efforts to retain the Andermanns as customers, thus the Andermanns were required to arbitrate because the dispute clearly arose from the assignment clause within the agreement.

It's not clear that arbitration, which can be expensive because of the high fees charged by some arbitrators and which fails to create precedents to guide the resolution of future disputes, should be preferred to litigation.

In his discussion of arbitration, Judge Posner discussed the presumption that arbitration is the favored method of dispute resolution. He stated:

> Sprint gilds the lily, however, in telling us that arbitration is a darling of federal policy, that there is a presump-

tion in favor of it, that ambiguities in an arbitration clause should be resolved in favor of arbitration, and on and on in this vein. It's true that such language (minus the "darling") appears in numerous cases. E.g., *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983); Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.,* 174 F.3d 907, 909 (7th Cir. 1999). But the purpose of that language is to make clear, as had seemed necessary because of judges' historical hostility to arbitration, that arbitration was no longer to be disfavored—especially in labor cases, see, e.g., *Granite Rock Co. v. International Brotherhood of Teamsters,* 561 U.S. 287, 298– 99 (2010), where arbitration is now thought a superior meth- od of dispute resolution to litigation.

The Federal Arbitration Act is inapplicable to labor disputes, however, and merely makes clauses providing for the arbitration of disputes arising out of transactions involving interstate or foreign commerce, as the dispute in this case is conceded to arise, enforceable in federal and state courts. 9 U.S.C. §§ 1, 2. The issue is then one of interpreting the clause to see whether it covers the dispute. It's not clear that arbitration, which can be expensive because of the high fees charged by some arbitrators and which fails to create precedents to guide the resolution of future disputes, should be preferred to litigation. And it's not clear why, so far as eliciting the meaning of a given arbitration clause is concerned, such a clause should be distinguished from any other clause in a contract.

COURT FINDS WAIVER OF ARBITRATION BASED ON SEVENTEEN MONTHS AND MORE THAN 1,300 ATTORNEY HOURS

Oregel v. PacPizza, LLC, ____F.3d____ (Cal. Ct. App. 2015).
http://www.consumerfinancelitigation.com/uploads/file/Oregel%20v%20PacPizza%20A141947.PDF

FACTS: Plaintiff, Julio Oregel ("Oregel"), was a former employee of Defendant, PacPizza, LLC ("PacPizza"). Oregel brought a class action suit against PacPizza alleging they failed to reimburse delivery drivers for necessary expenses in violation of Labor Code § 2802 and California's unfair competition law. Following seventeen months of litigation, extensive discovery request and more than 1,300 working hours attorneys spent related to Oregel's motion for class certification, PacPizza filed a petition to compel arbitration.

The district court denied PacPizza's petition to compel arbitration, concluding that they had waived their right to arbitrate Oregel's claims. PacPizza appealed.

HOLDING: Affirmed.

REASONING: The court disagreed as to the applicability of the futility rule to this case, and identified three reasons why PacPizza had waived their right to arbitrate. First, PacPizza waited to file their petition for arbitration until after Oregel filed his motion for class certification, taking the opportunity to examine the motion and supporting evidence. Only then did they strategically file their petition for arbitration, rather then failing to file due to the futility.

Secondly, PacPizza acted inconsistently with their right to arbitrate by actively participating in the seventeen-month long litigation process while maintaining their silence on arbitration. They failed to plead arbitration as an affirmative defense, demanded a jury trial, paid jury fees, attended two case management cases and actively participated in the extensive discovery related to Oregel's class claims. The court stated these actions would lead any plaintiff to believe that he or she had to fully prepare for a full trial, thereby supporting a claim of waiver.

Third, PacPizza waived its right to arbitrate by causing an unreasonable and unjustified seventeen-month delay. PacPizza created substantial prejudice for Oregel by causing him to incur substantial expenses of over 1,300 hours and $19,990 in costs associated with his class certification motion.

CALIFORNIA SUPREME COURT UPHOLDS CLASS ACTION WAIVER IN ARBITRATION CLAUSE

Sanchez v. Valencia Holding Company, LLC 353 P.3d 741 (Cal. 2015).
http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2001577&doc_no=S199119

FACTS: Plaintiff-Respondent, Gil Sanchez ("Sanchez"), an automobile purchaser, entered into an automobile sales contract with Defendant-Appellant, Valencia Holding Company, LLC ("Valencia"). The contract contained an arbitration agreement with a provision waiving the right to class action litigation or arbitration, and a provision stating that if the class waiver was deemed unenforceable, the entire agreement shall be unenforceable. Sanchez filed a class action lawsuit and alleged Valencia violated the Consumer Legal Remedies Act ("CLRA") by making false representations about the condition of the vehicle. Sanchez argued that a class action was appropriate despite the inclusion of a class action waiver in the arbitration clause.

"We hold that *Concepcion* requires enforcement of the class waiver but does not limit the unconscionability rules applicable to other provisions of the arbitration agreement."

The trial court held that both the class action waiver and the entire agreement were unenforceable on the ground that the CLRA expressly provided for class action proceedings and declared this to be an unwaivable right. Subsequently, in *Concepcion,* the United States Supreme Court held that the Federal Arbitration Act ("FAA") barred absolute class waivers in consumer arbitration agreements and preempted state law to the contrary. The Supreme Court noted, however, that "the FAA does not preempt generally applicable contract defenses, such as fraud, duress, or unconscionability." The court of appeals declined to decide whether the class action waiver was at issue and held that the arbitration appeal provision and the arbitration agreement as a whole were unconscionably one-sided. The California Supreme Court granted review.

HOLDING: Reversed and remanded.

REASONING: The court first stated that class arbitration waivers in consumer contracts are unconscionable when they are found in

a setting in which disputes between the contracting parties predictably involve small amounts of damages and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out individually of small sums of money. The court noted that the unconscionability standard is the same for arbitration and non-arbitration agreements.

The court noted that under *Concepcion* the CLRA's anti-waiver provision was preempted insofar as it barred class waivers in arbitration agreements covered by the FAA. The court explained that a state rule invalidating class waivers interferes with arbitration's fundamental attributes of speed and efficiency and disfavors arbitration as a practical matter and must be preempted by the FAA. "We hold that *Concepcion* requires enforcement of the class waiver but does not limit the unconscionability rules applicable to other provisions of the arbitration agreement."

ARBITRATION AGREEMENT IS AMBIGUOUS AND UNENFORCEABLE

Narayan v. Ritz-Carlton Dev. Co., Inc., 350 P.3d 995 (Haw. 2015).
https://scholar.google.com/scholar_case?case=11694822164135602215&hl=en&as_sdt=6&as_vis=1&oi=scholarr

FACTS: Plaintiffs, Krishna Narayan et al. ("Homeowners"), purchased ten condominium units that were developed and managed by Defendants, the Ritz-Carlton Development Company and the Ritz-Carlton Management Company ("Respondents"). The developer defaulted on its loans and Marriot pulled its Ritz-Carlton branding and operating funds, leaving the Homeowners with the responsibility of covering the multi-million dollar shortfall.

The Homeowners sued the Respondents for breach of fiduciary duty, access to books and records and injunctive/declaratory relief. Respondents filed a motion to compel arbitration based on the arbitration provision in the condominium declaration. The circuit court denied the Respondents' motion and the Respondents appealed. The intermediate court of appeals held that that the parties had entered a valid agreement to arbitrate and that the dispute fell within the scope of the agreement. The Homeowners appealed.

HOLDING: Vacated and remanded.

REASONING: The Homeowners argued that they had not agreed to arbitration terms "buried" in the condominium declaration, and that the terms of their purchase agreements created ambiguity regarding their assent to arbitrate. The Court accepted that argument by holding that the purported agreement to arbitrate was unenforceable because it was ambiguous when taken together with the terms of the purchase agreements and the public report.

The supreme court noted that in order to prove the existence of an enforceable agreement to arbitrate, the agreement must be unambiguous as to the intent to submit disputes or controversies to arbitration. The court identified two circumstances where the requisite unambiguous intent to arbitrate may be lacking: (1) where a contract contains one or more dispute resolution clauses that conflict and (2) where a party has received insufficient notice of an arbitration clause in a document that is external to the contract.

The court reasoned that the agreement to arbitrate was ambiguous because the purchase agreements, the public report and the condominium declaration stated different dispute resolution terms. The public report created further ambiguity by stating that the document provisions were enforceable in a court of law. The court held that the arbitration provision in the condominium declaration was unenforceable because the terms of the various condominium documents were ambiguous with respect to the Homeowners' intent to arbitrate.

U.S. DISTRICT COURT FINDS "SIGN-IN-WRAP" ARBITRATION AGREEMENT INVALID AND UNENFORCEABLE

Berkson v. Gogo LLC,____F.Supp.2d____ (E.D.N.Y. 2015).
http://www.gpo.gov/fdsys/granule/USCOURTS-nyed-1_14-cv-01199/USCOURTS-nyed-1_14-cv-01199-0

FACTS: Plaintiffs, Adam Berkson and Kerry Welsh ("Plaintiffs"), brought a class action suit against Gogo, LLC and Gogo, Inc. (collectively "Gogo"). Plaintiffs alleged that Gogo misleadingly increased sales and profits by getting customers to purchase a service that automatically renewed on a monthly basis without sufficient notice or consent. Plaintiffs brought a cause of action for common law breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violation of various consumer protection statutes.

The issue of the "sign-in-wrap," which is a hybrid version of "browsewrap" and "clickwrap" electronic contracts, brings forth a policy question to be determined by the court.

Gogo responded by filing a motion to transfer venue, compel arbitration and dismiss for lack of standing. The first two motions were based upon the "terms of use" created by Gogo that they argued Plaintiffs officially agreed to when they subscribed to Gogo's in-flight Wi-Fi service. Plaintiffs alleged that these provisions were hidden so they should not be held liable for such a misleading form of agreement.

The issue of the "sign-in-wrap," which is a hybrid version of "browsewrap" and "clickwrap" electronic contracts, brings forth a policy question to be determined by the court. The central factual legal question was whether Plaintiffs had given effective notice of the need to inquire as to the "terms of use" before agreeing to them. The court ruled in favor of the Plaintiffs and denied Gogo's motions for transfer of venue and to compel arbitration. Gogo appealed.

HOLDING: Denied.

REASONING: The court inferred, absent testimonial evidence about the expertise of the Plaintiffs with respect to internet use, the Plaintiffs were average internet users and uninformed that they were binding themselves to a "sign-in-wrap." The court applied a test to analyze the validity of electronic contracts in general, and the test casts significant doubt on

"sign-in-wrap" and clickwrap agreements because they do not adequately present material terms to Internet users.

For the third motion (denial for lack of standing), the Plaintiffs had to show that, as consumers, Plaintiffs suffered an injury-in-fact on the date the merchant charged their credit card(s) without authorization. Plaintiff Berkson, as well as other members of the class were able to provide credit card statements where Gogo had misleadingly charged their accounts. The court determined this was sufficient evidence to prove denial of Gogo's motion for lack of standing.

UBER ARBITRATION AGREEMENT HELD UNCONSCIONABLE AND UNENFORCEABLE

Mohamed v. Uber Technologies, Inc., ____ F.Supp.3d ____ (N. D. Cal. 2015).
http://www.employmentlawblog.info/images/uber%20decision.pdf

FACTS: Plaintiffs, Gillette and Mohamed, were drivers for Uber Technologies ("Uber") and each signed an arbitration agreement upon assuming employment with Uber. Uber later terminated Gillette and Mohamed as a result of information from background reports. When both parties filed suit against Uber for violations related to the use of these reports, Uber moved to compel all claims to arbitration, under the terms of arbitration agreements signed by the plaintiffs. Both challenged the enforceability of these agreements.
HOLDING: Motion to compel denied.
REASONING: The court found the terms in the contracts that reserved the adjudication of the validity and enforceability of the arbitration provisions were unenforceable as they did not pass the "clear and unmistakable" test. The court reasoned that because one of the provisions indicated that the enforceability of the arbitration provision was to be decided by the "arbitrator" and another provision indicated that the "court" might also find provisions in the contract unenforceable, these terms were not "clear and unmistakable."

Uber failed to notify the plaintiffs that they may be required to pay considerable fees to arbitrate.

The court also determined that the terms of the agreements were unconscionable, applying the test of "procedural unconscionability" that focuses on "surprise" and "oppression." The court found that both elements were met, because Uber failed to notify the plaintiffs that they may be required to pay considerable fees to arbitrate if they agreed to the arbitration agreement and that they would not be required to pay such fees if they opted-out. Uber also failed to ensure the drivers felt free of any pressure and were made aware of the ability to "opt-out" of the arbitration agreement. Thus the court found that both agreements were surprising and oppressive to the plaintiffs; therefore, the arbitration agreement was unenforceable.

REVIEW OF ARBITRATION AWARD IS SO LIMITED IT MAY NOT BE VACATED EVEN IF THERE IS A MISTAKE OF FACT OR LAW

Campbell Harrison & Dagley, L.L.P. v. Hill, 782 F.3d 240 (5th Cir. 2015).
http://www.leagle.com/decision/In%20FCO%2020150402108/CAMPBELL%20HARRISON%20&%3B%20DAGLEY,%20L.L.P.%20v.%20HILL

FACTS: Two law firms ("the Firms"), brought suit against former clients, ("Hill"), to recover fees due under an existing contingent fee arrangement. Hill agreed to pay the Firms hourly fees plus an undivided 15% interest in Hill's recovery. Later, Hill fired the Firm and retained a new firm for representation. Hill settled for $188 million. The Firms then attempted to collect $3.2 million in payment for their legal services, but Hill refused to pay. The Hills then arbitrated their rights to payment under the agreement. The arbitrator awarded the Firms $3.2 million in hourly fees and an additional $25 million for contingency fees.

In district court the Firms moved to confirm, and the Hills moved to vacate the award on the grounds of unconscionability and public policy. The district court held that ethical rules would deem collecting hourly fees plus a contingency fee unethical. The Firms appealed.
HOLDING: Affirmed in part, reversed and rendered in part and remanded.
REASONING: The Fifth Circuit reinstated the arbitration award on the grounds that under Texas law, the review of an arbitration award is very limited. The court held that the district court had misapplied the standard of review. The court stated that the review of an arbitration award is so limited that the award may not be vacated even if there is a mistake of law or fact. The court went on to discuss that they did not have the authority to substitute for the judgment of an arbitrator because the court would have reached a different decision itself.

THE RIGHT TO CHALLENGE AN ARBITRATION AWARD ON GROUNDS SET FORTH IN THE FEDERAL ARBITRATION ACT CANNOT BE WAIVED BY CONTRACT

Atlanta Flooring Design Centers, Inc. v. R.G. Williams Const., Inc, 773 S.E.2d 868 (Ga. Ct. App. 2015).
http://www.leagle.com/decision/In%20GACO%2020150716185/ATLANTA%20FLOORING%20DESIGN%20CENTERS,%20INC.%20v.%20R.%20G.%20WILLIAMS%20CONSTRUCTION,%20INC.

FACTS: R.G. Williams Construction Inc. ("Williams") hired Atlanta Flooring Design Centers, Inc. ("AFDC") as a subcontractor for a flooring project. The parties entered into a governing contract that set forth the provisions regarding any disputes that would arise under the agreement. The subcontractor agreement stated that any disputes would be resolved by arbitration, and that the award rendered by the arbitrator would be final and binding. The contract also stated that the parties could take steps to confirm an arbitration award, but it provided an express waiver of the parties' rights to challenge an arbitration award. A dispute was submitted to arbitration, and the arbitrator rendered an award.

AFDC filed a motion pursuant to the Georgia Arbitration Code (the "GAC") seeking a court order vacating the award. The reviewing court ruled that the language in the governing agreement precluded any challenge to the arbitration award. AFDC appealed.
HOLDING: Reversed.
REASONING: The court of appeals held that the GAC does not permit contracting parties to contractually waive or eliminate a party's right to apply to a court to vacate or modify an award based on statutory grounds. Because Georgia tracks federal arbitration law, the court looked to statutes interpreting the Federal Arbitration Act (the "FAA"). The court concluded that permitting parties to contractually eliminate judicial review of awards contradicts the text of the FAA, frustrates the intent and leaves parties without any safeguards against abuse by the arbitrator. Based on the FAA, the court concluded that an agreement that prohibits a party from challenging an arbitration award conflicts with and frustrates public policy as expressed in the GAC, thus the agreement is void and unenforceable.

QUESTION OF WHETHER CONTRACTUAL DEADLINE FOR INITIATING ARBITRATION APPLIED WAS FOR ARBITRATORS NOT COURT TO DECIDE

G.T. Leach Builders, LLC v. Sapphire V.P., L.P., 458 S.W.3d 502 (Tex. 2015).
http://law.justia.com/cases/texas/supreme-court/2015/13-0497.html

FACTS: Defendant-Appellant, G.T. Leach Builders, LLC ("G.T. Leach") was a general contractor in Texas that was sued by Plaintiff-Appellee, Sapphire V.P., L.P. ("Sapphire"), a property developer for negligence and breach of contract. Sapphire claimed that G.T. Leach was responsible for construction defects that caused a condominium project to sustain water damage.

The contract between G.T. Leach and Sapphire had an arbitration agreement that imposed a deadline to demand arbitration and required "any claim arising out of the contract to be subject to agreed private arbitration." Sapphire, however, claimed that G.T. Leach was barred from requesting arbitration because it requested arbitration after the contractual deadline.

The Court explained that procedural arbitrability encompasses issues such as time limits, while substantive arbitrability deals with issues such as enforceability and the scope of an arbitration agreement.

G.T. Leach filed a motion for interlocutory appeal and the court of appeals ruled in favor of Sapphire, finding that G.T. Leach was too late to demand arbitration under the contract. G.T. Leach filed a writ of certiorari arguing that arbitrators should decide whether a contractual deadline for initiating arbitration is to be applied.
HOLDING: Reversed.
REASONING: The Texas Supreme Court held that the dispute between Sapphire and G.T. Leach about the arbitration deadline was a "claim arising out of the contract" within the arbitration agreement. Thus the contract unequivocally subjected the dispute to arbitration instead of the Court.

The Court also distinguished between substantive arbitrability and procedural arbitrability. The Court explained that procedural arbitrability encompasses issues such as time limits, while substantive arbitrability deals with issues such as enforceability and the scope of an arbitration agreement. The Court held that courts should decide substantive arbitrability questions while procedural arbitrability questions should be decided by arbitrators, thus the procedural issue related to the time limit for arbitration under the arbitration agreement was unrelated to any substantive issues.