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CASES TOSSED OUT OF COURT BECAUSE OF FORCED ARBITRATION CLAUSES AND CLASS ACTION BANS

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In 2011 and again in 2013, the U.S. Supreme Court ruled that corporations can strip people of their constitutional right to civil jury trial and force them into private, corporate-controlled arbitration systems to resolve disputes. The Court also said that companies have the unilateral right to ban class actions by inserting class action "waivers" into these arbitration clauses.[1]

In the 2018 *Epic Systems* case, the Supreme Court greatly expanded the scope of these decisions for workers, ruling that employment contracts with class action waivers do not violate legal rights granted to workers by the 84-year-old National Labor Relations Act.[2] That case affected millions of employment contracts.[3] According to a recent analysis by the *National Law Journal*, most decisions citing the case, the bulk of which were class actions, "broke in favor of the defendant." More than half of those cases compelled plaintiffs to arbitrate.[4]

When a case is thrown out of court because of one of these clauses, the claims usually disappear, allowing corporate wrongdoers to completely escape any legal accountability. The following are actual cases where forced arbitration clauses and class action bans have been enforced – and cases dismissed. This list highlights cases that were immediately impacted following the 2011 and 2013 Supreme Court rulings, as well as a number of recent cases. It is far from an exhaustive list but merely representative of cases to demonstrate this point.

We gratefully acknowledge Public Citizen and the National Consumer Law Center for their help uncovering some of the early cases. The Center for Justice & Democracy provided all case descriptions.

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ASSAULT AND ABUSE

CHILD SEXUAL ASSAULT

***Dagnan v. St. John's Military Sch.*, No. 16-2246-CM, 2016 U.S. Dist. LEXIS 177303 (D. Kan. Dec. 21, 2016)**

A father brought a civil suit after his son had been sexually assaulted and stalked at boarding school by another student when he was 12. He argued that St. John's was on notice of the perpetrator's strange behavior towards the child, knew of other incidents of physical and sexual assaults on other students on campus and breached its duty to protect them. Specific claims included negligent supervision, intentional failure to supervise, negligent infliction of emotional distress, violation of the Tennessee Consumer Protection Act and conspiracy. The school and its Endowment sought to compel arbitration, citing an enrollment contract entered into by the father – and binding on both parent and child under its terms – that contained an arbitration clause. The court found that the arbitration agreement was valid and enforceable and ordered all claims into arbitration.

NURSING HOMES

***Colorow Health Care LLC v. Fischer*, 2018 CO 52M (Colo. S.Ct. Jul. 2, 2018)**

Family members brought a wrongful death lawsuit after 90-year-old resident Charlotte Fischer died from an assault allegedly committed by a Colorow employee. The county coroner ruled her death a homicide. According to reports, a nurse's assistant allegedly threw her against a wall and fractured her hip; he was charged with third-degree assault.[5] When Fischer entered the facility, her daughter filled out the admissions paperwork. Among the documents signed as part of the entry packet: an arbitration agreement compelling arbitration for any claim arising from or relating to Fischer's relationship with the facility.

Colorow filed a motion to compel arbitration, which was denied by the trial court and court of appeals, which concluded that the arbitration agreement was void since it didn't include the necessary bold-face type mandated by Colorado's Health Care Availability Act. In a split decision, the Colorado Supreme Court disagreed, ruling that only substantial compliance with the formatting requirements of the Act was needed and, as such, the case could be forced into arbitration.

EVERYDAY FINANCIAL TRANSACTIONS

CREDIT CARDS/BANKS/DEBT COLLECTORS/PAYDAY LENDERS

***Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230 (11th Cir. May 10, 2018)**
In 2017, Wells Fargo settled with many of its customers whose credit scores were harmed after thousands of bank employees opened as many as 3.5 million fake checking and credit card accounts in customers' names to meet the company's aggressive sales goals.[6] Yet for years, the company had forced complaining customers into arbitration and just a few months before the bank agreed to settle this case, it tried to kill the case by forcing defrauded customers to arbitrate.[7]

The bank continues to use forced arbitration clauses and class action bans in customer agreements, and to strong-arm its customers into arbitration. For example, Wells Fargo has victimized many of its customers by charging illegal overdraft fees, one of the banking industry's most pernicious practices. This has been the subject of numerous class action lawsuits, which have helped consumers and led to better regulation of this practice.[8] But since 2009, Wells Fargo has been trying to push many of its fraudulent overdraft fee victims into forced arbitration. In 2018, after litigating against its victims for almost a decade, the 11th Circuit allowed them to do so. The U.S. Supreme Court let this decision stand in January 2019.[9]

***Henry v. Cash Biz, LP*, 551 S.W.3d 111 (Tex. S.Ct. Feb. 23, 2018)**
Four borrowers filed a class action alleging that payday lender Cash Biz wrongfully used the criminal justice system against them to collect unpaid loans. Causes of action included malicious prosecution, fraud and violations of the Deceptive Trade Practices Act, Consumer Protection Act and the Texas Finance Code. Cash Biz sought to compel arbitration, arguing that the borrowers had agreed to waive their rights to jury trial, class actions and class arbitration when they signed their lender contracts. The lower court denied Cash Biz's motion after agreeing with the borrowers that "(1) their allegations related solely to Cash Biz's use of the criminal justice system so the arbitration clause was inapplicable, and (2) Cash Biz waived its right to arbitration by substantially invoking the judicial process." An appeals court reversed that decision and the Texas Supreme Court affirmed, forcing the borrowers out of court and into individual arbitrations.

***Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396 (S.D. Fla. Sept. 10, 2014)**
Patricia Gunson pursued a class action against regional banks for allegedly participating in an illegal scheme with payday lenders. More specifically, she argued that the banks had used an electronic debiting network to help lenders collect payday loan payments in violation of state and federal laws. The banks were not signatories to the payday loan agreements, which all contained arbitration clauses. Nevertheless, the court granted the defendants' motion to compel arbitration, saying that the arbitration provisions barred her from filing suit to resolve her claims.

***Booth v. BMO Harris Bank, N.A.*, No. 13-5968, 2014 U.S. Dist. LEXIS 111053 (E.D. Pa. Aug. 11, 2014)**
Patricia Booth filed a class action alleging that banks had allowed out-of-state payday lenders to credit and debit consumer checking accounts in states where such loans are illegal. The banks countered that loan agreement arbitration provisions compelled dismissal of the case. The court agreed with the banks and dismissed the action.

***Riley v. BMO Harris Bank, N.A.*, 61 F. Supp. 3d 92 (D.D.C. July 29, 2014)**
Johnetta Riley pursued a class action against several banks that allegedly participated in an illegal scheme with payday lenders by making debits from borrowers' accounts using an electronic network on behalf of lenders and by providing lenders access to the network. The loan agreements signed by Riley (but not by the banks) contained broadly-worded arbitration clauses. The court granted the banks' motions to compel arbitration and dismissed Riley's action.

***Graham v. BMO Harris Bank, N.A.*, No. 3:13cv1460, 2014 U.S. Dist. LEXIS 112651 (D. Conn. July 16, 2014)**
Borrowers brought a class action against various banks over alleged illegal payday loans obtained from online lenders. The banks moved to compel arbitration, arguing that they were covered by loan agreement provisions requiring borrowers to arbitrate any dispute even though the banks themselves were not signatories to the loan or arbitration agreements. The court agreed with the banks and dismissed the suit against them.

***Moss v. BMO Harris Bank, N.A.*, 24 F. Supp. 3d 281 (E.D.N.Y. June 9, 2014)**
Borrowers pursued a class action over two banks' alleged role in facilitating fund transfers connected to high-interest online payday loans that violated federal and state law. The loan agreements contained arbitration clauses. Despite the fact that the agreements didn't explicitly mention the banks by name nor were they signatories to any of the agreements, the court granted motions to compel arbitration and stayed the case.

***Elder v. BMO Harris Bank*, No. JFM-13-3043, 2014 U.S. Dist. LEXIS 50194 (D. Md. April 11, 2014)**
Jacinta Elder filed a class action against several banks for allegedly aiding and abetting payday lenders in connection with illegal loans. The loan agreements, which were not signed by defendants, contained arbitration provisions that the banks sought to enforce. The court agreed, granting the banks' motions to compel arbitration.

***Shetiwy v. Midland Credit Mgmt.,* 959 F. Supp. 2d 469 (S.D.N.Y. July 12, 2013)**
Consumers brought a class action alleging that debt collectors, credit card companies, and banks (American Express, GE Capital, Citigroup, and Citibank) were conspiring to collect debts from them through fraud and false judgments. However, when they opened their credit accounts, the defendants pointed out that agreements contained forced arbitration clauses. Thus, despite allegations of fraud, the court granted the credit card companies' motions to force arbitration and did not allow the claims to move forward in court.

***McKenzie Check Advance of Florida, LLC v. Betts,* 112 So.3d 1176 (Fla. S.Ct. Apr. 11, 2013)**
Several borrowers pursued a class action against the check cashing company for loaning money at exorbitant rates in alleged violation of multiple Florida state laws. One of the victims, a 24-year-old single mother turned down for public assistance and unable to obtain a bank loan, testified that she knew she had to sign contracts with McKenzie in order to receive cash advances. Such contracts included arbitration clauses with class action waivers. Both the trial court and the appeals court denied the company's motion to compel arbitration, holding that the class action waiver was unenforceable because it was void as against public policy. The Florida Supreme Court disagreed and determined that all claims could only move forward through individual arbitrations.[10]

***Clemins v. GE Money Bank,* No. 11-CV-00210, 2012 WL 5868659 (E.D. Wis. Nov. 20, 2012)**
Two consumers brought class action claims against GE Money Bank over Wal-Mart and Sam's Club cards. Customers paid a monthly fee to take part in an optional "debt cancellation program" that would have his or her credit card debt canceled in times of financial hardship. After enrolling, one plaintiff claims that she learned she was ineligible because she received disability benefits; and the other claims that she was enrolled and charged without her consent, and that she only learned she was ineligible (because she was self-employed) when she applied for relief. They brought claims alleging that GE Money Bank breached their credit card agreements and the agreements governing the debt cancellation program – as well as unjust enrichment claims. However, the credit card contracts contained forced arbitration clauses with class action waivers. The court found the arbitration agreements binding and dismissed the case.

***Safadi v. Citibank, N.A.,* No. 12-1356 PSG, 2012 WL 4717875 (N.D. Cal. Oct. 2, 2012)**
According to the court, when customer, Amar Safadi, opened two deposit accounts with Citibank he was offered and received 30,000 American Airline miles. Citibank then reported the miles to the IRS, claiming their value was $750. When opening accounts, Citibank's agreement contained forced arbitration provisions. Safadi brought a class action on behalf of himself, and others similarly situated, alleging that Citibank never told him it would report the miles to the IRS or how it valued them and claimed Citibank's actions were in violation of California state law. However, the court found that the arbitration agreement was valid and dismissed the case.

***Orman v. Citigroup, Inc.,* No. 11 Civ. 7086, 2012 WL 4039850 (S.D.N.Y. Sep. 12, 2012)**
The plaintiffs brought a class action alleging that Citigroup failed to "adequately secure their computer systems against intrusion" and, as a result, computer hackers got the plaintiffs' financial information, leading to identity theft. They brought claims for "violation of state identity theft protection statutes, breach of the implied warranty of merchantability and fitness for a particular purpose, common law negligence, breach of state consumer protection statutes, fraudulent concealment, and unjust enrichment." However, because of the arbitration clause, in Citigroup's agreement, the court dismissed the case.

***Villano v. TD Bank,* No. 11-cv-6714, 2012 WL 3776360 (D.N.J. Aug. 29, 2012)**
The plaintiffs obtained a Small Business Administration (SBA) loan from TD Bank to finance a franchise of a specialty tool store, Matco. They brought a class action alleging that Matco

gave inflated income projections for their franchise, without informing them, to TD Bank and TD Bank accepted the projections, assuming that they'd never be able to repay their loan violating New York and New Jersey state laws. According to the plaintiffs, the franchise offer between Matco and the plaintiffs stated that Matco does not make "representations regarding potential sales" unless they inform the franchisees. The plaintiffs claim that TD Bank was aware that there was an "extraordinarily high failure rate" of SBA loans. The plaintiffs struggled to make loan payments and the franchise did not perform as well as Matco's income projections.

Ultimately the plaintiffs closed their franchise because of poor financial results. They were able to repay their loan, but had to use their personal savings. The agreement that they signed with Matco contained an arbitration clause as well as a forum selection clause – which stated that all arbitration hearings must take place in Summit County, Ohio. The court held that the claims had to be arbitrated as per the agreement.

CELL PHONES/TEXTING/INTERNET

***Garcia v. Kendall Lakes Automotive LLC,* No. 1:18cv24397, 2019 U.S. Dist. LEXIS 50317 (S.D. Fla. Mar. 26, 2019)**
A customer signed multiple documents when he purchased a vehicle from car dealer Kendall Lakes Automotive in March 2017. Among the papers signed: a retail buyer's order that contained a forced arbitration provision and class action arbitration ban. In October 2018, the customer filed a class action suit against the dealer for sending prerecorded, unsolicited messages to customer cellphones in violation of the Telephone Consumer Protection Act. The court found that the arbitration provision covered the claims raised and dismissed the lawsuit.

***In re A2P SMS Antitrust Litig.,* 972 F. Supp. 2d 465 (S.D.N.Y. Sept. 16, 2013)**
Several small businesses that facilitate high volume commercial text services brought a class action against the major cell phone text message carriers; their trade association, the CTIA; and major call aggregators. The small businesses said the defendants created a system under which "short codes" (five or six digit numbers acceptable to all agreeing carriers) would not be sold but only leased from Neustar, at fixed, uneconomic rates. Further, it was alleged, the CTIA and the carriers promulgated guidelines to prevent firms or institutions from sending their mass text messages by means of regular ten-digit numbers, and thus forced them to lease from Neustar and pay higher per- message charges to aggregators and carriers. It was contended that this scheme constituted illegal price fixing of the leases, supported by a concerted refusal to allow use of less expensive ten-digit transmission, resulting in a CTIA/Neustar monopoly of mass text messaging service. Neustar's web site, the only source of short codes, included a forced arbitration clause. Plaintiffs did not even sue Neustar. Nevertheless, the court said carriers could invoke Neustar's arbitration clause. The case was therefore largely dismissed in favor of the arbitration.

***Shorts v. AT&T Mobility,* No. 11-1649, 2013 WL 2995944 (W. Va. Ct. App. June 17, 2013)**
When Ms. Shorts bought her AT&T cell phone and wireless plan in 2003, the contract contained a forced arbitration clause. According to the court, Ms. Shorts reportedly failed to make payments, and eventually her service was terminated and she was charged an early termination fee that she did not pay. According to the court, AT&T sent a debt collection company to collect

Ms. Shorts' debt and the company filed a debt collection lawsuit against her. She counterclaimed that the early termination fee and collection attempts violated the West Virginia Consumer Credit and Protection Act. However, AT&T moved to compel arbitration – and the court dismissed the lawsuit.

***Riensche v. Cingular Wireless LLC,* No. C06-1325, 2013 WL 951012 (W.D. Wash. Mar. 12, 2013)**
Cingular Wireless customers brought a class action against Cingular for breaching its service contracts and unjust enrichment – they claimed the company collected Washington State business and occupation tax as a surcharge from customers. However, their contracts with Cingular included arbitration provisions. While an initial motion to compel arbitration was denied and after four years of litigation, the motion was renewed and the court compelled arbitration.

***Vernon v. Qwest Communications Int'l, Inc.,* 925 F. Supp. 2d 1185 (D. Colo. Feb. 27, 2013)**
Consumers of Qwest Communication, a company that provides high speed internet, sought to challenge the fee they had to pay if they terminated service before the end of their contracts. Qwest included an arbitration clause with a class action waiver in their Subscriber Agreement. However, according to the consumers, they did not provide copies of this agreement to their new customers. The consumers said that it was only available if people went searching for it online. Despite this, the court granted Qwest's motion to compel individual arbitration and dismissed the lawsuit.

***Davis v. Sprint Nextel Corp.,* No. 12-01023-CV-W-DW, 2012 WL 5904327 (W.D. Mo. Nov. 26, 2012)**
A consumer, who signed a Subscriber Agreement contract with Sprint, brought a class action alleging that Sprint charged undeserved late fees to users of its cellular service. She brought claims of breach of contract, fraud, unjust enrichment, and violation of the Missouri Merchandising Practices Act. However, the Subscriber Agreement included an arbitration clause, which the court found valid and enforceable and dismissed the case.

***Phillips v. Sprint PCS,* 147 Cal.Rptr.3d 274 (Cal. Ct. App. Sep. 26, 2012)**
A customer brought a class action alleging that Sprint misrepresented its cellular phone rates to customers in violation of California state law. However, because Sprint's customer agreement included a class action waiver, the court dismissed the case.

***Schnuerle v. Insight Communications Co., L.P.,* 376 S.W.3d 561 (Ky. Aug. 23, 2012)**
Customers in Kentucky filed a class action against Insight companies, which provided their broadband Internet. According to the customers, after a 2006 update, many of Insight's customers experienced long service outages. The customers say that Insight did not warn them about the outages and gave misleading, incorrect information when customers called. The customers alleged that Insight violated the Kentucky Consumer Protection Act. All Insight service agreements contained forced arbitration clauses and class action bans. The court upheld the arbitration clause and class action ban. It struck down a confidentiality agreement contained within the arbitration clause.

***Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224 (11th Cir. Aug. 20, 2012)**
A former Sprint customer brought a class action against Sprint alleging that the company charged roaming fees for calls that were made within Sprint's service area. Sprint's service contract contained a forced arbitration clause. While the initial service contract did not contain a class action waiver, new terms and conditions were in use when the plaintiff purchased a new phone with Sprint four years later. At that point a class action waiver was included in the arbitration clause. As a result, the court dismissed the case.

***In re Apple iPhone 3G Products Liability Litigation*, 859 F.Supp.2d 1084 (N.D. Cal. May 9, 2012)**
Customers brought a class action against Apple and AT&T alleging that they violated various California state laws by misrepresenting the iPhone 3G's capabilities on AT&T's data network. According to the customers, the phones were advertised as "Twice as Fast" as phones on the 2G network, yet often the 3G did not connect to the 3G network and customers were left to rely on the older 2G network, despite paying a premium for their 3G data plan. The agreements with both Apple and AT&T contained arbitration clauses, which the court upheld, dismissing the case.

DATA BREACH

***Flores v. Uber Techs.*, No. 17-CV-8503-PSG-GJS, 2018 U.S. Dist. LEXIS 219400 (C.D. Cal. Sept. 5, 2018)**
Drivers and riders brought a class action after hackers obtained the names, email addresses and phone numbers of Uber users plus driver's license numbers for 600,000 drivers. The company had waited a full year to reveal the 2016 data breach, notifying approximately 57 million Uber customers and 600,000 drivers in November 2017 that their personal identification information had been compromised. The victims asserted multiple claims, including breach of implied contract, negligence, unlawful, unfair and fraudulent/deceptive business practices, constitutional invasion of privacy, negligence per se, breach of the covenant of good faith and fair dealing and violation of state data breach acts. Uber sought to compel individual arbitration based on a service agreement the drivers and riders had entered into when they'd registered with the ride-hailing service. The court agreed and ruled that all claims must be sent to arbitration.

GAMING

***G.G. v. Valve Corp.*, No. 2:16-cv-01941, 2017 U.S. Dist. LEXIS 50640 (W.D. Wa. Apr. 3, 2017)**
Teenagers and their parents filed a class action, alleging the video-game giant facilitated and profited from underage gambling through its online Steam Marketplace platform and video games like "Counter-Strike: Global Offensive." More specifically, they said that Valve created a gambling system that enabled millions of users to link their accounts to third-party websites, which then operated gambling transactions within Valve's marketplace that allowed minors to bet virtual goods that they'd bought with real money. Legal claims included violations of the Washington Consumer Protection Act and the Washington Gambling Act, unjust enrichment, negligence and declaratory relief. Valve countered that the children had agreed to arbitrate any disputes when they created their accounts and that their parents, though non-signatories, were

also bound by those terms. The trial court ruled in the company's favor and compelled arbitration.

HOMEBUYERS

***Simpson v. Pulte Home Corp.*, No. C-11-5376 SBA, 2012 WL 1604840 (N.D. Cal., May 7, 2012)**
The plaintiffs, homebuyers who purchased new homes in California, brought a class action against Pulte Home Corporation and Pulte Home Mortgage, alleging that they violated California's Unfair Competition Law. They additionally brought claims of international misrepresentation, concealment, and negligent misrepresentation. According to the homebuyers, Plute failed to tell the purchasers the homes they built would be subject to undisclosed taxes, governmental special assessments. They claimed Pulte did this to make their homes appear more valuable than they actually were. However, the homebuyers signed purchase agreements with Pulte that included a forced arbitration clause and class action waiver. The court upheld the clause and dismissed the case.

RENTALS CARS/AUTOMOBILES

***DeNicolo v. The Hertz Corp*, No. 19-210 (N.D. Ca. April 12, 2019)**
Rental car customers brought a class action against Hertz, which also operates Dollar and Thrifty, which uses debt-collector Viking Credit Services to bill customers for car damage months after they returned undamaged rental cars. The lawsuit notes, "[t]he Better Business Bureau has received numerous complaints about Viking's practice of billing for rental car damage long after the alleged damage occurred … citing data on the BBB website." Plaintiff DeNicolo received a bill for over a thousand dollars from Viking "more than three months after he returned an undamaged rental car," even though "[n]o one at the rental facility alleged that the car was damaged when he returned it" and "by the time he heard from Viking, the car had likely been rented again dozens of times and driven countless miles." Hertz sought to compel arbitration because DeNicolo had "agreed to arbitration when he rented a car at an automated kiosk at the airport and selected 'I Agree' on a screen asking if he consented to Hertz's rental terms." The court agreed with Hertz, and ordered that customers submit their claims in individual arbitration.[11]

***York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67 (S.C. Ct. App. Sept. 4, 2013)**
Melissa York and Olga Cristy brought a class action claiming that car dealerships (Dodgeland of Columbia and Jim Hudson Hyundai) charged them illegal documentation fees that increased the dealer's profits. However, when buying their cars, both Melissa and Olga signed contracts that included arbitration clauses. The court dismissed the lawsuit because of the arbitration clauses.

***Vasquez v. Greene Motors, Inc.*, 154 Cal. Rptr. 3d 778 (Cal. Ct. App. Mar. 27, 2013)**
A car-buyer, Vasquez, bought a used car on credit from Greene Motors – his financing was assigned to Honda. According to Vasquez, he originally signed a contract with Greene Motors on January 31, 2009, but Greene Motors informed him they couldn't find a financer, so asked him to execute a second contract. This second contract was executed on February 2, 2009 and included different financial terms. However, Vasquez claims Greene Motors backdated the

contract, which, according to Vasquez, meant there were different financing terms. Vasquez brought a case against Greene Motors because of this discrepancy alleging violations of the Rees-Levering Automobile Sales Finance, the Consumers Legal Remedies Act, and the unfair competition law. However, the contract included an arbitration clause. Despite Vasquez' claim that he was told to initial all his paperwork and was not given a chance to read over any pre-printed documents or negotiate, the Court upheld the arbitration agreement.

***Flores v. W. Covina Auto Group,* 151 Cal. Rptr. 3d 481 (Cal. Ct. App. Jan. 11, 2013)**
Andrea Naasz claims that she purchased a previously owned Toyota Sequoia, a "certified" vehicle from West Covina Toyota. After buying the car, she says that she experienced numerous problems and took it to Toyota Motor Sales where it was repaired multiple times. However, according to Naasz, Toyota was not able to fix it or "conform it to the express and implied warranties." When Naasz asked Toyota to buy the vehicle back from her, she says it refused. She alleged class claims for violations of the Consumer Legal Remedies Act, the Automobile Sales Finance Act, and the unfair competition law. West Covina Toyota filed a motion to compel arbitration based on the sales contract Naasz signed, which included an arbitration clause with a class action waiver. The court agreed, dismissing the lawsuit and compelling arbitration.

***Botorff v. Amerco,* No. 2:12-CV-01286-MCE, 2012 WL 6628952 (E.D. Cal. Dec. 19, 2012)**
Mary Botorff rented a moving truck from an authorized U-Haul International dealer – when doing so she signed two contracts with U-Haul, which referred to an addendum that included an arbitration clause and class action ban. According to Botoroff, no one discussed any of the terms or conditions in the contract with her. She later filed a complaint, on behalf of herself and others, alleging that U-Haul coerced its competitors to raise rental prices, violating California state law and causing people to overpay for their truck rentals. The court held that even though Botorff had not been given the addendum at the time she signed the rental contracts, as long as they were available to her upon request, the arbitration clause was valid and enforceable. Thus the Court dismissed the lawsuit.

STUDENT LOANS/COLLEGES/TRAINING

***Sakyi v. Estee Lauder Companies, Inc.*, 308 F. Supp. 3d 366 (D.D.C. Apr. 25, 2018)**
A former cosmetology student brought a class action, saying that Washington, D.C.'s Aveda Institute had not only used students as unpaid employees but to such an extent that they were left without the necessary coursework to prepare for the state board exam. After paying $26,000 in tuition, they were rather required to sell products to customers as well as perform simple, repetitive tasks for Aveda clients without supervision and "spend additional resources coming to the Institute for weeks after the program was supposed to end" since they'd received an incomplete education vis-à-vis the state board exam. The complaint sought damages for unlawful and deceptive trade practices plus failure to pay minimum wage as well as an injunction to "'pay students for work performed in the Aveda salon and change their marketing practices to accurately reflect the nature of work performed in the cosmetology program.'" The Institute and its parent companies argued that the case was barred by an arbitration agreement, signed by the student at the time of enrollment, that also banned class actions. The court compelled all claims, including the matter of class arbitration, out of court and into arbitration.

***Ferguson v. Corinthian Colleges, Inc.*, 733 F. 3d 928 (9th Cir. 2013)**
Two former students brought a class action alleging that for-profit Corinthian Colleges "misrepresented the quality of its education, its accreditation, the career prospects for its graduates, and the actual cost of education at one of its schools. Students were also allegedly misinformed about financial aid, which resulted in student loans that many could not repay. Corinthian also allegedly targeted veterans and military personnel specifically, so that it could receive funding through federal financial aid programs available to those people." Corinthian moved to compel arbitration since both students had signed enrollment agreements with an arbitration clause as well as related documents that mandated arbitration. The Ninth Circuit ordered the lower court to compel arbitration of all plaintiffs' claims for monetary and injunctive relief.

***Crewe v. Rich Dad Educ*., LLC, 884 F. Supp. 2d 60 (S.D.N.Y. Aug. 3, 2012)**
Consumers brought a class action against Rich Dad Education, a corporation that ran a "stock success training program" to teach money management skills. However, rather than provide any training or education, the plaintiffs alleged that the entire purpose of the program was to sell students additional, useless but expensive courses. Their claims included breach of contract, fraud, and violations of Florida state law. One contract with Rich Dad Education contained an arbitration clause; another contract contained a forum selection clause, forcing claims to be litigated in Florida instead of Tennessee where they, and the courses, were. The court dismissed the claims based on both the arbitration clause and the forum selection clause.

***Fensterstock v. Education Finance Partners,* No. 08 Civ. 3622, 2012 WL 3930647 (S.D.N.Y. Aug. 30, 2012)**
A former law student brought a class action alleging that Education Finance Partners and Affiliated Computer Systems improperly applied an undisclosed fee to his student loans. He calculated that this would lead to thousands of dollars in additional payment by the time he made his final payment. The Loan and Promissory Note included an arbitration clause with a class action waiver. As a result, the court dismissed the case.

SALES TAX

***Feeney v. Dell Inc.,* 993 N.E.2d 329 (Mass. Aug. 1, 2013)**
John Feeney and Dedham Health brought a class action against Dell. Feeney alleged that Dell was collecting unlawful sales taxes from Massachusetts residents in violation of Massachusetts law. However, Dell argued that when the consumers made their purchases, the terms included forced arbitration clauses so that any claim against Dell had to be arbitrated rather than heard in court. Initially the Massachusetts Supreme Court held that the arbitration clause and class action waiver violated public policy. Unfortunately, just days after that decision, the Supreme Court decided *American Express v. Italian Colors*.[12] Dell petitioned for a rehearing and the Massachusetts Supreme Court reconsidered their opinion. The Court then upheld the class waiver.

TICKET SALES

***Lee v. Ticketmaster LLC*, No. 18-cv-05987, 2019 U.S. Dist. LEXIS 57661 (N.D. Cal. Apr. 3, 2019)**

A customer pursued a class action against the world's largest ticket seller for conspiring with scalpers to resell event tickets on approved Ticketmaster reseller websites, enabling the company to cash in twice by collecting fees on the initial sale and resale.[13] He said this scheme constituted unlawful and unfair business acts and unjust enrichment at the expense of consumers. A trial court dismissed the case and compelled arbitration, siding with Ticketmaster who argued that its online terms of use policy required users to arbitrate all disputes.

TRAVEL WEBSITES

***In re Online Travel Co.*, 953 F. Supp. 2d 713 (N.D. Tex. June 14, 2013)**

Consumers, who used online travel and hotel companies (like Travelocity), brought a lawsuit claiming the companies fixed the prices of hotel rooms. According to the consumers, travel companies offered the "lowest" prices, but in reality all the prices were the same – the consumers claimed this was an anti-trust violation. However, Travelocity's website has a User Agreement that required arbitration when the amount in controversy was under $10,000. The court agreed that the consumers accepted the arbitration clause when they clicked the "agree and complete reservation" button on Travelocity's site. There was a notice above the button that explained clicking the button meant the user was agreeing to all the policies included in a hyperlinked User Agreement. Thus the court determined the claims had to be arbitrated.

EMPLOYMENT

RACE DISCRIMINATION

***Williams v. FCA US LLC*, No. 2:17-cv-10097, 2018 U.S. Dist. LEXIS 87184 (E.D. Mich. May 24, 2018)**

Employees at Fiat Chrysler, including the company's diversity manager, brought a class action alleging discrimination in the company's performance evaluation system, specifically that it discriminated against salaried, nonunion black employees who were rated with lower scores at a disproportionately "alarming rate" than nonblack employees. Moreover, the diversity manager was retaliated against and ostracized for reporting problems. Six employees in the suit, including the diversity manager, had signed employment agreements with forced arbitration clauses. Their cases were dismissed as a result. Only two other employees, who had joined the company before these clauses were included in employment contracts, were allowed to proceed with their case. Splitting plaintiffs in this manner illustrates a striking inequity that can result in such cases. Assuming a now much smaller class action ultimately survives, many victims suffering the exact same type of discrimination but are forced to arbitrate would be unable to benefit from any larger settlement and in fact, could be left with nothing.

GENDER DISCRIMINATION

***Diaz v. Sohnen Enterprises*, No. B283077, 2019 Cal. App. LEXIS 329 (Ct. App. Cal. Apr. 10, 2019)**

An employee suffered repeated sexual harassment from a porter/security monitor stationed at the company's front entrance and was retaliated against after reporting the situation and filing a formal complaint against the company and her alleged harasser, who was ultimately removed or fired from his post.[14] On December 22, 2016, she filed a lawsuit against the consumer good refurbishing company, its owner/operators, managers and alleged perpetrators, claiming discrimination, sexual harassment and failure to prevent it, intentional infliction of emotional distress, unfair business practices and negligent hiring/retention/supervision. "Twenty days earlier, on December 2, 2016, she and her co-workers received notice at an in-person meeting that the company was adopting a new dispute resolution policy requiring arbitration of all claims." Employees also received a copy of the agreement, which Diaz never signed and twice rejected (once orally and once in writing to the company), stating that she would continue to work under the terms of employment that existed prior to the presentation of the arbitration policy.

After reviewing the evidence, the trial judge rejected Sohnen's motion to compel arbitration, holding that the parties didn't reach an implied agreement to arbitrate. More specifically, the court stated, "You can't have an agreement where one side says, 'This is the deal,' and the other side says, 'No, this is not the deal,'" and the court found "there [was] no meeting of the minds." A split appeals court disagreed, ruling 2-1 that Diaz had to pursue all claims in arbitration.

***Jock v. Sterling Jewelers Inc.,* 284 F. Supp. 3d 566 (S.D.N.Y. Jan. 15, 2018)**
For many years Sterling Jewelers, the parent of 12 jewelry chains like Jared and Kay, subjected female sales employees to gender discrimination, including pay and promotion disparities, as well as to rampant sexual harassment and abuse.[15] The company had long required its employees to resolve disputes in arbitration. However, because these employees alleged systemic discrimination, they were able to convince an arbitrator to certify them as a class, which included close to 70,000 employees. However, for over a decade Sterling has fought these women,[16] trying to vacate the class arbitration even though it had already won the battle to keep plaintiffs out of court. In January 2018, a New York federal district court judge knocked a large percentage of the class members from the case, saying the arbitrator had exceeded her powers in forming this broad arbitration class action. The case is on appeal before the Second Circuit.

***Hay v. Summit Funding*, 2017 Ohio 8261 (Ohio Ct. App. Oct. 18, 2017)**
A loan officer filed a civil suit alleging severe and frequent sexual harassment by a co-worker that when reported per the company's established protocol, and despite being confirmed by an internal investigation, led to her firing. More specifically, she claimed that she was required to work alone in a branch office with an employee, who, among other things, targeted her with "sexually charged comments both verbally and via text and picture messaging," took a picture of her backside and published it to their superior, made repeated sexual advances, became physically violent and threatened not to pay her for overtime. Summit Funding, the harasser and his superior filed a motion to compel arbitration, pointing to the terms of an arbitration agreement the victim had executed when hired. The trial court rejected their argument, but an appeals court disagreed, determining that her sexual harassment claims fell within the scope of the agreement and had to be arbitrated.

***Karp v. CIGNA Healthcare, Inc.,* 882 F. Supp. 2d 199 (D. Mass. Apr. 18, 2012)**
A CIGNA Healthcare employee brought a class action on behalf of herself and other employees similarly situated, alleging gender discrimination in violation of Title VII of the Civil Rights Act. The employee, a Provider Contract Manager, was asked to sign CIGNA's Employee Dispute Arbitration Policy several months after she started working with the company. It contained a forced arbitration clause. In addition, the handbook referred to additional policies on CIGNA's website, and the website mentioned a class action waiver. Despite the fact that the employee wanted to bring a claim showing a "pattern or practice" of discrimination, which is possible in a class action case, the court found that she was not entitled to bring this kind of claim. They granted CIGNA's motion to compel arbitration and dismissed the case.

WAGE THEFT

***Bekele v. Lyft, Inc*., No. 16-2109, 2019 U.S. App. LEXIS 7385 (1st Cir. Ct. App. Mar. 13, 2019)**
A driver pursued a class action against lift for misclassifying drivers as independent contractors rather than as employees and by requiring drivers to bear expenses such as gas and car maintenance. Lyft countered that the case should be forced into individual arbitration since the driver had "agreed" to waive his rights when he signed up to work for the company. According to Lyft, by completing a 40-page online Terms of Service Agreement as part of the registration process and by clicking the "I accept" button, the driver knew about and consented to the

Agreement's arbitration clause and class action waiver that appeared about two-thirds of the way through the online document. The lower court sided with Lyft and compelled individual arbitration; the First Circuit affirmed.

***Vigueras v. Red Robin International Inc.,* No. 8:17-cv-01422 (C.D. Cal. Feb. 21, 2019)**
A Red Robin employee brought a class action, alleging that the company failed to: 1) pay all wages owed, including overtime; 2) provide lawful meal periods; 3) authorize and permit lawful rest periods; 4) comply with itemized payroll recordkeeping; and 5) reimburse necessary expenses.[17] He also argued that Red Robin had violated California's Unfair Competition Law. A class of over 18,500 workers was certified, yet months later more than 2,600 were barred from pursing their claims in court since they were bound by forced arbitration agreements and class action waivers that were part of their new hire paperwork. According to the court, the fact that the 2,600-plus employees could "scroll up or down to review the two arbitration documents before signing," were able to "download the unsigned Arbitration Agreement as a Word document," were sent a PDF copy of the signed agreement to their personal email and had 30 calendar days from the first day of employment to opt out of the Agreement meant that their claims had to proceed to arbitration on an individual basis.

***Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil USA,* 138 S. Ct. 1612 (May 21, 2018)**
Stephen Morris, a junior accountant at Ernst & Young, believed his firm had misclassified all junior accountants as professional employees, thus allowing the company to pay them salaries without overtime pay. Sheila Hobson and three others who worked for Murphy Oil were not paid for overtime and other work-related activities, like driving to competitors' gas stations to examine prices and signs. Jacob Lewis was a technical communications employee at Epic Systems, who was also required to work overtime without pay. All three were required to sign employment contracts containing forced arbitration clauses, and all three attempted to file class action lawsuits on behalf of others victimized by these practices.

In 2018, the cases were consolidated before the U.S. Supreme Court, and in a 5-to-4 decision, the court compelled arbitration in all three cases. While the 84-year-old National Labor Relations Act (NLRA) makes it illegal for employers to interfere in any way with employees' rights to engage in "concerted activity," the Court ruled that this right does not extend to "concerted legal activity," *i.e.*, class action lawsuits. The Court found it perfectly legal for employers to undermine protections guaranteed to all workers under the NLRA by requiring them to sign forced arbitration clauses and class action waivers.

***Lloyd v. J.P. Morgan Chase & Co.,* No. 11 CIV. 9305 LTS, 2013 WL 4828588 (S.D.N.Y. Sept. 9, 2013)**
Financial advisors at JP Morgan Chase & Co brought a class action, alleging that their company failed to pay them overtime when they worked over 40 hours a week in violation of the Fair Labor Standards Act and New York and New Jersey laws. They claimed the company misclassified them as exempt from overtime pay. While the class was conditionally certified, not all financial advisors denied their overtime have been able to participate. Five financial advisors were forced into arbitration according to their agreements with J.P. Morgan and their claims were dismissed as a result.

***Velazquez v. Sears, Roebuck & Co.,* No. 13cv680-WQH-DHB, 2013 WL 4525581 (S.D. Cal. Aug. 26, 2013)**
A California employee brought a class action alleging that Sears failed to pay minimum wage, failed to maintain required records, failed to pay wages due to discharged or quitting employees, and engaged in unlawful business practices. However, according to the court, in April 2012, Sears implemented an arbitration policy – Sears employees were required to acknowledge they'd received different employment policies through an Internet portal. Employees "agreed" to the arbitration policy by clicking "yes" and "submit" on an acknowledgment page – and in doing so they waived the right to bring employment related claims in court. Therefore the court held that the claims had to go to arbitration, rather than moving forward in court.

***Machado v. System4 LLC*, 989 N.E.2d 464 (Mass. June 12, 2013)**
Employees signed contracts with System4 LLC and NECCS, to provide janitorial service to third party customers. They alleged that the companies misclassified them as independent contractors and violated the Massachusetts Wage Act. They brought their claims on behalf of themselves and others similarly situated. But the contracts they had to sign included arbitration clauses that barred class actions. The court upheld the class waiver.

***Muriithi v. Shuttle Exp., Inc.,* 712 F.3d 173 (4th Cir. Apr. 1, 2013)**
The court compelled arbitration in a case where a driver for Shuttle Express claimed that his company misled him regarding his wages and wrongly classified him as an "independent contractor" rather than an "employee" meaning he did not receive overtime or minimum wage. He brought a class action under the Fair Labor Standards Act and various Maryland laws. However, the Franchise Agreement that he says he had to sign with Shuttle Express included an arbitration clause and class action waiver thus the case did not move forward.

***Ryan v. JPMorgan Chase & Co.,* 924 F. Supp. 2d 559 (S.D.N.Y. Feb. 21, 2013)**
An employee of JPMorgan Chase Bank in New York brought a class action alleging that Chase failed to pay her, and others, the overtime wages they were owed, in violation of the Fair Labor Standards Act. However, when accepting employment, the employee had to sign an arbitration agreement with Chase. The court ordered the parties to arbitrate the claims.

***Torres v. United Healthcare Servs., Inc.,* 920 F. Supp. 2d 368 (E.D.N.Y. Feb. 1, 2013)**
Sales representatives brought a class action claiming that United Healthcare Services, a New York insurance company, violated the Fair Labor Standards Act by misclassifying them as exempt from overtime protections and failing to pay them, and others similarly situated, their earned overtime. The named plaintiffs claimed they worked between 50 and 55 hours per week and never received time and a half for their time over 40 hours. When they were hired, employees had to click an electronic online button stating, "I have read and agree to the above". The "above" contained a forced arbitration clause. The court dismissed the lawsuit, compelling arbitration.

***Outland v. Macy's Dep't Stores, Inc.,* No. A133589, 2013 WL 164419 (Cal. Ct. App. Jan. 16, 2013)**
A Macy's employee brought a class action on behalf of all Macy's group sales managers in California from 2005-2009. She alleged that she was never paid overtime, and she was not compensated for missing meal and rest periods because her position was misclassified – in violation of the Fair Labor Standards Act. However, because the employee had not opted out of an employee dispute resolution program – which included a binding arbitration agreement -- Macy's argued she was bound by its terms. The court agreed.

***Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013)**
Sharon Owen was hired as an administrator by Bristol Care, a company that runs residential facilities for the elderly. When she was hired she had to sign a contract that included an arbitration clause and class action waiver. Owen brought claims, on behalf of herself and others, alleging that Bristol misclassified administrators to avoid paying overtime in violation of state and federal law. Because of the contract, the court dismissed the lawsuit.

***Steele v. American Mortg. Management Services,* No. 2:12-cv-00085, 2012 WL 5349511 (E.D. Cal. Oct. 24, 2012)**
Employees of Pinnacle, a private maintenance company, brought a class action alleging that they were forced to work over 40 hours a week without overtime compensation in violation of the Fair Labor Standards Act and California state law. They also brought claims for failure to follow record-keeping provisions, unfair business practices, and retaliation and whistleblowing violations. However, before beginning employment with Pinnacle, employees were forced to sign an Issue Resolution Agreement that included an arbitration agreement – otherwise they would not have been considered for employment. The court dismissed the case, compelling arbitration.

***Kairy v. Supershuttle Intern., Inc.,* No. C 08-02993, 2012 WL 4343220 (N.D. Cal. Sep. 20, 2012)**
Employees who drove SuperShuttle vehicles, brought claims alleging that SuperShuttle did not pay them minimum wage or overtime in violation of the Fair Labor Standards Act and California law. They claimed that SuperShuttle misclassified them as franchisees and independent contractors. However, the employees signed contracts when purchasing their franchise that included arbitration clauses and class action waivers. The court dismissed the case, compelling arbitration.

***Luchini v. Carmax, Inc.,* No. CV F 12-0417, 2012 WL 2995483 (E.D. Cal. Jul. 23, 2012)**
A Carmax employee brought a class action on behalf of himself and other employees alleging that Carmax misclassified them as exempt from overtime in violation of the Fair Labor Standards Act and California state law. Mr. Luchini was a buyer-in-training and later a buyer who claims he worked more than 40 hours a week, more than 8 hours a day without any overtime compensation. However, to get the job, Mr. Luchini was forced to sign a Dispute Resolution Agreement with mandatory arbitration clause. As a result, the court dismissed the claims.

De Oliveira v. Citicorp North America, Inc., **No. 8:12-cv-251-T-26TGW, 2012 WL 1831230 (M.D. Fla. May 18, 2012)**
An employee, a financial analyst, brought claims against Citicorp for violations of the Fair Labor Standards Act, alleging that several financial analyst positions were misclassified as exempt from overtime pay. However, an employee handbook, which she and others received, included an arbitration policy with a class action waiver. The court held that the arbitration agreement and the class action waiver were valid and dismissed the case.

Coleman v. Jenny Craig, Inc., **No. 11cv1301-MMA, 2012 WL 3140299 (S.D. Cal. May 15, 2012)**
After the Supreme Court decided *AT&T v Concepcion*, Jenny Craig requested that all employees sign forced arbitration agreements with class action waivers. Employees later tried to bring a class action alleging violations of the Fair Labor Standards Act and California state laws. However, based on the arbitration agreements, the court dismissed the case.

Morvant v. P.F. Chang's China Bistro, Inc., **870 F. Supp. 2d 831 (N.D. Cal. May 7, 2012)**
Former PF Chang employees brought a class action on behalf of current and former employees alleging that PF Chang's violated the California Labor Code and other California state laws by failing to provide meals and rest breaks, failure to pay over time, failure to pay for missed meals and rest breaks, and failure to provide accurate wage statements. However, most employees were forced to sign a dispute resolution policy that included an arbitration clause and class action waiver. One of the former employees bringing the suit signed and agreed to the dispute resolution agreement on her date of employment. However, the other employee began working before the dispute resolution policy came into effect. PF Chang's claims he was still required to sign it at a later date, however they did not have a signed copy on record. The former employee stated this was because he never agreed to it. PF Chang's argued that regardless, he agreed because of his continued employment. The court agreed with the former employee that continued employment alone was not enough and they denied PF Chang's motion to compel arbitration. However, as to the employee who signed the agreement, they granted PF Chang's motion to compel arbitration and dismissed her claim.

NOTES

[1] *American Express v Italian Colors Restaurant*, 133 S. Ct. 2403 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
[2] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
[3] https://www.nytimes.com/2017/10/02/us/politics/supreme-court-workplace-arbitration.html
[4] https://www.law.com/nationallawjournal/2019/02/28/epic-impact-how-a-major-scotus-decision-in-favor-of-arbitration-is-shaping-the-landscape-for-workplace-lawsuits/
[5] *See* https://www.gjsentinel.com/news/western_colorado/a-life-lost-justice-elusive-for-family-of-man-who/article_dc35fb08-92ea-11e8-a3ac-10604b9f7e7c.html
[6] *Jabbari v. Wells Fargo & Co.*, No. 15-CV-02159-VC (N.D. Cal. 2017).
[7] https://money.cnn.com/2017/03/29/investing/wells-fargo-settles-fake-account-lawsuit-110-million/index.html; https://money.cnn.com/2016/11/25/investing/wells-fargo-lawsuit-forced-arbitration/?iid=EL
[8] See more here: http://centerjd.org/system/files/ClassActionReportf2.pdf
[9] *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, (11th Cir. 2018), cert. denied, 139 S.Ct. 941, (U.S. Jan. 22, 2019)(No. 18-618).
[10] See more here: *McKenzie Check Advance of Florida, LLC v. Betts*, 191 So.3d 530 (Fla. Ct. App. May 18, 2016)("Supreme Court's ruling that class action waiver was enforceable was law of the case," so no class claims can be heard in arbitration.)
[11] Dena Aubin, "Lawsuit over Hertz's collection for car damages sent to arbitration," *Reuters Legal*, April 15, 2019.
[12] 570 U.S. 228 (2013).
[13] *Lee v. Ticketmaster LLC*, No. 18-cv-05987 (N.D. Cal.)(complaint filed Sept. 28, 2018).
[14] *Diaz v. Sohnen Enterprises*, No. B283077 (L.A. Cty. Super. Ct., Cal.)(complaint filed Dec. 22, 2016).
[15] https://www.nytimes.com/2014/03/29/business/women-charge-bias-and-harassment-in-suit-against-sterling-jewelers.html
[16] https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/articles/2018/spring2018-on-remand-2nd-circuit-district-court-vacates-arbitrators-certification/
[17] *Vigueras v. Red Robin International*, *Inc.*, No. SACV 17-1422 JVS, 2018 WL 5961293 (C.D. Cal. Oct. 23, 2018).