Consumer News Alert Recent Decisions

Since 2006, the Center for Consumer Law has published the "Consumer News Alert." This short newsletter contains everything from consumer tips and scam alerts, to shopping hints and financial calculators. It also has a section just for attorneys, highlighting recent decisions. The alert is delivered by email three times a week. Below is a listing of some of the cases discussed during the past few months. If a link does not work, it may be necessary to cut and paste it to your browser. To subscribe and begin receiving your free copy of the Consumer News Alert in your mailbox, visit www.peopleslawyer.net.

U.S. SUPREME COURT

California state law prohibiting class action waivers in arbitration agreements is not "valid law" for purposes of interpretation of arbitration clause after Supreme Court's decision in AT&T Mobility v. Concepcion in favor of enforcement of arbitration agreements. The DirecTV service agreement, which was the subject of a California class action, included a binding arbitration clause with a class action waiver. The language indicated that the waiver would be unenforceable if the applicable state law (described in the agreement as "the law of your state") made class action waivers unenforceable. Plaintiffs argued that because California had a state law making class action waivers unenforceable at the time of the filing, the clause allowed such a class, and both the district court and 9th Circuit agreed. The U.S. Supreme Court reversed the decision, holding that the phrase 'law of your state' is not ambiguous and takes its ordinary meaning: valid state law," and that its decision in *AT&T Mobility v. Concepcion* specifically invalidating California's law meant that there was no valid state law barring arbitration. *DirecTV v. Imburgia*, 136 S.Ct. 463 (Dec. 14, 2015). https://supreme.justia.com/cases/federal/us/577/14-462/case.pdf

Supreme Court Holds Offer of Judgment Does Not Moot a Class Action. The United States Supreme Court held that a class-action defendant cannot moot a plaintiff's case by making a pre-class certification offer of judgment that would satisfy the individual plaintiff's personal claims but not those of the class. Such an offer does not moot the individual plaintiff's claim because, if the plaintiff rejects it, the offer is a nullity and does not deprive the court of the ability to grant relief between the parties. In other words, a court can still award whatever damages, injunctive relief, and other relief the plaintiff seeks if the plaintiff proves his claims. Thus, the case does not meet the Supreme Court's definition of mootness, under which a case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." If the individual plaintiff's claims are not moot, he can pursue class relief as well, because "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald Co. v. Gomez*, 135 S.Ct. 663 (Dec. 15, 2016). https://supreme.justia.com/cases/federal/us/577/14-857/case.pdf

When an ERISA plan participant wholly dissipates a third-party settlement, plan fiduciary may not bring suit to attach participants separate assets. An ERISA plan participant, Montanile, was seriously injured by a drunk driver. His ERISA plan paid more than $120,000 for his medical expenses. Montanile sued the drunk driver and obtained a $500,000 settlement. The plan administrator sought reimbursement from the settlement. Montanile's attorney refused and indicated that the funds would be transferred from a trust account to Montanile unless the administrator objected. The administrator did not respond and Montanile received the settlement. Six months later, the administrator sued under ERISA 502(a)(3), which authorizes plan fiduciaries to file suit "to obtain . . . appropriate equitable relief . . . to enforce . . .

the plan." 29 U.S.C. 1132(a)(3). The Eleventh Circuit held that even if Montanile had completely dissipated the fund, the plan was entitled to reimbursement from Montanile's general assets. The Supreme Court reversed and remanded for determination of whether Montanile had dissipated the settlement. The court noted that historical equity practice does not support enforcement of an equitable lien against general assets. *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S.Ct. 651 (Jan. 20, 2016). https://supreme.justia.com/cases/federal/us/577/14-723/case.pdf

FEDERAL CIRCUIT COURTS

Fair Debt Collection Act violation occurred when bank freezes consumers account, not went notice is sent to bank. The Second Circuit held that the district court erred in finding that the FDCPA violation "occurred" when defendant sent the restraining notice. Instead, the court held that where a debt collector sends an allegedly unlawful restraining notice to a bank, the FDCPA violation does not "occur" for purposes of Section 1692k(d) until the bank freezes the debtor's account. *Benzemann v. Citibank,* 806 F.3d 98 (2nd Cir. Nov. 16, 2015). http://cases.justia.com/federal/appellate-courts/ca2/14-2668/14-2668-2015-11-16.pdf?ts=1447687805

Section 1641(g) requires a creditor who obtains a mortgage loan by sale or transfer to notify the borrower of the transfer in writing.

Truth in Lending 2009 amendment does not apply retroactively. Plaintiffs filed a putative class action against Wells Fargo and U.S. Bank, alleging federal and state law claims arising out of the modification of the deed of trust for plaintiffs' home. At issue was the retroactivity of 15 U.S.C.1641(g), a 2009 amendment to the 1968 Truth in Lending Act (TILA). Section 1641(g) requires a creditor who obtains a mortgage loan by sale or transfer to notify the borrower of the transfer in writing. The Ninth Circuit held that section 1641(g) does not apply retroactively because Congress did not express a clear intent to do so. The court noted that its holding is consistent with numerous district court decisions. *Talaie v. Wells Fargo Bank,* 808 F.3d 410 (9th Cir. Dec. 14, 2015). http://cases.justia.com/federal/appellate-courts/ca9/13-56314/13-56314-2015-12-14.pdf?ts=1450116142

Amount of mortgage loan not sufficient to establish unconscionability. Plaintiff filed suit against Wells Fargo, alleging that his mortgage agreement, providing him with a loan far in excess of his home's actual value, was an "unconscionable contract" under the West Virginia Consumer Credit and Protection Act, W. Va. Code 46A–1–101. The court agreed with the district court that the amount of a mortgage loan, by itself, cannot show substantive unconscionability under West Virginia law, and that plaintiff had not otherwise made that showing. *McFarland v. Wells Fargo Bank,* 810 F.3d 273 (4th Cir. Jan. 15, 2016). http://cases.justia.com/federal/appellate-courts/ca4/14-2126/14-2126-2016-01-15.pdf?ts=1452886220

Legal error alone is not a sufficient basis to vacate the results of an arbitration in any case. After a dispute arose regarding the ownership of two deceased song writers' music, the parties agreed to arbitration. The losing party unsuccessfully moved to vacate the arbitration award on the ground that the panel had committed legal errors that made it impossible for him to present a winning case. The losing party attempted to apply the Dead Man's Statute, which disqualifies parties interested in litigation from testifying about personal transactions or communications with deceased or mentally ill persons. The Third Circuit affirmed, stating that the arbitrators did not misapply the law and legal error alone is not enough to vacate the results of an arbitration. *Whitehead v. Pullman Group LLC,* 811 F.3d 116 (3rd Cir. Jan. 22, 2016). http://cases.justia.com/federal/appellate-courts/ca3/15-1627/15-1627-2016-01-22.pdf?ts=1453485606

Prevailing party defending an arbitration award in suit to vacate the award is not entitled to costs and attorney fees. The United States Court of Appeals for the Second Circuit was asked to review a district court order confirming an arbitration decision to award costs and attorney fees to the prevailing party. In reversing in part, the Second Circuit vacated the award of costs and attorney fees. The parties agreement provided: "BREACH. Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder." The second circuit found that this provision authorized a fee award against a party that breached the charter agreement as part of the non-breaching party's damages. Here, there was no finding of a breach of the charter agreement, thus no basis to award costs and attorney fees. *Zurich Am. Ins. Co. v. Team Tankers A.S.,* 811 F.3d 584 (2nd Cir. Jan. 28, 2016). http://cases.justia.com/federal/appellate-courts/ca2/14-4036/14-4036-2016-01-28.pdf?ts=1453993209

Arbitration agreement that forbids arbitrator from applying applicable law unenforceable. Plaintiff filed a putative class action against Delbert alleging that Delbert violated debt collection practices. The district court granted Delbert's motion to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. 4. The Fourth Circuit concluded, however, that the arbitration agreement in this case is unenforceable. The court stated, "The agreement purportedly fashions a system of alternative dispute resolution while simultaneously rendering that system all but impotent through a categorical rejection of the requirements of state and federal law." The agreement provided it was "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe." And that "no other state or federal law or regulation shall apply to this Loan Agreement." The court concluded that the FAA does not protect the sort of arbitration agreement that unambiguously forbids an arbitrator from even applying the applicable law. *Hayes v. Delbert Services Corp.,* 811 F.3d 666 (4th Cir. Feb. 2, 2016). http://cases.justia.com/federal/appellate-courts/ca4/15-1170/15-1170-2016-02-02.pdf?ts=1454443226

Letters sent to consumer's attorney did not violate fair debt Collection Practices Act. Bravo sued Midland for violations of the Fair Debt Collection Practices Act (FDCPA). Midland agreed to forgive two of Bravo's debts (GE/Lowe's and Citibank/Sears) as part of a settlement agreement. Philipps, an attorney who specializes in consumer litigation, represented Bravo. After the settlement, Midland sent two letters addressed to Bravo at Philipps' office. The letters were received at Philipps' business office and were basically identical. Philipps did not forward the correspondence to his client, but opened and reviewed the content of the letters. Bravo filed another claim under the FDCPA. The Seventh Circuit affirmed

dismissal, finding the letters were not continued communication to a consumer. *Bravo v. Midland Credit Mgmt., Inc,* 812 F.3d 599 (7th Cir. Feb. 8, 2016). http://cases.justia.com/federal/appellate-courts/ca7/15-1231/15-1231-2016-02-08.pdf?ts=1454967057

Court finds no manifest disregard of the law. The Second Circuit found that attempts to demonstrate errors committed by an arbitration panel were nothing more than attacks on "an arbitrator's factual findings and contractual interpretation" which "generally are not subject to judicial challenge." In response to the argument that the panel overlooked certain provisions in the MSA limiting damages, the court held that the FAA "does not permit vacatur for legal errors." *Sutherland Glob. Servs. Inc. v. Adam Techs. Int'l SA de C.V.*, 2016 WL 494155 (2nd Cir. Feb. 9, 2016). http://cases.justia.com/federal/district-courts/new-york/nywdce/6:2012cv06439/90629/50/0.pdf?ts=1428915388

No TCPA violation when prior consent is given. Plaintiffs received medical care from Hospital. After plaintiffs did not pay their bills, accounts were transferred to Credit Adjustments, which called plaintiffs' cell phone numbers, despite never having received their contact information directly from them. Credit Adjustments received the numbers from signed Patient Consent and Authorization forms covering "all medical and surgical care," and stating "I understand Mount Carmel may use my health information for … billing and payment … I authorize Mt. Carmel to receive or release my health information, [to] agents or third parties as are necessary for these purposes and to companies who provide billing services." Plaintiffs contend Credit Adjustments violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. 227(b)(1)(A)(iii), when it placed debt collection calls to their cell phone numbers using an "automatic telephone dialing system" and an "artificial or prerecorded voice." The Sixth Circuit affirmed summary judgment, finding that plaintiffs gave their "prior express consent" to receive such calls. *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338 (6th Cir. Feb. 12, 2016). http://cases.justia.com/federal/appellate-courts/ca6/15-3411/15-3411-2016-02-12.pdf?ts=1455298249

Manifest disregard of the evidence is not a basis for overturning arbitration award. The appellant argued that the arbitrator failed to weigh evidence properly when it made a finding of fact with respect to the passing of title. The Second Circuit rejected this as a basis of overturning an award based on "manifest disregard of the law," holding that the Second Circuit "does not recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award." *ISMT, Ltd. v. Fremak Indus., Inc.*, Case No. 15-2086 (2nd Cir. Feb. 24, 2016). https://scholar.google.com/scholar_case?case=12663852039047878192&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Assignee is not liable under the Truth in Lending Act for a servicer's failure to provide the borrower with a payoff balance. The Eleventh Circuit noted that TILA creates a cause of action against an assignee for a violation that is "apparent on the face of the disclosure statement provided in connection with [a mortgage] transaction pursuant to this subchapter." 15 U.S.C. § 1641(e)(1)(A). The court then held that because the failure to provide a payoff balance is not a violation apparent on the face of the disclosure statement it affirmed the dismissal of the plaintiff's amended complaint. *Evanto v. Federal National Mortgage Ass'n,* 814 F.3d 1295 (11th Cir. March 1, 2016). http://cases.justia.com/federal/appellate-courts/ca11/15-11450/15-11450-2016-03-01.pdf?ts=1456860764

Broad agreement language can cause a class or collective arbitration authorization issue to be sent to an arbitrator, even when the agreement is "silent" on those procedures. The Fifth Circuit held that "gateway disputes" in arbitration cases generally are for the court and that procedural questions are for the arbitrator. However, the court recognized that gateway issues may be subject to arbitration when the agreement "clearly and unmistakably" provides for it. The court concluded that broad agreement language can cause a class or collective arbitration authorization issue to be sent to an arbitrator, even when the agreement is "silent" on those procedures.
Robinson v. J&K Administrative Mgmt. Services, Inc., 2016 WL 1077102, Case No. 15-10360 (5th Cir. March 17, 2016). http://cases.justia.com/federal/appellate-courts/ca5/15-10360/15-10360-2016-03-17.pdf?ts=1458257433

Website arbitration clause unenforceable. Sgouros purchased a "credit score" package from TransUnion. After discovering the score was not calculated in a manner used by lenders, Sgouros filed suit, against TransUnion. TransUnion moved to compel arbitration, asserting that the website through which Sgouros purchased his product included an agreement to arbitrate. The district court concluded that no such contract had been formed and denied TransUnion's motion. The Seventh Circuit affirmed after evaluating the website and concluding that TransUnion had not put consumers on notice of the terms of agreement, as required by Illinois law, but actually distracted them from noticing those terms. *Sgouros v. TransUnion Corp*. 2016 WL 1169411 (7th Cir. March 25, 2016). http://cases.justia.com/federal/appellate-courts/ca7/15-1371/15-1371-2016-03-25.pdf?ts=1458937852

Court reduces punitive damages to 1:1 ratio. A federal appeals court has whittled a $25.5 million punitive damages award to $1.95 million in a carbon monoxide poisoning lawsuit out of Wyoming. Reversing much of the lower court's decision, the U.S. Court of Appeals for the Tenth Circuit found that punitive damages in the case were "excessive and arbitrary" in violation of the Fourteenth Amendment's due process clause. *Lompe v. Sunridge Partners*, 2016 WL 1274898 (10th Cir. April 1, 2016). http://cases.justia.com/federal/appellate-courts/ca10/14-8082/14-8082-2016-04-01.pdf?ts=1459540927

FEDERAL DISTRICT COURTS

The Eastern District of New York held that a debt collector, whose telephone call to a debtor is answered by a third party, must refrain from leaving callback information and attempt to call back later. Defendant debt collector telephoned plaintiff about his debt, and a third party responded that "Herschel [the debtor/plaintiff] is not yet in," and asked if he could take a message. The collection agent responded, "Name is Eric Panganiban. Callback number is 1-866-277-1877 ... direct extension is 6929. Regarding a personal business matter." The court determined that this message is a "communication in connection with the collection of a debt" because its purpose is to solicit a call back. For this reason, the message is subject to the Fair Debt Collection Practices Act, which prohibits debt collectors them from leaving a message identifying themselves as such under §1692c(b). *Halberstam v. Global Credit & Collection Corp.,* 2016 WL 154090 (E.D.N.Y. Jan. 12, 2016). http://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/260/2016/01/27883724_1.pdf

Arbitration provision unenforceable. A District Court in New Jersey recently faced a type of online agreement that did not fit nicely into either the "clickwrap," or "browsewrap" category. Where a

contract, sent electronically but signed in hard copy, contains a hyperlink to a separate terms and conditions page, are those separate terms incorporated into the agreement? The court said no. A requirement to arbitrate disputes buried in the online terms and conditions page was not incorporated into a contract where the contract merely stated, "Download Terms and Conditions" near the signature line. *Holdbrook Pediatric Dental, LLC, v. Pro Computer Service, LLC*, 2015 WL 4476017 (D.N.J. July 21, 2015). http://cases.justia.com/federal/district-courts/new-jersey/njdce/1:2014cv06115/309882/8/0.pdf?ts=1437567894

STATE COURTS

An implied warranty may not exist, but if it does, you must give notice. The Arkansas Supreme Court held that it would not rule on whether there is an implied warranty for services in Arkansas, but if there is, the UCC notice requirement applies. The Court stated:

> In any event, it would be premature for this court to decide whether express and implied warranties attach as a matter of law in a contract for services. The parties never briefed the issue, which has far-reaching implications. Commentators and other jurisdictions are split when the contract is for services rather than goods. Thus, our discussion below is limited to whether there is a notice requirement if such warranties exist. Again, taking no position on whether breach of warranty claims should even exist for a contract that is exclusively for services, we hold that if such warranties do exist, the UCC notice requirements apply.

Hartness v. Nuckles, 475 S.W.3d 558 (Ark. Dec. 3, 2015). http://cases.justia.com/arkansas/supreme-court/2015-cv-14-869.pdf?ts=1449165663

Out of state plaintiff may sue out of state defendant under Consumer Protection Act based on instate agent's actions. The Washington Supreme Court was asked to determine whether the Washington Consumer Protection Act (CPA), allowed a cause of action for a plaintiff residing outside Washington to sue a Washington corporate defendant for allegedly deceptive acts. The Court also was asked to determine whether the CPA supported a cause of action for an out-of-state plaintiff to sue an out-of-state defendant for the allegedly deceptive acts of its instate agent. The United States District Court noted an absence of Washington case law providing guidance on these issues. The Washington Supreme Court answered both certified questions in the affirmative. *Thornell v. Seattle Serv. Bureau, Inc.,* 363 P.3d 587 (Wash. Dec. 10, 2015). http://cases.justia.com/washington/supreme-court/2015-91393-5.pdf?ts=1449764833

Arbitration clause in a void contract is still enforceable. Plaintiff purchased a new car from Defendant. Plaintiff filed a lawsuit, alleging that Defendant violated the Missouri Merchandising Practices Act by failing to pass title for her new vehicle. Thereafter, Defendant asked the trial court to enforce the arbitration agreement between the parties. The trial court overruled the motion to compel arbitration on the ground that the contract between the parties was void under Mo. Rev. Stat. 301.210. The Missouri Supreme Court vacated the judgment of the trial court, holding that even though the sale between Plaintiff and Defendant may be void, that question is for the arbitrator to determine, not the trial court. *Ellis v. JF Enters. LLC.* 2016 WL 143281 (Mo. Jan. 12, 2016). http://cases.justia.com/missouri/supreme-court/2016-sc95066.pdf?ts=1452625538

Payday lender waived arbitration by bringing collection suits. A payday loan company provided loans to plaintiffs. The plaintiffs and other borrowers did not repay their loans, prompting lender to file several thousand individual collection actions and secured thousands of default judgments. It was later discovered that the process server hired by Appellant falsified affidavits of service. Plaintiffs sued, alleging lender improperly obtained its default judgments against them and other similarly situated borrowers without their knowledge. Lender moved to compel arbitration based on the arbitration provisions in its loan agreements. The district court denied Appellant's motions, holding that Appellant waived its right to arbitrate by bringing collection actions in justice court and obtaining default judgments based on falsified affidavits of service. The Nevada Supreme Court affirmed, holding that the district court correctly concluded that Appellant waived its right to an arbitral forum where the named plaintiffs' claims all concerned the validity of the default judgments Appellant obtained against them in justice court. *Principal Invs. V. Harrison,* 366 P.3d 688 (Nev. Jan. 14, 2016). http://cases.justia.com/nevada/supreme-court/2016-59837.pdf?ts=1452794865

Implied warranty of merchantability waived. Plaintiff bought a used motor vehicle from defendant for $1,895. The bill of sale indicated that the vehicle was sold "As is As seen." The sale also included a form from the New Hampshire Division of Motor Vehicles (DMV) titled "NOTICE OF SALE OF UNSAFE MOTOR VEHICLE." In his small claims suit, plaintiff alleged, among other things, that the defendant had breached the implied warranty of merchantability when it sold the vehicle to him. Agreeing with the trial court that plaintiff waived this implied warranty, the New Hampshire Supreme Court affirmed. *Roy v. Quality Pro Auto, LLC,* 132 A.3d 418 (N.H. Jan. 26, 2016). http://cases.justia.com/new-hampshire/supreme-court/2016-2014-073.pdf?ts=1453817210

Unavailability of NAF does not invalidate arbitration agreement. The Arkansas Supreme Court held an arbitration agreement was enforceable, notwithstanding the fact that it designated that NAF rules should be followed. The court held that the NAF term was merely an ancillary logistical concern and that section 5 of the FAA applies and provides a procedure for the appointment of a substitute arbitrator. *Courtyard Gardens Health & Rehab. LLC v. Arnold*, 2016 WL 675547 (Ark. Feb. 18, 2016). http://cases.justia.com/arkansas/supreme-court/2016-cv-14-1105.pdf?ts=1455811227

Unavailable forum invalidates arbitration agreement. A borrower entered into a pay-day loan agreement in August of 2012 that contained an arbitration provision mandating that all claims be arbitrated in the National Arbitration Forum (NAF), and under the Code of Procedure of the NAF. However, as of 2009, NAF did not accept consumer arbitrations. The Eleventh Circuit affirmed the trial court's ruling that the arbitration agreement's choice of forum of the NAF was not an "ancillary logistical concern," but was central to the arbitration agreement. Accordingly, the lender could not enforce the arbitration agreement, and the borrower's lawsuit was permitted to proceed in court. *Flagg v. First Premier Bank*, 2016 WL 703063 (11th Cir. Feb. 23, 2016). http://cases.justia.com/federal/appellate-courts/ca11/15-14052/15-14052-2016-02-23.pdf?ts=1456243310

Enforceability of a liquidated damages provision must be analyzed at the time of contracting, not at the end of a project. The Supreme Court of Ohio held that when deciding whether a liquidated damages clause in a public construction contract is enforceable, courts must focus "on the reasonableness of the clause at the time the contract was executed rather than looking at the provision

retrospectively … after a breach." *Boone Coleman Constr. Inc. v. The Village of Piketon*, Slip Opinion No. 2016-Ohio-628 (Ohio Feb. 24, 2016). http://cases.justia.com/ohio/supreme-court-of-ohio/2016-2014-0978.pdf?ts=1456322561

Arbitration agreement is unconscionable. The Montana Supreme Court affirmed a finding that an arbitration agreement was unconscionable and unenforceable. The court noted that where a party specifically challenges the validity of the arbitration clause, and not just the entire contract, it is the court that determines the validity of the arbitration clause. It also found that the arbitration provision lacked mutuality of obligation, was one-sided, and contained terms unreasonably favorable to the drafter.
Global Client Solutions, LLC v. Ossello, 367 P.3d 361 (Mont. March 2, 2016). http://cases.justia.com/montana/supreme-court/2016-da-15-0301.pdf?ts=1456956123

The Alaska Supreme Court held that foreclosure counts as "debt collection" and, therefore, firms in the business of foreclosing on homeowners are "debt collectors" subject to the restrictions of the FDCPA.

Foreclosure is "debt collection" covered under the FDCPA. The Alaska Supreme Court held that foreclosure counts as "debt collection" and, therefore, firms in the business of foreclosing on homeowners are "debt collectors" subject to the restrictions of the FDCPA. As the court explained, "foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitutes one way of collecting a debt." *Alaska Trustee, LLC v. Ambridge*, 2016 WL 852265 (Alaska March 4, 2016). http://cases.justia.com/alaska/supreme-court/2016-s-14915.pdf?ts=1457114409

Carve out clause does not invalidate arbitration agreement. The California Supreme Court considered the enforceability of an arbitration agreement authorizing the parties to seek provisional relief in a judicial action while still compelling the remainder of the dispute to arbitration. According to the court, the clause carving out provisional relief from the arbitration obligation "which does no more than restate existing law . . . does not render the agreement unconscionable." Moreover, the court reiterated that an arbitration agreement remains enforceable even when it only lists claims that would likely be brought by an employee and does not list claims that might be brought by an employer. *Baltazar v. Forever 21, Inc.*, 367 P.3d 6 (Cal. March 28, 2016). http://cases.justia.com/california/supreme-court/2016-s208345.pdf?ts=1459184425

Employer's motion to compel arbitration denied where arbitration clause not included in employment contract. The New Jersey Appellate Division affirmed the denial of an employer's motion to compel arbitration of age discrimination and wrongful termination lawsuit because the clause was in an employee handbook, which explicitly stated it was not a "contract" with the employee. *Morgan v. Raymours Furniture Co., Inc.,* 128 A.3d 1127 (N.J. Super. App. Div. Jan. 7, 2016). http://law.justia.com/cases/new-jersey/appellate-division-published/2016/a2830-14.html

Legality of contract with arbitration clause is to be determined by court and not by arbitrator. A California Court of Appeal has held that the question of enforceability is for the courts, and not the arbitrators, when the issue is illegality of the contract that contains the arbitration clause. The court noted that under California law, "a challenge to the legality of an entire contract that contains an arbitration provision must be determined by the trial court, not the arbitrator." *Sheppard v. J-M Mfg. Co.*, 198 Cal.Rptr.3d 253 (Cal. Dist. Ct. App. Jan. 29, 2016). http://cases.justia.com/california/court-of-appeal/2016-b256314.pdf?ts=1454094061