Chapter 6

ARBITRATION OF PARTICULAR KINDS OF CLAIMS AND BETWEEN PARTICULAR ENTITIES

SYNOPSIS

§ 6.1 • INTRODUCTION

This chapter briefly covers specialized arbitration situations. Such "specialty" arbitrations include labor arbitrations, consumer arbitrations, securities arbitrations, class action claims, mechanics' lien claims, and the various statutorily prescribed arbitrations mentioned in Chapters 2 and 3 of this book. As to the latter, some of these proceedings may not be "arbitrations" within the scope and application of the general arbitration statutes. Nevertheless, they are alternative dispute resolution procedures.

§ 6.2 • ARBITRATION OF EMPLOYER-EMPLOYEE DISPUTES

Employer-employee arbitration was well-developed long before arbitration generally became popular. Many of these arbitrations are pursuant to collective bargaining agreements.

There are principles of law applicable to labor arbitrations that are not commonly applicable to arbitrations generally. Labor arbitrations are beyond the scope of this book, although they are well defined by Colorado and federal case law and by the many articles written on the topic.[1]

There are numerous cases dealing with the arbitrability of employee claims against an employer. The arbitration agreement may be in a collective bargaining agreement, an employee handbook, or a specific employee-employer agreement. The context of the issues presented by these agreements encompasses the full range of employee-employer litigation. The scope of the issues as to arbitrability is too broad to be covered in this book. A few of the issues, however, can be noted:

- Binding effect of arbitration clauses in handbooks;[2]
- Arbitration procedures as cost prohibitive;[3]
- Whether a collective bargaining arbitration provision is a waiver of employees' statutory rights before a judicial forum;[4]
- Whether Title VII rights can be governed by arbitration provision;
- Whether a signature is needed where the arbitration clause is in employee handbook;[5]
- Lack of mutuality of arbitration provisions;[6]
- Contractual statutes of limitations;[7]
- Allocation of costs as affecting validity of an arbitration clause;[8] and
- Take-it-or-leave-it basis of an arbitration clause as affecting the arbitration clause.[9]

For additional authority, see

- Annot., *Enforceability Under the Federal Arbitration Act of Arbitration Clause Not Within Collective Bargaining Agreement with Respect to Claims Under Fed. Civil Rights Statutes*, 39 A.L.R. Fed.2d 253.
- Annot., *Vacating on Pub. Policy Grounds Arbitration Awards Reinstating Discharged Employees*, 142 A.L.R. Fed. 387 and 112 A.L.R.5th 263.
- Annot., *Enforceability of Arbitration Clauses in Collective Bargaining Agreements as Regards Claims Under Federal Civil Rights Statutes*, 152 A.L.R. Fed. 75.

- Annot., *Vacating Arbitration Awards as Contrary to Nat'l Labor Relations Act*, 147 A.L.R. Fed. 77.
- Annot., *Binding Precedential Effect of Prior Arbitrator's Construction of Provision of Collective Bargaining Agreement upon Subsequent Arbitrator Construing Same Issue Affecting Other Parties*, 121 A.L.R. Fed. 487.
- Criswell, "The 'Mandatory' Arbitration of Employees' Statutory Claims," 30 *Colo. Law.* 71 (Nov. 2011).

§ 6.2.1—Under The Federal Arbitration Act

Section 1 of the Federal Arbitration Act (FAA) defines the scope of application of the FAA, and specifically exempts contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. However, the U.S. Supreme Court has interpreted that exclusion very narrowly.[10]

In *Lenz v. Yellow Transportation, Inc.*,[11] the employer moved to compel arbitration of an employee's claim of wrongful termination under the Iowa Civil Rights Act. The arbitration agreement covered all employment-related disputes and provided that the FAA applied. The employee defended on the basis of the exclusion in FAA § 1, asserting that the employer was in the transportation industry and that the employee was directly engaged in interstate transportation. The Eighth Circuit compelled arbitration, rejecting that the employee and the agreement were within the transportation exemption:

- The exemption is limited to transportation workers who are actually engaged in the movement of goods in interstate commerce; and
- A truck driver for the employer would indisputably be excluded, but security workers at an airport and train station in earlier cases were held to have duties only tangentially related to movement of goods and therefore not excluded.

The court listed eight non-exclusive factors for determining whether a worker's duties are so closely related to interstate commerce so as to fit within the § 1 exclusion:

1) Whether the employee works in the transportation industry;
2) Whether the employee is directly responsible for transporting the goods in interstate commerce;
3) Whether the employee handles goods that travel interstate;
4) Whether the employee supervises employees who are "transportation workers" within the exemption;
5) Whether the employee is within a class of employees for which special arbitration already exists, such as seamen or railroad workers;
6) Whether the vehicle itself is vital to the employer's commercial enterprise;
7) Whether a strike by the employee would disrupt interstate commerce; and
8) The type of nexus that exists between the employee's duties and the vehicle used to carry out those duties.

Limousine drivers are not within the transportation-worker exemption of the FAA because they are not dedicated to the interstate transport of physical goods.[12] The FAA's "transportation exception" turns on whether the worker is "dedicated to the interstate shipment of physical goods," not people.[13]

While arbitration clauses in employment contracts generally are enforceable,[14] arbitration provisions in employee handbooks sometimes are held unenforceable.[15]

The failure of an employer to file for arbitration during the pendency of an EEOC investigation or after the EEOC finds no violation is not a waiver of the arbitration provision in the employment contract.[16]

Perhaps parties may escape the FAA exclusion by specific agreement that the state statute in whole or in part governs the arbitration or the validity of the arbitration clause.[17]

- Annot., *Enforcement, Breach or Repudiation of Collective Labor Contract as Subject to, or as Affecting Right to Enforce Arbitration Provision in Contract*, 29 A.L.R.3d 688.
- Annot., *What Statute of Limitations Applies to Action to Compel Arbitration Pursuant to Sec. 301 of Labor Management Relations Act* (29 U.S.C.A. § 185), 96 A.L.R. Fed. 378.
- Annot., *Matters Arbitrable Under Arbitration Provisions of Collective Bargaining Contract*, 24 A.L.R.2d 752.
- Annot., *Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided for by Collective Bargaining Agreement*, 60 A.L.R.3d 1041.

§ 6.2.2—Under The CRUAA

The Colorado Revised Uniform Arbitration Act (CRUAA) does not contain any restriction in its scope of application to employment disputes. The Colorado Uniform Arbitration Act (CUAA) was applied to employment disputes within the scope of an arbitration agreement.[18]

§ 6.2.3—Public Employees

- Annot., *Validity and Construction of Statutes or Ordinances Providing for Arbitration of Labor Disputes Involving Public Employees*, 68 A.L.R.3d 885.
- Annot., *Power of Municipal Corporation to Submit to Arbitration*, 20 A.L.R.3d 569.

§ 6.2.4—Private Employees

Arbitration under collective bargaining agreements is beyond the scope of this book. The FAA exempts from its provisions contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. The CRUAA does not contain such an exemption.

§ 6.3 • ARBITRATION OF CONSUMER DISPUTES

The harshest criticism of arbitration is usually reserved for consumer disputes: disputes between a consumer and the provider of a consumer product or service. *See* "Arbitration Everywhere, Stacking the Deck of Justice," *N.Y. Times*, Oct. 31, 2015. The criticism is focused on three points:

1) The contract containing the arbitration provision is a contract of adhesion. The provision is contained among extensive terms and conditions, which typically are not read by consumers.

2) The terms of the arbitration often are biased against the consumer. For example, the venue of the arbitration may be designated near the provider's headquarters and not where the service or product was sold or provided. The agreement defines an organization selected by the provider of the services or seller. It may impose costs on the buyer out of proportion to the claim. The drafter defines which disputes are required to go to arbitration and which are not.
3) The clause requires arbitration but also precludes class action arbitrations. Consumer claims are too small to be prosecuted individually in court actions, and class actions cannot be precluded by contract.

Obviously, there are counter points to these arguments, and most consumer arbitrations have provided a fair and reasonable process. The topic is simply too broad to be covered in this book. The following discussion is intended to simply point out a few of the issues.

Like labor arbitrations, special rules (or interpretations of rules) and procedures have developed for the arbitration of consumer claims against homebuilders, manufacturers, etc. These special rules are beyond the scope of this chapter.[19] However, there is no Colorado case law exempting consumer disputes from general arbitration law. The leading U.S. Supreme Court decision, *Green Tree Financial Corp.-Alabama v. Randolph*, and the leading Colorado decision *Gergel v. High View Homes, L.L.C.*, should be noted.[20]

A common issue is whether the consumer has agreed to arbitration when the bank, credit card company, etc. has mailed the arbitration agreement, on the basis the mailing was not received or was not agreed to.

In July 2009, the National Arbitration Forum reached a settlement of a suit by the Minnesota Attorney General. The National Arbitration Forum agreed to no longer administer consumer credit arbitration.[21] The National Arbitration Forum administered arbitrations for numerous banks and credit card companies and had been the subject of numerous lawsuits in connection with its administration of consumer debt arbitrations (214,000 in 2006). At that time, the American Arbitration Association (AAA) announced it would stop administering debt collection arbitrations "until some standards or safeguards are established." The AAA now has special rules for consumer disputes.

Attacks on arbitrability of consumer disputes have often been based upon unconscionability, there being many different fact situations. Often, the arbitration agreement is found in the small print material sent to the consumer after the application for a credit card is submitted. Sometimes the company asserts non-mutual provisions in the credit clause.[22]

The U.S. Supreme Court held that a mandatory arbitration clause in a credit card agreement is valid and does not violate the federal Credit Repair Organizations Act, 15 U.S.C. §§ 1679, *et seq.*[23] The Court rejected the argument that the statutory language that a consumer has "a right to sue" precluded enforcement of an arbitration agreement.

See § 6.8.3 as to class action waiver.

§ 6.4 • ARBITRATION OF STATUTORY CLAIMS — GENERALLY

The statutes and common law exclude certain disputes from being arbitrated. A few examples are discussed below. *See also* §§ 4.3.9 and 7.5.

Some parties have asserted that an arbitration clause requiring statutorily created rights to be arbitrated is invalid, because, *inter alia*, administrative fees and arbitrators' fees must be paid but are not costs in litigation. The litigant asserts that these costs effectively deprive the party of his or her statutorily granted rights. In addition, since arbitration does not utilize a jury, some parties have asserted they are being deprived of a right to trial by jury. These concerns primarily have been in the labor and consumer areas, discussed above, and limitations on the arbitration costs to be borne by consumers and employees have developed.

FAA

Particularly when the statute creating a cause of action provides for the "right to sue," the issue arises as to whether such same or similar language prohibits enforcement of the arbitration agreement with respect to claims under the statute. For example, in *CompuCredit Corp. v. Greenwood*,[24] the statute provided, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act [CROA]." The U.S. Supreme Court held that that language did not preclude enforcement of an arbitration clause between the parties. The Court has stated that the FAA's mandate to enforce arbitration agreements, "[l]ike any statutory directive, . . . may be overridden by a contrary congressional command."[25]

The courts have generally held that arbitration agreements encompassing statutory claims are enforceable under the FAA. Judge Roberts (now Chief Justice Roberts), sitting on the D.C. Circuit, defined the rules of arbitrating statutory claims in *Booker v. Robert Half International, Inc.*:[26]

> Statutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute.
>
> . . .
>
> [C]laims under anti-discrimination statutes may be subject to arbitration, so long as the claimant "effectively may vindicate [his or her] statutory cause of action in the arbitral forum."[27]

Generally, there is a presumption that an arbitral forum is adequate to resolve statutory claims. However, that presumption "'falls apart . . . if the terms of [the] agreement actually prevent an individual from effectively vindicating his or her statutory rights.'"[28]

Colorado federal district court judge Brooke Jackson defined the arbitrability of claims under the Fair Labor Standards Act.[29]

- The Supreme Court recognizes that arbitration generally is a sufficient medium for resolving federal statutory claims, even those arising under a statute designed to further important social policies.[30]
- However, the prospective litigant must be able to effectively vindicate its statutory claims — it must be an effective and accessible alternative forum.[31]
- The arbitration provision may not operate as a prospective waiver of a party's right to pursue statutory remedies.[32]

Judge Jackson found that two provisions of arbitration clause were unenforceable.

- The fee-splitting provisions of the AAA incorporated commercial rules. The condition that the plaintiff bear the costs of providing experts, witnesses, and preparation and presentation of proofs would effectively preclude the plaintiff in her circumstances from pursuing her claim.[33]
- The requirement that the plaintiff bear her non-attorney fees and costs even should she prevail is a prospective waiver of the statutory attorney fees remedy and undermines the statutory enforcement scheme, which may significantly chill the bringing of these claims. Arbitration agreements denying a civil rights plaintiff the right to attorney fees are presumptively void as a matter of public policy.

The court found the unenforceable provisions could not be severed (*see* § 5.5), and therefore declared the arbitration agreement unenforceable.[34]

A 2008 U.S. Supreme Court decision said:

> "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum." *Mitsubishi Motors Corp.*, 473 U.S., at 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444. So here, Ferrer relinquishes no substantive rights . . . California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum.[35]

On the other hand, arbitration agreements that require a Title VII plaintiff to pay all or a part of an arbitrator's fee have been held unenforceable because they deprive a plaintiff of a forum to vindicate statutory rights.[36]

As to an arbitration clause purporting to limit statutory rights, the court in *Booker* found the remedy to be to sever the offensive provision and require arbitration under the remainder of the agreement. The court rejected that it should decline to enforce the arbitration clause because of an invalid provision. In *Booker*, the agreement contained a severability clause, prohibited an award of punitive damages, and limited discovery to that provided by the AAA Commercial Rules of Arbitration.

The court summarized the approach to determining whether federal statutory claims are subject to arbitration:

> [F]irst, that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of sharing the likelihood of such interference, and second, that this burden cannot be caused by "mere speculation" about how an arbitrator "might" interpret or apply the agreement.[37]

However, in *Perez v. Hospitality Ventures-Denver, LLC*,[38] the U.S. District Court for the District of Colorado refused to enforce an arbitration provision in an employee handbook as to Family and Medical Leave Act claims where the employee was required to pay a portion of the arbitration costs, citing *Shankle v. B-G Maintenance Management of Colorado, Inc.*[39] The court found that fee splitting effectively deprived the plaintiff of an accessible forum in which to resolve her statutory claim and vindicate her statutory rights. The court refused to simply sever the offending provision, as there was no severability or savings clause. Alternatively, the court struck the arbitration clause on the ground that the handbook reserved to the employer the unilateral right to modify it.

The question of arbitrability of statutory claims was comprehensively resolved, at least under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, by the U.S. Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[40] The issue presented was whether antitrust claims arising under the Sherman Act were subject to arbitration.

The Court first addressed whether the arbitration clause encompassed antitrust claims — whether the parties had agreed to arbitrate statutory antitrust claims. In answering yes, the Court rejected the idea that in order to encompass statutory claims, the arbitration clause must specifically refer to the statutes in issue, or statutes in general. The Court rejected such a requirement and rejected a presumption that the parties' arbitration agreement excluded statutory claims. Instead, the Court approved a two-part test:

> [F]irst, determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.[41]

While the Supreme Court recognizes that as a matter of congressional intent some statutory claims may not be arbitrable, the courts have held a wide variety of statutory claims to be arbitrable if the parties so agree, and if the procedures reasonably protect the statutory rights. For example:

- Title VII claims;[42]
- RICO claims;[43] and
- Truth in Lending claims.[44]

However, courts may refuse to apply an arbitration clause to a claim based upon a federal statutory right if the cost of the arbitration to be borne by the claimant will deter potential claimants from pursuing their claims — where the cost of arbitration is prohibitive.[45]

CRUAA

These arbitrability issues are not conclusively resolved under the CRUAA. For example, the Colorado Supreme Court has held that claims under the Colorado Wage Claim Act are not arbitrable under the CUAA because the arbitration would result in a statutorily impermissible waiver of

procedural and substantive rights.[46] Subsequently, the Colorado Court of Appeals noted that the U.S. Supreme Court[47] had held that the FAA preempted a state wage claim statute that authorized an action in the state courts to collect wages regardless of "the existence of any private agreement to arbitrate." Therefore, claims for unpaid commissions were subject to arbitration when the FAA was applicable.

> In the context of plaintiff's claim for unpaid commissions at issue here, and mindful that there is no general policy against enforcing statutory claims through arbitration, we perceive no practical distinction between the wage statute preempted by the [Supreme Court under the FAA, and the Colorado wage statute]. . . . [T]he FAA preempts § 8-4-125 to the extent that an agreement to arbitrate a dispute relating to employee compensation is not void and that public policy is not thereby offended.[48]

Statutorily created rights involved in the construction industry probably can be subjected to arbitration under the CRUAA, although the particular facts and circumstances, and the case law, should be considered.[49]

§ 6.5 • ARBITRATION OF SPECIFIC STATUTORY CLAIMS

The following are examples of statutory claims generally held to be arbitrable.

§ 6.5.1—Securities Claims

Prior to 1987, pre-dispute agreements to arbitrate claims arising under the Securities Act of 1933, 15 U.S.C. § 771(2), and the Securities and Exchange Act of 1934, 15 U.S.C. § 78(a), were held by the courts to be void.[50] This conclusion was based upon interpretation of the provisions prohibiting waiver of any provision of the acts, *e.g.*, judicial remedies.

However, in 1987, the U.S. Supreme Court held, in essence, that customers who open a brokerage account could agree to arbitration of any disputes with respect thereto under the Securities Act and Securities and Exchange Act.[51] Today, such arbitration agreements are standard, and the National Association of Securities Dealers and stock exchanges have their own code of arbitration procedure, administration of arbitrations, and panel of arbitrators.

Securities arbitrations are somewhat unique in that, in the parties' arbitration agreement, the parties agree to the extensive rules contained in the code of arbitration adopted by the relevant agencies. These arbitrations typically are between the stockbroker and his or her employer brokerage firm, or between the customer and the broker/brokerage firm. The agreement to arbitrate is a part of the customer agreement or employment agreement.[52]

Commonly, securities claims are arbitrated under the auspices of the Financial Industry Regulatory Authority (FINRA) (formerly NASD). In general, the FINRA code requires members to arbitrate a dispute if so required by a written agreement or if requested by the customer.[53]

- Annot., *Who is "Customer" for Purposes of Nat'l Ass'n of Sec. Dealers (NASD) Rule Requiring NASD Member to Arbitrate Any Dispute Between Customer & Member*, 16 A.L.R. Fed.2d 231.
- Annot., *Securities Arbitration: Construction and Application of Self-Regulatory Organization Eligibility Rules*, 129 A.L.R. Fed. 489.
- Stoneman, "Securities Arbitration: A Hypothetical Securities Arbitration Case," 27 *Colo. Law.* 73 (Sept. 1998) (Part I); 27 *Colo. Law.* 61 (Nov. 1998) (Part II).

§ 6.5.2—Sarbanes-Oxley Claims

The claims of an employee that he or she was fired for being a whistle-blower in violation of the Sarbanes-Oxley Act are subject to that employee's arbitration agreement with his or her employer.[54] Arbitration agreement provisions requiring confidentiality, limited discovery, and a brief summary of the arbitrator's award did not make it unconscionable.

§ 6.5.3—Colorado Consumer Protection Act Claims

Colorado Consumer Protection Act claims are subject to arbitration.[55] In *Gergel v. High View Homes, LLC*,[56] the Colorado Court of Appeals enforced arbitration as to a homebuyer's suit against a developer, asserting violation of the Consumer Protection Act and the Soils Disclosure Act.[57]

§ 6.5.4—Magnuson-Moss Warranty Act Claims

The Magnuson-Moss Warranty Act has been interpreted by the Federal Trade Commission to preclude pre-dispute provisions that would eliminate a plaintiff's access to the courts for remedies. The Act has been found to be superseded by the FAA, although courts are split. The courts are somewhat split as to whether rules issued under the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*, barring pre-dispute binding arbitration clauses, 40 Fed. Reg. 60,168, 60,211, are valid, given the dictates and policy of the FAA. For example, arbitration clauses are barred.[58]

§ 6.5.5—Uniformed Services Employment And Re-employment Rights Act Claims

A reservist's employment rights under the Uniformed Services Employment and Re-employment Rights Act (USERRA) may be subject to arbitration.[59] The Act protects the substantive rights of soldiers and reservists to re-employment, to leaves of absence, to protection against discrimination, and to health and pension plan benefits. Submission of these rights to arbitration does not forego them; it only submits their resolution to an arbitral rather than a judicial forum. Arbitration of substantive statutory rights is precluded only when Congress evidences an intent that the judicial forum is part of the protected rights.

§ 6.5.6—Claims Or Defenses Based On Regulatory Agency Rule-Making Concerning Arbitration

Agencies charged with enforcing specific laws may by case decision or rule impact the exercise of rights under the federal or state arbitration acts.

See Federal Reserve Board of Governors Regulation 12 C.F.R. § 240.16 (78 Fed. Reg. 21,019 (April 9, 2013)) (Prohibits banking institution from entering into any agreement to submit to any settlement procedure prior to claim arising). *See also* Financial Industry Regulatory Authority (FINRA) Rule 13204 and 17 C.F.R. § 166.5 (Commodity Futures Trading Commission).

§ 6.5.7—Tenant Security Deposit Claims

A tenant cannot be forced to arbitrate a claim for the return of a security deposit under C.R.S. §§ 38-12-101, *et seq.*[60] In *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*,[61] the Colorado Supreme Court held that a claim under the Colorado Wrongful Withholding of Security Deposits Act, C.R.S. §§ 38-12-101 through -104 (2006), was not subject to arbitration and must be resolved by the trial court. The court reasoned that the statutory references to "legal proceeding" and "court action" contemplate that the tenant has the right to pursue a claim for wrongful withholding of a security deposit in a court. Moreover, the statute provides that any provision in the Act for the benefit of the tenant cannot be waived. On the other hand, the same factual allegations asserting a claim under the Colorado Consumer Protection Act were found subject to the arbitration clause.

§ 6.5.8—Credit Repair Organizations Act Claims

The Credit Repair Organizations Act (CROA) provides that "you [the consumer] have a right to sue a credit repair organization that violates" the Act. A U.S. Supreme Court decision held that the provision referring to a "right to sue" does not negate or void an arbitration clause in an agreement between the consumer and the credit repair organization.[62] The Supreme Court noted

> that this mere "contemplation" of suit in any competent court does not guarantee suit in all competent courts, disabling the parties from adopting a reasonable forum-selection clause. And just as the contemplated availability of all judicial forums may be reduced to a single forum by contractual specification, so also can the contemplated availability of judicial action be limited to judicial action compelling or reviewing initial arbitral adjudication. The parties remain free to specify such matters, so long as the *guarantee* of §1679g — the *guarantee of the legal power to impose liability* — is preserved.[63]

§ 6.5.9—Civil Rights Claims

Employee Title VII rights may be arbitrated.[64]

- Annot., *Enforceability Under Federal Arbitration Act of Arbitration Clause Not Within Collective Bargaining Agreement With Respect to Claims Under Federal Civil Rights Statute*, 39 A.L.R. Fed.2d 253.

§ 6.5.10—Dodd-Frank Claims

The Dodd-Frank Act provides that the Consumer Financial Protection Bureau (CFPB) shall study the use of pre-dispute arbitration agreements (PDAAs) in consumer financial transactions. "If the Bureau finds that such a prohibition [of PDAAs] or imposition of conditions or limitations is in the public interest and for the protection of consumers," it may promulgate rules that "prohibit or impose conditions or limitations" on the use of PDAAs.[65]

In considering arbitration clauses in agreements with respect to consumer financial products and services, the Dodd-Frank Act and regulations thereunder should be consulted.

See Friedman, "What's A Regulation to Do? Mandatory Consumer Arbitration, Dodd-Frank, and the Consumer Financial Protection Bureau," 20 *Dispute Resolution* No. 4 (Summer 2014).

§ 6.5.11—Truth In Lending Act (15 U.S.C. § 1601) Claims

The Act does not expressly preclude arbitration, and agreements requiring arbitration of such claims have been upheld.[66]

§ 6.5.12—Age Discrimination In Employment Act (29 U.S.C. § 623) Claims

The Act does not expressly exclude arbitration, and arbitration agreements have been enforced.[67]

§ 6.5.13—Racketeer Influenced Corrupt Organizations Act (RICO) (18 U.S.C. § 1961) Claims

Arbitration clauses have been upheld.[68]

§ 6.5.14—Fair Labor Standards Act Claims

See Sanchez v. Nitro-Lift Technologies, L.L.C.[69]

§ 6.5.15—Wage Claim Act Claims

The Colorado Supreme Court has held that notwithstanding an agreement to arbitrate, an employee cannot be compelled to arbitrate Colorado Wage Claim Act claims.[70] That Act voids any agreement that constitutes a waiver of employee rights, and the court found that enforcement of an arbitration agreement effects a waiver of the right to a civil action. The court did not consider preemption by the FAA because the issue was not presented to the trial court.

§ 6.5.16—Defenses That Claimant Lacks Required License

The lack of a required license by the claimant (*e.g.*, a contractor's, lawyer's, doctor's, or real estate agent's license) may make the arbitration agreement, or the agreement in which it is contained, void or voidable, barring the claimant from arbitrating or obtaining any relief.[71] However, the issue of whether the claimant is properly licensed may be for determination by the arbitrator; if so, failure to raise the issue before the arbitrator may be a waiver of the defense when the claimant seeks to confirm the award.[72] The arbitrator's decision may be reviewed *de novo*.[73]

§ 6.5.17—Statutory Contribution Claims

Arbitration of a claim for contribution between defendants may be precluded as a matter of law. In *Czarnik v. Wendover Financial Services*,[74] the plaintiff sued defendants A, B, C, and D for personal injuries. A cross-claim was filed against B for contribution under the Illinois Joint Tortfeasor Contribution Act. Defendant B moved to dismiss and compel arbitration pursuant to a contractual arbitration clause. The trial court denied the motion, holding that the claim for contribution was not arbitrable as a matter of law. The appellate court affirmed.

The court noted that A's contribution claim was contingent upon a finding that A owed liability to the plaintiff. Each defendant's liability to the plaintiff would be determined in the principal litigation under the Illinois comparative fault statute. This statute required a comparison of the fault of the plaintiff, the named defendants, and the designated responsible non-parties. The relative culpability of each defendant would be determined.

This would be *res judicata* or collateral estoppel as to any contribution claim. The defendants could not relitigate their pro rata share of liability thereafter in arbitration. However, the court noted that A was not foreclosed from arbitrating its contractual claim for indemnity (100 percent liability) against another.

§ 6.5.18—Statutory Defenses To The Enforcement Of The Arbitration Agreement

See § 7.6 as to defenses to the validity and enforceability of the arbitration agreement.

§ 6.5.19—Other Statutes Prohibiting Or Limiting Arbitration

Other statutes prohibiting or limiting arbitration include:

- Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (prohibits enforcement of pre-dispute arbitration agreements as to disputes arising under motor vehicle franchise contract between manufactures and dealers);
- Carmack Act, amending Interstate Commerce Act, 49 U.S.C. § 14706 (prohibits pre-dispute arbitration agreements between carriers and shippers);
- 7 U.S.C. § 26 (commodity exchanges);
- 12 U.S.C. § 5518 (authority of Bureau of Consumer Financial Protection to restrict mandatory pre-dispute arbitration); and
- 18 U.S.C. § 1514A (pre-dispute arbitration agreements not valid or enforceable as to whistle-blower retaliation claims).

§ 6.5.20—Arbitration Of Employee Retirement Income Security Act Of 1974 (ERISA) (29 U.S.C. §§ 1101, *et seq.*) Claims

- Annot., *Enforceability of Predispute Agreements to Arbitrate Claims Arising Under Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C.A. §§ 1001 et seq.)*, 116 A.L.R. Fed. 525.

§ 6.5.21—Uninsured Motorist Claims

- Annot., *What Issues Are Arbitrable Under Arbitration Provisions of Uninsured & Underinsured Motorist Insurance*, 103 A.L.R.5th 1.
- Annot., *Uninsured & Underinsured Motorist Coverage: Enforceability of Policy Provision Limiting Appeals from Arbitration*, 23 A.L.R.5th 801.

§ 6.5.22—Railway Labor Act (45 U.S.C. §§ 151, *et seq.*) Claims

See generally Brotherhood of Maintenance of Way Employees Division v. Burlington Northern Santa Fe Railway Co.[75]

- Annot., *What Constitutes "Minor" or "Major" Dispute for Purposes of Determining Whether Dispute is Subject to Mandatory Arbitration Before National Railroad Adjustment Board Under Railway Labor Act (45 U.S.C.A. §§ 151-188)*, 170 A.L.R. Fed. 1.

§ 6.6 • ARBITRATION OF MECHANICS' LIENS, MILLER ACT CLAIMS, AND FORECLOSURES

§ 6.6.1—Mechanics' Liens

C.R.S. § 38-22-110 requires that in order to enforce a mechanics' lien, a "civil action" must be commenced within six months after the work or labor is performed or material furnished, or after completion. An arbitration clause in a construction contract does not constitute a waiver under C.R.S. § 38-22-119 of the right to assert a mechanics' lien.[76] Commencement of a mechanics' lien civil action is not a waiver of the right to compel arbitration, where it is clear that there was no intentional relinquishment of the right. The mechanics' lien is a means of receiving payment, and not a claim upon which the lien is founded, and a civil action must be filed to preserve the remedy upon a favorable arbitration award.[77]

Thus, notwithstanding an arbitration clause, the Colorado Supreme Court has stated that where a party has filed a mechanics' lien, the claimant still must commence a judicial foreclosure action within the statutory time, which is then stayed pending the arbitration.[78] The arbitrator then can determine the issues as between or among the parties to the arbitration. This normally can include the amount owing to the claimant, although when a suit to foreclose the mechanics' lien based upon those findings is filed, the non-parties to the arbitration holding junior interests in the property may thereafter have a right to contest in the civil action the amount of the lien. If the claimant prevails, it then proceeds in the civil action with the determination of the priority of liens and foreclosure of the lien.

Generally, an arbitrator cannot enter and enforce a foreclosure decree — cannot foreclose on property. First, all parties (claiming an interest in the subject property) may not be parties to the arbitration agreement. Second, arbitrators do not normally hold foreclosure sales or otherwise execute upon an award, nor do they have powers to direct a sheriff to sell property.

A mechanics' lien claim involves two steps: (1) determination of the sum, if any, owed by the alleged obligor (owner or contractor) to the claimant (contractor, subcontractor, or materialmen), which is an *in personam* claim; and (2) creation and enforcement of a lien against the involved property for such amount, which is an *in rem* claim. Generally, if there is an arbitration agreement between the claimant and respondent, the first issue is for the arbitrator to determine, and most of the second issue is usually for the court to determine.

In *Sure-Shock Electric, Inc. v. Dramond Lofts Venture, LLC*,[79] upon an appeal of the confirmation of the award and denial of the motion to vacate the arbitrator's award, the Colorado Court of Appeals held:

> [T]he issue of procedural validity [of a mechanic's lien] may be properly determined by the court. Given that only a court is vested with authority to foreclose a mechanic's lien, it may concurrently determine any procedural validity issues connected with that foreclosure even when the underlying contract includes a broad arbitration clause, at least where, as here, neither party raised the issue in arbitration
>
> . . .

> Thus, we read the arbitrator's award to conclude that Sure-Shock had established the right to a lien or claim under the mechanic's lien statute.
>
> . . .
>
> [W]e conclude that the procedural validity of a lien securing a debt arising from breach of contract may be decided by a court even when the contract requires all disputes to be submitted to binding arbitration.[80]

The court affirmed the trial court's confirmation of the award where the arbitrator determined the amount owed to the mechanics' lien claimant and that the claimant had established a right to a lien or claim under the mechanics' lien statement. Note that those determinations probably are not binding upon third parties who are not parties in the arbitration, *e.g.*, other lien claimants.

The court noted the question of whether the issue was part of the foreclosure proceedings, or whether Sure-Shock or DLV was required to raise it in an arbitration under their agreement requiring all claims and disputes to be submitted to arbitration. Apparently, the parties and court acknowledged that under the statute, only a court could issue a decree of foreclosure.

The court concluded that the issue of procedural validity "may" be properly determined by the court, concurrently with the foreclosure, "at least where, as here, neither party raised the issue in arbitration."[81] The court noted that "the underlying debt (and, necessarily, the amount of any lien arising from it)" is an *in personam* dispute "undisputedly arbitrable," while the foreclosure of the mechanics' lien is an *in rem* action. "Although the parties to the contract may have agreed to arbitrate their disputes, importantly, the *in rem* action frequently involves additional parties who, although not personally indebted to the claimant, also have an interest in the land."[82]

- Annot., *Demand for or Submission to Arbitration as Affecting Enforcement of Mechanic's Lien*, 73 A.L.R.3d 1042.
- Annot., *Filing of Mechanics Lien or Proceeding for its Enforcement as Affecting Right to Arbitration*, 73 A.L.R.3d 1066.
- Annot., *Arbitration Proceeding as Affecting Mechanic's Lien or Liability of Surety on Owner's Bond for Discharge of Lien, or on Contractor's Bond*, 93 A.L.R. 1151.
- Annot., *Waiver of Filing of Mechanic's Lien or Proceeding for Enforcement as Affecting Right to Arbitration*, 24 A.L.R.5th 1.

§ 6.6.2—Miller Act Claims

The parties may agree to arbitrate claims under the federal Miller Act.[83] Like proceedings under the Colorado mechanics' lien statute, the claimant must assert its claims timely and probably must commence a civil action and not simply an arbitration action. A Miller Act lawsuit should be filed timely, and then a motion should be filed to stay the civil action under 9 U.S.C. §§ 3 and 4 or C.R.S. § 13-22-204 pending arbitration of the claims.

§ 6.6.3—Foreclosure Of Deeds Of Trust

Claims to foreclose a mortgage or deed of trust should be handled the same way. If there were no interests of non-parties involved in the property, the arbitrator perhaps could hold a private sale. In

absence of jurisdiction over all parties, the arbitrator is limited to resolving interests between the parties to the arbitration, leaving the interests of the non-parties to be resolved by the court.[84]

§ 6.7 • ARBITRATION OF ANTITRUST CLAIMS

The federal courts have generally held that claims arising under the federal antitrust laws are subject to arbitration, and do not distinguish between horizontal and vertical antitrust claims.[85]

However, clauses that restrict the statutory remedies may be involved, *e.g.*, barring recovery of treble damages, attorney fees and costs, and class action arbitration, and may be "invalid because they prevent the vindication of statutory rights under state and federal law."[86] As to whether the remedy is to sever the illegal provisions or strike the arbitration agreement, see §§ 5.5 and 6.4.

• Annot., *Arbitrability of Federal Antitrust Claims*, 3 A.L.R. Fed. 918.

§ 6.8 • CLASS ACTION ARBITRATIONS

Generally, at least until recently, class actions in arbitration have proceeded similarly to class actions in courts, except that they are privately administered. Generally, arbitrators have followed the rules established by judicial decisions as to when an arbitration may proceed as a class arbitration, as well as the various procedural requirements. (The AAA has special rules for class action arbitration.) Generally, class arbitrations have been under federal law.

Generally, class arbitrations occur in the same kind of proceedings as judicial class actions, particularly consumer and labor claims. Examples of consumer class action claims are claims premised on actions of a credit card issuer. Examples of labor class actions include employee claims against employers for compensation not paid.

Generally, class action status has been obtained when the individual claims are too small to justify the attorney fees and costs necessary to prosecute them.

While numerically infrequent in arbitration, issues with respect to class actions in arbitration have dominated judicial arbitration decisions over the past few years — particularly the U.S. Supreme Court. Generally, the class action issues have been:

- May a claimant bring a class action arbitration when it and many others in a similar position have entered into individual arbitration agreements with the proposed respondent (*e.g.*, consumer contracts)? Does the arbitration agreement allow class actions? Are class actions within the scope of the arbitration agreement?
- Whether an arbitration agreement "explicitly or implicitly" allows class action arbitration.
- Whether clauses in arbitration agreements that waive/prohibit class action arbitration are enforceable. Are they barred by the doctrine of unconscionability or other equitable doctrine?

As will be seen hereafter, the U.S. Supreme Court has directed substantial attention to these and related issues under the FAA. As most asserted arbitration class actions by their very nature involve interstate commerce and are therefore governed by the FAA (unless the parties otherwise agree), there are relatively few Colorado or other state decisions on the issues.

§ 6.8.1—U.S. Supreme Court Decisions On Class Action Arbitration

Greentree Financial Corp. v. Bazzle[87]

In 2003, after concluding that the arbitration agreement did not expressly forbid a class action, a plurality of the U.S. Supreme Court held that the question of whether the arbitration agreement forbids class action arbitration is for the arbitrator to decide. Thus, the Court held that the FAA did not foreclose class arbitration, and the issue was one of state law contract interpretation.

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.[88]

The rules for determining whether a class action arbitration can be maintained under the FAA were dramatically changed by the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*.[89] The Court noted that because arbitration is a consensual process, only parties who consent to arbitration are bound to arbitrate, and only on the terms agreed to. Therefore, under the FAA, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[90] The Court rejected any presumption that the parties so consented by a general arbitration clause. The Court held that the arbitrator cannot decide the issue on any basis other than whether the parties agreed class action arbitration could be maintained. Thus, when the parties stipulated that the arbitration agreement does not consent to or prohibit class action, it means a class action cannot be maintained, as there is no evidence of an agreement of the parties that a class action can be maintained.

While this holding has been subject to extensive commentary and analysis, a point from the Court's opinion should be noted: Arbitration contract interpretation decisions are ripe for judicial review. But must/may a party aggrieved by an award construing the arbitration clause immediately seek *vacatur* under the FAA or risk being found to have waived the right to seek *vacatur* due to the three-month period under the FAA for seeking vacation of awards? *See* AAA rules regarding "partial final awards."

Of equal interest is the question of to what extent the *Concepcion* decision affects the application of other state law contract defenses to arbitration agreements. Clearly, there is a federal law of grounds that "exist at law or in equity for the revocation of any contract" that in some circumstances will preempt state law of defenses.

AT&T Mobility LLC v. Concepcion[91]

AT&T Mobility LLC v. Concepcion[92] held that the FAA preempts state law that renders class arbitration bans unenforceable — clauses waiving/prohibiting any right for the arbitration to proceed as a class action. Previously, many courts had held such waiver clauses to be unconscionable on multiple grounds, including in cases where it was not economically feasible for a claimant to prosecute his or her claims individually.

Normally, defenses to enforceability of arbitration clauses are decided under state law. However, the Supreme Court also held that the FAA preempted state law as to the unconscionability of clauses that prohibited class arbitration. Here, under California law, the waiver was unconscionable, but was preempted by the FAA. Therefore, the prohibition of class actions was valid and enforceable.

Thereafter, *see Direct TV, Inc. v. Imburgia*.[93]

American Express Co. v. Italian Colors Restaurant[94]

In *In re American Express Merchants' Litigation*,[95] the Second Circuit considered a mandatory arbitration clause in a commercial contract that also contained a class action waiver ("a provision which forbids the parties to the contract from pursuing anything other than individual claims in the arbitral forum"). The court held the waiver unenforceable because it "would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs."[96] The Supreme Court vacated and remanded for reconsideration in light of *Stolt-Nielsen*. The Second Circuit thereafter essentially affirmed its prior decision and remanded to the trial court for further proceedings, but stayed the mandate. *Concepcion* was then issued, holding that the FAA preempted California law barring the enforcement of class action waivers in consumer contracts. The Second Circuit still again affirmed its holding that the class action waiver was unenforceable.

That decision brought the case to the Supreme Court again, which held that the FAA does not permit courts to invalidate a contractual waiver on the ground that the plaintiff's cost of individually arbitrating a federal claim exceeds the potential recovery.

Oxford Health Plans v. Sutter, LLC[97]

Dr. Sutter filed a class action against Oxford Health Plans alleging Oxford had improperly denied, underpaid, and delayed reimbursement of insurance claims. The trial court granted Oxford's motion to compel arbitration and ordered all procedural issues be resolved by the arbitrator, including those pertaining to class certification. The arbitration clause provided, "No civil action concerning any dispute . . . shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration."

After consideration of the *Stolt-Nielsen* decision that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so,"[98] the arbitrator ruled that the clause authorized class actions: the first phrase was broad enough to encompass class actions, and the second phrase defined all disputes, which included class actions. The appellate court affirmed, holding that *Stolt-Nielsen* was distinguishable because there the parties stipulated that the arbitration clause was silent as to class arbitrations and that *Stolt-Nielsen* did not define that class action arbitration is allowed solely if the words "class actions are allowed" are used. Hence, the case arrived at the U.S. Supreme Court.

The respondent's motion to vacate asserted that the arbitrator's decision "exceeded [the arbitrator's] powers" under 9 U.S.C. § 10(a)(4). An arbitrator did not "exceed [his] powers" under FAA § 10(A)(4) where he interpreted the arbitration agreement as authorizing class arbitration; so long as the he made a good faith effort to interpret the contract. A unanimous Supreme Court upheld the arbitrator's decision, and defined the meaning and scope of § 10(a)(4):

> [T]his Court held in *Stolt-Nielsen* [559 U.S. 662 (2010)] that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis that the parties agreed to do so." . . . The parties in *Stolt-Nielsen* had stipulated that they had never reached an agreement on class arbitration. Relying on § 10(a)(4), we vacated the arbitrators' decision approving class proceedings because, in the absence of such an agreement, the arbitrators had "simply . . . imposed [their] own view of sound policy."
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> . . .
>
> "It is not enough . . . to show that the [arbitrator] committed an error — or even a serious error." *Stolt-Nielsen*, 559 U.S. at 671. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. . . . So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.[99]

The Court also reaffirmed its position that questions of arbitrability, such as whether the parties have a valid arbitration agreement or whether a concededly binding arbitration clause applies to a certain type of controversy, are presumptively for courts to decide. "A court may therefore review an arbitrator's determination of such a matter *de novo* absent 'clear and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve the dispute."[100] The Court further emphasized its statement in *Stolt-Nielsen* that the Court has not yet decided whether the availability of class arbitration is a question of arbitrability.

The appellate courts have been quick to apply the *Sutter* decision.[101]

Rent-A-Center West v. Jackson[102]

In the *Rent-A-Center* case, the U.S. Supreme Court, in a 5-4 decision, defined who decides certain arbitrability issues under the FAA. *See* Chapter 8.

DeRoos & Steward, "Legal Trends and Best Practices in Class Arbitration," 40 *Colo. Law.* 47 (Sept. 2011).

Annot., *Pre-emption by Federal Arbitration Act (9 U.S.C.A. §§ 1, et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. Fed. 1789.

§ 6.8.2—Subsequent Lower Court Decisions

As a result of, or notwithstanding, the Supreme Court's rulings, numerous lower court decisions have issued.

The District of Colorado and Tenth Circuit have rendered a few decisions, many of which were prior to the recent Supreme Court decisions.[103]

The Fourth Circuit, in *Muriithi v. Shuttle Express, Inc.*,[104] considered the district court's refusal to compel arbitration upon a finding that three provisions in the arbitration agreement were

unconscionable under state law. The court found that the *Concepcion* case required that the FAA preempt the finding that a class action waiver was unconscionable — meaning the class action waiver was enforceable. The second provision required the parties to "split" the arbitration fees, and was found by the trial court to be unconscionable as the "costs" of arbitration would be so prohibitively expensive as to deter arbitration. However, the court applied an earlier Supreme Court decision, *Green Tree Financial Corp. – Alabama v. Randolph*,[105] and held the plaintiff had not met the federal standard of proof showing prohibitive arbitration costs. The finding that the third clause — a one-year contractual statute of limitations — was unconscionable was reversed on the ground that the arbitrator, not the court, should determine the issue.

The Sixth Circuit held that availability of class arbitration constitutes a question of arbitrability to be decided by the courts — and not the arbitrators — unless the parties' arbitration agreement clearly and unmistakably provides otherwise, *i.e.*, to be decided by arbitrator.[106]

The Fourth Circuit reasoned that, unless the parties clearly and unmistakably provide otherwise, whether an arbitration agreement permits class arbitration is a question of arbitrability for the court.[107]

§ 6.8.3—Class Action Waivers

Class action waivers are usually found in contracts of adhesion. As relevant to this book, they are a part of an agreement to arbitrate all disputes arising under the contract. Thus, the drafter attempts to require all disputes arising under the contract to be arbitrated, thereby precluding a court action and particularly precluding a court class action. The drafter may also add a waiver (prohibition) of class arbitration to the agreement to preclude any class arbitrations. The result is that the non-drafting party may only arbitrate its claims, and may not bring the claims as a class action. When the individual claims are small — of a size the claimant says will not support an individual arbitration claim, the claimant has urged the waiver/prohibition of class arbitrations to be unconscionable and therefore void or voidable as it effectively leaves the claimant without a remedy for the alleged wrongs inflicted upon the claimant.

FAA

Many courts found the class arbitration waiver/prohibition to be unconscionable and therefore either struck the arbitration clause as whole or struck the waiver/prohibition clause. However, given the recent Supreme Court holdings, such clauses are now being upheld. To summarize the U.S. Supreme Court very, very generally:

- A contractual waiver of class arbitration is enforceable under the FAA when the plaintiff's cost of individually arbitrating a federal statutory claim (antitrust statutes) exceeds the potential recovery.[108]

When the arbitration agreement is silent as to whether class arbitrations can be pursued, they cannot be maintained. Consent/agreement cannot be inferred from the fact of the arbitration agreement.[109] What constitutes "silence" is now being litigated in the lower courts.

- An arbitrator determines whether class action arbitration is allowed under the arbitration agreement.[110]

• The FAA preempts state law of unconscionability of clauses waiving/prohibiting class arbitration.[111]

Now, the test of unconscionability is under the FAA, not state law, and the discussion hereafter in this section may change rapidly. Whether a class action waiver in an arbitration agreement is unconscionable is preempted by federal law has resulted in conflicting decisions.[112]

A test for validity of a class action waiver as to a statutory claim has been defined as whether the provision "effectively waives the plaintiff's substantive rights or remedies or so structures the procedures as to make it impossible for the plaintiff to 'effectively vindicate his statutory cause of action.'"[113]

Generally waiver of rights to bring a class action in an arbitration clause will be unenforceable where individual plaintiffs can prove that small individual damages would preclude any recovery and effectively insulate the defendant from any liability.[114]

The Ninth Circuit in *Shroyer v. New Cingular Wireless Services, Inc.*,[115] defined a three-part inquiry to determine whether class action waiver in a consumer contract is procedurally and substantively unconscionable:

> 1) [W]hether the agreement is "a consumer contract of adhesion" drafted by a party that has superior bargaining power;
> 2) [W]hether the agreement occurs "in a setting in which disputes between the contracting parties predictably involve small amounts of damages"; and
> 3) [W]hether "it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[116]

Generally, however, the validity of a class action waiver in an arbitration clause should be analyzed no differently than a waiver of class action in litigation.

For example, a class action waiver requiring individual arbitration when applied to antitrust claims was held unconscionable and void as its enforcement would impose prohibitive expert costs that would preclude vindication of individual plaintiffs' Sherman Act claims.[117] The court expressly limited its holding to cases where individual plaintiffs can affirmatively demonstrate that small individual damages would preclude any recovery and effectively insulate a business from liability.

• Annot., *Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R.6th 145.

See § 5.4, "Void, Voidable, and Unenforceable Provisions in an Agreement to Arbitrate."

§ 6.8.4—Colorado State Law Decisions

Rarely are arbitration class actions governed by state law since, by nature, such claims involve interstate commerce. It is unlikely that adhesion arbitration agreements will be written allowing class actions, or even applying Colorado law, which might be contrary to class arbitration law under the FAA, since such agreements are normally drafted by the party having the superior bargaining power who does not want class arbitration.

In *Medina v. Sonic-Denver T, Inc.*,[118] the employment agreement provided for a waiver of class actions and class arbitrations, and that all disputes must be resolved by binding arbitration under the FAA. The Colorado Court of Appeals applied *Stolt-Nielsen*,[119] saying a party may not be compelled to submit to class arbitration because "parties may specify with whom they choose to arbitrate their disputes."[120] Alternatively, the court stated that even if the class arbitration waiver was unenforceable, the arbitration agreement did not contain the defendant's consent to arbitration as required by *Stolt-Nielsen.*

§ 6.8.5—Collective Proceedings By An Association On Behalf Of Its Members

Does *Concepcion* apply to actions by an organization on behalf of its members? Obviously, this situation has a lot of dissimilarities from a class action. For example, the identity of every member is known.

The First Circuit held it was an issue for the arbitrator as to whether an association of regional franchise holders could proceed in arbitration representing its members.[121] The court found that it could not find as a matter of law that *Stolt-Nielsen* barred the association's collective action, because it may be consolidated. A New Mexico appellate court held that a trial court had authority under its equivalent statute to order consolidation even though no arbitration had yet been commenced, provided the conditions of the statute were fulfilled.[122]

§ 6.8.6—Consolidating Claims

Under the CRUAA, C.R.S. § 13-22-210 (2016), and AAA rules, in certain circumstances separate arbitration proceedings may be consolidated.[123]

The FAA does not have any provision relating to consolidation of claims.

See §§ 8.6.6, 8.7.6, and 13.3.3.

§ 6.8.7—Procedures For Class Action Allegations

Generally, and absent specific agreement of the parties, whether a claim can proceed as a class action in arbitration is for the arbitrator to decide.[124]

If an arbitrator denies class action certification, apparently he or she can issue a partial final award to that effect.[125] The claimant can then move to vacate that award, but must do so on one of the statutory grounds. *See* Chapter 17.

§ 6.9 • ARBITRATIONS TO WHICH GOVERNMENTAL ENTITIES ARE A PARTY

Generally, state and federal governments may arbitrate disputes with persons and entities. This topic is covered in Chapter 22, "ADR in the State and Federal Governments, Agencies, and Subdivisions."

The question often arises as to whether political subdivisions can submit issues to binding arbitration. The quick answer is yes; however, the subject matter of such submissions in general is

limited to issues and disputes that could be decided by a court. A governmental body may not delegate its legislative powers and duties to an arbitrator.

For example, the City and County of Denver has an arbitration-like procedure for resolution of disputes arising out of its contracts. Binding employee-grievance arbitration has been upheld as not being a delegation of legislative powers.[126]

In public entity arbitrations, the arbitration and panel deliberation may be subject to Open Meeting Acts.[127]

§ 6.10 • ARBITRATION OF INDIAN CLAIMS

Generally, Indian tribes may enter into contracts containing arbitration clauses, and it will not be interpreted to be a waiver of sovereign immunity.[128] However, in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[129] an Indian tribe entered into a construction contract providing that all disputes would be decided by arbitration in accordance with AAA rules. The provision further provided that any federal or state court having jurisdiction could enter judgment on the arbitration award. The contract provided it was to "be governed by the law of the place where the Project is located." The project, being in Oklahoma, was governed by the Oklahoma Uniform Arbitration Act, which provided that the making of an arbitration agreement conferred jurisdiction on the courts of Oklahoma with respect thereto. The U.S. Supreme Court held that these terms constituted a waiver of the tribe's sovereign immunity with respect to enforcement of an arbitration award.

• Annot., *Construction and Application of Fed. Tribal Exhaustion Doctrine*, 186 A.L.R. Fed. 71.

§ 6.11 • ARBITRATION OF CLAIMS IN BANKRUPTCY

The impact of bankruptcy laws on arbitration is generally the same as the impact on a judicial proceeding. Generally, under 11 U.S.C. § 362 (Bankruptcy Code), the automatic stay of proceedings applies only to claims against the debtor, and not to co-defendants. Generally, it does not apply to claims of the debtor that do not impair assets of the debtor.

When one party to an arbitration agreement is in bankruptcy, it might be anticipated that special rules with respect to enforcement of arbitration might not apply. In fact, that may not be the case. For example, in *Mintze v. American General Financial Services, Inc.*,[130] a Chapter 13 debtor-borrower sought to compel the lender to arbitrate his pre-petition rescission of a mortgage under the Truth in Lending Act, as well as claims under the consumer protection laws. The Third Circuit held that regardless of whether it was a core or non-core proceeding, the issue was whether "Congress intended to preclude a waiver of remedies for the statutory rights at issue," *i.e.*, whether Congress intended to establish an exception to the FAA mandate to enforce arbitration agreements, even federal statutory claims. Here, the court found no such exception and enforced the arbitration clause.

Most courts at least compel arbitration in non-core bankruptcy matters.[131] On the other hand, other courts have held that arbitration clauses need not be applied to "core" proceedings if doing so would conflict with provisions of the Bankruptcy Code.[132]

Thus, the determinative issue, as with all statutory claims, is whether, given the federal policy in favor of arbitration, Congress intended to limit or preclude a waiver of judicial remedies for the statutory rights or intended to prohibit or limit the waiver of the judicial forum.[133] The burden is on the party opposing arbitration to show that Congress intended to limit waiver of the judicial forum or that there is a conflict between the FAA and the statute's underlying purpose.[134]

1) The automatic stay provision of the Bankruptcy Code applies to arbitration proceedings, as well as judicial proceedings.[135]
2) An arbitration clause survives a contract rejected by the bankruptcy debtor.[136]
3) Generally, preferential transfer claims are not arbitrable.[137]

- *See* § 14.8.
- Annot., *Disposition by Bankruptcy Court of Request for Arbitration Pursuant to Arbitration Agreement to which Debtor in Bankruptcy is a Party*, 72 A.L.R. Fed. 890.
- Annot., *Arbitration of Disputes in Bankruptcy Case Proceedings*, 63 A.L.R. Fed.2d 327.

It is beyond the scope of this book to define when an arbitration clause will be enforced as applied in bankruptcy court. However, a 2015 U.S. District Court for the District of Colorado decision, *Larson v. Swift Rock Financial, Inc.*,[138] provides an informative introduction.

In the *Larson* case, the contract between the debtor and defendant contained an arbitration clause. First, the trustee sought to recover sums paid by the debtor to the defendant, and the defendant moved to compel arbitration. On the first clause, under 11 U.S.C. § 548(a)(1)(B) the court found it was a claim that could not be asserted by the debtor, but rather exclusively a claim of the trustee on behalf of the creditors. As the trustee was not a party to the arbitration clause, it is not applicable to the $548 claim of the trustee.

The second claim (for recovery of the same money), was under the Colorado Uniform Debt Management Services Act. The court held this Act was not preempted by the FAA. "A bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code."[139] The trustee was simply standing in the shoes of the debtor.

- Annot., *Disposition by Bankruptcy Court of Request for Arbitration Pursuant to Arbitration Agreement to Which Debtor in Bankruptcy is a Party*, 72 A.L.R. Fed. 890.
- Annot., *Arbitration of Disputes in Bankruptcy Case Proceedings*, 63 A.L.R. Fed.2d 327.

§ 6.12 • ARBITRATION OF DOMESTIC RELATIONS ISSUES

The CRUAA appears to apply to arbitrations under C.R.S. § 14-10-128.5.[140]

See Center for Out-of-Court Divorce, http://centerforoutofcourtdivorce.org/ (seeking to offer families a more amenable method to reach a divorce, with collaborative parenting plans and emotional, mental health, and financial services to ease the process).

- Annot., *Validity & Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R.5th 69.

§ 6.12.1—Arbitration Of Child Custody Issues

See C.R.S. §§ 14-10-128.5 and 14-10-128.1, and *see generally In re Marriage of Rozzi.*[141]

§ 6.13 • ARBITRATION OF DISPUTES BETWEEN ATTORNEY AND CLIENT

As to the ethical considerations of an agreement between attorney and client to arbitrate disputes, *see* Colorado Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (1998) and ABA Ethics Opinion 02-425, "Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims."

A Florida appellate court held that an arbitration provision in a law firm's contingent fee agreement was enforceable by the firm only if it complied with the state's ethical rule on binding arbitration clauses and if the firm had a valid reason for withdrawing from its representation of the client.[142]

- Annot., *Validity & Construction of Agreement Between Attorney & Client to Arbitrate Disputes Arising Between Them*, 26 A.L.R.5th 107.
- Annot., *Validity of Statute or Rule Providing for Arbitration of Fee Disputes Between Attorneys and Their Clients*, 17 A.L.R.4th 993.
- Evans, Klevens & Lipinsky, "Enforcing ADR Provisions in Fee Agreements," 44 *Colo. Law.* 85 (Sept. 2015).

§ 6.14 • ARBITRATION OF TORT CLAIMS

Generally, a broadly worded arbitration clause includes tort claims.[143] Thus, a clause providing that all disputes between the parties concerning the provisions of a contract shall be submitted to arbitration includes not only breach of contract claims but also tort claims concerning the contract.[144] The Colorado Supreme Court explained that "'[t]he factual allegations which form the basis of the claim asserted, rather than the legal cause of action' pleaded, determines 'whether a particular dispute falls within the reach of the [arbitration] clause.'"[145]

§ 6.15 • ARBITRATION OF HEALTH CARE DISPUTES

See §§ 4.3.3 and 4.3.12 as to preemption and reverse preemption, and 5.6 for health-care agreements.

- Annot., *Validity, Construction & Application of Arbitration Agreement in Contract for Admission to Nursing Home*, 50 A.L.R.6th 187.
- Annot., *Arbitration of Medical Malpractice Claims*, 24 A.L.R.5th 1.
- Annot., *Medical Malpractice: Who are "Health Care Providers," or the Like, Whose Actions Fall Within Statutes Specifically Governing Actions & Damages for Medical Malpractice*, 12 A.L.R.5th 1.
- Schleppenbach, "Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents," 22 *Elder. L.J.* 141 (2014).

§ 6.16 • FINRA ARBITRATION

Pursuant to § 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(b)(1), and Rule 19 b-4 (17 C.F.R. § 240.19b-4), the Financial Industry Regulatory Authority, Inc. (FINRA) was created to provide self-regulation of the U.S. securities market. FINRA has adopted provisions for the arbitration of certain disputes within the securities industry, including the Code of Arbitration Procedure for Industry Disputes. Thus, FINRA administers securities arbitration of disputes between broker-dealers and their employees or customers. General information about FINRA can be found at www.finra.org. Information about its dispute resolution process can be found at www.finra.org/ArbitrationAndMediation/index.htm.

A forum selection clause in a broker-dealer agreement trumps the arbitration rule of FINRA.[146]

§ 6.17 • BIBLIOGRAPHY

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NOTES

1. *See also* AAA Labor Arbitration Rules and AAA National Rules for the Resolution of Employment Disputes.

2. *See generally Mitri v. Arnel Mgmt. Co.*, 69 Cal. Rptr. 3d 223 (Cal. Ct. App. 2007).

3. *Deaton v. Overstock.com, Inc.*, 2007 U.S. Dist. LEXIS 94436, 2007 WL 4569874 (S.D. Ill. Dec. 27, 2007).

4. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). *Compare Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33-35 (1991).

5. *E.g.*, *Brown v. St. Paul Travelers Cos.*, 559 F. Supp. 2d 288 (W.D.N.Y. 2008), *aff'd*, 331 F. App'x 68 (2d Cir. 2009); *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So.2d 658 (Fla. App. 2008).

6. *Jackson v. Hino Motors Mfg. USA, Inc.*, 2008 U.S. Dist. LEXIS 83271, 2008 WL 4425300 (E.D. Ark. Sept. 25, 2008).

7. *Pearson Dental Supplies, Inc. v. Super. Court*, 82 Cal. Rptr. 3d 154 (Cal. Ct. App. 2008), *review granted and opinion superseded*, 196 P.3d 220 (Cal. 2008), *rev'd*, 229 P.3d 220 (Cal. 2010).

8. *Swarbrick v. Umpqua Bank*, 2008 U.S. Dist. LEXIS 73678, 2008 WL 3166016 (E.D. Cal. Aug. 5, 2008).

9. *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007). *But see Massie v. Ralphs Grocery Co.*, 2012 Cal. App. Unpub. LEXIS 2508, 2012 WL 1078562 (Cal App. April 2, 2012), and *Kilgore v. KeyBank, N.A.*, 673 F.3d 947 (9th Cir. 2012).

10. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002). *See also Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286 (11th Cir. 2005); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

11. *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348 (8th Cir. 2005).

12. *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477 (S.D.N.Y. 2008).

13. *Id.* at 483. *Compare Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (interstate services by traveling basketball player does not involve goods and therefore is not within the exception) *with Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593-94 (3d Cir. 2004) (supervisor falls within the exception).

14. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), including Title VII claims. Only employment contracts of transportation workers are exempt from the FAA. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994).

15. *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001). As to EEOC claims, see *Dumais v. American Golf Corp.*, 299 F.3d 1216 (10th Cir. 2002).

16. *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1 (1st Cir. 2005); *cf. EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). *But see Scaffidi v. Fiserv, Inc.*, 2006 U.S. Dist. LEXIS 50546, 2006 WL 2038348 (E.D. Wis. July 20, 2006).

17. *Cf. Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005).

18. *See Austin v. US West, Inc.*, 926 P.2d 181 (Colo. App. 1996); *Cabs, Inc. v. Delivery Drivers, Warehousemen & Helpers Local Union No. 435*, 566 P.2d 1078 (Colo. App. 1977).

19. *See* AAA Protocol for Consumer Disputes.

20. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Gergel v. High View Homes, L.L.C.*, 58 P.3d 1132 (Colo. App. 2002).

21. *Wall Street Journal*, July 22, 2009.

22. *See generally* § 7.6. *See generally* Berner & Grow, "Banks v. Consumers (Guess Who Wins)," *Business Week*, June 5, 2008.

23. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

24. *Id*.

25. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). *See* §§ 6.5.1-6.5.2, and 6.5.17, and 6.5.4 and 6.5.8.

26. *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

27. *Id.* at 79-80 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

28. *Pollard v. ETS PC, Inc.*, 186 F. Supp. 3d 1166 (D. Colo. 2016) (quoting *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999)).

29. *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366 (D. Colo. 2014), *aff'd*, 811 F.3d 371 (10th Cir. 2016).

30. *Green Tree Fin. Corp – Alabama v. Randolph*, 531 U.S. 79, 89 (2000).

31. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

32. *Am. Express Co. v. Italian Rest.*, 133 S. Ct. 2304 (2013).

33. *Nesbitt*, 74 F. Supp. 3d at 1374 (citing *Daugherty v. Encana Oil & Gas (USA), Inc.*, 2011 U.S. Dist. LEXIS 76802, 2011 WL 2791338, at *11 (D. Colo. July 15, 2011)).

34. *See also Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139 (10th Cir. 2014).

35. *Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

36. *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999).

37. *Booker*, 413 F.3d at 81. *But see CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

38. *Perez v. Hospitality Ventures-Denver LLC*, 245 F. Supp. 2d 1172 (D. Colo. 2003).

39. *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999).

40. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *see also Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995).

41. *Mitsubishi Motors Corp.*, 473 U.S. at 628; *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir. 1995).

42. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (pregnancy discrimination); *cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination).

43. *Pacificare Health Sys. Inc. v. Book*, 538 U.S. 401 (2003).

44. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

45. *See Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343 (6th Cir. 2006); *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002).

46. *Lambdin v. Dist. Court*, 903 P.2d 1126 (Colo. 1995).

47. *Perry v. Thomas*, 482 U.S. 483 (1987).

48. *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771, 774 (Colo. App. 2000). *See also Grohn v. Sisters of Charity Health Servs. Colo.*, 960 P.2d 722 (Colo. App. 1998).

49. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (Title VII civil rights claim for unlawful discrimination is subject to compulsory arbitration and is not precluded by FAA § 1); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (statutory antitrust claims); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) (bankruptcy adversary proceeding).

50. *Wilko v. Swan*, 346 U.S. 427 (1953); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823 (10th Cir. 1978); *Coffey v. Dean Witter Reynolds, Inc.*, 640 F. Supp. 874 (D. Colo. 1986).

51. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). *See also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

52. For additional information, see Stoneman, "Securities Arbitration Part I: A Primer," 27 *Colo. Law.* 73 (Sept. 1998), and Stoneman, "Securities Arbitration Part II: A Hypothetical Securities Arbitration Case," 27 *Colo. Law.* 61 (Nov. 1998).

53. *See generally Citigroup Global Mkts. Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 2008 U.S. Dist. LEXIS 92043, 2008 WL 4891229 (S.D.N.Y. Nov. 12, 2008), *aff'd*, 598 F.3d 30 (2d Cir. 2010).

54. *Guyden v. Aetna, Inc.*, 544 F.3d 376 (2d Cir. 2008).

55. *Stone v. Vail Resorts Dev. Co.*, 2010 U.S. Dist. LEXIS 80849, 2010 WL 2653314 (D. Colo. July 1, 2010); *Triple Crown at Observatory Vill. Ass'n v. Vill. Homes of Colo., Inc.*, 328 P.3d 275 (Colo. App. 2013); *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007); *Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes*, 2015 COA 65, *cert. granted*, 2016 Colo. LEXIS 618, 2016 WL 3453507 (Colo. 2016) (the right to a civil action under CCPA § 6-1-113 was not made non-waivable under the statute). *Contra Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 18 (Colo. App. 2010), and *Ingold*, 159 P.3d at 126.

56. *Gergel v. High View Homes, LLC*, 996 P.2d 233 (Colo. App. 1999).

57. *Cf. Eagle Ridge Condo. Ass'n v. Metro. Builders, Inc.*, 98 P.3d 915 (Colo. App. 2004). *But see Ingold v. AMICO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007).

58. *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011), *opinion withdrawn*, 676 F.3d 867 (9th Cir. 2012); enforced under FAA: *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002).

59. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006), *relying on Mitsubishi Motor Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985).

60. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007).

61. *Id.*

62. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

63. *Id.* at 102 (emphasis original).

64. *Koridze v. Fannie Mae Corp.*, 593 F. Supp. 2d 863 (E.D. Va. 2009).

65. 12 U.S.C. § 5518(b).

66. *Green Tree Fin. Corp.*, 531 U.S. at 88-92.
67. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).
68. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 243 (1987).
69. *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139 (11th Cir. 2014).
70. *Lambdin v. Dist. Court*, 903 P.2d 1126 (Colo. 1995).
71. *WB, The Building Co., LLC v. El Destino L.P.*, 257 P.3d 1182 (Ariz. App. 2011).
72. *Smith v. Pinnamaneni*, 254 P.3d 409 (Ariz. App. 2011).
73. *Lindenstadt v. Staff Builders, Inc.*, 55 Cal. App. 4th 882, 64 Cal.Rptr.2d 484 (Cal. App. 1997).
74. *Czarnik v. Wendover Fin. Servs.*, 870 N.E.2d 875 (Ill. App. Ct. 2007).
75. *Bhd. of Maint. of Way Employees Div. v. Burlington N. Santa Fe Ry. Co.*, 596 F.3d 1217 (10th Cir. 2010).
76. *Park Lane Props., Inc. v. Fisher*, 5 P.2d 577, 579 (Colo. 1931).
77. *Brendsel v. Winchester Constr. Co.*, 875 A.2d 789 (Md. App. 2005).
78. *Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928, 930 (Colo. 1990). *See* C.R.S. § 38-22-110; *Paul Mullins Constr. Co.*, 628 P.2d 113, 114 (Colo. App. 1980); *H.R.H. Prince Ltc. Faisal M. Saud v. Batson-Cook Co.*, 291 S.E.2d 249 (Ga. App. 1982); *Brendsel v. Winchester Constr. Co.*, 875 A.2d 789 (Md. App. 2005), *aff'd*, 898 A.2d 472 (Md. 2006).
79. *Sure-Shock Elec., Inc. v. Dramond Lofts Venture, LLC*, 259 P.3d 546 (Colo. App. 2011).
80. *Id.* at 548-49.
81. *Id.* at 549.
82. *Id.*
83. 40 U.S.C. § 3131; *U.S. ex rel. Tanner v. Daco Const., Inc.*, 38 F. Supp. 2d 1299, 1302 (N.D. Okla. 1999) (*dictum*).
84. Annot., *Filing of Mechanic's Lien or Preceding for its Enforcement as Affecting Right to Arbitration*, 73 A.L.R.3d 1066.
85. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004). *But see Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) ("provision of the arbitration agreements barring the recovery of trebel damages is invalid . . . because it prevents the vindication of a federal statutory right"). *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704 (10th Cir. 2011).
86. *Kristian*, 446 F.3d at 29.
87. *Greentree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).
88. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
89. *Id.*
90. *Id.* at 684 (emphasis original).
91. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).
92. *Id.*
93. *Direct TV, Inc. v. Imburgia*, 136 U.S. 339 (2015).
94. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).
95. *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009).
96. *Id.* at 304.
97. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).
98. *Id.* at 2067.
99. *Id.* at 2067-68 (citation omitted).
100. *Id.* at 2068 n. 2.
101. *Southern Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013), and *Wolf v. Sprenger & Lang, PLLC*, 70 A.2d 225 (D.C. Ct. App. 2013), *amended and superseded*, 86 A.3d 1121 (D.C. 2014).
102. *Rent-A-Center West v. Jackson*, 561 U.S. 63 (2010).
103. *See Ornelas v. Sonic-Denver T, Inc.*, 2007 U.S. Dist. LEXIS 6214, 2007 WL 274738 (D. Colo. Jan. 29, 2007) (class action waiver upheld as it would not preclude plaintiff and other proposed class members from vindicating their statutory rights); *Dent v. Encana Oil & Gas, Inc.*, 166 F. Supp. 3d 1210 (D. Colo. 2016) (Parties' agreement assigned issue of whether collective and class action claims could proceed in arbitration to the arbitrator).
104. *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173 (4th Cir. 2013).

105. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

106. *Huffman v. Hilltop Cos.*, 747 F.3d 391 (6th Cir. 2014).

107. *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016).

108. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

109. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

110. *Id.*

111. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

112. *Compare Tallman v. Eighth Judicial Dist. Ct.*, 359 P.3d 113 (Nev. 2015), *with Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). *See also* Annot., *Validity of Arbitration Clause Precluding Class Action*, 13 A.L.R.6th 145.

113. *Wong v. T-Mobile USA, Inc.*, 2006 U.S. Dist. LEXIS 49444, at *7-8, 2006 WL 2042512 (E.D. Mich. July 20, 2006) (internal citations omitted). S*ee also Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

114. *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009) (antitrust claims).

115. *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007) (internal quotations and citations omitted).

116. *Id.* at 983.

117. *In re Am. Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009). *See also Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009).

118. *Medina v. Sonic-Denver T, Inc.*, 252 P.3d 1216 (Colo. App. 2011).

119. *Stolt-Nielsen SA*, 559 U.S. at 683.

120. *Medina*, 252 P.3d at 1220.

121. *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.*, 683 F.3d 18 (1st Cir. 2012).

122. *Lyndoe v. D.R. Horton, Inc.*, 287 P.3d 357 (N.M. App. 2012).

123. *Id.*

124. *Dent v. Encana Oil & Gas, Inc.*, 166 F. Supp. 3d 1210 (D. Colo. 2016). *See also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 44 (2003) (plurality opinion); *Fischer v. General Steel Domestic Sales, LLC*, 2010 U.S. Dist. LEXIS 108223, 2010 WL 3791181 (D. Colo. Sept. 22, 2010); *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016).

125. *Haro v. NCR Corp.*, 2008 U.S. Dist. LEXIS 54620, 2008 WL 2323785 (S.D. Ohio June 3, 2008).

126. *City & County of Denver v. Denver Firefighters Local No .858*, 663 P.2d 1032 (Colo. 1983).

127. *See Page v. MiraCosta Cmty. Coll. Dist.*, 102 Cal. Rptr. 3d 902, 180 Cal. App. 4th 471 (Cal. App. 2001).

128. *See Big Valley Band of Pomo Indians v. Superior Court of Lake County*, 35 Cal. Rptr.3d 357 (Cal. App. 2005).

129. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001). *See also Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 2007 U.S. Dist. LEXIS 67422, 2007 WL 2701995 (D. Colo. Sept. 12, 2007), *rev'd*, 629 F.3d 1173 (10th Cir. 2010). *Compare Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1114 (Colo. 2010), *with Cal. Parking Servs., Inc. v. Soboba Band of Luiseno Indians*, 197 Cal.App.4th 814 (Cal. App. 2011).

130. *Mintze v. Am. Gen. Fin. Svcs., Inc.*, 434 F.3d 222 (3d Cir. 2006); *see also MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006).

131. *See generally In re Nat'l Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997).

132. *Id.*; *In re Am. Freight Sys., Inc.*, 164 B.R. 341 (D. Kan. 1994); *In re Blanchard Transp. Servs.*, 2008 Bankr. LEXIS 664, 2008 WL 61937 (Bankr. E.D.N.C. Feb. 29, 2008).

133. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

134. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

135. *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252 (3d Cir. 2006).

136. *In re Fleming Cos.*, 2007 U.S. Dist. LEXIS 18739, 2007 WL 788921 (D. Del. March 16, 2007); *In re Mintze*, 434 F.3d 222 (3d Cir. 2006).

137. *Bethlehem Steel Corp. v. Moran Towing Corp.*, 390 B.R. 784 (Bankr. S.D.N.Y. 2008).

138. *Larson v. Swift Rock Fin., Inc.*, 545 B.R. 47 (D. Colo. 2015).

139. *Id*. at 53 (quoting *In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021 (9th Cir. 2012), *amended and superseded*, 677 F.3d 869 (9th Cir. 2012)).

140. *Vanderborgh v. Krauth*, 370 P.3d 661 (Colo. App. 2016).

141. *In re Marriage of Rozzi*, 190 P.3d 815 (Colo. App. 2008).

142. *Feldman v. Davis*, 53 So.3d 1132 (Fla. App. 2011).

143. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116, 122 (Colo. 2007).

144. *Id.*

145. *Id.* (quoting *City & County of Denver v. Dist. Court in & for City & County of Denver*, 939 P.2d 1353, 1364 (Colo. 1997)).

146. *Goldman Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210 (2d Cir. 2014).