No. 20-1435

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF NEW YORK,

Petitioner-Appellee,

v.

FREDERICK BAKER, LOUIS VARELA,

Respondents-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

APPELLANTS' INITIAL BRIEF

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STATEMENT OF JURISDICTION

On December 4, 2017, Appellee American Family Life Assurance Company of New York ("Aflac") filed a petition with the U.S. District Court for the Eastern District of New York to compel Appellants, Aflac's former sales associates Frederick Baker and Louis Varela (the "Associates"), to arbitrate their claims against Aflac alleged in their draft class action complaint shared with Aflac in the course of settlement discussions (the "Complaint"), and amended its petition on December 14, 2017 (as amended, the "Petition," Doc. 11-1, pp. A59-69).

The District Court had original federal question jurisdiction over the Petition pursuant to 28 U.S.C § 1331, predicated by Aflac on the federal statutory claims alleged by the Associates in their Complaint.[1]

[1] In particular, the Petition states: "This Court has jurisdiction over this action pursuant to 28 U.S.C §1331 and Vaden v. Discover Bank, 556 U.S. 49, 62 (2009), in that this is a civil action ***to compel arbitration over disputes arising under various federal statutes*** . . . raising issues involving several federal laws, including (1) the Employee Retirement Investment Security Act, 29 U.S.C. §1132(a)(1)(B); (2) the Federal Insurance Contributions Act, 26 U.S.C. §3101 et seq. ("FICA"); and (3) the Federal Unemployment Tax Act, 26 U.S.C.§3301 ("FUTA"), among other claims." Doc. 11-1, p. A62 (emphasis added throughout unless indicated otherwise). Elsewhere, the Petition states: "the Draft Complaint asserts a breach of the federal Employee Retirement Investment Security Act arising from, among other things, the fact that 'Aflac misclassified its Sales Associates as independent contractors . . .' ***Because this is a claim arising under federal law and from a dispute relating to the Associate's Agreements, it is clearly covered by the arbitration provision***." Id., p. A66.

This appeal arises from the Memorandum and Order issued by the Honorable LaShann DeArcy Hall, U.S. District Judge, on March 31, 2020, and the Judgment entered on April 1, 2020, on remand from this Court's summary order vacating the District Court's prior judgment compelling arbitration in American Fam. Life Assur. Co. of New York v. Baker, 778 F. App'x 24 (2d Cir. 2019). The Court's jurisdiction to consider this appeal arises under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The issue on this appeal is whether Aflac's standard-form Arbitration Agreement should be condemned as a "prospective waiver of [Aflac's sales associates'] federal statutory rights" and invalidated in its entirety as an "integrated scheme to contravene public policy" and a "farce."

STATEMENT OF THE CASE

I. Procedural history

On December 4, 2018, Aflac commenced this action in the District Court to compel the Associates to arbitrate all claims alleged in their Complaint, including their federal statutory claims, pursuant to Aflac's Arbitration Agreement as written, knowing full well that Paragraph 10.7.1 of its Agreement prohibited the Associates from arbitrating those federal statutory claims. (On the same day, Aflac's affiliate initiated a parallel action to compel arbitration against seven of Baker's and Varela's fellow sales associates, their co-plaintiffs on the Complaint,

and ultimately succeeded in enforcing the Arbitration Agreement as written in the Eleventh Circuit, American Fam. Life Assur. Co. of Columbus v. Hubbard, No. 18-11869 (11th Cir. Jan. 7, 2019)).

On June 4, 2018, the District Court enforced the Arbitration Agreement as written and compelled the Associates to arbitrate all their claims, including federal statutory claims. The Associates timely appealed, arguing that the Arbitration Agreement was unconscionable and unenforceable because, among other things, its Paragraph 10.7.1 prohibited arbitration of the Associates' federal statutory claims and thus amounted to an unconscionable "prospective waiver" of those claims.

Aflac, for its part, urged this Court to enforce the Arbitration Agreement as written, including its Paragraph 10.7.1. Had this Court then agreed with Aflac, the Associates would have been required to retain and pay their party arbitrator (up to $500 per hour, as Aflac conceded) as the Arbitration Agreement requires them to do to pursue their claims in arbitration – which they would never have to pay in any federal or state court and which in itself erects a significant barrier to the effective vindication of the sales associates' federal rights, unsurmountable for many, including Baker and Varela who attested in their affidavits (filed in the Georgia action) that they could not afford arbitration costs.[2]

[2] This cost-sharing requirement could make arbitration prohibitively expensive for many sales associates. See Lisa A. Nagele-Piazza, Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker, 23 U. Miami

Those sales associates who could afford to pay their party arbitrator in addition to paying their attorney would nevertheless see their federal statutory claims dismissed pursuant to Paragraph 10.7.1 of the Agreement and quietly extinguished in the strict confidentiality of the arbitration proceedings.

This Court, however, rejected Aflac's attempt to enforce the Arbitration Agreement as written and vacated the Court's June 4, 2018 order, remanding for "a more sufficient development of the record" on the issue whether "the Agreement is substantively unconscionable because Paragraph 10.7 of the Agreement bars sales associates from pursuing certain state and federal statutory claims against Aflac NY." Baker, 778 F. App'x at 28.

On remand, the District Court limited the Associates to a single 10-page brief as requested by Aflac, dismissing their own request for 20 pages as "patently absurd and an apparent effort to take advantage of the generosity of the Second Circuit." Doc. A, p. A6.[3]

Bus. L. Rev. 39, 46 (2014) ("By the time the matter is resolved, arbitration costs and fees can amount to thousands of dollars, as one estimate shows the average cost of arbitrating an employment claim is approximately $20,000.00. In contrast, while litigation can be expensive, there are no required fees beyond the initial filing fee, and thus employee-claimants likely will not experience the same cost barriers in litigation as they may in arbitration.").

[3] The District Court issued its order prior to this Court's August 6, 2019 mandate, following which, on August 7, 2019, the District Court vacated that order as invalid while simultaneously reaffirming its substance. Doc. A, p. A7.

The Associates argued in their brief that (1) Aflac's Arbitration Agreement constituted an impermissible "prospective waiver" of the Associates' federal statutory rights and should be condemned as such under the unbroken line of the Supreme Court precedents; and (2) this "plainly unconscionable" provision taints the entire Arbitration Agreement and shows it to be an "integrated scheme to contravene public policy" not subject to judicial reformation under the on-point authorities from other Circuits and this Court's *dicta* in Ragone v. Atlantic Video, 595 F.3d 115 (2d Cir. 2010). Doc. 23, pp. A70-85.

In response to the Associates' showing, Aflac offered to waive the enforcement of Paragraph 10.7.1 in this particular case while maintaining that the Paragraph is otherwise valid, enforceable and "not substantively unconscionable." Doc. 25, pp. A95. The District Court readily accepted Aflac's waiver, held the waived Paragraph "***effectively severed***" from the rest of the Agreement, and enforced the Agreement so reformed by Memorandum and Order issued on March 31, 2020. Doc. 27, pp. A102-07. On April 1, 2020, the Clerk entered the Judgment, Doc. 28, p. A108, leading to this appeal.

II. Factual Background

Paragraph 10.1 of the Agreement requires Aflac's sales associates to arbitrate any claims "arising under federal, state or local laws, statutes or

ordinances." Doc. 1-6, p. A29 (Baker's Arbitration Agreement).[4] This Paragraph 10.1 shuts the courthouse doors to Aflac's sales associates such as Baker and Varela seeking to bring their federal statutory claims against Aflac, sending them to arbitration.

Once in arbitration, however, these claims would have been dismissed pursuant to Paragraph 10.7.1 of the Agreement that squarely precludes Aflac's associates from arbitrating them (Doc. 1-6, p. A31):

> With the exception of a claim that is based upon misconduct by Aflac that is willful, malicious or fraudulent, any claim or action by Associate based upon any act, error or omission by Aflac or any of its past or present officers, directors, employees, associates, coordinators, agents or brokers ***shall be limited to a claim for breach of contract*** and the remedies and liabilities arising thereunder.

This Paragraph on its face prohibits Aflac's associates from arbitrating any federal or state statutory claim not based on willfulness, malice or fraud, including the ERISA, FICA and FUTA claims alleged in the Associates' Complaint.

Read together, Paragraphs 10.1 and 10.7.1 operate as a "prospective waiver" of Aflac's sales associates' rights to pursue have their federal statutory claims in ***any*** forum, judicial and arbitral.

[4] Varela's Arbitration Agreement is identical, see Doc. 1-7, pp. A54-56.

Aflac had first attempted to enforce its unconscionable Arbitration Agreement as written in the District Court proceeding, succeeding in its attempt and leading to the first appeal.

On appeal, Aflac urged this Court to uphold the Agreement as written, without any waivers. After this Court vacated the District Court's judgment and remanded for a "more sufficient development of the record" on this very issue, Aflac continued to insist on remand that paragraph 10.7.1 was valid and enforceable, but stated (Doc. 25, p. A93):

> Only Respondents have suggested that Paragraph 10.7.1 might bar the statutory claims that are the subject of the Petition. Indeed, Aflac filed the Petition in order to compel Respondents to arbitrate same. For the avoidance of doubt, however, Aflac states for the record that it will not assert in the future—here or in arbitration—that the limitation of liability language in Paragraph 10.7.1 is a defense to the Respondents' Draft Complaint.

This chronology strongly suggests that Aflac's last-minute offer to forego the enforcement of Paragraph 10.7.1 in this action was made opportunistically, solely to avoid judicial scrutiny and potential invalidation of its Arbitration Agreement in its entirety, and without conceding that the provision is unlawful (indeed, maintaining its validity throughout).

Nevertheless, the District Court again sided with Aflac and upheld the Arbitration Agreement by accepting Aflac's forbearance offer, and going further

by holding Paragraph 10.7.1 "effectively severed" from the rest of the Agreement. Doc. 27, p. A106.

III. Standard of review

The District Court's order compelling arbitration is reviewed *de novo*. See Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F. 2d 840, 846 (2d Cir. 1987).

ARGUMENT

1. Legal standards

The Supreme Court has consistently ruled that the Federal Arbitration Act saving clause, 9 U.S.C. § 2, "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339 (2011); Doctor's Associates, Inc. v. Casarotto, 517 U. S. 681, 687 (1996); Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1622 (2018) ("The FAA saving clause by its terms allows courts to refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract.'").

"Whether or not the parties have agreed to arbitrate is a question of state contract law." Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012). "The party seeking arbitration has the burden of establishing an agreement to arbitrate," Resorb Networks, Inc. v. YouNow.com, 30 N.Y.S.3d 506, 510 (N.Y. Sup. Ct. 2016), and "the court must draw all reasonable inferences in favor of the non-moving party." Nicosia v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir.

2016). "A party that has signed a contract may be relieved from its attendant obligations if a court finds . . . that the contract is unconscionable. . . ." Zhu v. Hakkasan, 291 F. Supp. 3d 378, 387 (S.D.N.Y. 2017). "[T]he presumption of arbitrability 'does not apply to disputes concerning whether an agreement to arbitrate has been made.'" Wework Cos. v. Zoumer, No. 16-cv-457, 2016 WL 1337280 (S.D.N.Y. Apr. 5, 2016).

"While determinations of unconscionability are ordinarily based on a conclusion that both the procedural and substantive components are present, there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." Ragone, 595 F.3d at 122 (applying New York law); NML Capital v. Argentina, 621 F.3d 230, 237 (2d Cir. 2010) (same).

2. The "prospective waiver" red line

Despite the strong federal policy in favor of arbitration and a string of recent Supreme Court decisions effectuating that policy, the Supreme Court has never wavered from a red line originally drawn in Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), and consistently reaffirmed in subsequent rulings, and which no proponent of mandatory arbitration may cross.

That red line is the "prospective waiver" of a party's right to pursue federal statutory claims in arbitration. The Supreme Court requires federal courts to

condemn any arbitration agreement crossing that red line with "little hesitation" as contravening public policy – and the Circuit Courts have uniformly followed that mandate.

In Mitsubishi Motors, the Supreme Court held that statutory claims arising under the Sherman Act were arbitrable pursuant to the FAA "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." Conversely, if the arbitration agreement operates "***as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy***." Id. at 637 n.19.

In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991), the Supreme Court explained that by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" (quoting Mitsubishi Motors).

In 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273 (2009), the Supreme Court reaffirmed that "a substantive waiver of federally protected civil rights ***will not be upheld***" in an arbitration agreement.

Most recently, in American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310-11 (2013), the Supreme Court noted that "the [effective vindication]

exception finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies,'" quoting Mitsubishi Motors (emphasis original). The Supreme Court further stated that such an impermissible "prospective waiver" "***would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights***." Id.

New York state law is the same: "we are mindful of the strong state policy favoring arbitration agreements and the equally strong policy ***requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum***." Brady v. The Williams Capital Group, 14 N.Y.3d 459, 467 (N.Y. 2010).

This Court, too, stated in Halligan v. Piper Jaffray, Inc., 148 F. 3d 197, 204 (2d Cir. 1998), that "in Gilmer, when the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, the Court did so on the assumptions that the claimant would not forgo the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in the arbitration" (reversing the District Court's confirmation of the arbitration award in the case that had "put[] those assumptions to the test"). In Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 150 (2d Cir. 2004), this Court recognized that "there may be circumstances under which courts will not

enforce pre-dispute mandatory arbitration agreements with regard to statutory employment claims. See, e.g., Halligan, 148 F.3d at 204 (noting that arbitration was mandatory only where claimant could effectively vindicate her statutory rights in arbitration)."

In Ragone, 595 F.3d at 125, this Court cited Mitsubishi Motors for the proposition that "if certain terms of an arbitration agreement served to act 'as a perspective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." The Ragone opinion describes an arbitration provision "***which by itself would actually preclude a plaintiff from pursuing its statutory rights***" as "***plainly unconscionable***." Id.

Such was not the case in Ragone itself, however, where the challenged "ninety-day statute of limitations for filing an arbitration claim and a fee-shifting provision," while diminishing plaintiff's statutory rights, did not "actually preclude" her from pursuing those rights in arbitration, and the defendant had never attempted to enforce those provisions.

But it is the case here, where Paragraph 10.7.1 of Aflac's Arbitration Agreement is precisely that type of a "plainly unconscionable" provision that "actually preclude[s]" Aflac's sales associates from pursuing their federal statutory

rights. Accordingly, this Court should have "little hesitation in condemning [Aflac's] agreement as against public policy."

Indeed, while upholding the arbitration agreement in Ragone, the Court sounded the following "***Note of Caution***" that squarely applies to this case, 595 F.3d at 125-26:

> While we affirm the district court's holding that the arbitration agreement is enforceable as modified by the defendants' waivers, we emphasize that ***we do so with something less than robust enthusiasm***. Although the enforceability of an arbitration agreement is decided in the first place under the applicable body of state law, Section 2 of the FAA also "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the" statute. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Pursuant to this body of law it has long been "clear that statutory claims may be the subject of an arbitration agreement." Gilmer, 500 U.S. at 26, 111 S.Ct. 1647. Still, however, ***a federal court will compel arbitration of a statutory claim only if it is clear that "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum***," such that the statute under which its claims are brought "will continue to serve both its remedial and deterrent function." Mitsubishi, 473 U.S. at 637, 105 S.Ct. 3346. Thus, as the Supreme Court stated in Mitsubishi, ***if certain terms of an arbitration agreement served to act "as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy***." Id. at 637 n. 19, 105 S.Ct. 3346. . . .
>
> Had the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor. Specifically, as already noted, the arbitration agreement signed by Ragone includes both a ninety-day statute of limitations for filing an arbitration claim and a fee-shifting provision that requires that fees be awarded to the prevailing party. As Ragone forcefully argues, both of these terms would significantly diminish a litigant's rights under Title

> VII. . . . [H]ad the defendants not waived enforcement, it is at least possible that Ragone would be able to demonstrate that these provisions were incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA.

Aflac had failed to heed this clarion call: instead of revising its long-standing standard-form Arbitration Agreement, Aflac had Baker and Varela execute the same Agreement with the same "prospective waiver" in 2014 -- four years after Ragone's "Note of Caution," and one year after the Supreme Court's unequivocal reaffirmation of the "prospective waiver" red line in Italian Colors.

In 2017, Aflac attempted to enforce its Arbitration Agreement against the Associates as written in the District Court, and in 2018 in this Court on the first appeal. Only after its attempt had failed in this Court in 2019, and the case was remanded to the District Court for further development of the record because this Court was troubled by Paragraph 10.7.1, Aflac attempted to avoid judicial scrutiny of its Arbitration Agreement by offering not to use that Paragraph as a defense against the Associates in arbitration, all the while maintaining that the Paragraph was perfectly valid, enforceable, and "not unconscionable." Doc. 25, pp. A86-101.

3. Aflac's Arbitration Agreement crosses the red line and should be condemned in its entirety as an "integrated scheme to contravene public policy."

Aflac's Arbitration Agreement indisputably crosses the red line because it "actually preclude[s]" Aflac's sales associated from effectively vindicating their federal statutory claims and operates as a "prospective waiver" of these claims in

both judicial forum (pursuant to Paragraph 10.1) and in the arbitral forum (pursuant to Paragraph 10.7.1). Ragone, 595 F.3d at 125. No more is needed to condemn the Agreement as against public policy.

As noted above, this Court in Ragone did not encounter an arbitration provision that "actually preclude[d]" plaintiff from vindicating her federal statutory claims. However, the Court stated that "***if certain terms of an arbitration agreement*** served to act as a prospective waiver . . . we would have little hesitation in ***condemning the agreement*** as against public policy." Ragone, 595 F.3d at 125 (quoting Mitsubishi Motors). Notably, the Court did ***not*** say "we would have little hesitation in enforcing the arbitration agreement without the offending terms."

Other Circuits encountering such arbitration agreements have indeed condemned them in their entirety with "little hesitation" as an "integrated scheme to contravene public policy" and not subject to salvation through judicial reformation, severance, waivers, or redlining.

In Paladino v. Avnet Comp. Tech., Inc., 134 F.3d 1054, 1061-62 (11th Cir. 1998), the Eleventh Circuit refused to enforce an arbitration agreement similar to Aflac's:

> Two provisions of the arbitration clause here describe arbitrable claims and available remedies. The first unambiguously includes all claims: it extends the clause to "any controversy or claim arising out of or relating to my employment or the termination of my employment." . . .

> The second relevant provision, however, just as plainly circumscribes the arbitrator's authority to grant relief. That provision divests the arbitrator of jurisdiction to award any relief in a Title VII action. . . . Thus, if an arbitrator were to award Paladino classic Title VII relief such as back pay or reinstatement, a court applying the FAA could vacate the award. . . .
>
> These two provisions are not inconsistent; they should rather be read together. So read, they work hand-in-glove to make it difficult for the employee to obtain any relief. The employee must go to arbitration. Arguably, the employee can get a bare finding of liability there, but nothing more. The advantages to the drafter, Avnet, which imposed the agreement as a condition of employment, are obvious. Not only does it avoid discovery and other expenses of in-court litigation; it also is safe from damages. The words are plain, and the intent behind them apparent. There is no need, therefore, to resort to any other contract construction rules.
>
> We therefore conclude that the arbitration clause includes Title VII claims within its scope, but denies the employee the possibility of meaningful relief in an arbitration proceeding. . . . [T]he arbitrability of such claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies. See Gilmer, 500 U.S. at 28, 111 S. Ct. at 1653.

The Court in Paladino held that "when an arbitration clause has provisions that defeat the remedial purpose of the statute," then the arbitration agreement is unenforceable in its entirety. In so ruling, the Eleventh Circuit rejected the employer's invitation to sever the limitation of remedies provision and compel arbitration, 134 F.3d at 1057-58:

> Avnet urges us to declare that it has entered into a valid arbitration agreement with an invalid limitation of remedies clause that should be stricken for purposes of resolving its dispute with Paladino. Paladino responds, in part, with an argument that the arbitration agreement Avnet authored unconstitutionally denies her access to the courts, and should be stricken in its entirety.

> At first glance, Avnet's suggested approach seems appealing: it sends the parties to arbitration, in accordance with the federal policy favoring arbitration, but preserves Paladino's right to benefit from statutory remedies. Upon closer examination, however, Avnet's suggested approach is far more problematic. This is so because ***the presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable, not just subject to judicial reformation***. See, e.g., Graham Oil v. Arco Prods. Co., 43 F.3d 1244, 1248-49 (9th Cir. 1994) (arbitration clause that purported to waive federal statutory remedies and to shorten statute of limitations for filing statutory claims was unenforceable), cert. denied 516 U.S. 907, 116 S.Ct. 275, 133 L.Ed.2d 195 (1995); . . . see also E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990) (severance is inappropriate when the entire provision represents an "integrated scheme to contravene public policy").[5]

Other Circuits have likewise held that the presence of a prospective waiver of statutory claims in an arbitration agreement "taints" the entire agreement, rendering it "completely unenforceable" as an "integrated scheme to contravene public policy," and not subject to judicial reformation. In Graham Oil v. Arco Prods. Co., 43 F.3d 1244, 1248-49 (9th Cir. 1994), cert. denied 516 U.S. 907 (1995), the Ninth Circuit invalidated the arbitration clause in its entirety because of its provisions compelling plaintiff to surrender its federal statutory rights:

> Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden. . . . ***ARCO attempted to use an arbitration clause to achieve its***

[5] Aflac's Arbitration Agreement is even more restrictive than the one invalidated in Paladino as it leaves Aflac's sales associates with no hope for even a "bare finding of liability" (and at least the sense of vindication that comes with it) theoretically available to Paladino.

> ***unlawful ends. Such a blatant misuse of the arbitration procedure serves to taint the entire clause***. As a leading treatise notes, severance is inappropriate when the entire clause represents an "integrated scheme to contravene public policy." See E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990). For the above reasons, we conclude that ***the entire arbitration clause, and not merely the offensive provisions, must be stricken from the contract***.

In Hayes v. Delbert Servs. Corp., 811 F.3d 666, 673-74 (4th Cir. 2016), the Fourth Circuit invalidated the arbitration agreement in its entirety "for the fundamental reason that it purports to renounce wholesale the application of any federal law to the plaintiffs' federal claims" through the choice-of-law provision:

> Delbert seeks to avoid federal law through the prospective waiver of federal law provision found in the arbitration agreement. But that provision is simply unenforceable. ***With one hand, the arbitration agreement offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other, it proceeds to take those very claims away***. ***The just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce.***

Like the Eleventh Circuit in Paladino and the Ninth Circuit in Graham Oil, the Fourth Court in Hayes, 811 F.3d at 675-76, refused to sever the offending provision and invalidated the arbitration agreement in its entirety:

> Because the arbitration agreement in this case takes this ***plainly forbidden step***, we hold it invalid and unenforceable. Moreover, we do not believe the arbitration agreement's errant provisions are severable. It is a basic principle of contract law that an unenforceable provision ***cannot be severed when it goes to the "essence"*** of the contract. 8 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 19:73 (4th ed.1993). Here, the offending provisions go to the core of the arbitration agreement. It is clear that one of the animating purposes of the arbitration agreement was to

> ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law. . . . As noted above, provisions in the loan agreement starkly proclaim that "no United States state or federal law applies to this Agreement." J.A. 154. The brazen nature of such statements confirms that Western Sky's arbitration agreement is little more than an attempt "to achieve through arbitration what Congress has expressly forbidden." *Graham Oil Co.*, 43 F.3d at 1249. ***Good authority counsels that severance should not be used when an agreement represents an "integrated scheme to contravene public policy."*** Id. (quoting E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990)). We thus decline to sever the provisions here.

More recently, in Dillon v. BMO Harris Bank. NA, 856 F. 3d 330, 336-37 (4th Cir. 2017), the Fourth Circuit likewise invalidated an arbitration agreement in its entirety because of its choice-of-law provision that precluded the application of federal law, as in Hayes, rejecting defendant's request to sever the offending provision:

> ***Our conclusion is not altered by BMO Harris' alternative request that we effectively sever the choice of law provisions from the arbitration agreement***, and accept BMO Harris' concession to the application of federal substantive law in arbitration notwithstanding the unambiguous choice of tribal law in the arbitration agreement. BMO Harris argues that this concession would ensure that Dillon have access in arbitration to any federal substantive rights, thereby removing the chief policy rationale for application of the prospective waiver doctrine.
>
> We find no merit in this argument. In essence, BMO Harris ***seeks to rewrite the unenforceable foreign choice of law provision in order to save the remainder of the arbitration agreement. As we discussed in Hayes, such a result is untenable***. Unlawful portions of a contract may be severed only if: (1) the unlawful provision is not central or essential to the parties' agreement; and (2) the party seeking to enforce the remainder negotiated the agreement in good faith. 8 Williston on

> Contracts § 19:70 (4th ed. 1993 & Supp. 2010); Restatement (Second) of Contracts § 184 (1981). As we observed regarding the nearly identical provisions at issue in Hayes, "the offending provisions go to the core of the arbitration agreement." 811 F.3d at 676. Great Plains ***purposefully drafted the choice of law provisions in the arbitration agreement to avoid the application of state and federal consumer protection laws***. See id. at 675-76. Because these choice of law provisions were essential to the purpose of the arbitration agreement, ***BMO Harris' consent to application of federal law would defeat the purpose of the arbitration agreement in its entirety***. See 8 Williston on Contracts § 19:70; Restatement (Second) of Contracts § 184.

Section 184(1) of the Restatement (Second) of Contracts states: "If less than all of an agreement is unenforceable . . . a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is ***not*** an essential part of the agreed exchange." Comment b further provides: "***The fact that the [overbroad] term is contained in a standard form supplied by the dominant party argues against aiding him in this request***." Id. § 184 cmt. b.

As the Dillon court stated, 856 F.3d at 337:

> ***[W]hen a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract***. Restatement (Second) of Contracts § 184 cmt. b. In the present case, Great Plains obtained the terms in the arbitration agreement through its "dominant bargaining power" in a calculated attempt to avoid the application of state and federal law. See id. Because Great Plains did not negotiate these terms in good faith, we decline to give effect to this "integrated scheme to contravene public policy."

Aflac, the dominant party here, purposely included in its standard-form Arbitration Agreement the essential "Limitation of Claims and Remedies" provision operating as a prospective waiver of its sales associates' federal statutory claims, which the Supreme Court consistently ruled impermissible and the Circuit Courts invariably described as a "***plainly forbidden***" "***sort of farce***,"(Hayes); "***plainly unconscionable***" (Ragone); "***a blatant misuse of the arbitration procedure . . . to achieve . . . unlawful ends***" (Graham Oil); "***purposefully drafted . . . to avoid the application of state and federal***" laws (Dillon); and "***unlawful***" (Paladino). And these Circuit Courts have indeed shown "little hesitation" in invalidating arbitration agreements in their entirety as an "integrated scheme to contravene public policy" based solely on the presence of such an unlawful "prospective waiver" provision.

Ragone and other authorities cited above compel the invalidation of Aflac's Arbitration Agreement in its entirety. Aflac could not have been ignorant of the "prospective waiver" red line but has chosen to ignore the law and maintain the offending Paragraph 10.7.1 in its standard-form Associate's Agreements executed by thousands of sales associates every year for many years, in "a calculated attempt" to extinguish prospectively its associates' federal statutory claims and avoid any judicial or public scrutiny of its alleged misconduct in brazen and deliberate violation of public policy. Cf. Hayes, 811 F.3d at 675 ("That sort of

outright prohibition is exactly what we have here. ***It goes well beyond the more borderline cases involving mere disincentives to pursue arbitral relief***. As the plaintiffs point out, the arbitration agreement here almost surreptitiously waives a potential claimant's federal rights through the guise of a choice of law clause."). Aflac's Arbitration Agreement is not a "borderline" case either – its "outright prohibition" of the Associates' federal statutory claims alleged in their Compliant has clearly crossed the red line established by the Supreme Court.

4. Severance is improper here.

The District Court erred in severing Paragraph 10.7.1 and enforcing the rest of the Arbitration Agreement on several independent grounds.

First, good authority cited above counsels against severance here. See Paladino, 134 F.3d at 1058 (the "prospective waiver" provision "taint[s] the entire arbitration agreement, rendering the agreement completely unenforceable, not just subject to judicial reformation"); Graham Oil, 43 F.3d 1244, 1248-49 ("ARCO attempted to use an arbitration clause to achieve its unlawful ends. Such a blatant misuse of the arbitration procedure serves to taint the entire clause. . . . For the above reasons, we conclude that the entire arbitration clause, and not merely the offensive provisions, must be stricken from the contract."); Dillon, 856 F. 3d at 336-37 (because "the offending provisions go to the core of the arbitration agreement," and "Great Plains purposefully drafted the choice of law provisions in

the arbitration agreement to avoid the application of state and federal consumer protection laws," its attempts to "rewrite the unenforceable foreign choice of law provision in order to save the remainder of the arbitration agreement . . . . is ***untenable***."); Ragone, 595 F.3d at 125 ("[I]f ***certain terms of an arbitration agreement*** served to act as a prospective waiver . . . we would have little hesitation in ***condemning the agreement*** as against public policy."); E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990) (severance is inappropriate when the entire clause represents an "***integrated scheme to contravene public policy***").

Second, the District Court's severance of Paragraph 10.7.1 and its enforcement of the rest of the Agreement here was also improper as contrary to the clear terms of the Agreement itself. Thus, Paragraph 11.3 of the Associates' Agreement, titled "Severability," provides: "If any one or more of the provisions, words or phrases contained in this Agreement shall, for any reason, be held to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provisions, words or phrases were not contained herein." Doc. 1-6, p. A57.

The District Court, however, ruled: "The waiver of Paragraph 10.7.1 renders arguments about whether the provision is substantively unconscionability moot. Paragraph 10.7.1 has been effectively severed from the Agreement and the

Agreement is enforceable." As is apparent from the quoted passage, the Court had never found Paragraph 10.7.1 of Aflac's Arbitration Agreement to be "invalid, illegal or unenforceable" – the necessary condition for triggering severance. Aflac itself has likewise never conceded the point, and indeed argued the opposite on remand. Doc. 25, p. A95 ("Paragraph 10.7.1 is not substantively unconscionable."). Cf. Ragone, 595 F.3d at 123 ("The severability clause, however, has no relevance to this appeal. According to its terms, the severability clause applies '[i]n the event that any provision of this Agreement, or the application of such provision shall be held by a court of competent jurisdiction to be contrary to law. . . .' The district court, however, did not hold any provision of the arbitration agreement to be contrary to law. . . . Thus, the district court did not trigger any application of the severability clause . . . .").

Here, the District Court erroneously held Paragraph 10.7.1 to be "effectively severed" contrary to the plain terms of the Agreement itself that do not permit severance of the terms not found to be "invalid, illegal or unenforceable." The Tenth Circuit observed in Shankle v B-G Maintenance Mgt. of Colo., Inc., 163 F3d 1230, 1235 (10th Cir. 1999), that a fee-splitting provision "placed Mr. Shankle between the proverbial rock and a hard place -- it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum." Nevertheless, the

Court rejected the argument that it "should 'redline' the fee-splitting provision and compel arbitration," id. at 1235 n.6, because the fee-splitting provision "clearly makes the employee responsible for one-half of the arbitrator's fees and ***we are not at liberty to interpret it otherwise***." Id.

Under New York law, too, "[t]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties; ***it does not include the rewriting of their contract***." Salvano v. Merrill Lynch, Pierce, Fenner & Smith, 85 N.Y.2d 173, 182 (1995) (rejecting the argument that a party could be compelled to submit to arbitration on the terms not contained in the arbitration agreement).

Third, Aflac had used "its superior bargaining power to extract a promise that offends public policy" in the first place, and "courts generally ***opt not to redraft an agreement to enforce another promise in that contract***" under such circumstances, Dillon 856 F. 3d at 337. See also Restatement (Second) of Contracts, § 184 cmt. b ("The fact that the [overbroad] term is contained in a standard form supplied by the dominant party argues against aiding him in this request.").

Finally, this Court stated in Ragone, 595 F.3d at 126:

> We also take notice of Ragone's argument that waiver of the suspect provisions should not save the arbitration agreement because enforcement of the agreement, less the waived provisions, "create[s] highly undesirable incentives to employers" because it "teaches employers to create as oppressive and one-sided arbitration agreements as possible (with the hopes of chilling employment

> discrimination actions) while maintaining the expectation that [they] can *still* enforce arbitration by simply stating 'Never Mind' to all the unenforceable provisions that never should have been included in the first place."

While rejecting this argument in Ragone because "Ragone herself has not been chilled in asserting her Title VII rights," the Court considered the issue "far from insubstantial." Id. Generally speaking, the Court is by definition highly unlikely to hear from those who had been chilled in asserting their rights; in the case of Aflac's Arbitration Agreement, however, a stark example of just such a chilling effect has happened to be not far to seek.

In Laka v. Aflac, No. 651809/2018 (N.Y. Sup. July 27, 2018), the New York Supreme Court ruled that Aflac could enforce its Arbitration Agreement "on the express condition that Aflac pay all arbitration costs for both parties." That ruling was made in response to Aflac's offer to pay its former sales associate Plaintiff Eugene Laka's arbitration costs made that day on the record, July 27, 2018. Aflac did not make that offer in 2014 when it ruthlessly terminated Laka, then a 71-year-old cancer survivor, a few months before his 10-year anniversary as Aflac's sales associate and the vesting of his renewal commissions, after denying his disability claim and in response to his complaints about unethical practices at the company. At that time, Aflac demanded Laka to arbitrate his statutory claims for age and disability discrimination pursuant to the Arbitration Agreement as written, which he could not afford to do and let those statutory claims expire. When Laka did

eventually bring his remaining unexpired claims against Aflac in the New York state court in 2018, the Company again attempted to enforce its Arbitration Agreement as written, and only offered to pay Mr. Laka's arbitration costs (up to $500 per hour) when Mr. Laka was in the terminal stage of his long illness, and Aflac knew it. Aflac's waiver had come too little too late for Mr. Laka, who passed away the following month.

CONCLUSION

The following is reasonably certain to occur if the District Court's judgment is allowed to stand:

1. Aflac would continue to enforce its long-standing standard-form Arbitration Agreement with its "prospective waiver" of its former, current and future sales associates' statutory claims – a "sort of farce" but virtually unassailable as blessed by the Eleventh and the Second Circuits;
2. an undeterminable number of Aflac's associates would be chilled from bringing their meritorious claims against Aflac by its unconscionable Arbitration Agreement, and they and their grievances would never be heard in any forum;
3. an unknown number of associates would bring their statutory claims in arbitration only to see them unlawfully extinguished by Paragraph

10.7.1 of the Agreement under the cover of its strict confidentiality, never to be heard from again;

4. a number of associates may try their luck in court only to see their federal statutory claims dismissed in favor of arbitration (see Hubbard, No. 18-11869), with the same outcome as above;
5. finally, for the very few remaining associates who persist in challenging the Arbitration Agreement, Aflac would reluctantly and at the very last minute say "Never Mind" to a particular offending provision (such as the cost-sharing provision in Laka or the limitation on claims here) – not out of any good faith or a sense of fair play but for the improper purpose of shielding its brazenly unconscionable and illegal Arbitration Agreement and its misconduct (such as alleged in Laka's and in the Associate's Complaint) from judicial or public scrutiny.

Appellants respectfully submit that this outcome would be untenable, legally indefensible, and out of step with the authorities cited above that such arbitration agreements should be invalidated with "little hesitation" in their entirety as a "sort of farce," "a blatant misuse of the arbitration procedure . . . to achieve . . . unlawful ends," "an integrated scheme to contravene public policy," "plainly forbidden," "plainly unconscionable," and plainly "unlawful."

Dated: July 24, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE AND TYPE-STYLE REQUIREMENTS

I, Dimitry Joffe, counsel for Appellants, certify that this document complies with the word limit requirements of FRAP 32 because it contains 7,111 words, and complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

Dated: July 24, 2020

/s/ Dimitry Joffe
Dimitry Joffe
Counsel for Appellants

CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 24th day of July 2020, I caused a copy of Appellants' Initial Brief to be sent electronically to the registered participants in this case through the ECF system.

/s/ Dimitry Joffe
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