February 18, 2021

ADR Case Update 2021 - 4

California

- **ARBITRATION AGREEMENT VALID**

  Alvarez v. Altamed Health Services Corp.
  2021 WL 388698
  Court of Appeal, Second District, Division 8, California
  February 4, 2021

  Erendira Alvarez sued former employer Altamed for violations of FEHA, wrongful discharge, defamation, and intentional infliction of emotional distress. Altamed moved to compel arbitration under an arbitration agreement included with Alvarez's offer letter and signed by Alvarez. Alvarez asserted that she did not remember receiving or signing the agreement. The court denied the motion, and Altamed appealed.

  The Court of Appeal, Second District, Division 8, California, reversed. The arbitration agreement was valid. The trial court erred in concluding that Alvarez never knowingly waived her right to a jury trial because neither the offer letter nor agreement contained the word jury. The agreement included the word "jury" and used the word as part of an express waiver provision. Alvarez forfeited the argument that her signature on page two of the agreement did not prove that she saw or read the first page of the agreement because she did not make this claim in the trial court. Language in the offer letter could reasonably be understood as an integration clause, negating Alvarez's argument that the arbitration agreement was a modification of the offer letter or a separate contemporaneous agreement that required the signature of Altamed's CEO. Any unconscionability in the agreement did not provide grounds for revocation or non-enforcement. The lack of a Spanish translation did not result in procedural inequality, given Alvarez's declaration describing a high English fluency level. Though Altamed did not give Alvarez a copy of the arbitration rules, procedural unconscionability surfaced only if there was a substantively unconscionable provision in the omitted rules, which did not exist here. The agreement was not long or complicated, and Alvarez was given at least 24 hours to review the agreement. The provision in the agreement calling for a second arbitrator review (appellate arbitral review) could be viewed as benefiting the employer by unilaterally adding costs and time to the process;

however, it was entirely severable. The Court ordered the provision severed.

- **A PARTY RECEIVING NOTICE WHO FAILS TO PARTICIPATE IN COURT-ORDERED MEDIATION IS BOUND BY THE RESULT**

  David Breslin as Trustee v. Paul G Breslin et al., and Pacific Legal Foundation, et al.
  2021 WL247962
  Court of Appeal, Second District, Division 6, California
  January 26, 2021

  When Don Kirchner died, his estate was held in a living trust. David Breslin was the successor trustee in the November 2017 restated trust, which made four $10,000 specific gifts and directed that the remainder be distributed to the persons and charitable organizations listed on Exhibit A. Exhibit A was not attached; however, in the estate planning binder containing the restated trust, Breslin found a June 2017 "Estate Charities" document listing 24 charities and notations that appeared to be percentages. Breslin filed a petition in probate court to confirm him as successor trustee and determine the trust beneficiaries in the absence of Exhibit A. Breslin served each of the listed charities. The court confirmed Breslin as successor and ordered mediation among interested parties, including Kircher's intestate heirs and the listed charities. Notice of the mediation was sent to all interested parties, providing "non-participating persons or parties…may be bound by the terms of any agreement reached at mediation...Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation." Only five of the charities appeared at the mediation. A settlement was reached, with specific amounts awarded to various parties, including the appearing charities, and excluding the non-participating charities. Over the objection of the non-participating parties (the Pacific parties), the court granted Breslin's petition to confirm the settlement. Pacific parties appealed.

  The Court of Appeal, Second District, Division 6, California affirmed. The probate court had the power to order the parties into mediation. The Pacific parties received notice of the mediation but chose not to participate. By failing to participate in the mediation, the Pacific parties waived their rights to an evidentiary hearing. Furthermore, the Pacific parties were not entitled to the determination of factual issues, such as the decedent's intent, and could not raise such issues for the first time on appeal. The Pacific parties' failure to participate in the mediation was not the trustee's fault. The Court rejected the Pacific parties' contentions that the trustee failed in his duty to deal impartially with all beneficiaries and to keep the Pacific parties informed. Had the Pacific parties participated, they would have been fully informed of all developments. The notice made clear that non-participating parties may be bound by any agreement reached during mediation and referred to substantive rights. There was no extrinsic fraud.

Texas

- **ORDER OF SPECIFIC PERFORMANCE FOR SETTLEMENT AGREEMENT AFFIRMED**

  Roy III and El Veleno v. Jennings, Tres Mujeres, and Person
  2021 WL 356903
  Court of Appeals of Texas, San Antonio
  February 3, 2021

  Susan and Pamela Jennings and the Tres Mujeres partnership brought an action against Roy III and El Veleno to partition the family ranch, Mira Flores, and involuntarily dissolve Roy III's partnership. The parties mediated the case and executed a Rule 11 Settlement Agreement providing that within 45 days, the parties would execute all documents to dissolve Roy Jennings Properties, with the legal dissolution work to be completed by George Juarez. After Juarez prepared the dissolution documents, which Susan and Tres Mujeres signed, Roy III filed a revocation of the Agreement. Susan, Pamela, and Tres Mujeres amended their petition to include a cause of action for breach of the agreement. The court granted the plaintiffs' motion for summary judgment and ordered specific performance of the agreement. Roy III appealed.

  The Court of Appeals of Texas, San Antonio affirmed. The Agreement was an enforceable

contract, with clear and unambiguous terms. The language “any and all necessary documents to cause the dissolution” was not an essential term in the Agreement and did not render it non-binding. There was no summary judgment evidence showing that parties intended for time to be of the essence. By their course of dealing – continuing to receive drafts of the dissolution documents and engaging in conferences with the other side after the 45-day deadline had passed – defendants waived the argument that the contract's timing was a question of fact that precluded summary judgment. The plaintiffs did not expressly state that they were ready, willing, and able to timely perform their obligations under the agreement; however they asserted that they executed and delivered the dissolution documents, substantially complied and performed pursuant to the agreement, and complied with conditions precedent to the Agreement. In so doing, they met the pleading requirements, and their actions demonstrated that they met their burden to prove substantial compliance.

Colorado

- **ORDER DENYING A MOTION TO CONSOLIDATE IS NOT APPEALABLE**

  Tug Hill Marcellus LLC and Chief Exploration and Development (Sellers) v. BKV Chelsea LLC
  2021COA17
  Colorado Court of Appeals
  February 11, 2021

  Sellers entered into substantially similar agreements with BKV; the agreements included identical arbitration provisions. BKV alleged that Sellers breached their agreements and requested separate arbitration proceedings. The court denied Seller’s petition to consolidate the three arbitration proceedings, and Sellers appealed.

  The Colorado Court of Appeals dismissed the appeal. An order denying a motion to consolidate separate arbitration proceedings is not appealable because it is neither one of the pre-arbitration orders listed in 13-22-228(1)(a) and (b) of the Colorado Revised Uniform Arbitration Act, nor a final judgment under section 13-22-228(1)(f). The order was not a motion to compel or stay arbitration and, unlike a final judgment, did not finally dispose of the particular action and prevent further proceedings. The Act expressly authorizes parties to file specified arbitration-related motions in district court, even though the court’s rulings on those motions may not be appealable. One of these is a motion for consolidation of separate arbitration proceedings.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.