March 17, 2021

ADR Case Update 2021 - 6

Federal Circuit Courts

- **FAILURE TO CHALLENGE DELEGATION RESULTS IN ENFORCEMENT OF CLAUSE**

  Swiger v. Joel Rosette, et al., Kenneth Rees
  2021 WL 821396
  United States Court of Appeals, Sixth Circuit
  March 4, 2021

  Nicole Swiger alleges that she fell victim to an illegal "rent-a-tribe" scheme when she accepted a loan from Plain Green LLC, an entity owned and organized under the laws of the Chippewa Cree Tribe. She alleges that Kenneth Rees used Plain Green – with its tribal immunity - as a front to shield them from state and federal law. The loan contract included an arbitration provision with a delegation clause. When Swiger sued Rees and Plain Green for violations of state law, RICO, and consumer protection law, Rees moved to stay the case in favor of arbitration. The court denied the motion, maintaining that the enforceability of the arbitration agreement was already decided against Rees in a similar case in Vermont. Rees appealed.

  The United States Court of Appeals for the Sixth Circuit reversed and remanded. A valid delegation clause precludes courts from resolving any threshold arbitrability disputes, and only a specific challenge to the clause will bring arbitrability issues back within the court's province. Swiger failed to specifically challenge the delegation clause. Accordingly, the district court should have enforced it and referred the case to arbitration. The ability of non-signatory Rees to invoke the arbitration agreement constituted an issue of enforceability to be considered by an arbitrator in the presence of a delegation provision.

- **LACK OF ASSENT TO MODIFICATION RESULTS IN NO ARBITRATION**

  Sevier County Schools Federal Credit Union v. Branch Banking and Trust
  2021 WL 8334010
  United States Court of Appeals, Sixth Circuit
  March 5, 2021

  Sevier alleged that BB&T failed to honor a commitment made by its predecessor, the First National Bank of Gatlinburg (FNB), promising that the annual interest rate on certain high-interest Money Market Investment Accounts was guaranteed to never fall below 6.5%. The court granted BB&T's motion to dismiss and compel arbitration. Sevier appealed.

  The United States Court of Appeals for the Sixth Circuit reversed and remanded. The original contract signed by Sevier with FNB included a change of terms provision that stated, "Changes in

the terms of this agreement shall be made by the financial institution from time to time…" When BB&T acquired BankFirst, which had merged with FNB, it sent a Bank Services Agreement (BSA) to each account holder, stating that by continuing to maintain an account, the account holder agreed to the BSA's terms. The BSA also included an arbitration provision. BB&T amended the BSA numerous times to add a class-action waiver, abolish all damages, and include a waiver of rights to litigate claims in court or before a jury. The issue, in this case, was whether, after agreeing to be bound by the initial MMIA agreement, Sevier assented to the new terms set out in the Bank Services Agreements from BB&T. The Court found they did not. The changes implemented by BB&T were not reasonable. They provided Sevier with no opt-out opportunity, leaving them with no choice other than to consent to the new arbitration provision or to close their high-yield savings accounts, an unreasonable option. BB&T did not act reasonably when it added the arbitration provision years after Sevier's accounts were established by FNB, violating the implied covenant of good faith and fair dealing in its attempt to use the original change of terms provision to force Sevier to arbitrate.

- **LANGUAGE COVERING CLAIMS "ARISING OUT OF EMPLOYMENT" DID NOT COVER CLAIM FOR BREACH OF FIDUCIARY DUTY**

  Cooper v. Cunniff & Goldfarb, Inc.
  2021 WL 821390
  United States Court of Appeals, Second Circuit
  March 4, 2021

  As a DST employee, Cooper participated in a profit-sharing plan covered by ERISA and managed by Ruane, a third-party investment advisor. Alleging that Ruane's overallocation to one entity led to catastrophic losses, Cooper sued Ruane under ERISA for damages arising from Ruane's breach of fiduciary duty and mismanagement of the PSA. Ruane moved to compel arbitration under Cooper's arbitration agreement with DST, which mandated arbitration of "all legal claims arising out of or relating to employment." The court granted the motion, and Cooper appealed.

  The United States Court of Appeals for the Second Circuit reversed and remanded. The language in the arbitration agreement – covering all legal claims arising out of or relating to employment - did not encompass the claims for breach of fiduciary duty brought by Cooper on behalf of the Plan. In the context of an employment arbitration agreement, a claim will "relate to" employment only if the merits of that claim involve facts particular to an individual plaintiff's own employment.

California

- **PAGA NOT ARBITRABLE WITHOUT STATE CONSENT**

  Contreras v. The Superior Court of Los Angeles County
  2021 WL 776560
  Court of Appeal, Second District, Division 5, California
  March 1, 2021

  Petitioners Contreras and Ets-Hokin raised a single cause of action under PAGA alleging that Zum, a ride-service company, mischaracterized them and others as independent contractors, thereby violating multiple provisions of the CA Labor Code. The court granted the motion, ordering into arbitration the issue of arbitrability of the suit – whether Contreras, Ets-Hokin, and others were aggrieved employees entitled to raise PAGA claims. Contreras and Ets-Hokin petitioned for a writ of mandate.

  The Court of Appeal, Second District, Division 5, California, issued a peremptory writ of mandate, directing the trial court to deny the employer's motion in its entirety. A PAGA claim lies entirely outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. Because every PAGA claim is a dispute between an employer and the state, PAGA claims cannot be arbitrated without state consent. The preliminary

question of whether petitioners were aggrieved employees under PAGA may not be decided in private party arbitration.

Georgia

- **CHALLENGE TO VALIDITY OF CONTRACT FOR ARBITRATOR TO DECIDE**

  Jhun v. Imagine Castle, LLC
  2021 WL 790162
  Court of Appeals of Georgia
  March 2, 2021

  The Jhuns contracted with Imagine Castle to remodel their home. The Jhuns alleged that Imagine produced shoddy, incomplete work and sued for negligence, fraud, conversion, and civil conspiracy. The Jhuns also asked the court to declare the contract unenforceable and void as a matter of public policy because Imagine was not a licensed contractor and, in the alternative, raised a claim of breach of contract. Imagine moved to compel arbitration based on the contract's arbitration agreement and moved to stay the proceedings against Imagine owners, Alfred and Patricia Hughes, pending arbitration. The court granted the motion to compel and stayed the action against the Hughes defendants. The Jhuns applied for an interlocutory appeal from the trial court's order.

  The Court of Appeals of Georgia affirmed. Under the FAA, where there is a specific challenge attacking the validity of an arbitration agreement, the court and not the arbitrator should decide whether the arbitration provision is enforceable. A challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. The Jhuns did not allege any specific challenge to the arbitration agreement, rendering this a challenge to the entirety of the contract that must be settled by the arbitrator. A stay was appropriate given that the Jhuns' claims against the Hughes defendants and those against Imagine Castle were intimately related.

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

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