

April 7, 2021

ADR Case Update 2021-7

Federal Circuit Courts

- **ONLINE CONTRACT PROVIDED REASONABLE NOTICE OF MANDATORY ARBITRATION**

Emmanuel v. Handy Technologies

2021 WL 1084688

United States Court of Appeals, First Circuit

March 22, 2021

Emmanuel completed an online agreement to work for Handy Technologies, a house cleaning service. The Terms of Use included a mandatory arbitration clause. Emmanuel completed and accepted updated terms – including mandatory arbitration provisions - on two occasions before she filed a putative class against Handy, claiming that she was misclassified as an independent contractor and alleging minimum wage violations of the FLSA and Massachusetts Law. The court granted Handy's motion to dismiss and compel arbitration. Emmanuel appealed.

The United States Court of Appeals for the First Circuit affirmed. After the parties submitted their briefings on appeal, the Massachusetts Supreme Judicial Court decided *Kauders v. Uber*, in which they explained that for an online contract to have been formed under MA law, the user of the online interface must have been given "reasonable notice of the terms" of the agreement and must have made a "reasonable manifestation of assent to those terms." The form of Emmanuel's agreement pointed in favor of the conclusion that she had reasonable notice that it contained terms to which she would be bound when she selected "Accept" on the app. In choosing to accept, Emmanuel entered into a contract with Handy in which she agreed to arbitrate the state and federal claims she brought. Emmanuel's challenge to the agreement based on unconscionability was a challenge to the validity of an entire contract that contained an arbitration clause - rather than a challenge to the validity of the specific agreement to resolve the dispute through arbitration - and was properly resolved by the arbitrator.

- **EQUITABLE ESTOPPAL INAPPLICABLE TO PLAINTIFFS WHO DID NOT ACCEPT UBER'S TERMS OF USE**

O'Hanlon et al., v. Uber Technologies, Inc.

2021 WL 1011201

United States Court of Appeals, Third Circuit

March 17, 2021

The plaintiffs, motorized wheelchair users and the non-profit Pittsburghers for Public Transit, sued Uber, alleging that the ridesharing company discriminated against individuals with mobility disabilities by not offering a "wheelchair accessible vehicle" (WAV) option in the Pittsburgh area. As alleged in the complaint, this practice violated Title III of the ADA prohibiting discrimination on the basis of disability and but for the

unavailability of WAVs, Plaintiffs would have downloaded the Uber app and used its ridesharing service. Uber moved to compel arbitration, contending that although plaintiffs had never registered for an Uber account or accepted its Terms of Use, they could not establish standing to sue in federal court without stepping into the shoes of actual Uber Rider App users who are bound by the Terms of Use. The court rejected Uber's arguments, and Uber appealed.

The United States Court of Appeals for the Third Circuit affirmed. On interlocutory appeal from the denial of a motion to compel arbitration, the Court's appellate jurisdiction is confined to review of that order. Thus, the Court did not have independent duty to review the court's ruling that users had standing to sue. While the Court has discretion to review an otherwise non-appealable order under pendent appellate jurisdiction where it is inextricably intertwined with the appealable order, the two issues here were not intertwined. Equitable estoppel did not bind the plaintiffs to arbitrate because there was no evidence that the plaintiffs availed themselves of Uber's service agreement before or in the course of litigation or received any benefit under that agreement.

- **COMPANY DID NOT WAIVE ITS RIGHT TO INVOKE ARBITRATION**

Morgan v. Sundance
2021 WL 1181677
United States Court of Appeals, Eighth Circuit
March 30, 2021

Morgan sued Sundance for violations of FLSA, alleging that Sundance failed to pay her and other similarly situated employees for overtime. Sundance moved to dismiss, arguing that a similar lawsuit in a Michigan federal court (the Michigan case) barred this suit under the first to file rule. The court denied the motion, and Sundance answered Morgan's complaint; however, it did not assert its right to arbitrate. After Morgan participated in an unsuccessful settlement mediation and eight months after Morgan filed the complaint, Sundance moved to compel arbitration. The court denied the motion, and Sundance appealed.

The United States Court of Appeals for the Eighth Circuit reversed and remanded. Sundance did not waive its contractual right to invoke arbitration. A party waives its right to arbitration if it knew of its right to arbitration, acted inconsistently with that right, and prejudiced the other party by the inconsistent acts. While Sundance failed to assert its right to arbitration in its answer, the totality of the circumstances should have been considered. The time during which Sundance's motion to dismiss was under advisement made up half the delay the court attributed to Sundance. Sundance participated in mediation, an effort to avoid invoking the litigation machinery. When Sundance filed its motion to dismiss, it focused on a quasi-jurisdictional first to file argument; thus, although there was a delay, the parties spent little time actively litigating, and no discovery was conducted. Morgan was not prejudiced.

- **MANIFEST DISREGARD OF THE LAW AS GROUND FOR VACATUR REJECTED**

Jones v. Michaels Stores
2021 WL 960490
United States Court of Appeals, Fifth Circuit
March 15, 2021

Tiffany Jones agreed to arbitrate employment disputes with her former employer, Michaels. After she was terminated, she sued Michaels for violations of the company handbook and invoked the arbitration agreement. When the arbitrator ruled against her, Jones tried to sue Michaels in federal court, challenging the same termination on a different theory – that it amounted to discrimination and retaliation in violation of Title VII. The parties agreed to stay the suit pending a second arbitration, and the new arbitrator ruled that res judicata barred the Title VII claims. Jones then asked the district court to vacate the arbitrator's ruling, asserting that the arbitrator manifestly disregarded LA law in finding her new claims precluded. The court denied the motion, and Jones appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. In moving to vacate, Jones did not invoke any of the four grounds listed in the FAA for vacatur but relied on manifest disregard as an independent ground. Manifest disregard of the law as an independent, non-statutory ground for setting aside an award

must be abandoned and rejected. As Jones did not invoke any statutory grounds for vacatur, her appeal could not overcome the Court's instruction that arbitration awards under the FAA may be vacated only for reasons provided in §10.

Texas

- **PRE-ARBITRATION DISCOVERY REQUEST OVERTURNED**

In Re Copart, Inc., Copart of Houston, Inc., and Houston Copart Salvage Auto Actions, LP
2021 WL 935907
Supreme Court of Texas
March 12, 2021

Maria Ordaz sued her former employer, Copart, claiming discrimination and retaliation in violation of the Texas Labor Code. Copart answered and moved to compel arbitration under the Copart Dispute Resolution Policy and Agreement. In support of the motion to compel, Copart attached the sworn declaration of HR Generalist Kallie Sirles, in which she described Copart's policies and averred that Ordaz received via email and electronically signed a copy of the arbitration agreement. In response, Ordaz moved to compel pre-arbitration discovery, denying the existence of an enforceable arbitration agreement. After a hearing, the trial court orally granted the motion for discovery and ordered Sirles to appear for deposition. Copart's petition for a writ of mandamus was denied, and Copart sought further relief.

The Supreme Court of Texas conditionally granted Copart's petition for writ of mandamus, ordering the trial court to vacate the discovery order and rule on Copart's motion to compel arbitration. Here, Ordaz's motion and affidavit provided no reasonable basis to support her assertion that deposing Sirles would lead to relevant information on the arbitrability issues raised by the motion. Although Ordaz generally denied the existence of an enforceable arbitration agreement, she made no factual assertions in support of that claim – never denying that she received the agreement, signed the agreement, received emails about the agreement, or continued to work after receiving the agreement. She did not dispute the authenticity of any of the documents attached to Sirles's declaration. Accordingly, the trial court abused its discretion by ordering pre-arbitration discovery.

Illinois

- **ARBITRATION PROVISION ON BACK OF MLB TICKET PROCEDURALLY UNCONSCIONABLE**

Zuniga v. Major League Baseball
2021 IL App (1st) 201264
Illinois Appellate Court/Civil
March 16, 2021

While attending a Chicago Cubs baseball game, plaintiff Laiah Zuniga was hit in the face by a foul ball. The back of Zuniga's ticket contained fine print language that any dispute/ controversy/claim arising out of the ticket terms would be resolved by binding arbitration. Zuniga noted that she had not noticed the fine print on the tickets, only the advertisements, which occupied one-third of the space. After Zuniga filed a personal injury claim in circuit court, MLB and the Cubs moved to compel arbitration. The court denied the motion, finding the arbitration provision to be procedurally unconscionable because it was so difficult to find, read, or understand that it could not fairly be said that the plaintiff was aware of what she was agreeing to. MLB and the Cubs filed this interlocutory appeal.

The Illinois Appellate Court affirmed. The arbitration provision was difficult to find when using the ticket, so Zuniga was likely not aware of what she was agreeing to. The paper ticket contained merely a summary of contract terms and directed ticketholders to a website or administrative offices to read the actual terms

and conditions. Presenting the paper ticket to gain entry to a game was not an act that would cause a consumer to realize that she was agreeing to the terms and conditions of a contract.

Florida

- **INSURANCE AGENCY ESTOPPED FROM AVOIDING ARBITRATION WITH NON-SIGNATORY**

Kratos, et al., v. ABS Healthcare Services, LLC
2021 WL 1009277
District Court of Appeal of Florida, Third District
March 17, 2021

ABS Healthcare and Health Option One, doing business as ICD, sued Kratos, et al. over an alleged scheme to steal ICD's business. ICD's relationship with its licensed health and insurance agents is governed by the ICD Exclusive Agent Agreement, which prohibits agents from inducing customers to discontinue business with ICD and from selling non-ICD plans. When ICD filed its complaint against Kratos, it also commenced actions against eight of its licensed agents individually in Broward County, seeking both legal and equitable relief. Non-signatory Kratos, et al. moved to compel arbitration with ICD under the ICD Exclusive Agent Agreements' dispute resolution provision, asserting that they were entitled to enforce the arbitration provision under the doctrine of equitable estoppel. The court denied the motion, and Kratos appealed.

The District Court of Appeal of Florida for the Third District affirmed in part, reversed in part, and remanded with instructions. ICD was estopped from avoiding arbitration. The claims against the appellants and the agents were based on the same set of operative facts and unquestionably premised upon substantially interdependent and concerted misconduct between the non-signatories and signatories to the Agreement. There was a sufficient nexus between ICD's claims against the appellants and the Agent Agreement such that the arbitration clause applied and was enforceable between the parties. The claims did not fall within the arbitration provision's carve-out for equitable remedies since ICD's claims seek legal, rather than equitable, relief.

Washington State

ARBITRATOR'S DECISION TO REINSTATE POLICE OFFICER VIOLATED PUBLIC POLICY

City of Seattle, Seattle Police Dept. (SPD) v. Seattle Police Officers' Guild and Arbitrator Jane Wilkinson and Adley Shepherd
No. 80467-7-1
Court of Appeals, Division 1, State of Washington
April 5, 2021

The City of Seattle terminated police officer Adley Shepherd for violating the Seattle Police Department's excessive use of force policies after Shepherd punched a handcuffed woman in the face hard enough to cause an orbital fracture. Shepherd's union, the Seattle Police Officers' Guild (SPOG), requested that a disciplinary review board (DRB) be convened so Shepherd could challenge his termination under the CBA between SPOG and the City. The DRB, comprised of one representative for the SPOG, one representative for the City, and an independent arbitrator, concluded that: Shepherd violated SPD's policy restricting the use of force on handcuffed subjects; the policy was clear and specific; Shepherd had been trained on the basics of the policy, and the penalty shall send a clear message that alternatives to the use of force on a handcuffed person should be utilized when circumstances permit. The DRB then reinstated Shepherd with a 15-day suspension and duty modifications, finding that the seriousness of Shepherd's offense was mitigated by the fact that Shepherd used force "perhaps reflexively" after the woman kicked him and that his patience was being tried. The DRB also observed that Shepherd was insistent he did nothing wrong, and several of his co-workers agreed. The City successfully moved the court to vacate the DRB's decision, and SPOG appealed.

The Court of Appeals, Division 1, State of Washington affirmed. The court did not err when it vacated the DRB's decision reinstating Shepherd. The DRB's decision reinstating Shepherd was so lenient it violated the explicit, well-defined, and dominant public policy against the excessive use of force in policing, sending a message to officers that a violation of a clear and specific policy is not that serious if the officer is dealing with a difficult subject, losing patience, or passionate in believing that he or she did nothing wrong – however mistaken that belief may be. Such a message cannot be squared with the public policy against the excessive use of force in policing, which the Court holds imposes on the City an affirmative duty to sufficiently discipline officers.

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

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