April 22, 2021

ADR Case Update 2021 - 8

Federal Circuit Courts

- **ARBITRATION AGREEMENT UNENFORCEABLE - NO MEETING OF THE MINDS**

  Rowland v. Sandy Morris Financial & Estate Planning Services
  2021 WL 1287563
  United States Court of Appeals, Fourth Circuit
  April 7, 2021

  Barry and Donna Rowland hired Sandy Morris Financial (SMF) to manage their investment accounts. The Rowlands completed and signed SMF's Asset Management Agreement (AMA), which contained an arbitration clause, and returned it to SMF for signature by the Chief Compliance Officer. When the investments did not work out as planned, the Rowlands sued SMF. The parties produced different versions of the AMA, with the Rowlands' AMA encompassing SMF's management of one account and the SMF's AMA encompassing management of two accounts, a detailed section for Risk Tolerance and Investment, and information on SMF's investment experience. SMF's motion to compel arbitration was denied, and SMF appealed.

  The United States Court of Appeals for the Fourth Circuit affirmed. Under NC law, for a valid contract to be formed, the two parties must assent to the same thing in the same sense, and their minds meet as to all terms. Here, there were material differences in the terms of the two AMAs and no evidence that the Rowlands were informed of or reviewed those differences. This prevented a meeting of the minds on the essential elements of the contract. No contract was formed.

- **WAIVER OF APPELLATE REVIEW OF ARBITRATION AWARD IS VALID AND ENFORCEABLE**

  Beckley Oncology Associates v. Abumasmah
  2021 WL 1306120
  United States Court of Appeals, Fourth Circuit
  April 8, 2021

  Dr. Abumasmah's employment agreement with Beckley contained an arbitration clause specifying that the arbitrator's decision "shall be final and conclusive and enforceable in any court of competent jurisdiction without any right of judicial review or appeal." Following Beckley's termination of Dr. Abumasmah's employment, the parties proceeded to arbitration over the amount of Abumasmah's incentive bonus, with the arbitrator finding that Dr. Abumasmah was entitled to a bonus and awarding him $167,030. Beckley filed a complaint in district court to

vacate the award, and Dr. Abumasmah moved to dismiss and confirm the award. Finding the clause prohibiting judicial review of the award unenforceable under the FAA, the court upheld the award because nothing in the ruling suggested the arbitrator refused to heed a clearly defined legal principle or disregarded the contract language. Beckley appealed.

The United States Court of Appeals for the Fourth Circuit dismissed the appeal. As a matter of first impression, in an arbitration agreement under the FAA, a waiver of appellate review of a district court's decision confirming or vacating an award is valid and enforceable. The Court agreed with the Tenth Circuit's finding in *MACTEC v. Gorelick* that a provision prohibiting appellate, but not district court, review is "a compromise whereby the litigants trade the risk of protracted appellate review for a one-shot opportunity before the district court." Such provisions are consistent with the fundamental policy behind the FAA to reduce litigation costs by providing a more efficient forum.

Texas

- **PARTIES' INTENT WAS TO BE BOUND BY ARBITRATION**

Wagner v. Apache Corporation
2021 WL 1323413
Supreme Court of Texas
April 9, 2021

Wagner Oil purchased oil and gas wells, mineral leases, and personal property from Apache. The purchase and sale agreement (PSA) included an indemnification provision in which Wagner Oil agreed to defend, indemnify, release and hold harmless the Seller against all losses, damages, etc. The PSA also contained an arbitration clause, providing that any disputes would be arbitrated and language that "notwithstanding the above, in the event a third party brings an action against Buyer or Seller concerning this Agreement or the Assets or transactions contemplated herein, Buyer and Seller shall not be subject to mandatory arbitration under this section and Buyer and Seller shall each be entitled to assert their respective claims, if any, against each other in such third party action." Finally, the PSA provided that it was binding upon the parties and their respective successors and assigns. Wagner Oil assigned its assets to Bryan Wagner, Trade Exploration Corp, and Wagner and Cochran (plaintiffs). When landowners sued Apache for environmental contamination caused by Apache's operation of assets before it sold them to Wagner Oil, Apache filed a demand for arbitration against the plaintiffs for indemnity and defense, and the plaintiffs filed a declaratory judgment. After the court granted the plaintiffs' motion to stay arbitration and denied Apache's motion to compel arbitration, Apache filed an interlocutory appeal. The court of appeals reversed and remanded, and the Supreme Court of TX granted the plaintiffs' petition for review.

The Supreme Court of Texas affirmed. The intent of the parties, in this case, was to be bound by arbitration. The Court agreed with the court of appeals that the PSA carve-out was limited to cross-claims within third-party actions and found that it did not permit plaintiffs to pursue their request for a declaratory judgment regarding defense and indemnity obligations in court. The Court also found that the assignees expressly assumed and agreed to be bound by all of the Buyer's obligations to Seller, including the obligation to arbitrate, pointing to the language: "Assignees assume and agree to be bound by and perform their proportionate parts of all obligations imposed upon Assignor by the Apache assignment."

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