September 7, 2022

ADR Case Update 2022 - 16

Federal Circuit Courts

- **ARBITRATION AGREEMENT MANDATORY, NOT PERMISSIVE**

  ExxonMobil Oil Corporation v TIG Insurance Company
  United States Court of Appeals, Second Circuit
  2022 WL 3330425
  August 12, 2022

  Insurer TIG issued a $25 million Excess Insurance Policy to Exxon. In negotiating the Policy, the parties replaced the original form arbitration provision with a new, custom Alternative Dispute Resolution Endorsement. The Endorsement provided that, in the event of a dispute, 1) either party "may" make a written request to the other for ADR processes; 2) "if" the parties did proceed, they should jointly select an ADR process; 3) "if" the parties were unable to agree on an ADR process within 90 days the parties "shall use binding arbitration" by a mutually selected arbitrator; and 4) any "decision, award, or agreed settlement" would be limited to the Policy amount. Exxon sought indemnification under the Policy, and TIG sued for a declaratory judgment of non-coverage. Exxon filed a motion to compel, which the court granted, rejecting TIG's claim that the Endorsement permitted, but did not require, arbitration. The arbitrators awarded Exxon the full $25 million allowed under the Policy but declined to award pre-judgment interest as, under the terms of the Endorsement, they lacked jurisdiction to make any award exceeding the Policy amount. The court confirmed the award and, finding that the Endorsement did not constitute a "sufficiently clear" waiver of pre-judgment interest, awarded Exxon an additional $8 million. TIG appealed.

  The United States Court of Appeals, Second Circuit, affirmed that the Endorsement created a binding mandatory arbitration agreement. The court conceded that neither party's interpretation of the Endorsement was "without flaw." By providing that a party "may" request ADR and proceed "if" the parties agreed, the Endorsement appeared to suggest that "either party may request arbitration, but neither party can require it." However, the Endorsement's subsequent requirement that the parties "shall use" arbitration if unable to agree on an ADR process indicated that the "clock on arbitration starts ticking" upon the party's written request for ADR, regardless of

whether the other party accepts. The Court rejected TIG's argument that, by rejecting the original mandatory arbitration provision, the parties evinced an intent for the Endorsement to be permissive. The new Endorsement also rejected the venue, choice of law, and pre-hearing discovery rules set forth in the original provision, making it impossible to conclude that the parties also intended to eliminate the mandatory nature of the provision. The court below erred, however, in awarding Exxon pre-judgment interest dating from the cause of action to the issuance of the award. The Endorsement stated that the parties "expressly agreed" that any award "made as a result of the ADR process" was limited to the Policy amount, "clearly" waiving the parties' rights to pre-award interest beyond that limitation. Pre-judgment interest arising after the award, however, fell outside the arbitrator's authority and within the authority of the courts. The Court directed the lower court on remand to calculate and award Exxon interest accruing from the date of the arbitral decision to the date of judgment.

- **CASE PROPERLY DISMISSED WHERE PARTY REFUSED TO COMPLY WITH OR APPEAL ARBITRATION ORDER**

  R and C Oilfield Services LLC v American Wind Transport Group LLC
  United States Court of Appeals, Third Circuit
  2022 WL 3350590
  August 15, 2022

  Small family company R&C contracted to haul equipment for American Wind. When R&C sued American Wind for failing to make payments, American Wind successfully moved to compel arbitration under their contract. R&C filed a motion for reconsideration, which the court denied but did not seek interlocutory review. R&C refused to arbitrate and, in a joint status report submitted seventeen months after the arbitration order, told the court that it "did not plan to do so." American Wind moved to dismiss. R&C opposed, repeating previous arguments that the contract's arbitration clause was unconscionable and expressing concerns about the "expense and futility" of arbitration. The court dismissed the case with prejudice, and R&C appealed.

  The United States Court of Appeals, Third Circuit, affirmed. The court had "no choice" but to dismiss the complaint where R&C failed to seek interlocutory review of the court's order, failed to arbitrate its claims, and "sat on its rights" for a year and a half. R&C's concerns about the arbitration process did not excuse it from either complying with the arbitration order or seeking judicial review. Once a party has invoked the judicial system, it cannot "decide for itself when it feels like pressing its action." Although Third Circuit law sets forth a six-part test to be applied before a court dismisses a case as a sanction before trial on the merits, it was unnecessary to apply that test here, where the litigant willfully refused to prosecute.

- **FAA § 1 EXEMPTION FOR TRANSPORTATION WORKERS ENGAGED IN INTERSTATE COMMERCE DID NOT APPLY TO LOCAL DELIVERY DRIVER**

  Lopez v Cintas Corporation
  United States Court of Appeals, Fifth Circuit
  2022 WL 3753256
  August 30, 2022

  Douglas Lopez was a delivery driver for Cintas Corporation, picking up work uniforms and other facility-services products from a Houston warehouse and delivering them to local customers. Following termination, Lopez sued Cintas for ADA violations. Cintas moved to dismiss, arguing that Lopez was required to pursue his claims in arbitration under the binding arbitration provision of his employment agreement. Lopez opposed, claiming that he was a transportation worker engaged in interstate commerce exempt from enforcement of arbitration under FAA §1 and, alternatively, arguing that the arbitration provision was unconscionable. The court dismissed, finding that Lopez was a local driver not covered by the exemption and that the arbitration provision was not unconscionable. Lopez appealed.

  The United States Court of Appeals, Fifth Circuit, affirmed that Lopez was not "engaged in" interstate commerce for purposes of FAA §1, as his work had no "direct and necessary role" in the transportation of goods across borders. While some of the items he delivered originated out of state, "once the goods arrived in the Houston warehouse and were unloaded, anyone

interacting with those goods was no longer engaged in interstate commerce." Further, his "customer-facing" role as a Route Service Sales Representative involved sales-related tasks inconsistent with the transportation-worker exemption. The court below erred, however, in resolving Lopez's unconscionability claim on the merits. Under Texas law, unconscionability goes to validity rather than formation and should be decided by the arbitrator. Accordingly, the Court affirmed the dismissal below except with respect to the issue of unconscionability, which it directed to be dismissed without prejudice for consideration in arbitration.

- **TORT CLAIMS FOR BATTERY AND ASSAULT NOT ARBITRABLE DISPUTES RELATED TO CONTRACTOR AGREEMENT**

  Anderson v Hansen
  United States Court of Appeals, Eighth Circuit
  2022 WL 3725202
  August 30, 2022

  While Aflac contractor Katherine Anderson was attending a work conference, Aflac employee Jeffrey Hansen drugged her drink, forcibly entered her hotel room, and raped her. Anderson sued Hansen for multiple tort claims, including battery and assault. Hansen moved to compel arbitration, claiming he was a third-party beneficiary to the Arbitration Agreement contained in Anderson's Associate's Agreement with Aflac. The court denied the motion, holding that Anderson's claims were not covered by the Arbitration Agreement, as they did not "arise under" and were not "related to" the Associate's Agreement. Hansen appealed.

  The United States Court of Appeals, Eighth Circuit affirmed. Anderson's claims did not fall within the Arbitration Agreement because they bore no "direct relationship" to the Associate's Agreement. "Relatedness" does not encompass "everything that touches employment in any way," and the fact that Anderson was staying in the hotel for a work conference was "incidental" to an assault that occurred outside the scope of her employment. Hansen could have engaged in the alleged attack "even in the absence of any contractual or employment relationship" between Anderson and Aflac, and even if all duties under the Associate's Agreement were perfectly performed by Anderson and Aflac, Anderson's tort claims would still be in dispute.

- **SHIPPING INVOICE TERMS AND CONDITIONS BINDING ONLY WHERE VENDOR'S ACCEPTANCE OF ORDER EXPRESSLY REQUIRED BUYER'S ASSENT**

  Ballou v Asset Marketing Services, LLC
  United States Court of Appeals, Eighth Circuit
  2022 WL 3725204
  August 30, 2022

  Over a period of four years, William Ballou paid more than $600,000 to purchase coins from Asset Marketing Services (AMS), which used high-pressure phone sales tactics targeted at senior citizens to sell coins for far above their market value. Ballou and other customers (Plaintiffs) placed their orders by phone, and AMS sent the goods with shipping invoices that referenced its Terms and Conditions. Plaintiffs filed a class action against AMS for violating Minnesota laws prohibiting consumer fraud against senior citizens. AMS moved to compel arbitration under its Terms, arguing that its shipping invoices constituted "shrinkwrap contracts" and Plaintiffs' failure to return their purchases constituted acceptance of those Terms. The court denied AMS's motion, and AMS appealed.

  The United States Court of Appeals, Eighth Circuit reversed and remanded for trial of material facts. The Court declined to treat AMS's shipping invoices as shrinkwrap contracts. Shrinkwrap analysis applies when the vendor is the offeror and, therefore, in a position to dictate the terms that constitute acceptance. Minnesota contract law, however, provides that, in a phone order for goods, the buyer is the offeror: the vendor's price quote is an invitation to deal, the buyer is the offeror, and the vendor is the offeree. A written confirmation operates as an acceptance, and any additional or different terms set forth in that confirmation constitute "proposals for addition to the contract" unless acceptance is "expressly made conditional" on assent to those additional terms. Here, Plaintiffs' phone orders created oral contracts: AMS provided information about its goods, Plaintiffs offered to buy the goods for money, AMS accepted and collected payment information,

and the money and goods constituted consideration. The shipping invoices stated, “Thank you for your order,” confirming that a contract had been formed. As AMS’s customer service practices varied over time, some invoices did contain language expressly conditioning AMS’s acceptance on Plaintiffs’ acceptance of Terms, and, in other instances, some Plaintiffs may have verbally agreed to Terms in conversations with customer service representatives. It, therefore, was for trial to determine whether the parties formed contracts that included an arbitration agreement.

- **DELEGATION CLAUSE REQUIRED THAT THRESHOLD ISSUES OF ARBITRABILITY TO BE DETERMINED BY THE ARBITRATOR**

  Caremark, LLC v Chickasaw Nation
  United States Court of Appeals, Ninth Circuit
  2022 WL 3206683
  August 9, 2022

  The Chickasaw Nation signed provider agreements, each including an Arbitration Agreement, with pharmacy benefits manager Caremark to facilitate insurance reimbursement of pharmacy costs to its tribal members. Before 2014, Arbitration Agreements incorporating AAA Rules, which included a delegation clause, were set forth in a manual which the provider agreements incorporated by reference. After 2014, Arbitration Agreements containing a delegation clause were set forth in the body of the provider agreements. The Nation sued Caremark for improperly denying reimbursement claims in violation of the Indian Health Care Improvement Act (Recovery Act), and Caremark filed a motion to compel arbitration. The Nation opposed, claiming that the Arbitration Agreements were unenforceable on sovereign immunity grounds and were precluded by the Recovery Act, which states that “no provision of any contract” shall “prevent or hinder” a tribal organization’s right to recovery under the Act. The court ordered arbitration, holding that threshold arbitrability issues should be submitted to the arbitrator. The Nation appealed.

  The United States Court of Appeals, Ninth Circuit, affirmed that the delegation clauses required threshold arbitrability issues of sovereign immunity and preclusion to be determined by the arbitrator. The pre-2014 Arbitration Agreements’ incorporation of AAA rules constituted “clear and unmistakable evidence” that the parties agreed to arbitrate arbitrability, and the post-2014 Arbitration Agreements expressly granted the arbitrator “exclusive authority” to resolve any dispute relating to the applicability or enforceability of the Arbitration Agreements. The Court rejected the Nation’s argument that any arbitration agreement inherently waived sovereign immunity and was therefore unenforceable absent “clear and unequivocal” evidence that the Nation intended waiver. An arbitration agreement does not necessarily waive tribal immunity, as a tribal organization might agree to arbitrate disputes for which it has waived sovereign immunity and may reserve the right to waive immunity in any given case. The Nation’s preclusion argument constituted a challenge to the Arbitration Agreement as a whole and therefore was “exactly the type of threshold arbitrability issue that the parties have delegated to the arbitrator.”

- **ARBITRATION OF INDIVIDUAL PAGA CLAIMS DID NOT DEPRIVE EMPLOYEE OF STANDING TO ADJUDICATE PAGA CLAIMS AS REPRESENTATIVE OF STATE**

  Shams v Revature LLC
  United States District Court, N.D. California
  2022 WL 3453068
  August 17, 2022

  Leyla Shams sued her former employer, Revature, bringing PAGA claims for wage theft on behalf of herself and as a representative of the state. Revature moved to compel arbitration under the Arbitration Agreement Shams signed as a condition of her employment. In opposition, Shams argued that the Arbitration Agreement’s class action waiver, which extended to “private attorney general remedies,” constituted a wholesale PAGA waiver barred under the Supreme Court’s recent decision in *Viking River Cruises v Moriana*.

  The United States District Court, Northern District of California ordered arbitration of Shams’ individual claims but declined to do so with respect to her representative PAGA claims made on behalf of the State. In *Viking*, the Supreme Court clarified that PAGA claims are “representative” in two ways: the employee brings the action as a representative of the state or as a

representative of other employees. *Viking* upheld PAGA's prohibition on waiver of PAGA claims made on behalf of the state but held that, due to FAA preemption, parties could not be precluded from dividing PAGA actions into individual and non-individual claims. Here, the waiver at issue did not constitute a "wholesale" PAGA waiver but applied only "to non-individual representative actions, not Shams' individual PAGA claims on behalf of the State." The Agreement was therefore valid, and Shams' individual claims relating to the terms and conditions of her employment and compensation fell within its coverage. As to Shams' remaining claims made on the state's behalf, the Court rejected *Viking*'s holding that, once a plaintiff's non-representative individual claims have been removed from a PAGA action, that plaintiff no longer has standing to pursue representative PAGA claims in that action. The California Supreme Court is the final arbiter of California laws, and the Court has previously held that employees do not lose standing to pursue a representative PAGA claim if they settle and dismiss their individual claims. PAGA sets forth only two requirements for bringing an action on behalf of the state: 1) the plaintiff must be an "aggrieved employee" 2) against whom one or more of the alleged violations was committed. Shams, who was employed by Revature and alleged that she suffered at least one of the asserted PAGA Labor Code violations, was, therefore, an aggrieved employee with standing to pursue penalties on the State's behalf. Accordingly, the Court did not dismiss Shams' representative claims and ordered the parties to address those claims in supplemental briefings.

California

- **AGREEMENT TO ARBITRATE NOT "HEALTH CARE DECISION" AUTHORIZED BY ADVANCE DIRECTIVE**

  Logan v Country Oaks Partners, LLC
  Court of Appeal, Second District, Division 4, California
  2022 WL 3500353
  August 18, 2022

  Charles Logan executed an Advance Directive granting his nephew, Mark Harrod, the power to make health care decisions on his behalf in the event that he was unable to do so. Following hospitalization, Logan was admitted to Country Oaks Care Center. Harrod, acting as Logan's Legal Representative/Agent, signed Logan's admissions agreement, as well as a separate Arbitration Agreement which stated in bold type that signing the Arbitration Agreement was not a condition of admission. Logan later, acting on his own behalf, sued Country Oaks for elder abuse and neglect, and Country Oaks petitioned to compel arbitration. The court denied the petition, holding that, although the Advance Directive specifically authorized Harrod to choose a health care facility for Logan, it did not authorize Harrod to enter into an arbitration agreement on Logan's behalf. Country Oaks appealed.

  The Court of Appeal, Second District, Division 4, California, affirmed that Logan's agency power to make health care decisions on Logan's behalf did not extend to entering into an agreement to arbitrate. California regulations prohibit a care facility from requiring residents to sign an arbitration agreement as a condition of admission and from including an arbitration agreement within admission documents, precisely to "decouple" the decision to enter a care facility from the decision whether to enter into an optional arbitration agreement. These regulations were enacted to address a problem facing many California residents, especially those in areas where few nursing facilities were available, who felt they had no choice but to surrender their judicial rights to obtain necessary medical care. While the Advance Directive did authorize Harrod to choose a health care facility on Logan's behalf, the regulatory context makes clear that a decision to enter into a separate, optional arbitration agreement does not constitute part of a health care decision-making process.

Washington State

- **ARBITRATION AGREEMENT APPLIED TO DISPUTES BETWEEN LIMITED LIABILITY COMPANY AND ITS MEMBERS**

Berman v Tierra Real Estate Group, LLC
Court of Appeals of the State of Washington
No. 83311-1-I
August 22, 2022

Joel Berman is a minority member of three limited liability companies that own and operate retail cannabis stores. His Co-members own two additional companies and formed a new corporation, ICG, to coordinate management services between all five companies. Berman received initial shares in ICG, half of which he later exchanged for a monthly fee to be paid until ICG acquired planned retail stores. When ICG was acquired, and those monthly payments ceased, Berman sued the five original companies and the individual Co-members on his own behalf and derivatively on behalf of two of the companies in which he held an interest, TREG, and BIG. The defendants moved to compel arbitration under the separate Operating Agreements of TREG and BIG. The court held that Berman's individual claims for breach of fiduciary duty and civil conspiracy were arbitrable under the Operating Agreements but that his identical derivative claims were not. The court also declined to compel arbitration of Berman's personal civil conspiracy claims against TREG and BIG. TREG, BIG, and the Co-members appealed.

The Court of Appeals of the State of Washington reversed and remanded, finding that all Berman's claims were arbitrable under the Operating Agreements. The Court rejected BIG's argument that its arbitration provision applied only to disputes between members. Washington law makes clear that a limited liability company's operating agreement governs relations "among the members as members and between the members and the limited liability company." The arbitration provision applied to all disputes "between or among" the parties, and BIG was a party to the Operating Agreement. As the Co-members' fiduciary duties arose from the Operating Agreements, Berman's claims for breach of fiduciary duty and civil conspiracy were "related" to those Agreements and subject to their arbitration provisions. The dispute itself was entirely among members of the companies, and the fact that Berman made some claims derivatively did not "transform" that dispute into one between non-members, especially given that Berman's derivative claims were identical to those made on his own behalf.

Georgia

- **PARTY NOT FRAUDULENTLY INDUCED TO SIGN ARBITRATION AGREEMENT**

West v Bowser
Court of Appeals of Georgia
2022 WL 3571458
August 19, 2022

Jobe West sued care facility Provident Village for the wrongful death of his father. Provident moved to compel arbitration under the Arbitration Agreement West signed as his father's guardian at the time of his father's admission. The court granted the motion, but the Court of Appeals of Georgia reversed, holding that West lacked authority to enter into the Arbitration Agreement. The Georgia Supreme Court granted certiorari, holding that the Georgia Guardianship Code grants a guardian the authority to enter an arbitration agreement "where the exercise of such power is reasonably necessary to provide adequately for the ward's support, care, health, and welfare." The trial court reinstated the arbitration order on remand, and West appealed.

The Court of Appeals of Georgia affirmed that the Arbitration Agreement was enforceable, finding that 1) the Agreement was supported by adequate consideration in the form of mutual promises to arbitrate any disputes; 2) West was not fraudulently induced to sign the Agreement because he was "made to believe" that he was required to sign all the documents Provident placed before him. Parties are expected to exercise ordinary diligence in determining contractual terms, and the Agreement stated in bold caps that resident services were not conditional upon signing the Arbitration Agreement. There was no evidence that West had been prevented from reading the Agreement or lacked capacity to do so; 3) waiver of West's judicial remedies did not violate the

Remedies for Residents of Personal Care Homes Act, as parties to a binding arbitration agreement may waive constitutional and statutory rights; and 4) the Agreement was not void under any Georgia public policy and, if it were, such policy would "run afoul of" the FAA.

Case research and summaries by Deirdre McCarthy Gallagher and Rene Todd Maddox.

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