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ADR Case Update 2022 - 22

Federal Circuit Courts

- **FOOD DELIVERY COURIERS NOT TRANSPORTATION WORKERS ENGAGED IN INTERSTATE COMMERCE EXEMPT UNDER FAA § 1**

  Immediato v Postmates, Inc.
  United States Court of Appeals, First Circuit
  2022 WL 17261123
  November 29, 2022

  Damon Immediato worked as a courier for the online and mobile meal delivery platform Postmates, picking up and delivering take-out orders from local restaurants and grocery stores to local customers. 99.66% of all deliveries occurred within Massachusetts, and the average delivery distance was 3.7 miles. Immediato and other couriers (Couriers) sued Postmates for misclassifying them as independent contractors rather than employees. Postmates moved to compel arbitration under the online arbitration agreement to which the Couriers agreed when registering on the mobile app. The Couriers opposed, arguing that they were transportation workers engaged in interstate commerce exempt from arbitration enforcement under FAA § 1. The court held that the exemption did not apply, ordered arbitration, approved the resulting arbitration awards, and dismissed the case. The Couriers appealed.

  The United States Court of Appeals, First Circuit, affirmed, finding it "conspicuously clear" that the Couriers were not transportation workers engaged in foreign or interstate commerce under FAA § 1. The Couriers made deliveries to and from local destinations as part of local intrastate commerce. They were not "last mile" drivers completing the in-state leg of a greater journey across state lines. The goods the Couriers delivered may once have crossed state lines, but their interstate journey terminated upon delivery to the local restaurants and retailers to which they were shipped. A customer's order from one of these restaurants or retailers constituted an "entirely new and separate transaction" of local commerce. The Court rejected the Couriers' alternative argument that if they were not engaged in interstate commerce for purposes of § 1, they were not subject to the FAA because their contracts did not "involve commerce" under § 2. The terms "engaged in commerce" and "involving commerce" are not co-extensive, and § 2 is construed as extending the FAA's coverage to the limits of Congress's commerce power.

- **ARBITRATION AGREEMENT ENFORCED AGAINST NON-SIGNATORY ALTER EGOS**

  In re: Amberson v McAllen
  United States Court of Appeals, Fifth Circuit
  2022 WL 17076708
  November 18, 2022

Texas rancher James McAllen hired his then-son-in-law's legal firm, Jon Christian Amberson, P.C. (the Firm), pursuant to engagement contracts requiring mandatory arbitration of fee disputes. While representing McAllen, the Firm billed him for services it did not perform and failed to repay loans for litigation expenses. Amberson also formed a new company, ANR, funded by a loan from McAllen that it refused to repay to purchase a majority share in Cannon Grove Investments. The Firm sued McAllen to compel arbitration of a disputed fee. McAllen counterclaimed for breach of fiduciary duty, fraud and theft, and damages relating to the Cannon Grove transaction and joined Amberson and ANR as third-party defendants. Amberson moved to compel arbitration and for summary judgment of the Cannon Grove claims. The court ordered arbitration of all claims, and the arbitrator awarded McAllen more than $7 million for the Cannon Grove interests. When McAllen sued to confirm the award, Amberson and ANR filed for bankruptcy, and the award was confirmed in bankruptcy court. The court denied Amberson's request to vacate the part of the award resolving the Cannon Grove claims, holding that Amberson could not challenge the arbitration order post-arbitration but should have sought immediate review through a writ of mandamus. Amberson appealed.

The United States Court of Appeals, Fifth Circuit, affirmed on other grounds. Following an exhaustive review of the TAA, other states' decisions, journal articles, and FAA, the Court held that Amberson properly challenged the arbitration order by waiting until the arbitration's conclusion and filing a motion to vacate the award. Requiring Amberson to immediately challenge the arbitration order through mandamus would be inconsistent with the FAA, which provides for immediate appeal from an order denying arbitration but not from an order granting it. An arbitrator's authority derives entirely from the arbitration agreement, and an arbitrator exceeds that authority if they decide issues beyond the scope of the agreement. Here, the arbitrator relied on factual findings, including Amberson's sole ownership of the Firm and ANR, his commingling of funds, and ANR's inadequate capitalization, to conclude that the Firm and ANR were Amberson's alter egos, rendering the arbitration agreement enforceable against both Amberson and ANR. The Cannon Grove claims fell within the scope of the arbitration because they were "factually intertwined," and the arbitrator acted within the scope of his authority in arbitrating the Cannon Grove claims. The Court found it unnecessary to reach McAllen's claim that Amberson was required to seek vacatur with respect to specific claims under TAA § 171.088(a)(4) based on the absence of an agreement to arbitrate.

California

- **EMPLOYER'S FAILURE TO TIMELY PAY ARBITRATION RETAINER WAS MATERIAL BREACH OF ARBITRATION AGREEMENT**

  De Leon v Juanita's Foods
  Court of Appeal, Second District, Division 3, California
  2022 WL 17174498
  November 23, 2022

  Kail De Leon filed an employment action against his former employer, Juanita's Foods, and Juanita's Foods successfully compelled arbitration under De Leon's employment agreement. Juanita's Foods paid its initial arbitration fee but, after an arbitrator was selected and scheduling commenced, was more than 30 days late in paying the retainer fee. De Leon moved to vacate the arbitration order under Cal. Civ. Proc. Code § 1281.98 which provides that if the employer that drafted the arbitration agreement fails to pay fees necessary to continue an arbitration proceeding within 30 days of the due date, the employer is in "material breach" of the arbitration agreement, and the employee may, among other options, terminate the arbitration and proceed in litigation. Juanita's Foods then paid the retainer fee and opposed the motion to vacate, arguing that its late payment had not delayed the arbitration or otherwise caused prejudice to De Leon. The court held that Juanita's Foods was "automatically" in material breach of the arbitration agreement under the "plain language" of § 1281.98 and declined to consider additional factors. Juanita's Foods appealed.

  The Court of Appeal, Second District, Division 3, California, affirmed. It was undisputed that Juanita's Foods failed to pay "fees required to continue the arbitration proceedings" within 30

days of the due date. Under § 1281.98, this failure constituted a "material breach" of the arbitration agreement and waived Juanita's Foods' right to compel De Leon to proceed with the arbitration. The court below correctly declined to consider other factors, as the language of § 1281.98 is "clear and unambiguous."

- **UNILATERAL AND HARSHLY ONE-SIDED ARBITRATION PROVISIONS INVALID**

  Navas v Fresh Venture Foods, LLC
  Court of Appeal, Second District, Division 6, California
  2022 WL 17087898
  November 21, 2022

  Fresh Venture Foods (FVF) required employees to sign an Arbitration Agreement as a condition of employment. The Agreement required employees to waive their rights to bring representative PAGA actions and also stated that FVF "reserved the right" to enforce "the Waiver of Individuals to Self-Representation in Trials (Private Attorney General Waiver)." FVF employees Juan Navas, Martha Herrera Lopez and Benjamin Hernandez Ramos filed a class action against FVF for wage theft and other employment violations. FVF moved to compel arbitration. Navas, Lopez, and Ramos opposed, claiming that they had not signed the Agreements and that the Agreements were unconscionable. The court found that FVF failed to prove that Lopez and Ramos signed the Agreements and that, with respect to Navas, the Agreement was procedurally and substantively unconscionable. Even assuming Navas's Agreement was valid, the court held that arbitration must be stayed pending adjudication of a related action against FVF, to which Navas was a party. FVF appealed.

  The Court of Appeal, Second District, Division 6, California, affirmed. Evidence at trial was sufficient for the court to conclude that FVF failed to prove that Lopez and Ramos signed the Agreements. Navas's Agreement, required as a "take it or leave it" condition of employment, was procedurally unconscionable, but its failure to mention discovery rights did not render it substantively unconscionable because discovery rights are statutorily guaranteed. However, the waiver of individual PAGA actions was invalid. While an employee may agree to arbitrate individual PAGA claims, the unilateral provision here declared forfeiture of those claims without first obtaining the employee's consent and failed to inform a Spanish-speaking employee what a PAGA claim was. The provision was also invalid as ambiguous, conclusory, and open-ended. The Agreement was unconscionably "one-sided and harsh," as it applied only to employee-side claims and because it required employees to exhaust internal complaint procedures but failed to explain what those procedures were. Given the number of challenges to the Agreement, the court below could reasonably find that severance was not an acceptable option. Even assuming the Agreement's validity, however, the lower court properly stayed the case under Cal. Civ. Proc. Code § 1281.2(c) pending the outcome of a related case.

Texas

- **COURT SEVERED UNCONSCIONABLE PROVISIONS OF ARBITRATION AGREEMENT**

  Casa Ford, Inc. v Warner
  Court of Appeals of Texas, El Paso
  2022 WL 17345501
  November 30, 2022

  John Warner sued his former employer Casa Ford for wrongful termination based on age discrimination. Casa Ford moved to compel arbitration under the Arbitration Agreement to which Warner had agreed as a condition of employment. The Agreement contained two provisions requiring Warner to pay his attorneys' fees and costs. Warner argued in opposition that the two attorneys' fee provisions deprived him of his statutory right, under the Texas Commission on Human Rights Act, to reasonable attorneys' fees, making the Agreement substantively unconscionable. The court agreed and denied the motion to compel. Casa Ford appealed.

  The Court of Appeals of Texas, El Paso, reversed, directing the lower court, on remand, to sever

the two attorneys' fee provisions and enforce the remainder of the Agreement. The Court agreed with the lower court's finding that the provisions were unconscionable. Although the Agreement contained no severance clause, courts have "inherent power to sever non-essential unconscionable contract provisions." A provision is non-essential if the parties would have contracted in the absence of that provision. The Court found that it could not conclude that Warner would have quit his job rather than sign an arbitration agreement, and, based on the Agreement's broad language authorizing the award of any remedy available by litigation, concluded that Casa Ford would have entered into the Arbitration Agreement absent the attorneys' fees provisions. Given Texas policy in favor of arbitration, the appropriate remedy was to sever the invalid clauses rather than invalidate the entire Agreement.

Washington

- **UAA GOVERNED ARBITRATION UNDER AGREEMENT MADE IN RESOLUTION OF TEDRA ACTION**

  In re: Estate of Bolding
  Washington State Court of Appeals Division Two
  No. 55907-2-II
  November 22, 2022

  Bruce and Patricia Bolding, brother and sister co-trustees of their late mother's trusts, disagreed on final distribution of the assets. Bruce initiated mediation under Washington's Trust and Estate Dispute Resolution Act (TEDRA). The mediation concluded in a signed Agreement that required any disputes arising under the Agreement to be submitted to "binding arbitration" and provided that the non-prevailing party in any enforcement action would pay reasonable costs and attorneys' fees. Bruce subsequently refused to comply with the Agreement's requirement to submit an agreed-upon motion and stipulated dismissal order to the court. Patricia invoked arbitration under the Agreement, and a briefing schedule was set.

  At this point, Bruce submitted the required motion and stipulated dismissal, closing the TEDRA case. The arbitrator then arbitrated the remaining fee and cost issues based on documentation and issued an award requiring Bruce to pay arbitration costs and Patricia's attorney's fees. Bruce refused. Bruce filed an appeal under TEDRA provision RCW 11.96A.310(9), which allows a party to a TEDRA action to appeal an arbitration award and request a trial de novo. In response, Patricia moved to reopen the TEDRA action to affirm the award, arguing that the arbitration was governed by the UAA and not TEDRA. A superior court commissioner held that the award remained subject to TEDRA because the Agreement did not expressly cite the UAA. The court denied Patricia's subsequent motions to revise the order, for summary judgment, and for discretionary review. Patricia appealed.

  The Washington State Court of Appeals Division Two reversed, holding that the UAA, not TEDRA, governed the arbitration. It was undisputed that the parties entered into a binding Agreement that resolved their TEDRA case. In the Agreement, the parties contractually agreed to "binding arbitration," which is governed by the UAA. Under the UAA, Bruce could have moved to vacate, modify, or correct the final award, but he did not, and the court was therefore required to confirm the award. Patricia was the prevailing party in that arbitration and, under the terms of the Agreement, was entitled to the award of reasonable costs and attorney fees arising from the arbitration, as well as those relating to the subsequent litigation and appeal.

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

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