February 16, 2022

ADR Case Update 2022 - 4

Federal Circuit Courts

- **NARROW INTERPRETATION OF EXEMPTION TO ARBITRATION CLAUSE REQUIRED**

  Johnson Controls Security Solutions, LLC v IBEW, Local 103
  2022 WL 262963
  United States Court of Appeals, First Circuit
  January 28, 2022

  Johnson Controls (Johnson) provided a 401(K) plan (the Plan) to employees pursuant to Article 9 of its collective bargaining agreement (CBA) with IBEW, Local 103 (the Union). When Johnson temporarily reduced matching contributions to the Plan, the Union filed a grievance, which Johnson denied, and the Union demanded arbitration under the CBA's arbitration clause. Johnson sued for a declaratory judgment that the dispute was not arbitrable under the CBA's exclusion clause, which exempted "any dispute which either directly or indirectly involves the interpretation or application of the plans covering the pensions." The Union moved to dismiss, and the parties agreed to treat the motion as one for judgment on the pleadings. The court entered a declaratory judgment stating that the dispute was not arbitrable. The Union appealed.

  The United States Court of Appeals, First Circuit, reversed. A grievance claim should proceed to arbitration unless the court can say with "positive assurance" that the clause is not susceptible to an interpretation that allows coverage. Here, the broadly drafted arbitration clause required arbitration of grievances "involving and limited to the interpretation of any specific provision" of the CBA, and both parties agreed that the grievance arose from Johnson's Article 9 obligation to provide the Plan. The Court rejected Johnson's argument that the grievance qualified for exemption because it "indirectly" involved "interpretation or application" of the Plan. The exemption did not exclude all disputes relating to the Plan and could be read narrowly as inapplicable to a compliance dispute, which required no resolution of "what the Plan means or how it applies." Johnson provided no evidence that the parties intended to exclude this type of dispute and therefore failed to rebut the presumption in favor of arbitration.

- **NON-CUSTOMER COULD NOT COMPEL FINRA ARBITRATION**

Principal Securities, Inc. v. Agarwal
2022 WL 273267
United States Court of Appeals, Eighth Circuit
January 31, 2022

Dr. and Mrs. Agarwal (the Agarwals), who own a company that builds biofuel refining plants, partnered with John Krohn, a financial advisor at Principal Securities (PSI), to form a second company, KemX, to build and operate such plants. Dr. Agarwal served as president and CEO of KemX, and heavily funded the company through loans. The Agarwals subsequently invested in Spotlight, a company partially owned by Krohn. After losing millions to these ventures, the Agarwals sought to compel arbitration under FINRA Rule 12200 against Krohn's employer, PSI, for failing to supervise or place reasonable controls on Krohn's outside business activities. PSI sued to enjoin the arbitration, arguing that the Agarwals were not PSI "customers," for purposes of invoking FINRA arbitration. The court held for PSI and enjoined the arbitration.

The United States Court of Appeals, Eighth Circuit, affirmed. The Agarwals were not PSI "customers" as defined by FINRA, as they were involved in no business relationship with PSI that "related directly to investment or brokerage services." The Agarwals produced no evidence that Krohn had been acting as their financial advisor or broker; rather, the evidence indicated that the Agarwals had joined as partners in Krohn's outside ventures, which they funded through arms-length transactions. The Court noted that the FAA does not permit a federal court to enjoin arbitration based on an issue's non-arbitrability, but the Agarwals did not challenge the court's authority below or on appeal, and, because the issue was non-jurisdictional, the Court treated it as a waived cause-of-action issue.

- **DENIAL OF MOTION TO RECONSIDER DECISION TO COMPEL ARBITRATION UNAPPEALABLE INTERLOCUTORY ORDER**

Doe v Tonti Management Company, LLC
2022 WL 293222
United States Court of Appeals, Fifth Circuit
February 1, 2022

After landlord Tonti Management Company (Tonti) denied Doe's request to allow a second cat in her apartment, Doe sued under federal and state housing laws. Tonti opposed, moving to compel arbitration under the lease's arbitration clause, which included a delegation clause and a cost-splitting provision. In response, Doe requested severance of the cost-splitting provision in the event of arbitration. The court granted Tonti's motion to compel, denied Doe's cost-splitting request, and stayed the case, closing and retaining jurisdiction over the action. Doe moved to re-open the case, requesting reconsideration of her request to sever the cost-splitting provision. The court denied, holding that it was for the arbitrator to allocate costs if and when they arose. Doe appealed.

United States Court of Appeals, Fifth Circuit denied jurisdiction, finding that the denial of Doe's reconsideration motion was not a final, appealable decision. The FAA precludes appellate review of a court's interlocutory order to compel arbitration. Because an order denying reconsideration of an order to compel is, essentially, a reiteration of the original order, it must also be precluded. A litigant cannot circumvent the FAA's appellate rules simply by bringing a motion to reconsider. In dicta, the Court expressed agreement with the court's conclusion that the arbitration clause, which incorporated the MAPS rules of arbitration, granted the arbitrator the discretion to allocate the arbitration costs, if any, once they were determined.

Maryland

- **NO VALID ARBITRATION AGREEMENT WHERE APPROVAL GAINED THROUGH FRAUD**

Linton v Access Funding LLC
2022 WL 220132
Court of Special Appeals of Maryland

January 26, 2022

After resolving lead paint exposure claims in structured settlements, Crystal Linton and other putative class members (Plaintiffs) sold their income stream rights to Access Funding (Access) in exchange for lump sum cash payments, via identical Purchase and Sale Agreements (Purchase Agreement). The Purchase Agreement contained a mandatory arbitration provision, applicable to claims arising after the transaction had "closed," that included a delegation clause. As required by the Structured Settlement Protection Act (SSPA), Access petitioned for, and was granted, court approval of the transfers. As part of this process, Access-paid attorney Charles Smith (Smith) met with Plaintiffs and submitted signed letters in support of the petition, attesting that he had provided Plaintiffs independent professional advice concerning the legal, tax, and financial implications of their transfers, as required by the SSPA. Plaintiffs filed a class action against Access, claiming that Smith misled them as to their legal rights, and fraudulently misrepresented the nature of that advice in his letters to the court. Access sued to compel arbitration under the Purchase Agreement. The motion remained undecided, as the parties entered negotiations for a Settlement Agreement, which the court approved. The Court of Special Appeals of Maryland reversed and remanded, holding that the Settlement Agreement impermissibly interfered with concurrent state and federal consumer protection actions against Access. On cross petitions for certiorari, the Court of Appeals vacated and remanded to the district court. On remand, Access renewed its motion to compel arbitration, which Plaintiffs opposed, claiming fraudulent inducement. The court granted the motion, holding that arbitrability should be decided by the arbitrator under the delegation clause. Plaintiffs appealed.

The Court of Special Appeals of Maryland reversed and remanded. In alleging that the Defendants committed fraud in the course of gaining the court's approval of the transfers, the Plaintiffs questioned the existence of the arbitration agreement. Whether there is an agreement to arbitrate is always for the court to decide. Compelling arbitration in this context would enable Access to circumvent the authorization process, violating the arbitration clause's prohibition against using arbitration "to bypass state and federal laws requiring court approval of this transaction."

Florida

- **DEED'S ARBITRATION CLAUSE BINDING UPON SUBSEQUENT OWNERS**

Hayslip v U.S. Home Corporation
2022 WL 247073
Supreme Court of Florida
January 27, 2022

The Hayslips purchased their home from the original owners and subsequently sued the builder, U.S. Home, for improperly installing a stucco system in violation of applicable building codes. U.S. Home moved to compel arbitration, citing the arbitration provision in the original deed (the Deed), recorded in the official county records, conveying the property from U.S. Home to the original owners. The magistrate granted U.S. Home's motion to compel, and the circuit court adopted the decision. The Hayslips appealed, arguing that, as non-signatories to the Deed, they were not bound by its arbitration provision. The district court affirmed, holding that the arbitration clause was a binding covenant running with the land, and certified the question to the Supreme Court.

The Supreme Court of Florida confirmed that the arbitration agreement was a covenant running with the land binding upon the Hayslips. A covenant runs with the land if 1) the covenant "touches and involves the land"; 2) the original parties intended the covenant to run with the land; and 3) the contesting party had notice of the restriction. Here, the covenant necessarily touched and involved the land, as the dispute arose when the Hayslips discovered an apparent defect in the home, and the outcome of the arbitration would affect their enjoyment of the property. The Deed clearly stated the original parties' intention that all the Deed's covenants and restrictions including, specifically, the arbitration provision, were "perpetual and run with the land." As the

Deed was properly recorded in the official county records, the Hayslips had constructive notice of its provisions.

Maine

- **NO ARBITRATION AGREEMENT WHERE UBER APP FAILED TO PROVIDE "REASONABLY PRUDENT USER" SUFFICIENTLY CONSPICUOUS NOTICE OF CONTRACT TERMS OR MEANS OF MANIFESTING ASSENT**

  Sarchi v Uber Technologies
  Supreme Judicial Court of Maine
  (Note: We know this isn't a JAMS jurisdiction, but thought the case might be of interest)
  2022 WL 244113
  January 27, 2022

  Patricia Sarchi, who is blind and uses a guide dog, registered for an account on the Uber app with the help of her son. At the time, Uber used a "sign-in wrap" interface, in which a user's assent to registration also constituted assent to contract terms. A page entitled "LINK PAYMENT" provided the user a box to input credit card information, and a text notification (Notification) at the bottom of the page informed the user that creating an account constituted agreement to Terms and Conditions (Terms) accessible by hyperlink. After the user input credit card information, a small box labeled "Done" appeared in the screen's upper righthand corner. Once the user clicked on the "Done" box, their registration was complete. Uber later emailed its users, including Sarchi, that it had updated the Terms' arbitration clause, stating that subsequent use of the Uber app would constitute acceptance of the updated Terms. Sarchi did not open the email. Sarchi ordered a ride through the app, but when the driver arrived, he refused to drive Sarchi with her guide dog. Sarchi sued Uber for Human Rights Act violations, and Uber moved to compel arbitration under the Terms' arbitration clause. The court denied Uber's motion, and Uber appealed.

  The Supreme Judicial Court of Maine affirmed. Online contract terms are enforceable only where the user has received reasonable notice of the terms and manifested assent to those terms. Uber's Notification, which used small, low-contrast font, lacked hyperlink cuing, and was located at the furthest possible distance from the box the user was required to click, was insufficiently conspicuous to notify a "reasonably prudent user" of the contract terms. Even assuming reasonable notice of the terms, a reasonably prudent user would not understand that clicking the "Done" box manifested assent to those terms but would more likely conclude that clicking "Done" merely indicated they had finished entering their credit card information. The Court pointedly contrasted Uber's user registration app with its driver registration app, which required prospective drivers to repeatedly acknowledge contract terms by clicking boldly prominent buttons labeled "I AGREE." The Court rejected Uber's argument that Sarchi accepted the updated Terms by continuing to use Uber after receiving Uber's email notification. The email failed to notify users that they were bound by the updated Terms, and the fact that Uber allowed Sarchi to continue to use the app without opening the email justified the inference that the email lacked indicia of notice and assent.

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