May 19, 2022

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Federal Circuit Courts

- **MEDIATION AGREEMENT NEEDING FORMALIZATION DEEMED ENFORCEABLE**

  Murphy v Institute of International Education
  2022 WL 1217180
  United States Court of Appeals, Second Circuit
  April 26, 2022

  Philana Murphy filed a discrimination action against her employer, the Institute of International Education, and the court referred the case to mediation. The mediation concluded with the parties signing a pre-printed "Mediation Agreement" stating that they had reached agreement "on all issues." Immediately below, handwritten terms itemized amounts the Institute would pay to Murphy in salary and benefits. The Agreement stated that a "full settlement agreement w/applicable releases" would follow." A few days later, Murphy emailed the court asking to revoke the Mediation Agreement, stating that she had been nervous and confused, that she was denied the chance to consider her decision over the weekend, and that she had signed only because she felt she had no choice. Meanwhile, the parties' counsel had negotiated a more comprehensive settlement, including non-compete, non-disparagement, and confidentiality provisions, which Murphy refused to sign. The Institute filed a motion to enforce the Mediation Agreement, which the court granted. Murphy appealed.

  The United States Court of Appeals, Second Circuit affirmed. Under New York law, a party may enforce the terms of a "Type I" preliminary agreement, which expresses the parties' complete agreement subject to formalization, as opposed to a "Type II" agreement, which leaves material terms open subject to a mutual, good faith commitment to negotiate. The Mediation Agreement here was Type I. Its pre-printed language clearly stated that agreement had been reached "on all issues." Had the parties disagreed with language, they could have crossed it out or added handwritten language reserving the right not to be bound. The Agreement set forth specific material terms of payment, indicating that these were no longer open issues. By Murphy's own account, she was anxious precisely because she understood that the Agreement would be binding and would conclude her litigation. The Court rejected Murphy's alternate claim of duress, as she provided no evidence of coercive behavior by the Institute and pressure to sign came from

her own counsel.

- **BAKERY DISTRIBUTOR NOT "TRANSPORTATION WORKER" EXEMPT FROM FAA**

  Bissonnette v LePage Bakeries Park St., LLC
  2022 WL 1416703
  United States Court of Appeals, Second Circuit
  May 5, 2022

  Neal Bissonnette was an independent distributor for LePage Bakery, a subsidiary of Flower Foods. Under his Distribution Agreement, Bissonnette delivered baked goods from the warehouse to restaurants and stores in his assigned territory. He was responsible for sales; soliciting new locations; stocking shelves; and hiring his own workers. He was paid by his store and restaurant customers, earning approximately the difference between the sales price and the price he paid the warehouse for product. Bissonnette filed a putative class action against Flower Foods for labor violations, and Flower moved to compel arbitration under the Distribution Agreement. Bissonnette argued that he was a "transportation worker" exempt from arbitration under the FAA. The court ruled that he was not, and granted Flower's motion to compel. Bissonnette appealed.

  The United States Court of Appeals, Second Circuit affirmed, holding that Bissonnette was in the bakery industry, not the transportation industry. The FAA, which otherwise provides broadly for enforcement of arbitration agreements, excludes from coverage "seamen, railroad employees," and "any other class of workers engaged in foreign or interstate commerce." This "other class" has been construed to include "transportation workers" engaged in interstate commerce in a manner similar to seamen and railroad workers. After surveying other Circuits, the Court adopted the standard that "an individual works in the transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement." Although Bissonnette moved baked goods from place to place, his customers paid for the baked goods themselves, not for transportation services, and the FAA exclusion did not apply.

- **ARBITRATION AGREEMENT ILLUSORY DUE TO MODIFICATION CLAUSE**

  Coady v Nationwide Motor Sales Corp.
  2022 WL 1207161
  United States Court of Appeals, Fourth Circuit
  April 25, 2022

  When Michael Coady began sales work at Nationwide, he signed a Receipt stating that he had received Nationwide's employee Handbook; that he had read and understood specific sections of the Handbook including its Arbitration Agreement; and that he understood a Modification Clause set forth in the Receipt, under which Nationwide retained the right to modify or eliminate its policies at any time without notice. Coady and other employees sued Nationwide for fraudulent payment practices, and Nationwide moved to compel arbitration. Coady opposed, claiming that the Arbitration Agreement was illusory because the Modification Clause allowed Nationwide to alter or revoke the Agreement at any time. Nationwide argued that the Modification Clause did not apply to the Agreement because it was set forth only in the Receipt, a separate document outside the four corners of the Agreement. The district court denied Nationwide's motion and held that the Agreement was illusory. Nationwide filed an interlocutory appeal.

  The United States Court of Appeals, Fourth Circuit affirmed that the Agreement was illusory. The Receipt, including its Modification Clause, was part of the Agreement. The Agreement therefore was unenforceable under Maryland law, which holds that an employer's reservation of the right to modify or revoke an arbitration policy at any time without notice renders the promise to arbitrate illusory.

- **COURT INDISPUTABLY ERRED IN AUTHORIZING NOTICE OF COLLECTIVE ACTION TO PARTIES BOUND BY ARBITRATION AGREEMENTS**

  In re A&D Interests, Incorporated

2022 WL 1315465
United States Court of Appeals, Fifth Circuit
May 3, 2022

Four exotic dancers at the Heartbreakers Gentlemen's Club sued owner A&D for labor violations and moved to certify their cases as a "collective action." The dancers had signed Arbitration Agreements which required disputes to be resolved in one-on-one arbitration between A&D and the individual dancer, and provided that any dispute between the parties "shall not be the subject of a class action lawsuit or arbitration." A&D opposed certification, arguing that district courts are prohibited from issuing notice to potential plaintiffs who have signed valid, enforceable arbitration agreements "unless the record shows that nothing in the agreement would prohibit the employee from participating in the collective action." The court granted certification, finding that the Agreements prohibited only class actions, not collective actions. The court approved notice, holding that the prohibition against issuing notice to parties bound by signed arbitration agreements did not apply until A&D moved to compel arbitration. The court denied A&D's request for interlocutory review, and A&D petitioned for a writ of mandamus.

The United States Court of Appeals, Fifth Circuit granted the writ, holding that the court indisputably erred in approving the issuing notice to employees bound by an arbitration agreement. The Agreements required one-on-one arbitration, which necessarily ruled out all collective actions, whether by class action, collective action, or joinder. A&D's failure to compel arbitration was irrelevant, as the court should have focused on whether the individuals receiving notice would be able to participate in the collective action. Issuing notice to those unable to participate "merely stirs up litigation," and, here, constituted sufficiently good cause to support the writ.

- **ARBITRATION AGREEMENTS DID NOT APPLY TO ERISA SECTION 502(a)(2) ACTION**

Hawkins v Cintas Corporation
2022 WL 1236954
United States Court of Appeals, Sixth Circuit
April 27, 2022

Former Cintas employees Raymond Hawkins and Robin Lung (Plaintiffs) brought a putative class action under ERISA Section 502(a)(2) alleging that Cintas had breached fiduciary duties to its retirement Plan by offering limited investment options and charging excessive fees. Cintas moved to compel arbitration under various agreements Plaintiffs had signed during their employment. The court denied the motion, holding that Plaintiffs were suing on behalf of the Plan, not themselves, and previous arbitration agreements they had entered into as individuals were irrelevant. Cintas appealed.

The United States Court of Appeals, Sixth Circuit affirmed. Section 502(a)(2) authorizes parties to sue in a representative capacity for injuries to an ERISA plan. Here, the alleged mismanagement of option choices and administrative costs caused harm to the Plan, not to Plaintiffs as individuals. The action was derivative, made to benefit the Plan as a whole, and the fact that Plaintiffs might indirectly benefit from any remedy to the Plan did not render their claims individualized. The claims therefore belonged to the Plan and were not subject to arbitration agreements made by Plaintiffs as individuals.

- **PARTY WAIVED RIGHT TO CLAIM THAT COURT LACKED AUTHORITY TO DETERMINE ARBITRABILITY**

Dorsa v Miraca Life Sciences, Inc.
2022 WL 1403038
United States Court of Appeals, Sixth Circuit
May 4, 2022

Miraca Life Sciences fired Paul Dorsa shortly after he filed an internal complaint alleging False Claims Act (FCA) violations. Dorsa filed a qui tam action against Miraca alleging FCA violations and retaliatory termination. A government settlement resolved all but the retaliation claim, which Miraca then moved to dismiss, arguing that Dorsa's Employment Agreement required him to

pursue his claim in arbitration. Dorsa opposed on coverage grounds and Miraca, in reply, argued that the court lacked authority to rule on arbitrability, as the Agreement delegated threshold issues to the arbitrator. The court denied Miraca's motion, holding that Dorsa's retaliation claim was not covered by the Agreement's arbitration clause. Miraca appealed but, as Miraca had not moved to compel arbitration or stay litigation, the appellate court dismissed for lack of jurisdiction under the FAA. On remand, Miraca moved to compel arbitration, again arguing that the court lacked authority to determine arbitrability. The court held that Miraca had waived its right to challenge the court's authority by failing to raise that challenge in its initial motion to dismiss. Miraca appealed.

The United States Court of Appeals, Sixth Circuit affirmed that Miraca had waived its right to challenge the court's authority to determine arbitrability. Miraca's claim that the arbitrator must determine arbitrability was "completely inconsistent" with its initial motion to dismiss, which invited the court to determine the scope of the arbitration clause. Miraca could not first ask the district court to determine arbitrability and then later argue, in reply and then a separate motion, that the court could not decide the issue. Miraca waited more than a year after its dismissal motion before moving to compel arbitration. This delay caused prejudice to Dorsa, forcing Dorsa to spend resources litigating two actions and two contradictory arguments, all of which would have been avoided had Miraca raised its claim at the outset.

- **COURT MUST ENFORCE COMMON SENSE MEANING OF AWARD**

  Nano Gas Technologies, Incorporated v Roe
  2022 WL 1210560
  United States Court of Appeals, Seventh Circuit
  April 25, 2022

  Clifton Roe invented a nozzle that transforms gases into liquids. He assigned the invention to Nano Gas in exchange for a board seat, equity, and salary tied to development of the nozzle. When the relationship soured, Roe left to develop the technology on his own, taking with him the nozzle prototype and some Nano Gas intellectual property, and the parties agreed to arbitration. The arbitrator concluded that Roe owed Nano Gas $150,000 for the intellectual property and $1.5 million in damages, minus $1 million compensation from Nano Gas, to be paid "in such manner as Roe chooses." The award stated that the arbitrator did not award a royalty to Roe because Roe, as a major shareholder in Nano Gas, would profit from Nano Gas's future development of the nozzle. Nano Gas successfully sued to enforce the award and filed a turnover action seeking Roe's Nano Gas stock in partial payment of the $650,000 judgment. Roe opposed, arguing that the award allowed him to pay in any manner he chose, meaning that he could even direct payment to be made by his estate after his death. The court initially denied the turnover motion, finding that the arbitrator had relied on Roe's shareholder status in calculating the award and specifically granted Roe control over the manner of payment. On Nano Gas's motion for reconsideration, the court held that "in such manner as Roe chooses" applied only to the damages payment and ordered Roe to turn over his Nano Gas stock to pay the $150,000 intellectual property costs. The court denied Roe's motion for reconsideration, and the parties cross-appealed.

  The United States Court of Appeals, Seventh Circuit affirmed in part, reversed in part, and remanded. While the award was "not a picture of clarity," a court must enforce the award as written. The arbitrator's reference to Roe's shareholder status was "merely explanatory" and did not require that Roe remain a shareholder indefinitely. Allowing Roe to pay "in such manner as Roe chooses" was directed at the manner, but not the timing, of the payment, meaning only that Roe could choose among his available assets how best to satisfy his obligations. A common sense reading of the award dictated that the arbitrator expected the payment to be made in the usual course of post-arbitration. While a court may remand an award to the arbitrator for clarification, it was unnecessary and impractical to do so here, where the award was made five years before and the arbitrator's whereabouts were unknown.

- **COURT HAD AUTHORITY TO CONSIDER PRIVILEGE ISSUES WHEN ENFORCING ARBITRAL SUBPOENA**

  Turner v CBS Broadcasting Inc.

United States District Court, S.D. New York
2022 WL 1209680
April 25, 2022

A CBS employee reported a freelance cameraman for sexual harassment and, after an internal investigation, CBS removed the cameraman from its referral list. The Union filed an arbitration challenging the investigation and, in discovery, requested the investigator's notes and final report, and the names and contact information of people interviewed. CBS refused to comply, and, at the Union's request, the Arbitrator issued a subpoena. CBS continued to refuse, claiming attorney-client privilege. The Union petitioned for judicial enforcement of the subpoena under FAA Section 7. CBS opposed, arguing that the arbitrator had exceeded his authority and showed manifest disregard of the law.

The United States District Court, S.D. New York granted Turner's petition to enforce the subpoena. The Court declined to rule on CBS's claims of excess authority and manifest disregard, as those standards relate only to an action to vacate. The relevant question was whether a court is authorized to consider Civil Procedure Rule 45 privilege objections in a Section 7 action. Because arbitrators are empowered to decide privilege issues, a court is not required to consider them on a section 7 petition. It would be improper, however, to construe Section 7 to prohibit a Court from considering privilege issues. The Court must balance deference to the arbitrator against its duty to protect people from patently unlawful subpoenas. Here, the balance fell in favor of deference, as CBS was a party to the arbitration agreement; CBS had provided the cameraman no information about the investigation that was the crux of the arbitration; and courts routinely allow discovery of internal investigation materials created in the course of a business decision such as firing. The Court denied CBS's request to allow redaction of complainant's and witnesses' names, but held it was appropriate for the investigation materials to be issued subject to a protective order limiting disclosure of non-party names to counsel only.

California

- **EMPLOYEE'S ARBITRATION AGREEMENT DID NOT APPLY TO PAGA ACTION**

  Wing v Chico Healthcare & Wellness Centre, LP
  Court of Appeal, Second District, Division 5, California
  2022 WL 1261452
  April 28, 2022

  Jill Wing filed a private attorneys general (PAGA) action against her employer, Chico Healthcare, for Labor Code violations. Chico moved to compel arbitration, citing the ADR Policy to which Wing had agreed as a condition of employment. The Policy required arbitration of all claims relating to employment and prohibited employees from suing "as a private attorney general or representative of others." The trial court denied the motion, and Chico appealed.

  The Court of Appeal, Second District, Division 5, California affirmed, applying the rule, under California law, that an employee's right to bring a PAGA action is unwaivable. The Court rejected Chico's claim that recent case law required the court to find the rule preempted by the FAA. An employee sues under PAGA as a proxy or agent of the state's labor law enforcement agencies and most of the action's proceeds go to the state. The action lies between the employer and the state, and any waiver must be made by the state. The FAA was intended to streamline the resolution of private disputes rather than government actions and did not preempt the prohibition against waiver of the right to bring a PAGA action. Wing had agreed to the ADR Policy solely in her capacity as an individual, not as a representative of the state, as she executed her agreement before filing the PAGA action and an employee becomes a proxy for the state only upon filing PAGA claims.

- **ARBITRATION AGREEMENT BETWEEN TREATMENT CENTER AND PATIENT IN IMPAIRED MENTAL STATE UNCONSCIONABLE**

  Nelson v Dual Diagnosis Treatment Center, Inc.

2022 WL 1165853
Court of Appeal, Fourth District, Division 3, California
April 19, 2022

After nearly two months' hospitalization for sudden-onset psychosis, Brandon Nelson was released into a Sovereign Health treatment center in a state of high agitation. Despite Sovereign's assessment that Nelson required 24-hour supervision, he was sent alone to his room, where he committed suicide. His parents sued for wrongful death and, on his behalf, negligence, abuse, and fraud. Sovereign moved to compel arbitration under the Enrollment Agreement Nelson signed when he was admitted. The Agreement included a broad arbitration provision incorporating AAA Rules, which delegate arbitrability to the arbitrator. The trial court held that the Agreement was unenforceable, finding it procedurally and substantively unconscionable. Sovereign appealed.

The Court of Appeal, Fourth District, Division 3, California affirmed, rejecting Sovereign's claim that the Agreement's enforceability should be decided by the arbitrator. Looking at the Agreement as a whole, the arbitration provision's incorporation of AAA Rules did not constitute clear and unmistakable evidence of the parties' intention to delegate arbitrability. The Agreement's severability clause "expressly gave the court the authority to review the validity and enforceability of the agreement as a whole," rendering any delegation intention ambiguous at best. The Agreement was procedurally unconscionable, imposing both oppression and surprise on Nelson in a situation in which he lacked bargaining power. Even a "conscientious reader" would "likely be surprised" to find themselves bound by rules that were not attached to the Agreement or otherwise provided, especially when those Rules contradicted express terms of the Agreement. It was oppressive to "artfully hide" contract terms "by the simple expedient of incorporating them by reference." By Sovereign's own assessment, Nelson was in a highly impaired mental state at the time of signing, evincing a high level of procedural unconscionability. The Agreement was substantively unconscionable in requiring Nelson's unliteral release of "almost every conceivable claim" he could assert against Sovereign, relieving Sovereign of any duty to provide competent care. Finally, the Agreement was so thoroughly permeated with unconscionability -- reducing limitations periods by a year, severely restricting discovery, and imposing a gag rule against discussing the dispute – that severability was not a reasonable option.

Texas

- **EMPLOYER'S AGREEMENT TO ARBITRATE NOT ILLUSORY**

  In re Whataburger Restaurants LLC
  2022 WL 1194373
  Supreme Court of Texas
  April 22, 2022

  When Yvonne Cardwell was hired as a dishwasher at Whataburger, she signed a Receipt stating that she had received Whataburger's Employee Handbook and, specifically, the Arbitration Policy set forth in the Handbook. The Receipt stated that the "information" in the Handbook was "intended to be used as a guide only"; that Whataburger could modify or revoke the Handbook's policies at any time without notice; and that nothing in the Handbook was "intended to create" or "be construed to constitute" a contract. Cardwell initialed a separate paragraph of the Receipt labeled "Arbitration," which stated her understanding that she would be required to submit any claims or disputes to arbitration. The Arbitration Policy itself, set forth in the Handbook, provided that Whataburger would provide 30 days' notice of any modification to the Policy, and once facts giving rise to a claim had occurred, could not modify the Policy without the affected employee's consent. Cardwell was injured at work and sued Whataburger, which moved to compel arbitration. Cardwell opposed, arguing that the Arbitration Policy was illusory, and the court denied the motion. A court clerical error caused Whataburger to miss the deadline for appeal and Whataburger challenged the decision in a mandamus petition.

  The Supreme Court of Texas reversed and remanded, holding that the Arbitration Policy was not illusory. Although the Handbook as a whole was identified as a guide rather than a contract,

context showed that the Policy was identified as a separate agreement. The Handbook's introduction clearly carved out an "exception" for the "mutual binding obligations" in the "mandatory Arbitration Policy." The Receipt identified "Arbitration" as a separate topic and required separate initialing to indicate Cardwell's agreement to arbitration. While all other policies in the Handbook were subject to unilateral modification without notice, the Policy created mutual contract obligations, requiring Whataburger to provide 30 days' notice of modifications, after which time the employee's continued employment would be deemed to constitute assent. Cardwell's at-will employment status did not render the Policy illusory, as the Policy provided that the parties' arbitration duties continued beyond termination.

- **PARTIES FULLY AND FINALLY RESOLVED CLAIMS THROUGH A COMPREHENSIVE SETTLEMENT AGREEMENT**

  Transcor Astra Group S.A. v Petrobras America Inc.
  2022 WL 1275238
  Supreme Court of Texas
  April 29, 2022

  International petroleum companies Transcor and Astra reorganized their contentious business relationship in a purchase and sale agreement (2006 Agreement) and, following a series of arbitrations and lawsuits, signed a comprehensive settlement agreement (2012 Agreement) releasing each other from all claims. Petrobas later sued to invalidate the 2012 Agreement based on claims of fraud and bribery, and initiated arbitration under the 2006 Agreement to invalidate that agreement as well. The trial court granted summary judgment to Astra, declaring that the 2012 Agreement, including its mutual release provisions, was valid, binding, and enforceable against all claims, including those Petrobras asserted in arbitration. The appellate court reversed, holding that several of the claims were not released by the 2012 Agreement. The parties cross-claimed.

  The Supreme Court of Texas reversed, holding that the 2012 Agreement fully and finally resolved all claims. With respect to arbitration, the Court rejected Petrobas's argument that the 2006 Agreement's delegation clause required the gateway issue of arbitrability to be determined by the arbitrator. The court, not the arbitrator, must determine whether parties in fact delegated arbitrability to the arbitrator. Although the 2006 Agreement did delegate validity issues to the arbitrator, the 2012 Agreement confirmed the parties' intention to resolve all claims and supersede the 2006 Agreement, as the 2012 Agreement 1) included a merger clause specifically stating that it superseded "all prior written and oral agreements"; 2) designated Texas courts as "the exclusive forums for any dispute," using restrictive language that went beyond choice of venue to exclude other dispute-resolution forums, including arbitration; and 3) mutually released the parties from all claims arising out of or related to the 2006 Agreement. Viewing these provisions collectively, the Court could not conclude the clear and unmistakable existence of an enforceable arbitration agreement. Absent an arbitration agreement, the claims Petrobas asserted in arbitration were barred by the 2012 Agreement's mutual releases.

Missouri

- **COURT COULD NOT DETERMINE VALIDITY OF DELEGATION CLAUSE ABSENT SPECIFIC CHALLENGE BY PARTY**

  Car Credit, Inc. v Pitts
  2022 WL 1229613
  Supreme Court of Missouri
  April 26, 2022

  When purchasing a vehicle from Car Credit, Cathy Pitts signed an Arbitration Agreement with a delegation clause requiring any "Dispute," defined to include arbitrability, to be resolved in arbitration under the rules of the National Arbitration Forum (NAF). When Car Credit repossessed the vehicle for non-payment, Pitts sued, and Car Credit moved to compel arbitration. The court granted the motion, noting that Pitts had not challenged the delegation clause. As NAF no longer

handled consumer claims, the court appointed an AAA arbitrator. Pitts initiated arbitration but challenged the arbitrator's jurisdiction. The arbitrator entered an award for Car Credit, concluding that he had the authority to determine that the Agreement was valid and enforceable with the AAA as substitute for the NAF. The circuit court confirmed the award, but the court of appeals reversed, holding that the AAA arbitrator had exceeded his authority, as the Agreement designated NAF the only valid arbitration forum. The court of appeals certified its decision for transfer, which was granted.

The Supreme Court of Missouri affirmed the award. When a designated arbitrator is unavailable, FAA Section 5 requires the court to appoint a substitute unless the agreement shows that the parties intended to accept no substitute. Pitts claimed that the NAF's unavailability rendered the Agreement unenforceable, essentially arguing that only an NAF arbitrator could determine arbitrability under the delegation clause. Her claim stopped short of the real issue: whether the delegation clause was valid. A party must "specifically challenge" a delegation provision to avoid its application and Pitt did not do so. Absent such a challenge, the Court could only assume the delegation clause to be valid and enforceable, in which case the Agreement's validity was a gateway question properly resolved by the arbitrator.

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