May 17, 2023

ADR Case Update 2023 - 10

Federal Circuit Courts

- **BAKERY DISTRIBUTORS EXEMPT FROM ARBITRATION UNDER FAA SECTION 1**

  Canales v CK Sales Co., LLC
  United States Court of Appeals, First Circuit
  2023 WL 3269173
  May 5, 2023

  LePage Bakeries delivers its baked goods to groceries and other stores via "independent distributors" who purchase the rights to distribute LePage goods along particular routes. LePage ships the baked goods to a Massachusetts warehouse where the distributors pick up the goods to distribute along their route. Margarito Canales and Benjamin Bardzik (Plaintiffs) co-own a company that owns distribution rights for three Massachusetts routes. Both Plaintiffs spend a minimum of fifty hours/week driving their routes. Plaintiffs sued LePage and its subsidiary CK Sales (together, LePage) for wrongfully classifying them as "independent contractors." LePage moved to dismiss and compel arbitration under their distribution agreements. LePage argued that Plaintiffs were not "transportation workers" exempt from the FAA under FAA § 1 because 1) their distributor responsibilities "extend significantly" beyond the "mere transportation of goods" and 2) they do not work in the "transportation industry." The court denied LePage's motion, holding that Plaintiffs were transportation workers exempt under FAA § 1. LePage appealed.

  United States Court of Appeals, First Circuit affirmed that Plaintiffs were "transportation workers" exempt from arbitration under FAA § 1. On waiver grounds, the Court did not address LePage's argument that Plaintiffs were not exempt because they drive solely within Massachusetts. The Court noted, however, that the goods Plaintiffs transport "are in the stream of interstate commerce." It was irrelevant whether Plaintiffs were involved in the "transportation industry." The Supreme Court has rejected the "industry-wide" approach for a standard that examines "what the worker does at the company, not what the company does generally." Here, both Plaintiffs "deliver goods in trucks to stores for at least fifty hours every week." The fact that Plaintiffs are business owners with additional non-driving responsibilities did not alter their status as transportation workers.

- **UNION'S CLAIM FELL WITHIN CBA'S GRIEVANCE & ARBITRATION PROVISION**

  Local Union 97, International Brotherhood of Electrical Workers, AFL-CIO v Niagara Mohawk Power Corporation
  United States Court of Appeals, Second Circuit
  2023 WL 3214508
  May 3, 2023

  The Union filed a grievance against utility company Niagara for violating their CBA by making medical benefits more expensive for retired employees than active employees. Niagara declined to process the grievance, stating that "the Union does not represent and the Agreement does not cover retired employees." The Union sued to compel arbitration. The court granted the motion, and Niagara appealed.

  The United States Court of Appeals, Second Circuit affirmed. The Union's claim unambiguously fell within the CBA's grievance and arbitration provision, which applied to any "dispute or difference" between Niagara and the Union "as to the meaning, application, or operation of any provision of" the CBA. The CBA provided that retirees would "continue to participate in medical plans identical to those that are offered to active Employees." The Court rejected Niagara's claim that only current employees could file grievances. Nothing in the CBA precluded the Union from bringing a grievance in its own name or on behalf of a non-member.

- **ARBITRATOR DID NOT EXCEED POWERS**

  Kinsella v Baker Hughes Oilfield Operations, LLC
  United States Court of Appeals, Seventh Circuit
  2023 WL 3299706
  May 8, 2023

  Donald Kinsella suffered an on-the-job injury while working as a field operator for Baker Hughes. When he sought a return to work, Baker was unable to provide ADA accommodations for him in his former position, and Kristen Martinez of Baker's HR department notified him of an opening for a sedentary dispatcher position. Kinsella missed the application deadline and, after Martinez had the deadline extended, missed that, too. It was later discovered that he did apply after the second deadline, but due to an internal system error, Martinez did not see the application. Kinsella sued Baker for disability discrimination, and the parties went to arbitration. The arbitrator granted summary judgment to Baker on all claims. The award stated that both parties bore some degree of fault for the botched application process and that there was no evidence of discriminatory animus or intentionality in Martinez's failure to consider Kinsella's application. Kinsella sued to vacate the award on excess of powers grounds. By considering lack of discriminatory animus or intentionality, Kinsella argued, the arbitrator applied a heightened discrimination standard "requiring illegitimate elements of proof." The court denied vacatur, and Kinsella appealed. Baker moved for sanctions, arguing that the appeal was frivolous.

  The United States Court of Appeals, Seventh Circuit affirmed vacatur and denied sanctions. An arbitrator's interpretation of the law may be overturned only where there is "no possible interpretive route to the award." The arbitrator applied governing law, and any argument that he did so incorrectly "must fail." Kinsella's claim was based on an erroneous reading of the award: the language to which he objected adhered only to the arbitrator's recognition of the parties' mutual fault. Although this interpretation was erroneous, it was not frivolous, and the Court denied Baker's request for sanctions.

- **REMAND TO DETERMINE WHETHER COMPELLED ARBITRATION VIOLATED NLRA**

  International Brotherhood of Teamsters Local 947 v National Labor Relations Board
  United States Court of Appeals, Eleventh Circuit
  2023 WL 3220980
  May 3, 2023

  Matthew Brown was terminated from his canning line job at Anheuser-Busch. His Union filed a grievance and arbitration under its CBA, and the grievance committee held the discharge

justified. Brown meanwhile filed a Title VII discrimination action against Anheuser-Busch. Anheuser-Busch moved to compel arbitration under the Dispute Resolution Policy (DRP) Brown signed when he applied for his job. While the motion was pending, Brown filed an unfair practice charge with the NLRB, claiming that Anheuser-Busch's attempt to enforce the DRP violated the CBA. An ALJ held that the DRP was a mandatory bargaining subject and that Anheuser-Busch violated the CBA by applying it to Brown without giving the Union prior notice or the opportunity to bargain. The ALJ required Anheuser-Busch to withdraw its motion to compel. Anheuser-Busch filed exceptions, arguing that the motion was protected by its First Amendment Right to Petition. On review, the NLRB Board reversed. The Board rejected Brown's argument that, under the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v NLRB*, the NLRB had the authority to enjoin the motion to compel because it was filed with the "illegal objective" of violating the CBA. Since the act of filing a motion was not of itself illegal, the Board held, an "illegal objective" could be found only where there was some illegal "underlying act." As no such illegal underlying act was associated with the motion to compel, it could not be enjoined. The Union appealed.

The United States Court of Appeals, Eleventh Circuit reversed. Under *Bill Johnson's* the NLRB may enjoin "a suit that has an objective that is illegal under federal law." The inquiry should be whether the lawsuit, if successful, would result in an illegal outcome. The Board made no attempt to answer this question but instead narrowed the "illegal outcome" standard to require the presence of an additional "underlying illegal act." There is no statutory or judicial support for this element, and the Board erred in "injecting" this new requirement. The Court remanded the case for the Board to determine "whether the outcome sought by Anheuser-Busch – the compelled arbitration of Brown's Title VI claims under the Dispute Resolution Policy – would violate the NLRA."

California

- **PRE-JUDGMENT INTEREST OUTSIDE SCOPE OF ARBITRATION AGREEMENT**

  Glassman v Safeco Insurance Company of America
  Court of Appeal, Sixth District, California
  2023 WL 3144465
  April 28, 2023

  An uninsured motorist (UIM) hit Sherry Glassman and her mother in a crosswalk, injuring Glassman and killing her mother. Glassman sought recovery from insurer Safeco for her own injuries and for PTSD suffered from witnessing her mother's death. Safeco paid $505,000 under Glassman's auto policy and uninsured driver's auto policy but denied coverage under her $1 million umbrella policy for excess UIM benefits. Glassman initiated arbitration seeking $4 million in reimbursement. Following discovery, she made a CCP § 998 settlement offer to Safeco in the amount of $999,999.99. Safeco declined the offer. The arbitrator excluded Glassman's PTSD claims but held that her medical expenses, psychotherapy treatment, and lost wages totaled more than the $1,505,000 floor necessary to trigger the umbrella policy and that she was therefore entitled to the full $1 million policy amount. Glassman petitioned to confirm the award and requested prejudgment interest from the date of her settlement offer under CCP § 3287(a), which provides a right to prejudgment interest when the right to recover damages is fully vested on a specific day. The court confirmed the award but rejected the prejudgment interest claim, finding that the amount of Glassman's claim was not fixed at the time of her offer. Glassman appealed.

  The Court of Appeal, Sixth District, California, affirmed that Glassman was not entitled to prejudgment interest. California law statutorily provides for arbitration of UIM cases. Here, the arbitration was limited to determining whether Glassman's damages exceeded her policy limits and triggered the umbrella policy. A UIM arbitration award may not exceed the policy limits, and the scope of the party's arbitration agreement did not extend to prejudgment interest. Accordingly, any award of prejudgment interest fell to the courts. The Court rejected Safeco's assertion that prejudgment interest was unavailable in UIM proceedings, as the governing provision, Insurance Code § 111580.2, does not address the availability of prejudgment interest. Nonetheless, Glassman was not entitled to prejudgment interest, as she failed to show that, at

the time of her CCP § 998 offer, Safeco had knowledge that her damages had already exceeded the umbrella policy limits, or that this information was then “reasonably available” to Safeco.

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