July 19, 2023

ADR Case Update 2023 - 14

Federal Courts

- **CLASS ACTION WAIVER INVALID**

  Henry ex rel. BSC Ventures Holdings, Inc. Employee Stock Ownership Plan v Wilmington Trust NA
  United States Court of Appeals, Third Circuit
  2023 WL 4281813
  June 30, 2023

  Marlow Henry filed a putative class action against the trustee of his employer's ESOP, Wilmington Trust, for breach of fiduciary duties. Wilmington moved to dismiss based on the ESOP's Arbitration Agreement, which included a non-severable class action waiver prohibiting claimants from bringing any "representative" or "class" action and from seeking monetary or other relief for the benefit of third parties. The court denied the motion to dismiss, finding that the Arbitration Agreement, which was added to ESOP documents after Henry's hiring, was made unilaterally and lacked consent. Wilmington appealed.

  The United States Court of Appeals, Third Circuit, affirmed on other grounds. The Arbitration Agreement was invalid because it required Henry to waive his statutory right to pursue plan-wide relief under ERISA. ERISA § 1109(a) expressly allows ESOP participants to sue for removal of a plan fiduciary and permits recovery of "all" plan losses caused by fiduciary breach. These forms of relief necessarily have plan-wide effect: a plan fiduciary cannot be removed "only for the litigant." It was impossible to reconcile the class action waiver with these provisions. The waiver was, therefore, unenforceable, and because the waiver was non-severable, the entire Arbitration Agreement was unenforceable as well.

- **ARBITRATOR'S "DISCLAIMER" DID NOT BAR COLLATERAL ESTOPPEL**

  In re: Amberson v McAllen
  United States Court of Appeals, Fifth Circuit
  2023 WL 4484239
  July 12, 2023

Arbitration between attorney Jon Amberson and his former client and father-in-law James McAllen concluded in a multi-million-dollar damages award against Amberson. The award stated that because the parties had requested a "reasoned" award," it would set forth the arbitrator's "essential reasoning" on all issues but would not "consist of formal findings of fact and conclusions of law." Amberson filed for bankruptcy, seeking to discharge the award amounts. McAllen objected and moved for summary judgment, arguing that the discharge was precluded by collateral estoppel. Amberson responded that the award's "disclaimer" of formality constituted an acknowledgment that there were "flaws" in the fact-finding process and that arbitrator did not intend the award to have a preclusive effect. The bankruptcy court granted summary judgment in favor of McAllen, which the district court affirmed. Amberson appealed.

The United States Court of Appeals, Fifth Circuit affirmed. Without determining whether "any" disclaimer could bar collateral estoppel, the Court held that the one at issue in this case did not. The arbitrator's statements did not cast doubt upon the award; rather, they acknowledged the parties' request for a "reasoned" award and set forth the arbitrator's understanding of that request. Before issuing the award, the arbitrator held 10.5 days of hearings, heard testimony from 16 witnesses, and reviewed 325 exhibits filling 17 three-ring binders. "At no place in his 53-page, single-spaced award," the Court noted, "does the arbitrator provide an 'express instruction' to future tribunals not to grant the Award preclusive effect."

- **COURT LACKED JURISDICTION OVER CBA INTERPRETATION DISPUTE**

Avina v Union Pacific Railroad Co.
United States Court of Appeals, Eighth Circuit
2023 WL 4308917
July 3, 2023

Union Pacific warehouse employee Nancy Avina applied for two posted supervisor positions by faxing her resume rather than using Union Pacific's online application platform. Both times, her name was omitted from the candidate list, and someone else was hired. Avina sued for age and race discrimination. At trial, Avina's counsel specifically questioned Union Pacific employees about the CBA's job application requirements. Union Pacific immediately sought dismissal under the Railway Labor Act, which requires arbitration of disputes over interpretation of the CBA. The court granted dismissal, and Avina appealed.

The United States Court of Appeals, Eighth Circuit affirmed. Under the Railway Labor Act, Avina's case constituted a "minor dispute": a controversy over the meaning of an existing CBA in a particular fact situation. If such a dispute lands in litigation, the Railway Labor Act "strips federal courts of subject matter jurisdiction and places it in the National Railroad Adjustment Board." Here, the parties disputed whether Avina had actually applied for the positions, i.e., whether Avina had sufficiently complied with the application requirements set forth in the CBA. The court below concluded that this was a question of CBA interpretation and properly dismissed for the National Railroad Adjustment Board to decide.

- **THIRD-PARTY BENEFICIARY COULD ENFORCE ARBITRATION AGREEMENT**

Kashkeesh v Microsoft Corp.
United States District Court, N.D. Illinois, Eastern Division
2023 WL 4181226
June 26, 2023

In their work as Uber drivers, Emad Kashkeesh and Michael Komorski (Drivers) were required to use facial recognition software provided by Microsoft. In May 2021, Drivers sued Microsoft in state court for violating the Illinois Biometric Privacy Act. Microsoft removed the action to federal court and moved to dismiss for lack of personal jurisdiction. In December 2022, Uber informed Microsoft that, in registering with Uber, the Drivers had entered into an Arbitration Agreement requiring them to arbitrate any dispute against Uber or "any other entity" arising "out of or related to" their use of the Uber platform or driver app. Microsoft then asserted the arbitration requirement as a defense to the Drivers' complaint, and six weeks later, in February 2023, moved to compel arbitration. Drivers opposed, arguing that non-signatory Microsoft could not enforce the

Agreement and that Microsoft had waived any arbitration rights by litigating for more than twenty months after removal without asserting them.

The United States District Court, N.D. Illinois, Eastern Division granted the motion to compel, holding that non-signatory Microsoft was a third-party beneficiary of the Arbitration Agreement. Although not mentioned by name, Microsoft belonged to the class described in the Agreement: it was an entity with whom the Drivers were engaged in a dispute arising from the Drivers' use of the Uber platform and app. The Agreement expressed the parties' intention to "confer a direct benefit" upon entities that met that description. Although it was a "close case," Microsoft did not waive its arbitration rights. Microsoft's failure to discover the Agreement by its own diligence was, at most, negligent; its litigation was "largely responsive" and did not seek a merits determination; and Microsoft asserted its arbitration rights promptly upon learning of the Agreement.

California

- **NON-SIGNATORY MANUFACTURER COULD NOT ENFORCE ARBITRATION**

  Montemayor v Ford Motor Company
  California Court of Appeal, Second District, Division 7
  2023 WL 4181909
  June 26, 2023

  Unhappy with their purchase of a 2013 Ford Edge SUV, Rosanna and Jesse Montemayor sued car dealership AutoNation and manufacturer Ford Motor Company for breach of implied warranty of merchantability. They filed six additional claims solely against Ford for consumer protection violations and breach of express warranty. AutoNation and Ford moved to compel arbitration of all claims under the Sales Contract between the Montemayors and AutoNation. The Montemayors then dismissed their claim against AutoNation and, in opposing the motion to compel, produced Ford's 2013 Model Year Warranty Guide. The Warranty Guide set forth Ford's three-year "bumper to bumper" warranty and five-year 60,000-mile "powertrain warranty" for new vehicles and provided only for voluntary, non-binding arbitration. The court granted Ford's motion to compel arbitration of the implied warranty of merchantability claim, holding that equitable estoppel barred the Montemayors from avoiding arbitration of a claim that they had asserted against both Ford and AutoNation. The court denied the motion as to all remaining claims. Ford appealed.

  The California Court of Appeal, Second District, Division 7 affirmed that non-signatory Ford could not enforce arbitration of the remaining claims under the Sales Contract. The mere "but for" causation of the Sales Contract did not render the Montemayors' claims "inextricably intertwined" with its terms, nor was the Sales Contract intended to benefit Ford. The claims against Ford arose not from the Sales Contract but from the "express written warranty" set forth in the Warranty Guide.

- **ARBITRATOR LACKED AUTHORITY TO EXTEND § 1281.98 FEE DEADLINE**

  Cvejic v Skyview Capital, LLC
  California Court of Appeal, Second District, Division 8
  2023 WL 4230980
  June 28, 2023

  Milan Cvejic sued former employer Skyview Capital for wrongful termination, and Skyview successfully moved to compel arbitration and stay proceedings. Skyview failed to pay its arbitration fees within 30 days of the June 4 deadline. Cvejic's counsel confirmed the non-payment with the case manager and expressly reserved Cvejic's rights to proceed under the Code of Civil Procedure. The arbitration panel then extended the deadline to July 14. Cvejic's counsel immediately notified the panel that Cvejic was withdrawing from the arbitration under Cal. Civ. Proc. Code § 1281.98, which provides that a company's failure to pay arbitration fees within 30 days beyond the due date constitutes a "material breach" of the arbitration agreement and entitles the consumer to "unilaterally elect" one of several statutory remedies. The panel

responded that Cvejic's request was "premature" and, after Skyview paid the fees, ruled that § 1281.98 was "not in play" because Skyview "came into compliance." Cvejic filed a § 1281.98 Election to Withdraw from Arbitration and moved to vacate the stay. The court granted withdrawal, vacated the stay, and awarded Cvejic reasonable expenses. Skyview appealed.

The California Court of Appeal, Second District, Division 8 affirmed. The legislature enacted § 1281.98 specifically to prevent companies from stalling consumer and employment arbitrations by refusing to pay fees and intended the provision to be strictly enforced. Skyview failed to pay within thirty days of the deadline, rendering it in material breach, at which point Cvejic was entitled to withdraw from the arbitration. "It is," the Court stated, "that simple." § 1281.98 "does not empower an arbitrator to cure a party's missed payment." There is no "escape hatch" for companies that "may have an arbitrator's favor" or for an arbitrator "eager to keep hold of a matter."

Texas

- **SUBSEQUENT PURCHASER BOUND TO ARBITRATION BY ESTOPPEL**

  Taylor Morrison of Texas, Inc. v Kohlmeyer
  2023 WL 4278242
  Supreme Court of Texas
  June 30, 2023

  Subsequent purchasers, Andrew and April Kohlmeyer, sued home builder Taylor Morrison for breach of implied warranties of habitability and good workmanship, claiming that negligent construction had caused mold issues throughout their home. Taylor Morrison moved to compel arbitration under its Purchase Agreement with the original owner. The court denied the motion, and the appellate court affirmed, finding no valid arbitration agreement between Taylor Morrison and the Kohlmeyers. The Kohlmeyers were not bound by direct-benefits estoppel, the court held, because the implied warranty of good workmanship did not arise solely from the underlying contract. Taylor Morrison petitioned for and was granted review.

  The Supreme Court of Texas reversed, holding that the Kohlmeyers were bound to arbitration by direct benefits estoppel. While Taylor Morrison's petition was pending, the Court had ruled, in *Lennar Homes of Texas Land & Construction Ltd. v Whitely,* that equitable estoppel bound subsequent purchasers to the arbitration clause in an original purchase agreement because implied warranties did not "stand independently" of that agreement. Implied warranties of good workmanship and habitability "are as much a part of the writing as the express terms of the contract and are automatically assigned to subsequent purchasers." The Court rendered judgment ordering arbitration and remanded for the appropriate stay.

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