

August 16, 2023

ADR Case Update 2023 - 16

Federal Circuit Courts

- **ADEA CLAIM-FILING “PIGGYBACKING RULE” DID NOT APPLY TO ARBITRATION**

In re: IBM Arbitration Litigation
United States Court of Appeals, Second Circuit
2023 WL 49882010
August 4, 2023

During mass terminations at IBM, most terminated employees signed a Separation Agreement, which included a class action waiver and a mandatory arbitration provision. A “Timeliness Provision” required that “if the claim is one which must first be brought before a government agency,” the employee must submit an arbitration demand within the same time period as required by that agency. A group of former employees subject to Separation Agreements (Plaintiffs) filed arbitration demands for ADEA claims, but the demands were dismissed as untimely, as the EEOC’s 300-day claim-filing window had passed. Plaintiffs then tried to opt into a separate EEOC litigation being pursued by former IBM employees who had not signed Separation Agreements, but they were dismissed because of their class action waivers. Plaintiffs sued IBM seeking a declaratory judgment that the Timeliness Provision was unenforceable because it foreclosed the ADEA’s piggybacking” or “single-filing” rule, which allows plaintiffs who failed to file an EEOC claim to “piggyback” off a timely filed action if their claims arise out of “similar discriminatory treatment arising in the same time frame.” The court granted IBM’s motion to dismiss, and Plaintiffs appealed.

United States Court of Appeals, Second Circuit affirmed that the Timeliness Provision is enforceable. The piggybacking rule does not apply to arbitration. It is an exception that “functionally waives” the EEOC’s administrative exhaustion requirement but “does not extend the 300-day deadline to file an EEOC charge.” The rule creates no substantive rights under the ADEA and is contractually waivable.

- **NONPARTY COULD NOT ENFORCE ARBITRATION AGREEMENT**

Rogers v Tug Hill Operating, LLC
United States Court of Appeals, Fourth Circuit
2023 WL 5004996
August 7, 2023

Oil rig foreman Lastephen Rogers enrolled with oil-and-gas industry job placement company RigUp pursuant to an Agreement containing an Arbitration Provision with a delegation clause. The Agreement stated that, once Rogers was placed with a company, Rogers would “solely

negotiate” his employment terms with that company and that RigUp disclaimed any “liability, obligation or responsibility for any interaction” between Rogers and that company. RigUp placed Rogers with Tug Hill Operations, where he worked for a year and a half. Rogers filed an FLSA claim against Tug Hill for misclassifying him as an independent contractor and failing to pay overtime. RigUp moved to intervene, and Tug Hill moved to compel arbitration under the Agreement. The court granted RigUp’s motion to intervene, citing RigUp’s “economic interest” in the outcome, and ordered arbitration, holding that Rogers’s FLSA claim against Tug Hill was covered by the Arbitration Provision and, alternatively, that Tug Hill could enforce the arbitration agreement as a third-party beneficiary. Rogers appealed.

The United States Court of Appeals, Fourth Circuit reversed. The lower court erred in granting Tug Hill’s motion to compel without first resolving whether, as a matter of state contract law, Tug Hill was authorized to enforce the Arbitration Agreement. Although Rogers agreed to arbitrate disputes arising between him and RigUp, he “did not enter into any agreement that allows an arbitrator to decide whether a third party like Tug Hill has rights under the arbitration agreement.” Tug Hill was not a third-party beneficiary under West Virginia or Texas law, as the Agreement included no statement that it was made for the sole benefit of Tug Hill or directly for its benefit. The court abused its discretion in granting RigUp’s intervention, as the Agreement expressly disclaimed RigUp’s right to be party to any dispute between Rogers and Tug Hill.

- **RECEIPT OF NOTICE OF ARBITRATION AGREEMENT RAISED TRIABLE ISSUE**

Kass v PayPal Inc.

United States Court of Appeals, Seventh Circuit
2023 WL 4782930
July 27, 2023

Terry Kass filed a putative class action claiming that PayPal had mishandled charitable donations, and PayPal moved to compel arbitration under her User Agreement. When Kass first joined PayPal, the Agreement did not require mandatory arbitration, but the Agreement was later amended to include a mandatory arbitration provision. At hearing, PayPal presented evidence that it had posted the amended Agreement on its website and followed its standard practice of emailing notice of the amended Agreement to active users. Kass testified that she had not seen the amended Agreement on the website nor received email notice. The court granted PayPal’s motion to compel. Applying the “mailbox rule,” the court held that PayPal’s evidence created a rebuttable presumption that its notice was “properly sent, received, and read” and that Kass’s “conclusory statement” failed to rebut that presumption. The arbitration resulted in an award for PayPal, which PayPal successfully sued to confirm. Kass appealed.

The United States Court of Appeals, Seventh Circuit, vacated, finding that the lower court misapplied the mailbox rule. By presenting evidence that it had adhered to its usual practice of emailing amendments to its users, PayPal did raise a presumption that the email was received by Kass. Under Illinois law, however, Kass’s testimony that she did not receive the email notice was sufficient to rebut that presumption. Kass’s receipt of the email notice was, therefore, a disputed issue of fact requiring resolution at trial.

- **NO ENFORCEMENT OF AGREEMENTS MADE BY SUBSIDIARY’S SUBSIDIARIES**

Burnett v National Association of Realtors

United States Court of Appeals, Eighth Circuit
2023 WL 4921710
August 2, 2023

A group of home sellers filed a putative antitrust class action against HomeServices and other real estate organizations, claiming it was anti-competitive to require home sellers to compensate buyers’ brokers. Following class certification, HomeServices moved to compel arbitration of the claims of unnamed class members (Sellers) who, in previously listing their properties for sale, had signed Arbitration Agreements with either of two realty companies -- ReeceNichols and BHH KC – which were wholly owned subsidiaries of a HomeServices subsidiary. The court denied the motion on waiver grounds. Absent waiver, however, the court held that HomeServices did not have a “sufficiently close relationship” with ReeceNichols and BHH KC to enforce the Arbitration

Agreements. HomeServices appealed.

The United States Court of Appeals, Eighth Circuit affirmed that HomeServices lacked authority to enforce the Arbitration Agreements. The Court rejected HomeServices's argument that the Agreements' delegation clauses required the gateway issue of nonparty enforceability to be decided by the arbitrator. Arbitration arises solely from contract, and "one cannot be forced into arbitration by a contract to which one is a stranger." Here, Home Services conceded that "neither the named plaintiffs nor any purported class member has any contract or direct relationship with HomeServices." By their terms, the Agreements applied only to disputes between the "parties," which the Agreements "narrowly defined" as either ReeceNichols or BHH KC and the unnamed class member.

- **CASE REMANDED TO ALLOW ARBITRATION-RELATED DISCOVERY**

Boshears v PeopleConnect, Inc.

United States Court of Appeals, Ninth Circuit

2023 WL 4940430

August 3, 2023

John Boshears filed a putative class action claiming that PeopleConnect had violated his right of publicity by using his photo on its Classmates.com website. PeopleConnect moved to compel arbitration under the Classmates.com Terms of Use (TOU) and separately moved to dismiss on immunity grounds under the Communications Decency Act. PeopleConnect claimed that Boshears was bound to arbitration through his counsel, Benjamin Osborn, who had registered multiple Classmates.com accounts subject to the TOU beginning in 2019. Boshears argued that he was not bound by the TOUs related to Osborn's previous accounts, which Osborn had opened for personal reasons unrelated to the litigation. Boshears claimed that, in 2021, Osborn had opened a separate account in his capacity as an agent for Boshears and had, at that time, opted out of the TOU's arbitration provision. The court denied PeopleConnect's motion to compel and its motion to dismiss for immunity. PeopleConnect filed an interlocutory appeal challenging both rulings.

The United States Court of Appeals, Ninth Circuit, in a Memorandum Opinion, held that the lower court abused its discretion in denying PeopleConnect's motion to compel arbitration. Boshears could be bound to arbitration under Osborn's agreement to the TOU if PeopleConnect could prove that 1) Osborn became Boshears's agent before creating his member accounts, and 2) Boshears "knowingly accepted a benefit from, failed to repudiate, or exhibited conducting adopting that or those member accounts." The Court vacated the lower court's order denying the motion to compel and remanded with instructions for the court to allow arbitration-related discovery. The Court dismissed PeopleConnect's second challenge – to the denial of its motion to dismiss for immunity -- for lack of jurisdiction. The Court's FAA § 16(a) jurisdiction to hear PeopleConnect's interlocutory appeal of the denial motion to compel did not extend to other orders simply because they were included in the same ruling.

California

- **DEALERSHIP BORE BURDEN OF PROOF IN "ESTABLISHMENT CHALLENGE"**

Barber Group, Inc. v New Motor Vehicle Board

California Court of Appeal, Third District

2023 WL 4699885

July 24, 2023

Barber Group, owner of an existing Honda dealership, filed an "establishment challenge" with California's New Motor Vehicle Board protesting Honda's proposal to build a new dealership less than ten miles away. Following hearing, the ALJ held that Barber "failed to demonstrate good cause" to disallow the encroaching dealership, concluding that the new dealership would "not materially impact" Barber's sales. The New Motor Vehicle Board adopted the ALJ's decision as its own ruling. Barber challenged the ruling in a writ of mandate, which the court denied. Barber

appealed.

The California Court of Appeal, Third District, affirmed. The Court rejected Barber's argument that the court erred in placing the burden of proof on Barber. Barber relied on Cal. Veh. Code § 11713.13(g)(2), which places the burden of proof on the manufacturer in "any proceeding in which the reasonableness of a performance standard" is at issue. This blanket requirement, Barber argued, must be harmonized with Cal. Veh. Code §3066(b)'s establishment protest provision, which states that, while the manufacturer must establish good cause to terminate a dealership, the dealer has the burden of proof to show good cause not to establish an additional dealership. Legislative history indicated that §3066(b) was intended to carve out an exception to § 11713.13(g)(2), rendering that provision inapplicable to Barber's challenge.

New York

- **COURT PROPERLY DENIED REQUEST THAT EXCEEDED SCOPE OF REMAND**

In re: Country-Wide Insurance Company v Hills
New York Supreme Court, Appellate Division, Second Department
2023 WL 4611350
July 19, 2023

Following a car accident, Susanne and Precious Hills served a demand for uninsured motorist arbitration upon Country-Wide Insurance. Country-Wide sued to permanently stay arbitration on the grounds that the vehicle was insured at the time of the accident. Alternatively, Country-Wide sought a temporary stay and to add the vehicle's owner, Laura Dulin, and the vehicle's insurer, GEICO, to the action. The court held that Country-Wide was collaterally estopped from challenging Dulin's non-liability based on prior litigation. On appeal, the New York Supreme Court directed the lower court to issue the temporary stay and add Dulin and GEICO to the action. On remand, the Hills moved for a framed-issue hearing, and Dulin and GEICO opposed. The court denied the motion and permanently stayed the arbitration. The Hills appealed.

The New York Supreme Court, Appellate Division, Second Department affirmed. A trial court "lacks the power to deviate from the mandate of the higher court" and "must conform strictly with the remittitur." The lower court properly denied the Hills' motion for a framed-issue hearing, as the Court did not remit the case for a framed-issue hearing. The court properly issued a permanent stay of the arbitration, as Country-Wide established prima facie that the vehicle was insured at the time of the accident, and the Hills failed to raise a question of fact that it was not.

- **INSURED BREACHED AGREEMENT BY SETTLING CLAIM WITHOUT CONSENT**

In re: Travelers Home and Marine Insurance Company v Delgado
New York Supreme Court, Appellate Division, Second Department
2023 WL 4611349
July 19, 2023

Adrian Delgado's vehicle was involved in a five-car collision, and Delgado served an arbitration demand upon his insurer, Travelers. While arbitration was pending, Delgado settled his claims against the owners of one of the other vehicles involved. Travelers then petitioned to permanently stay arbitration, claiming that Delgado had violated his insurance policy by settling his claim against the other owners without first obtaining Travelers' consent. The court granted Travelers' petition, and Delgado appealed.

The New York Supreme Court, Appellate Division, Second Department affirmed. Delgado's policy expressly required Travelers' prior consent to any settlement by Delgado with another tortfeasor. Delgado's failure to obtain such consent before his settlement constituted a breach of a condition of the insurance contract, and the lower court properly granted the petition to permanently stay arbitration of his claim.

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

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