September 20, 2023

ADR Case Update 2023 - 18

Federal Circuit Courts

- **VOLUNTARY DISMISSAL WITHOUT PREJUDICE WAS NOT A FINAL JUDGMENT**

  Waetzig v Halliburton Energy Services, Inc.
  United States Court of Appeals, Tenth Circuit
  2023 WL 5837487
  September 11, 2023

  Gary Waetzig sued his former employer, Halliburton, for age discrimination. Waetzig was contractually bound to arbitration, and he voluntarily dismissed the case without prejudice and proceeded in arbitration. The arbitrator granted summary judgment in favor of Halliburton. Instead of filing a new action, Waetzig moved to reopen his original case and to vacate the arbitration award. The court reopened the case under Civil Procedure Rule 60(b), finding that Waetzig had mistakenly failed to stay the case pending arbitration and that, because an intervening Supreme Court case had reinterpreted FAA jurisdiction, this mistake cost Waetzig the opportunity to file a new cause of action in federal court. The court vacated the award, holding that the arbitrator had exceeded her powers by failing to provide adequate notice of the summary judgment hearing or sufficient explanation of her decision. Halliburton appealed.

  The United States Court of Appeals, Tenth Circuit, reversed. Waetzig's voluntary dismissal without prejudice divested the lower court of subject matter jurisdiction to consider a Rule 60(b) motion to reopen. Rule 60(b) provides only for relief from a "final judgment." Waetzig's voluntary dismissal was not a "final judgment" because it was made without prejudice, leaving Waetzig the option of refiling.

- **BROWSERWRAP AGREEMENT PROVIDED SUFFICIENT NOTICE OF TERMS**

  Adams v Lashify, Inc.
  United States District Court, M.D. Florida
  2023 WL 5573822
  August 29, 2023

  Courtney Adams made multiple purchases from online retailer Lashify, a seller of eyelash extension products. The Lashify website used a "browserwrap" agreement. A notice at the bottom of its checkout page stated: "Upon placing an order you agree to Lashify's Terms of Use, shipping and return policy." The underlined terms were hyperlinks to the full Terms, and the user placed the order by clicking a set-off black bar containing the word "CHECKOUT" in white typeface. Adams began receiving unwanted Lashify telephone sales calls and filed a state court action against Lashify for violating the Florida Telephone Solicitation Act. Lashify removed the

case to federal court and, a month later, moved to compel arbitration under the Terms. Adams opposed, arguing that the site failed to provide sufficient inquiry notice, and that Lashify waived its arbitration rights by exerting those rights only after removing the case to federal court.

The United States District Court, M.D. Florida granted Lashify's motion to compel arbitration. The Terms were sufficiently conspicuous to put a reasonably prudent person on inquiry notice. Although the hyper-linked text "could have been bolder and larger," it was of "critical" importance that the notice was "prominently" placed above the "Checkout" button in visually contrasting typeface. Lashify did not waive its arbitration rights. Lashify "timely removed" the case and filed its motion to compel within a month without engaging in other litigation practice. Removal, of itself, does not constitute waiver of arbitration rights.

- **APPOINTMENT PROCESS COMPROMISED CLAIM REVIEWER'S NEUTRALITY**

  In re: Diocese of Camden, New Jersey
  United States Bankruptcy Court, D. New Jersey
  2023 WL 5605156
  August 29, 2023

  In 2020, the Diocese of Camden, New Jersey filed for Chapter 11 Bankruptcy, citing the potential liability it faced from sexual abuse survivors (Survivors), as well as income decline resulting from the Covid epidemic. The proposed Bankruptcy Plan provided that Survivors could resolve their claims by 1) electing to receive a $2,500 Expedited Distribution, 2) submitting to an Initial Review Determination which allocated the Survivor's share of the Trust according to a point system, or 3) opting for a Verdict Value Assessment in which a Neutral would review the claim to estimate the "Verdict Value" a reasonable jury was likely to award. The Neutral would be a retired judge appointed by the Trust Administrator in consultation with the Trust Advisory Committee (TAC), which had approval rights over the Trust Administrator's compensation, and was subject to court approval. The Diocese petitioned for Plan confirmation. Several of the Diocese's Insurers objected.

  The United States Bankruptcy Court, D. New Jersey sustained Insurers' objections and held that the Plan could not be confirmed. The Neutral could have "significant impact" on the Insurers' rights, as the Neutral set the value of Survivor Claims prior to the Trust seeking coverage from the Insurers. For the Neutral to fulfill its role, it must be independent and "function more as an arbitrator, with independence from all parties involved." As configured in the proposed Plan, the Neutral here "may be too easily influenced by the Trust Administrator" and "too restricted" by the Trust Distribution Procedures. For this process to "truly be neutral," selection of a Neutral "must be made either together with the Insurers, or at this Court's discretion after input from interested parties."

California

- **ARBITRATION OF INDIVIDUAL PAGA CLAIM DID NOT DIVEST PLAINTIFF OF STANDING IN REPRESENTATIVE PAGA ACTION**

  Barrera v Apple American Group LLC
  California Court of Appeal, First District, Division 2
  2023 WL 5620678
  August 31, 2023

  Mario Barrera and Francisco Varguez (Plaintiffs) sued Apple American Group, owner and operator of the Applebee's restaurant chain, each alleging a single cause of action under PAGA on behalf of themselves and other employees. Apple proceeded with the litigation, including discovery, for more than a year. After learning that the Supreme Court had granted certiorari in *Viking River Cruises, Inc. v. Moriana*, Apple moved to compel arbitration of Plaintiffs' individual PAGA claims under Arbitration Agreements Plaintiffs had signed upon their hiring. Plaintiffs opposed, arguing that Apple had waived its arbitration rights by proceeding in litigation, and that the Agreements were unconscionable. The court denied the motion to compel, stating that it

would not speculate on the outcome of *Viking River*, and that "interests of justice would not be served by further delaying the proceedings." Apple appealed.

The California Court of Appeal, First District, Division 2 affirmed in part, reversed in part, and remanded. Apple did not waive its rights to enforce arbitration by proceeding in litigation. It was not unreasonable for Apple to delay its motion to compel until the motion bore some chance of success. In the intervening time following the lower court's ruling, the Supreme Court handed down its decision in *Viking River,* and the California Supreme Court interpreted that decision in *Adolph v Uber Technologies*. Based on those cases, the Court held that 1) the Arbitration Agreement's PAGA waiver was unenforceable; 2) Plaintiffs' individual PAGA claims were subject to arbitration; and 3) under California law, arbitration of Plaintiffs' individual claims did not "strip" them of standing as aggrieved employees to litigate PAGA claims on behalf of other employees.

- **ARBITRATION FEES WERE NOT "PAID" UNTIL RECEIVED BY ARBITRATOR**

Doe v Superior Court of the City and County of San Francisco
California Court of Appeal, First District, Division Three
No. A167105
September 8, 2023

Jane Doe sued her former employer, Na Hoku, and Na Hoku successfully moved to compel arbitration. Na Hoku's arbitration fees were due September 1. Na Hoku did not meet the due date. On September 28, the arbitrator sent Na Hoku a "courtesy reminder" stating that October 3 was the "last day to remit payment." Na Hoku mailed a check for the fees on September 30 and notified the arbitrator on October 3 that the payment had been mailed. The arbitrator received the check on October 5. Doe moved to vacate the arbitration order under Cal. Civ. Proc. Code § 1281.98, which provides that an employer's failure to pay arbitration fees within 30 days beyond the due date constitutes a "material breach" of the arbitration agreement and entitles the employee to elect one of several statutory remedies, including litigation. The court denied the motion, finding that the payment had been remitted within the statutory period. Doe appealed.

The California Court of Appeals, First District, Division Three reversed. Section 1281.98 provides a "clear, bright-line rule" for determining compliance with the 30-day grace period. If the fees are not received by the conclusion of that grace period, an employee "may immediately" pursue options for relief. As a "general principle," depositing a check in the mail does not constitute payment. It was irrelevant whether Na Hoku had "remitted" the payment in compliance with the arbitrator's courtesy reminder. The arbitrator had no authority to alter the due date absent the parties' agreement. The statute itself makes no reference to "remittance" of payment but only to the date on which fees must be "paid."

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

Yeh v Superior Court of Contra Costa County
California Court of Appeal, First District, Division 4
2023 WL 5741703
September 6, 2023

Jaquelyn Yeh and David Chin (Plaintiffs) sued Mercedes-Benz, USA (MBUSA) for violations of the Song-Beverly Consumer Warranty Act, claiming that their leased Mercedes-Benz B250E had undisclosed defects in breach of MBUSA's implied and express warranties. MBUSA moved to compel arbitration under Plaintiffs' two agreements with the dealer (Dealer Agreements): the car lease and a Retail Installment Sales Contract (RISC). MBUSA claimed enforcement rights as a third-party beneficiary or, alternatively, under the doctrine of equitable estoppel. The court held that MBUSA was not a third-party beneficiary but granted the motion to compel under equitable estoppel. Plaintiffs filed a petition for a writ of mandate.

The California Court of Appeal, First District, Division 4 granted the petition to issue a writ of mandate. MBUSA could not enforce arbitration under the Dealer Agreements based on equitable estoppel. Recent California appellate decisions established that "California law does not treat manufacturer warranties imposed outside the four corners of a retail sale contract as part of the sale contract." Here, it was undisputed that MBUSA's express warranties were separate from the

Dealer Agreements, and the RISC expressly disclaimed such warranties. Plaintiffs' implied warranty claims likewise were not "intimately founded and intertwined" with the Dealer Agreements, as they were based on statutory warrants of merchantability and referenced neither of the Dealer Agreements.

- **COURT'S CONSTITUTIONAL DUTY NOT SUBJECT TO ARBITRATION AGREEMENT**

  Housing Authority of the City of Calexico v Multi-Housing Tax Credit Partners XXIX, L.P.
  California Court of Appeal, Fourth District, Division 1
  2023 WL 5521226
  August 28, 2023

  The City of Calexico Housing Authority entered into a contract with Multi-Housing Tax Credit Partners (MHTCP) to develop affordable housing. The contract's Arbitration Agreement stated that the arbitrator should decide party disputes "as though the arbitrator were a judge in the California court," and that the arbitrator's decision should be reviewable "upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions were entered by a court with subject matter and present jurisdiction." The Housing Authority sued MHTCP in superior court and the parties agreed to arbitration, which concluded with an award in favor of MHTCP. Following the terms of the Arbitration Agreement, the Housing Authority filed both a notice of appeal to the superior court and a petition to partially reverse or vacate the award. The superior court denied the petition. Under the Agreement, the court held, the arbitration award was the equivalent of a superior court decision and was therefore subject to review only by an appellate court. The Housing Authority appealed.

  The California Court of Appeals, Fourth District, Division One reversed. The court below erred in declining to review the case on the merits. Jurisdiction is a constitutional matter, and parties cannot contractually "leapfrog" over the trial court to achieve immediate appellate review. The superior court had a duty to exercise the jurisdiction conferred upon it and was not "at liberty" to "refrain from exercising its original jurisdiction on a theory that the parties have agreed to proceed 'as though' that original jurisdiction had been vested in an arbitrator instead."

Colorado

- **ATTORNEY STATEMENTS PROTECTED BY LITIGATION PRIVILEGE**

  Killmer, Lane & Newman, LLP v BKP, Inc.
  Colorado Supreme Court
  506 P.3d 84
  September 11, 2023

  Attorney Mari Newman held a press conference announcing the filing of a class action against BKP, Inc. and three of its Beauty Bar salons, claiming that Beauty Bar service technicians were unlawfully required to perform janitorial duties without pay. Beauty Bar sued Newman and associated counsel (Attorneys) for defamation and interference with contract. Attorneys claimed litigation privilege, under which attorneys have "absolute privilege" to publish defamatory statements "in the institution of, or during the course and as part of, judicial proceeding" if the statements 1) bear "some relation" to the litigation subject matter and 2) are made "in furtherance of the objective of the litigation." Attorneys argued that the challenged statements promoted the class action and could potentially reach service technicians who might join the class action, provide witness testimony, or pursue similar claims independently. The court dismissed Beauty Bar's claims, but the appellate court reversed. The statements did not further litigation objectives by providing notice to potential class members, the court held, because all class members would be "easily ascertainable" in discovery from Beauty Bar records. Attorneys appealed.

  The Colorado Supreme Court reversed. There is no "ascertainability" exception to litigation privilege. Such an exception would "substantially diminish" the "efficacy" of litigation privilege in class actions. It was irrelevant that the class would be ascertainable following discovery as, at the time of the statements, Beauty Bar's records were not yet available to Attorneys. The "eventual

identification" of class members through discovery was "not a substitute for reaching absent class members and witnesses in the beginning stages of litigation."

District of Columbia

- **LEGISLATIVE REPEAL OF TOLLING PROVISION APPLIED RETROACTIVELY**

  District of Columbia Metropolitan Police Department v District of Columbia Public Employee Relations Board
  District of Columbia Court of Appeals
  2023 WL 5762177
  September 7, 2023

  The District of Columbia Metropolitan Police Department (MPD) served Officer Paul Lopez with a Notice of Proposed Adverse Action seeking to terminate his employment based on a previous arrest. Lopez demanded arbitration under his CBA. The arbitrator held that, under the "90-day rule" set forth in D.C. Code § 5-1031, the MPD's Notice of Adverse Action was untimely and Office Lopez should therefore be reinstated. MPD petitioned PERB to overturn the arbitration decision, and, following PERB's denial, appealed to the Superior Court, which affirmed PERB's decision. MPD appealed.

  The District of Columbia Court of Appeals reversed and remanded. While the case was pending, the Council of the District of Columbia passed the Comprehensive Policing and Justice Reform Amendment Act. Among other provisions, the Reform Act repealed D.C. Code § 5-1031as it applied to MPD officers, expressly providing that the repeal should "apply retroactively to any matter pending, before any court or adjudicatory body" as of the date of enactment. This clear statement of the Council's intentions was sufficient to rebut the general judicial presumption against retroactivity. The Court rejected arguments by the Fraternal Order of Police that retroactivity would cause "manifest injustice." Those arguments were "nothing more than an expression of its frustrated hope" that the original 90-day rule "remain unchanged in perpetuity." As the arbitration award rested solely on the arbitrator's application of the 90-day rule, the award, on its face, was contrary to the Reform Act. The Court remanded the case to PERB with instructions to vacate the decision, set aside the award, and remand to the arbitrator for further proceedings.

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

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