January 18, 2023

ADR Case Update 2023 - 2

Federal Circuit Courts

- **FAA GOVERNED VACATUR AND CHALLENGES TO FCIC ARBITRATION AWARD**

  Bachman Sunny Hill Fruit Farms, Inc. v Producers Agriculture Insurance Company
  United States Court of Appeals, Sixth Circuit
  2023 WL 152518
  January 11, 2023

  Bachman Farms initiated arbitration against insurer Producers Agriculture under their Common Crop Insurance Policy, governed by the Federal Crop Insurance Corporation (FCIC). FCIC regulations strictly limit an arbitrator's authority, providing that only the FCIC, not the arbitrator, may interpret the Policy. If a dispute requires Policy interpretation and an arbitrator issues an award without seeking an FCIC interpretation, the parties may file for FCIC review within one year to have the award nullified. Bachman claimed that Producers had issued an unreasonably low crop-damage payout because the adjuster failed to comply with the applicable FCIC handbook. Neither the parties, nor the arbitrators, requested an FCIC interpretation, and the arbitrator ruled for Producers, holding that the handbook was not a binding part of the Common Policy. Months later, the FCIC determined that its handbooks are in fact part of the Common Policy. Bachman sued in federal court to nullify the award and, alternatively, to vacate. Although Bachman had missed the FAA's three-month deadline for bringing an action to vacate, it claimed that because nullification was an FCIC-created remedy, the FCIC's one-year deadline should apply. The court denied Bachman's motions, and Bachman appealed.

  The United States Court of Appeals, Sixth Circuit affirmed. The FAA is the exclusive source of judicial remedy for challenging an arbitration award. The FCIC regulations establish an administrative nullification process, not a unique judicial remedy. Bachman had the option to seek nullification through the FCIC's administrative processes. Instead, Bachman went to federal court to seek regulatory nullification, "flouting" the FAA's substance and procedure. Accordingly, Bachman's nullification claim was properly dismissed for failing to state a cause of action, and its

vacatur request barred by the FAA's three-month deadline.

- **FORMER INMATE DID NOT ASSENT TO TERMS OF PRE-ACTIVATED DEBIT CARD**

  Moyer v Rapid Investments, Inc.
  United States Court of Appeals, Ninth Circuit
  2022 WL 17999660
  December 30, 2022

  Gary Moyer was briefly incarcerated twice in 2017 and once in 2018. Each time, his cash was confiscated and, upon his release, he was given a Rapid debit "release card" in the same amount. He was offered no other option for receiving his cash back. A sticker on the card identified it as pre-activated, and text on the back stated that by "accepting and/or using this card, you agree to the Account Agreement." The Account Agreement, which Moyer received only with the 2018 card, stated, "If you do not agree to these terms, do not use the Card and cancel it by calling Customer Service," at a number provided, to receive a distribution check at an unspecified future time. Rapid charged $2.50/week in maintenance fees, beginning three days after a card issued, and $2.95 per ATM withdrawal. As a result, each time Moyer was released, he found himself with substantially less cash than when he started. Moyer joined a pre-existing putative class action, and Rapid moved to compel arbitration under the Account Agreement. The district court denied the motion, and Rapid appealed.

  The United States Court of Appeals, Ninth Circuit affirmed. Under Washington law, inaction in response to an offer is not acceptance, so Moyer's retention of the card did not constitute assent to the Account Agreement. The Court rejected Rapid's argument that Moyer had assented to the Agreement by retaining the "benefit" of its card services. Moyer was given no reasonable opportunity to reject those services and, again, it was his own money to begin with.

- **WEBSITE'S TERMS OF SERVICE DID NOT APPLY TO IN-STORE TRANSACTION**

  Johnson v Walmart Inc.
  United States Court of Appeals, Ninth Circuit
  2023 WL 140132
  January 10, 2023

  Kevin Johnson purchased tires online from Walmart.com. As part of the purchase process, Johnson agreed to Walmart.com's Terms of Use. The Terms applied to the "access to and use of all Walmart Sites," defined to include walmart.com, as well as its mobile site and related apps. Johnson had his tires installed at a Texas Walmart Auto Care Center and, while there, purchased a lifetime Service Agreement. When Johnson later attempted to use the covered services, however, he was repeatedly denied, and filed a putative class action against Walmart. Walmart moved to compel arbitration under the Terms. The court denied, holding that the Terms did not apply to in-store purchases. Walmart appealed.

  The United States Court of Appeals, Ninth Circuit affirmed. The parties agreed that Johnson did not enter into an arbitration agreement at the time he purchased the Service Agreement; therefore, an agreement to arbitrate would exist only if the Service Agreement was subject to the Terms of Use. The Terms, however, set forth a "clear, delineated purpose" to regulate use of Walmart's online resources and content, and Johnson's in-store purchase did not involve "access to or use of any Walmart Site" as defined by the Terms. The mere fact that both contracts were between Johnson and Walmart did not render them interrelated: the Service Agreement was entered into separately, involved separate consideration, and differed substantially in its terms.

- **COURT DID NOT ABUSE DISCRETION IN DENYING VACATUR OF PRIOR CONFIRMATION JUDGMENT**

  Campania de Inversiones Mercantiles S.A. de C.V. v Grupo Cementos de Chihuahua S.A.B. de C.V.
  United States Court of Appeals, Tenth Circuit
  2023 WL 140552
  January 10, 2023

A Bolivian arbitration concluded that GCC had failed to honor CIMSA's right of first refusal to purchase GCC, and awarded CIMSA $35 million. GCC had the award annulled in local courts, but the decision was reversed on appeal by Bolivia's highest court. Simultaneously, CIMSA filed a 2015 action to confirm the award in Colorado federal district court, but the action was unable to proceed because GCC could not be located. CIMSA renewed the action in 2018 and the court confirmed the award. GCC refused to pay the ordered damages, moved multiple times to stay execution without posting a supersedeas bond, and challenged the court's Turnover Order in Mexican court. Meanwhile, GCC initiated new Bolivian actions that eventually reinstated the annulment. GCC then sued to vacate the district court's confirmation under Fed. Civ. Pro. Rule 60(b)(5). The court denied the motion, holding that the vacatur would offend basic standards of justice, outweighing interests of comity, and that GCC's conduct in Bolivian and U.S. courts "swayed equitable considerations decidedly against it." GCC appealed.

The United States Court of Appeals, Tenth Circuit affirmed. Rule 60(b)(5) relief is an extraordinary remedy that may only be granted in special circumstances. When a non-prevailing party moves to vacate an award confirmation based on a foreign jurisdiction's subsequent annulment, the court must balance comity against U.S. public policy, but the moving party must also show "highly convincing" evidence "that it is entitled to this extraordinary remedy." The court below did not abuse its discretion in concluding that comity interests were outweighed by U.S. public policy interests in protecting the finality of judgments, in upholding parties' contractual expectations, and in favor of arbitral dispute resolution and further, did not abuse its discretion in finding that GCC's failures to comply with processes relating to the original confirmation weighed against Rule 60(b)(5) relief.

California

- **MEDIATION AGREEMENT ENCOMPASSED DISPUTES**

California-American Water Company v Marina Coast Water District
Court of Appeal, First District, Division 2, California
2022 WL 17973690
December 28, 2022

Water utility Cal-Am joined with two public agencies, Monterey and Marina, to develop a regional desalinization project (RDP). The parties entered into several RDP Agreements, among them a Water Purchase Agreement (WPA). It was later disclosed that Monterey board member Stephen Collins had been a paid consultant to Marina while the RDP Agreements were being negotiated. The parties entered into a Mediation Agreement in an attempt to comply with the WPA's dispute resolution requirements, but remained unable to resolve their disputes. Cal-Am submitted a claim under the California Government Claims Act, and then, joined by Monterey, sued Marina for derailing the RDP. A Phase I declaratory action declared the WPA and other RDP Agreements void based on Collins's conflict of interest. In a Phase II damages action, Marina argued that Cal-Am's statement of its tort claims was deficient under the Claims Act, and opposed waiver allegations on the grounds that she could not have waived claims not yet made. The court held that the WPA and Mediation Agreement did not provide alternatives to claim presentation requirements because the WPA was void at its inception and the Mediation Agreement was made subsequent to the void WPA. The court granted summary judgment in favor of Marina. Monterey and Cal-Am appealed.

The Court of Appeal, First District, Division 2, California reversed and remanded on multiple grounds, including the lower court's basic misunderstanding of waiver. Among other findings, the Court noted the Claims Act's provision that its statutory claims process does not apply if the parties have entered into a contract containing an alternate procedure. Exempting contracts later declared void, the Court found, would negate the purpose of that provision. The Court rejected Marina's argument that the tort claims fell outside the Mediation Agreement's claim procedures because the tort claims arose prior to the Mediation Agreement. The Mediation Agreement was formed precisely to enable the parties to negotiate and discuss all RDP-related disputes,

including the tort causes that premised those disputes.

- **ONLINE "CHECK IN" FORMS FAILED TO PUT USER ON INQUIRY NOTICE**

  Doe v Massage Envy Franchising, LLC
  Court of Appeal, First District, Division 2, California
  2022 WL 17984107
  December 29, 2022

  Jane Doe sued Massage Envy Franchising (MEF) for sexual battery and fraud that occurred at its San Rafael franchise. MEF moved to compel arbitration under a Terms of Use Agreement contained in online "check in" forms completed by Doe. The court denied MEF's motion to compel arbitration, and MEF appealed.

  The Court of Appeal, First District, Division 2, California affirmed. The Court rejected MEF's claim that the Terms constituted a "clickwrap" agreement. Doe did not navigate to a website through an online browser to download an app or a new online service. Rather, Doe showed up to an appointment made under her pre-existing relationship with the San Rafael office; she was shown text presenting the forms as an update to her existing account; and she was at no time made aware that she was signing up for a new service with MEF. The line Doe checked appeared to be part of the general "My Consent" agreement, and the hyperlink was notably "inconspicuous," particularly when compared to the bright purple headings and buttons used elsewhere. Consumers "cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound."

- **AGREEMENT DID NOT APPLY TO CLAIMS PRECEDING DATE OF EMPLOYMENT**

  Vaughn v Tesla, Inc.
  Court of Appeal, First District, Division 5, California
  2023 WL 29132
  January 4, 2023

  Monica Chatman and Evie Hall (Plaintiffs) were employed by a staffing agency that placed them at jobs with Tesla. After several months, each signed an employment Offer Letter with Tesla, effective August 2, 2017, requiring all claims to be resolved in individual arbitration with an arbitrator authorized to grant only individual relief. Plaintiffs subsequently joined a class of Black workers suing Tesla for FEHA violations arising from a racially hostile work environment. Tesla moved to compel arbitration of all claims under the Offer Letters. The court ordered arbitration of disputes arising on or before August 2, 2017, but denied the motion with respect to disputes preceding that date, and to Plaintiffs' request for a public injunction. Tesla appealed.

  The Court of Appeal, First District, Division 5, California affirmed that the arbitration agreement applied only to claims arising on or after the date of Plaintiffs' "direct, contractual employment" with Tesla. Claims arising before that date were not "related to" the Plaintiffs' employment for purposes of arbitrability. Injunctive relief is available in a FEHA action, and California law prohibits waiver of a party's right to seek public injunction in any forum. The Court rejected Tesla's claim that the injunction sought was insufficiently "public" to invoke the prohibition because it would apply within a private employment environment. FEHA and its subsequent case law establish that it is in the public interest for all persons to have access to safe, non-discriminatory employment environments.

- **MISSED FEE DEADLINE CONSTITUTED STATUTORY "MATERIAL BREACH"**

  Williams v West Coast Hospitals, Inc.
  Court of Appeal, Sixth District, California
  2022 WL 17881773
  December 22, 2022

  John Williams, on behalf of his mother's estate, sued West Coast Hospitals for elder abuse and wrongful death. West Coast successfully moved to compel arbitration but failed to timely pay its filing fees. Under Cal. Civ. Proc. Code § 1281.98, 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. After West Coast's 30-day deadline had passed, Williams elected the option to withdraw from the arbitration and proceed in litigation, and moved to vacate the stay. West Coast belatedly paid the fees and opposed the motion, arguing that 1) material breach should be decided by the arbitrator; 2) §1281.98 applies only to mandatory consumer arbitrations; and 3) once arbitration commenced, the court held no jurisdiction to do anything other than confirm, vacate, or correct the resulting award. The court vacated the stay, and West Coast appealed.

The Court of Appeal, Sixth District, California affirmed. "Material breach" under §1281.98 is not an issue for the arbitrator. A company's failure to meet the 30-day deadline is a matter of "ministerial record keeping rather than adjudicative fact-finding," akin to a litigant's failure to pay jury fees, and required no initial determination by anyone other than the consumer. The commencement of arbitration did not divest the trial court of jurisdiction, and the court below properly exercised its "vestigial jurisdiction" to determine that the arbitration had concluded without an award and the case was therefore allowed to proceed in litigation.

Nevada

- **COURT LACKED AUTHORITY TO SET ASIDE CONFIRMATION OF AWARD**

  Arce v Sanchez
  Supreme Court of Nevada
  2022 WL 17886399
  December 22, 2022

  Following a car accident, Patricia Sanchez sued the other driver, Juan Millan Arce. The court ordered the parties to court-annexed arbitration, in which Arce was represented by Erich Storm, in-house counsel for Arce's insurer. The arbitration awarded Sanchez no recovery. Her counsel then contacted the insurer's claims adjuster, and the two reached a settlement in which Sanchez agreed to forego her right to request trial de novo in exchange for a cash payment. Storm objected to the settlement, claiming that Sanchez's counsel had violated the Rules of Professional Conduct (RPC) by contacting the adjuster. Storm sued for, and was granted, confirmation of the arbitration award. Sanchez moved for relief of the judgment under Nevada Civil Procedure Rules 60(b). The court set aside the judgment, finding that Sanchez's counsel had not violated the RPC, and that Sanchez had relied on the settlement in failing to timely request a trial de novo. Arce appealed.

  The Supreme Court of Nevada reversed, directing the lower court to reinstate the arbitration award. In the context of court-annexed arbitration, post-judgment review of award confirmation is controlled by Nevada Arbitration Rule 19(C), not NRCP 60(b). The court-annexed arbitration program was intended to simplify and streamline resolution of civil cases and, to that end, NAR 19(C) strictly limited post-judgment relief to correction of "clerical mistakes in judgments and errors therein arising from oversight or omission." It did not authorize a reviewing court to set aside a judgment. By its plain meaning NAR 19(C) therefore barred application of NRCP 60(b).

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

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