JAMS Institute
LEARNING FROM EACH OTHER

October 18, 2023
ADR Case Update 2023 - 20

Federal Circuit Courts

- **RECEIVER BOUND BY RECEIVERSHIP ENTITY'S AGREEMENT TO ARBITRATE**

  Winkler v McCloskey
  United States Court of Appeals, Ninth Circuit
  2023 WL 6301667
  September 28, 2023

  The SEC filed an enforcement action against Essex Capital, an equipment leasing company operating as a Ponzi scheme front. The court appointed a receiver to "claw back" profits from "net winner" Investors who had received profits from the scheme. The receiver sued a group of such Investors who received their payments through an Essex affiliate, CE Leasing. The Investors moved to compel arbitration under a lease agreement between Essex and CE Leasing. The court denied the motion, holding that the receiver was not bound by Essex's agreement to arbitrate. The court likened the receiver to a bankruptcy trustee, citing a Ninth Circuit Ponzi scheme case, which held that a bankruptcy trustee was not bound by the debtors' arbitration agreement because the trustee "stood in the shoes" of the debtor's creditors, not the debtor. The Investors appealed.

  The United States Court of Appeals, Ninth Circuit reversed. The receiver was bound by Essex's agreement to arbitrate. Unlike a bankruptcy trustee, who is statutorily authorized to act on behalf of creditors, a receiver derives authority from the court's equitable powers and stands in the shoes of the company itself. The Court remanded the case for the court to determine whether the claims fell within the scope of the arbitration agreement and whether the Investors were parties to those agreements.

- **ARBITRATOR MUST DECIDE APPLICABILITY OF ARBITRATION EXCEPTION**

  Brayman v KeyPoint Government Solutions, Inc.
  United States Court of Appeals, Tenth Circuit
  2023 WL 6396518
  October 3, 2023

  KeyPoint Government Solutions' employee Arbitration Agreement contained a Pending Litigation Exception, which stated that "notwithstanding any other language" in the Agreement, the Agreement did not apply to any individual or collective litigation pending at the time of the employee's signing. Employee Rachel Brayman filed a collective action against KeyPoint for FLSA violations, then, two years later, amended the complaint to add California plaintiffs, asserting class-action claims under California law. KeyPoint moved to compel arbitration against

California plaintiffs who had signed the Arbitration Agreement before the date of the amended complaint. The court held that the Pending Litigation Exception applied to the California plaintiffs and denied the motion to compel. KeyPoint appealed.

The United States Court of Appeals, Tenth Circuit reversed. The court below erred in denying the motion to compel. Under the Arbitration Agreement's delegation clause, it was for the arbitrator to determine the application of the Pending Litigation Exception. The Court rejected Brayman's argument that the "notwithstanding" language introducing the Pending Litigation Exception created a "carve-out" exception to the delegation clause. The Court compared this language unfavorably to an explicit carve-out, in which the Agreement clearly stated that the delegation clause "shall not apply" to the Class Action Waiver and that Class Action Waiver disputes should be resolved by the court, "not by the arbitrator." The "notwithstanding" language, in contrast, made no reference to arbitrability and was in no way contrary to the delegation clause.

- **LITIGATION STAY LIFTED AFTER ARBITRATION WAS TERMINATED**

Lee v Citigroup Corporate Holdings, Inc.
United States District Court, N.D. California
2023 WL 6053849
September 14, 2023

Josephine Lee sued PayPal, and the case was stayed pending arbitration. Lee filed a claim with the designated arbitration provider and paid her portion of the arbitration fees. Despite multiple reminders from the provider, PayPal failed to pay its share of the fees within 30 days after the due date, as required by Cal. Civ. Pro. § 1281.97 and by the provider's rules. The provider closed the case, and Lee moved to lift the stay and proceed in litigation.

The United States District Court, N.D. California granted Lee's motion to lift the stay. In a separate order, the Court held that § 1281.97 was preempted by the FAA. However, California courts have "consistently held that termination by the provider allows for the cases to return to district court." PayPal failed to pay its fees within 30 days as required by contract, and the provider terminated the case according to the contract's terms. The Court rejected PayPal's argument that, because the provider's policy was based on § 1281.97, termination was no longer warranted following the Court's preemption ruling. Courts "greatly defer" to the arbitration provider in setting and enforcing such schedules as they deem appropriate. Had PayPal sought to abide by different rules, it should have contracted to do so. Further, PayPal actions waived its arbitration rights, as it was aware of its arbitration rights but nonetheless failed to timely pay its arbitration fees despite multiple reminders from the provider.

California

- **PUBLIC EMPLOYMENT LAW ENFORCEMENT ACTIONS NOT SUBJECT TO EMPLOYEES' ARBITRATION AGREEMENTS**

In re: Uber Technologies Wage and Hour Cases
California Court of Appeal, First District, Division 4
2023 WL 6332898
September 28, 2023

The People of the State of California sued Uber and Lyft for violating the Unfair Competition Law by misclassifying drivers as independent contractors. The court granted the People's motion for a preliminary injunction. California subsequently passed Proposition 22, which altered the standards for classifying independent contractors. The People, Uber, and Lyft agreed to dissolve the injunction, and the People filed an amended complaint seeking injunctive relief "to the extent Proposition 22 is unconstitutional or otherwise invalid." The Labor Commissioner filed a separate Labor Code action against Uber and Lyft, and its case was coordinated with the People's. Uber and Lyft then invoked arbitration agreements made with their drivers, moving that the People's and Labor Commissioner's action be stayed pending completion of any driver arbitrations. The court denied the motions, and Uber and Lyft appealed.

The California Court of Appeal, First District, Division 4 affirmed. The Court rejected Uber's and Lyft's arguments that the FAA preempted the People's and the Labor Commissioner's actions. The People and the Labor Commissioner were not parties to the drivers' arbitration agreements, nor were they acting as "proxies" for the drivers' individual actions.

Illinois

- **PLATFORM COULD NOT ENFORCE ARBITRATION OF CLAIMS UNRELATED TO PLATFORM USE**

  Peterson v DeVita
  Appellate Court of Illinois, First District
  2023 IL App (1st) 230356
  September 22, 2023

  Andrew Peterson created an Airbnb account, but never used the site. Years later, he attended a party on an Airbnb property rented by his friend, Ian Bannon. The railing on an elevated porch gave way, and Peterson suffered serious injury resulting in a lower-leg amputation. Petersen sued Airbnb for negligence. Airbnb moved to compel arbitration under the Terms to which Peterson had agreed when creating his account. Alternatively, Airbnb claimed that Bannon acted as Peterson's agent in booking the property and that Peterson was bound to Bannon's agreement to arbitrate under equitable estoppel. The court denied the motion, and Airbnb appealed.

  The Appellate Court of Illinois, First District, affirmed. Airbnb could not enforce arbitration of Peterson's claims, as they did not arise from Peterson's use of Airbnb's platform. To hold otherwise would bind Peterson to arbitration "in perpetuity" even where his claims had "no connection whatsoever with his use of the website." Bannon did not act as Peterson's agent in booking the property. Although Bannon made a reservation for nine guests, Peterson's name was nowhere listed on the reservation, and Airbnb made no showing that Peterson authorized a reservation on his behalf. Equitable estoppel did not apply, as Peterson received a benefit from Bannon's contract only as an "invitee" to the property.

New York

- **CLICK-WRAP AGREEMENT PUT USER ON INQUIRY NOTICE OF UPDATED TERMS**

  Wu v Uber Technologies, Inc.
  New York Supreme Court, Appellate Division, First Department
  2023 WL 6150415
  September 21, 2023

  Emily Wu's Uber driver dropped her off in the middle of the street, where she was struck by an oncoming vehicle. Wu sued Uber for her personal injuries, and Uber moved to compel arbitration under its Terms, as updated on January 15, 2021. On that date, Uber sent a mass email notification of the update to all users and installed a click-wrap agreement on its website. A blocking popup screen prevented users from entering the site until they clicked a box next to the statement: "By checking this box, I have reviewed and agreed to the Terms of Use." The popup informed users that the update altered their arbitration rights and provided hyperlinks to the updated Terms. Uber's evidence showed that Wu had opened the mass email and had, in order to use the Uber website, checked the box on the popup screen. Wu claimed that she never agreed to the updated Terms and that the popup failed to provide inquiry notice. The court granted Uber's motion to compel arbitration, and Wu appealed.

  The New York Supreme Court, Appellate Division, First Department affirmed. The court was

correct in finding an agreement to arbitrate. Uber's popup screen constituted a valid click-wrap agreement, and Uber prima facie established the existence of an agreement to arbitrate by showing that Wu had electronically signed its updated Terms. Uber established inquiry notice by submitting the mass email opened by Wu, as well as the popup screen, which informed Wu that the Term changes affected her arbitration rights and included "prominent hyperlinks" to the Terms "in font commonly understood to signify hyperlinks."

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

Contact Information
David Brandon
Program Manager
JAMS Institute
415-774-2648
DBrandon@jamsadr.com

C