February 1, 2023

ADR Case Update 2023 - 3

Federal Circuit Courts

- **REMAND APPROPRIATE FOR FAILURE TO PROVIDE REASONED AWARD**

  Smarter Tools Inc. v Chongqing SENCI Import & Export Trade Co., Ltd.
  United States Court of Appeals, Second Circuit
  2023 WL 192501
  January 17, 2023

  STI refused to pay SENCI for generators non-compliant with CA regulations. The parties submitted to arbitration, agreeing that the arbitrator should provide a "reasoned award." The arbitrator held for SENCI, stating that SENCI's claims were "well-founded and supported by the evidence" and that he did "not find support for STI's claims." On STI's petition to vacate, the court held that the award was not "reasoned" because it contained "no rationale for rejecting STI's claims." The court remanded to the arbitrator for clarification. The arbitrator issued an amended award with more detailed findings, discussing particularly the evidentiary weight of the purchase orders. STI again moved to vacate, arguing that the court's remand violated the doctrine of functus officio and that the award still lacked sufficient reasoning. The court granted SENCI's cross-petition to confirm the amended award, and STI appealed.

  The United States Court of Appeals, Second Circuit affirmed. A remand for clarification is an exception to the functus officio doctrine and a permissible choice once the court determined that the arbitrator had failed to produce an award in the form agreed by the parties. The award was flawed in form rather than merit and therefore fell under FAA Section 11, which allows a court to modify or correct an award. The award was reasoned, as the arbitrator provided both reasons and a rationale for denying STI's claims based on record evidence.

- **CLAIMS NOT RAISED ON APPEAL PROPERLY DISMISSED**

  Young v Grand Canyon University, Inc.
  United States Court of Appeals, Eleventh Circuit
  2023 WL 118610
  January 6, 2023

  Doctoral student Donrich Young sued Grand Canyon University for breach of contract, intentional misrepresentation, violation of the AZ Consumer Fraud Act (ACFA), and unjust enrichment. Young claimed that GCU made it impossible to complete a doctoral program in 60 credit hours

and failed to provide faculty support necessary to complete his dissertation. GCU moved to dismiss and compel arbitration under the arbitration agreement Young signed as part of his admissions application. Young opposed, citing student loan regulation 34 C.F.R. § 685.300(e)-(f) (2016), which prohibits any university that accepts federal student-loan money from enforcing arbitration agreements against a student's "borrower defense claim." The court ordered arbitration, finding that Young did not raise "borrower defense claims" as defined under the statute. The United States Court of Appeals, Eleventh Circuit reversed, holding that the "core breach of contract, misrepresentation and statutory fraud claims" were, in fact, non-arbitrable "borrower defense claims." On remand, the court denied Young's motion for default judgment and dismissed all remaining claims under Rule 12(b)(6). Young appealed.

The United States Court of Appeals, Eleventh Circuit, affirmed in part and reversed in part. The Court found that Young had sufficiently made out a claim that GCU agreed to provide a certain level of faculty resources and guidance and failed to do so, but failed to show that GCU had promised degree completion within 60 credit hours. The Court affirmed dismissal of Young's unjust enrichment claim, as Young had failed to raise the claim on appeal.

- **DOORDASH & CPR RELATIONSHIP DID NOT INVALIDATE CLASS WAIVER**

  Mullo v Doordash, Inc.
  United States District Court, S.D. New York
  No. 22-CV-2430 (VEC)
  January 17, 2023

  Delivery drivers Jose Mullo and Silverio Flores (Plaintiffs) filed individual and class wage theft claims against Doordash. Doordash moved to strike the class claims and compel arbitration of the individual claims under Doordash's Independent Contractor Agreement (ICA), to which Plaintiffs had agreed as part of their online registrations. The ICA's arbitration agreement required waiver of class claims and designated rules of the International Institute for Conflict Prevention & Resolution (CPR). CPR, a nonprofit organization, had previously accepted donations from Doordash's counsel and had collaborated with Doordash and its counsel in designing Doordash's arbitration policies. Plaintiffs opposed Doordash's motions, arguing that their consent was defective because they were not fluent in English and were unaware of CPR's relationships with Doordash and Doordash's counsel. These relationships also, Plaintiffs argued, rendered the class waiver unconscionable.

  The United States District Court, S.D. New York struck Plaintiffs' class claims and ordered arbitration of their individual claims. The ICA's arbitration provision "clearly and unmistakably" delegated arbitrability to the arbitrator, and Plaintiffs provided no grounds for invalidating that clause. The ICA was available in multiple languages, and an "imperfect grasp of the English language" does not invalidate consent, as the worker is "obliged to seek assistance in understanding the document prior to signing." Doordash owed no disclosure duty regarding relationships with CPR, and information about those relationships would have been "easily available" to Plaintiffs through a "surface inquiry." Those relationships did not render the class waiver unconscionable. Plaintiffs identified nothing in the CPR rules indicating bias against them, and their bias claims otherwise rested on "rank speculation."

California

- **NO FACTUAL DISPUTE AS TO AUTHENTICITY OF ARBITRATION AGREEMENT**

  Iyere v Wise Auto Group
  Court of Appeal, First District, Division 4, California
  2023 WL 314122
  January 19, 2023

  Leroy Iyere and other former employees (Plaintiffs) filed employment claims against Wise Auto Group. Wise moved to compel arbitration pursuant to the Arbitration Agreements each Plaintiff had signed on the first day of employment, which Wise produced with a declaration of

authenticity from its HR Director. Plaintiffs argued that they did not recall signing the Agreements and that the Agreements were procedurally unconscionable, as Plaintiffs were given no choice but to quickly sign a "large stack" of documents as a condition of beginning their employment. The court denied Wise's motion, holding that Wise failed to meet its burden of proving authenticity and that the Agreements were substantively unconscionable because they violated CA Labor Code § 925, which prohibits employers from requiring employees to waive the protections of CA law, and favored Wise by allowing "the party against whom the claim is brought" to choose between two specified arbitration providers. Wise appealed.

The Court of Appeal, First District, Division 4, California, reversed. The evidence showed no factual dispute as to authenticity. Plaintiffs did not deny signing the Agreements or that the Agreements were contained within the stacks of documents they signed. A party's failure to recall signing an agreement may shift the burden of proof in the context of electronic agreements, but Plaintiffs here were capable of recognizing their own handwritten signatures. The agreement to be governed by the FAA does not violate Labor Code § 925, as a party does not forego substantive rights by submitting their resolution to an arbitral rather than judicial forum. Even assuming the Agreements were one-sided in allowing the defending party to choose between arbitration providers, Plaintiffs failed to show how allowing Wise the choice between the two well-recognized and respected providers specified would cause them disadvantage.

Maine

- **COURT DID NOT EXCEED DISCRETION IN ADDRESSING POST-MEDIATION BEHAVIOR IN FINAL JUDGMENT**

  Aubuchon v Blaisdell
  Supreme Judicial Court of Maine
  2023 WL 163968
  January 12, 2023

  At the conclusion of court-ordered divorce mediation, Franklin Blaisdell and Nadine Aubuchon signed a Mediation Agreement that set forth the terms for final judgment, including allocation of the couple's joint business, BFC, to Blaisdell. Almost immediately, Blaisdell triggered the Agreement's "indemnify and hold harmless" provision by publicly posting accusations about Aubuchon's handling of BFC. After his counsel withdrew, Blaisdell represented himself through the remainder of the divorce process and was twice sanctioned for continuing his unsupported accusations against Aubuchon, accusing the court of complicity with Aubuchon and threatening Aubuchon with criminal charges if she failed to agree to his proposed changes. Following a hearing, the court issued a final judgment that mirrored the terms of the Mediation Agreement. Noting that it would be "unfair" to Aubuchon to leave Blaisdell's post-mediation behavior unaddressed, the court also added three new provisions to the judgment: a non-disparagement clause, and two provisions preserving claims "arising out of false and defamatory" post-mediation statements. Blaisdell appealed.

  The Supreme Judicial Court of Maine affirmed the final judgment. The court did not exceed the bounds of its discretion by adding new provisions to the final judgment. The additional provisions did not "add anything substantive to the decision" but merely confirmed "the limited nature of the settlement agreement." The Mediation Agreement had released the parties for past misdeeds, and the court's additional language "simply underscores the fact that there is no acquiescence to future misdeeds." The court then sanctioned Blaisdell for his "frivolous and contumacious appeal," awarding Aubuchon treble costs and attorneys' fees.

Texas

- **EMERGENCY CARE STATUTES DO NOT AUTHORIZE PRIVATE CAUSE OF ACTION**

Texas Medicine Resources, LLP v Molina Healthcare of Texas, Inc.
Supreme Court of Texas
2023 WL 176287
September 20, 2022

Texas's Emergency Care Statutes require insurers to reimburse physicians for emergency care at "the usual and customary rate." Insurance Code Chapter 1467, titled Out-of-Network Claim Dispute Resolution, provided for mediation of balance-billing disputes, stating, in §1467.004, that the remedies provided were "in addition to" other legal or common defenses, remedies, or procedures. In 2019, the legislature added a mandatory arbitration provision -- § 1467.085(a), effective January 1, 2020 -- for disputes between insurers and out-of-network providers over the "reasonable amount" owed. The new provision sets forth specific procedures for requesting and pursuing arbitration, lists ten categories of information the arbitrator must consider, and establishes the standard for judicial review. It states that "Notwithstanding §1467.004," the parties may not sue on covered claims until the conclusion of arbitration." In separate actions, out-of-network physician practice groups ("Physicians"), with various other groups and physicians, sued insurers for failure to reimburse emergency care at a "usual and customary rate." In both cases, the actions were dismissed, and the Fifth Circuit certified to the Supreme Court the question of whether the Emergency Care statutes authorized a private cause of action for failure to reimburse out-of-network emergency care at a "usual and customary" rate.

The Supreme Court of Texas affirmed dismissal of both actions, holding that the statutory texts of the Emergency Care statutes do not impliedly authorize a private cause of action. The Court rejected the Physicians' arguments that new § 1467.085(a) "presupposes" a right to file suit by 1) acknowledging § 1467.004's provision of non-exclusive remedy and 2) requiring parties to delay filing suit until the conclusion of arbitration. Before the 2019 amendments, Chapter 1467 did not apply to claims under the Emergency Care Statutes and, therefore, could not have authorized a private action preceding those amendments. The requirement to delay suit does not anticipate a damages action in front of a jury but recognizes that the arbitrator's decision is binding and subject to judicial review.

Contact:
David Brandon
Program Manager
JAMS Institute
Telephone: 415-774-2648
Email: dbrandon@jamsadr.com