February 15, 2023

ADR Case Update 2023 - 4

Federal Circuit Courts

- **EMPLOYEE RIGHT TO INVOKE GRIEVANCE ARBITRATION DID NOT APPLY TO COMPANY'S ACTION AGAINST UNION**

  United Natural Foods, Inc. v Teamsters Local 414
  United States Court of Appeals, Seventh Circuit
  2023 WL 1247125
  January 31, 2023

  United Natural sued the Union for initiating strikes in violation of their CBA. The Union moved to compel arbitration under CBA Article 14, which provided that an "aggrieved employee" could initiate a four-step Grievance and Arbitration Procedure. If the grievance was not resolved by the conclusion of the third step, the employee could submit to arbitration. The court denied the Union's motion, finding that Article 14 applied only to employee-instigated grievances. The Union appealed.

  The United States Court of Appeals, Seventh Circuit affirmed. Article 14 set forth an employee-oriented process to be initiated by an "aggrieved employee" for resolution of an individual grievance. It was not a stand-alone arbitration provision and did not apply to a claim filed by United Natural against the Union.

- **DEFENDANT WAIVED ARBITRATION RIGHTS BY PURSUING EXTENSIVE LITIGATION AND APPEALS**

  Hill v Xerox Business Services, LLC
  United States Court of Appeals, Ninth Circuit
  2023 WL 1490808
  February 3, 2023

  XBS call centers utilized an Achievement Based Compensation system (ABC Plan) under which

agents were paid by task at differentiated pay rates, rather than at an hourly rate. In 2002 most, but not all, agents signed a Dispute Resolution Plan (2002 DRP). Tiffany Hill did not sign and, in 2012, filed a putative class action claiming that Washington's Minimum Wage Act (MWA) required agents to be paid at an hourly, not piecemeal, rate. XBS asserted failure to exhaust administrative and contractual remedies as a defense, and shortly issued an updated DRP (2012 DRP) requiring arbitration "on an individual basis" and class action waiver. Hill filed a subsequent amended complaint and moved to certify the class. In its responses, XBS cited only the 2012 DRP, not the 2002 DRP. The court certified the class as current and former XBS call center agents compensated under the ABC Plan, excluding 2012 DRP signatories. XBS meanwhile moved for partial summary judgment of its claim that the agents were "piecemeal workers," arguing that judicial resolution of this issue would "obviate the need for certification." The court denied the motion but certified the ruling for interlocutory appeal and stayed the case. The United States Court of Appeals, Ninth Circuit certified the question to the Washington Supreme Court, adopted its holding that the agents were hourly workers, and affirmed denial of summary judgment. The appellate process took five years and, when the district court lifted the stay, Hill immediately filed a Motion to Define Scope. In the parties' Joint Status Report, XBS, for the first time in six years, stated that the 2002 DRP, as well as the 2012 DRP, needed to be "specifically addressed prior to finalizing the class." The parties developed a final list of 5,772 class members and proceeded to stipulate a trial schedule, conduct discovery, and exchange expert reports. The day after class size was finalized, XBS moved to compel individual arbitration by the 2002 DRP signatories, constituting 2,927 of the class members. Hill opposed, claiming that XBS had waived its arbitration rights by proceeding in litigation. XBS argued that it had been unable to identify or compel arbitration by the class members until the class was confirmed. The court denied the motion to compel on waiver grounds, and XBS appealed.

The United States Court of Appeals, Ninth Circuit affirmed. A party waives its right to compel arbitration when it 1) has knowledge of the right, and 2) acts inconsistently with that right. By asserting "failure to exhaust administrative remedies" as a defense, XBS showed that it "had knowledge of and knew how to assert its right to compel arbitration well before class certification and notice was complete." There was "little doubt" that XBS acted inconsistently to its arbitration rights. Taken together, its actions presented "a clear narrative of XBS's strategic choice to engage the judiciary for resolution of the class claims rather than to obtain a resolution from an arbitrator." XBS issued extensive discovery requests seeking information to challenge the merits of putative class member claims. It "actively litigated" the case through summary judgment and a "six-year appellate journey" in the hopes that a favorable judicial resolution would defeat "a substantial amount" of the class members' claims. The Court rejected XBS's claim that it would have been futile to file a motion to compel prior to class certification because the district court would have lacked jurisdiction. Waiver does not require a court to have jurisdiction over waiver beneficiaries, or even for a lawsuit to have been filed. After engaging in actions so obviously inconsistent with assertion of its arbitration rights, XBS "was responsible for concretely signaling its intention to raise its 2002 DRP arbitration defense to the court" – something XBS did not do precisely because it did not wish to put the 2002 DRP signatories on notice of its intention to arbitrate.

- **ARBITRATION AND WAIVER PROVISION UNENFORCEABLE UNDER "EFFECTIVE VINDICATION EXCEPTION"**

Harrison v Envision Management Holding, Inc. Board of Directors
United States Court of Appeals, Tenth Circuit
2023 WL 1830446
February 6, 2023

Three individual Defendants were founders and board members of Envision Management (Envision), a shell corporation that owned a diagnostic imaging company. Robert Harrison worked for Envision for four years and was vested in an employee stock ownership plan (ESOP) created by Defendants. Harrison brought an ERISA action against Defendants and other board members claiming that they installed Argent Trust Company as the ESOP's trustee to facilitate the ESOP's purchase of Defendants' private Envision stock at inflated prices, which the ESOP funded with high-interest loans from Defendants, leaving the ESOP $155 million in debt. Harrison claimed that Defendants' fiduciary breaches caused him and other ESOP participants to suffer significant losses to their retirement savings. His complaint sought "plan-wide relief" including Argent's removal, appointment of a new fiduciary, and orders requiring disgorgement of profits

and restoration of plan losses. Defendants moved to compel arbitration of Harrison's individual claims under the Plan Document's ERISA Arbitration and Class Action Waiver. Harrison opposed, arguing that the Waiver was unenforceable because it stripped him of his right to pursue statutory plan-wide remedies provided by ERISA. The court denied the motion to compel, invoking the "effective vindication exception." Defendants appealed.

The United States Court of Appeals, Tenth Circuit affirmed. Under the "effective vindication exception," an arbitration provision is invalid if it prevents a prospective litigant from "effectively vindicating its statutory cause of action in the arbitral forum." ERISA expressly authorizes representative actions as a means of achieving plan-wide relief such as restoration of losses and removal of a breaching fiduciary. By preventing Harrison from pursuing any form of relief that would "benefit anyone other than Harrison," the Waiver prevented the effective vindication of the plan-wide statutory remedies available under ERISA. As the Plan Document contained a non-severability clause, the entire Arbitration Procedure it set forth was therefore rendered "null and void in all respects."

- **DEFENDANT'S ARBITRATION RIGHTS NOT WAIVED BY MINIMAL LITIGATION PARTICIPATION**

  Amargos v Verified Nutrition, LLC
  United States District Court, S.D. Florida
  2023 WL 1331261
  January 31, 2023

  Roger Amargos filed a class action against nutritional supplement manufacturer Verified Nutrition for violating the Florida Telephone Solicitation Act. Verified's answer made no mention of an arbitration agreement, and the parties proceeded to hold a scheduling conference and submit a Joint Planning and Scheduling Report. The Court entered an Order Setting Trial. Two months after answering the complaint, Verified moved to compel arbitration pursuant to an existing arbitration agreement. Amargos opposed, arguing that Verified had waived its arbitration rights by participating in the litigation process.

  The United States District Court, S.D. Florida granted the motion to compel arbitration. Waiver should be determined by "a totality of the circumstances test that determines whether the Defendant acted inconsistently with its contractual right to arbitration." Verified's minimal litigation participation was "not significant enough" to support a finding of inconsistency. The Court relied in part on an email exchange in which Verified agreed to provide scheduling dates "under duress," stating that it did so only to avoid default, as Verified did not "intend to avail itself of the Federal Courts."

- **AFFIDAVIT INSUFFICIENT TO ESTABLISH EXISTENCE OF MISSING ARBITRATION AGREEMENT**

  Crean v Morgan Stanley Smith Barney, LLC
  United States District Court, D. Massachusetts
  2023 WL 363589
  January 23, 2023

  The Creans created a profit-sharing plan with investment firm Legg Mason, Inc., which was later acquired by Morgan Stanley. The Creans sued Morgan for wrongfully retaining funds. In its answer, Morgan cited a mandatory arbitration provision among its affirmative defenses. The parties engaged in settlement negotiations while proceeding desultorily with litigation. Morgan refused to comply with discovery requests and submitted none of its own. More than a year after receiving the complaint, Morgan moved to compel arbitration under a Client Agreement it believed the Creans would have signed with Legg Mason. Morgan did not produce the Agreement, but Morgan vice president Arthur Murphy asserted by affidavit that, in the normal course of business, Legg Mason required clients to sign a Client Agreement containing a mandatory arbitration clause. That provision, Murphy asserted, would have been "similar" to the provision in Morgan's current standard client agreement, which Murphy attached to his affidavit. The Creans opposed the motion, arguing the absence of a valid arbitration agreement, and that Morgan had waived its arbitration rights by proceeding in litigation.

The United States District Court, D. Massachusetts denied the motion to compel. Morgan did not waive its arbitration rights: it asserted those rights at the outset as an affirmative defense and did not actively invoke the machinery of litigation while the parties were pursuing settlement. Morgan failed, however, to show the existence of a valid arbitration agreement. Secondary evidence is permissible to show the existence of a lost agreement if the failure to produce the original is satisfactorily explained. Murphy's affidavit, however, was unconvincing: he never worked for Legg Mason; he never saw the alleged Client Agreement; he was unable to locate the alleged Agreement among documents kept in the ordinary course of business; and he provided no basis for asserting that the Agreement contained an arbitration provision resembling the one in Morgan's standard client agreement.

- **ARBITRATION RIGHTS NOT WAIVED BY "MERE DELAY"**

  Naranjo v Nick's Management, Inc.
  United States District Court, N.D. Texas
  2023 WL 416313
  January 28, 2023

  Aydee Naranjo worked as an exotic dancer pursuant to a Licensing Agreement with Nick's Club's Inc. d/b/a PT Men's Club (PT). The Agreement stated that Naranjo was not an employee, but performed as a "licensee" and tenant" in exchange for entertainment fees and patron tips. It contained a class and collective action waiver (Waiver) and an arbitration clause. Naranjo filed a collective FLSA action against PT, Nick's Management, Inc., and owner Nick Mehmeti (together, Defendants) for misclassifying the dancers as independent contractors and failing to pay minimum wage and overtime compensation. Defendants moved to dismiss based on the Waiver. Naranjo argued that Defendants had waived their right to enforce the Waiver by 1) failing to produce the Agreement for seven months following her request and 2) invoking the judicial process in a manner inconsistent with their arbitration rights. Naranjo further argued that Mehmeti held no rights to enforce the Class Waiver because he was a non-signatory to the Agreement.

  The United States District Court, N.D. Texas granted the motion to dismiss in part and denied in part. Naranjo's individual claims survived the motion to dismiss, but Naranjo waived her collective action rights by signing the Agreement, which contained an enforceable collective action Waiver. Defendants did not waive their right to enforce the Waiver. A "mere delay" in producing the License Agreement was insufficient to show action inconsistent with Defendants' arbitration and waiver rights. Defendants did not waive their rights by moving in litigation rather than arbitration. The Waiver was distinct from the Agreement's arbitration provision, and Defendants were not required to pursue arbitration in order to enforce the Waiver. Mehmeti could enforce the Waiver under principles of equitable estoppel, as Naranjo's claims were based on the "substantially interdependent and concerted misconduct" by Mehmeti and PT and were dependent on provisions of the Agreement.

District of Columbia

- **ARBITRATION AGREEMENT NOT UNCONSCIONABLE**

  Doucette v Neutron Holdings, Inc.
  District of Columbia Court of Appeals
  2023 WL 408120
  January 26, 2023

  Adoria Doucette was injured when the brakes on her rental scooter failed, causing her to crash. Doucette sued the scooter rental company, Lime, and Lime moved to compel arbitration under the arbitration agreement Doucette accepted when renting the scooter. Doucette opposed, arguing that the arbitration agreement was unconscionable because it required the losing party to bear all arbitration costs; was a contract of adhesion; reduced the time period for bringing an action, and referenced the FAA without explaining it or providing a copy. The trial court granted Lime's motion to compel, and Doucette appealed.

The District of Columbia Court of Appeals affirmed that the arbitration agreement was not unconscionable. Both parties were equally obligated to bring their claims before a neutral entity, both bore the risk of paying costs as the losing party, and no avenues for litigation were reserved to Lime alone. A contract of adhesion is not, of itself, unconscionable. Although the agreement reduced the time for initiating a claim from three years to one, courts have held that one year is a reasonable time limitation in an arbitration agreement. The failure to explain or include a copy of the FAA was not unconscionable, as information about the FAA is "easily obtainable."

California

- **CREDIT CARD USER COULD NOT CONSENT TO ARBITRATION AGREEMENT HE NEVER RECEIVED**

  Fleming v Oliphant Financial, LLC
  Court of Appeal, First District, Division 1, California
  2023 WL 1255617
  January 31, 2023

  Bruno Fleming applied for a Barclay Rewards credit card online. The electronic application made no reference to an arbitration agreement. After Fleming had held the account for several years, his account statements began to include the sentence, "Please refer to your Cardmember Agreement for additional information about the terms of your Account." Debt collection agency Oliphant was hired to collect on Fleming's account, and Fleming sued Oliphant for Debt Collection Act violations. Oliphant moved to compel arbitration based on the Cardmember Agreement's arbitration provision. The court denied the motion, finding no evidence of any signed arbitration agreement between Fleming and Barclays. Oliphant appealed.

  The Court of Appeal, First District, Division 1, California affirmed. Fleming could not give valid consent to an agreement that he was never provided. It was "incongruous" for Oliphant to suggest that account statement references should have prompted Fleming to request the Cardmember Agreement when there was no evidence of its existence or its transmission to Fleming.

- **MOTION TO VACATE DISMISSED AS UNTIMELY**

  Darby v Sisyphian, LLC
  Court of Appeal, Second District, Division 2, California
  2023 WL 409701
  January 26, 2023

  Exotic dancer Aisha Darby sued Sisyphian, owner of the Xposed Gentlemen's Club where Darby worked, for employment violations. Sisyphian successfully moved to compel arbitration. The arbitrator granted Sisyphian's initial motion to strike a number of Darby's attorney fees requests, which were scattered and repeated throughout several different parts of her complaint. The arbitrator issued an interim award for Darby, assessing damages and penalties against Sisyphian. The arbitrator issued a separate award denying attorney fees, accepting Sisyphian's assertion that all attorney fee provisions had been stricken from Darby's complaint. A week later, Darby requested reconsideration, arguing that her complaint still retained several attorney fees requests. Following briefing, the arbitrator issued a revised award granting a portion of Darcy's requested attorney fees. Darby sued to confirm. Sisyphian opposed and petitioned to vacate, arguing that the arbitrator exceeded his powers by reconsidering his initial attorney fees award. The court denied Sisyphian's petition to vacate as untimely and confirmed the award. Sisyphian appealed.

  The Court of Appeal, Second District, Division 2, California affirmed. Under the California Arbitration Act (CAA) a party may seek an order vacating or correcting an award within 100 days after the award is served. A party may also seek to vacate or correct an award in response to the other party's petition to confirm within 10 days of being served with that petition. If a petition to

confirm has been filed, the shorter deadline applies. Sisyphian waited 32 days to file his petition and thus missed the deadline. If a procedurally correct award cannot be vacated or corrected, it must be confirmed. The Court awarded Darby attorney fees and costs of the appeal under the California Labor Code, which allows employees to recover reasonable attorney fees incurred in defending a judgement award for overtime, minimum wage, and accurate wage statement violations.

- **NON-SIGNATORIES COULD NOT COMPEL ARBITRATION UNDER EQUITABLE ESTOPPEL**

  Hernandez v Meridian Management Services, LLC
  Court of Appeal, Second District, Division 8, California
  2023 WL 1097324
  January 30, 2023

  Jessica Hernandez signed an arbitration agreement when she began work as a customer service representative with medical supply company Intelex Enterprise. While working for Intelex, she also worked for six other companies (Other Firms) engaged in related businesses and located in the same building. Intelex and the Other Firms were jointly owned and operated, and Hernandez was paid by Intelex. Hernandez was terminated following her maternity leave and sued the Other Firms for wrongful termination. The Other Firms unsuccessfully sought to join Intelex as a necessary party, and then sued to compel arbitration under Hernandez's arbitration agreement with Intelex under the doctrine of equitable estoppel. The court denied the motion, and Hernandez appealed.

  Court of Appeal, Second District, Division 8, California affirmed. There were no equitable estoppel grounds for compelling arbitration. There was nothing unfair or wrong in either party wanting to appear in court or arbitration. Hernandez was not trying to "have it both ways," as she completely gave up her claims against Intelex in order to appear in court. The Other Firms offered no evidence that they were acting as agents for Intelex, or that Intelex and Hernandez sought to benefit the Other Firms as third-party beneficiaries.

- **"SECRETIVE, ONE-SIDED" PROVISIONS RENDERED ARBITRATION AGREEMENT UNCONSCIONABLE**

  Murrey v Superior Court of Orange County
  Court of Appeal, Fourth District, Division 3, California
  2023 WL 1098156
  January 30, 2023

  During her on-boarding process at General Electric (GE), Cassandra Murrey was required to review and complete several online documents, including an Acknowledgement of Conditions of Employment in which Murrey agreed, as a condition of her employment, to review and accept an Arbitration Agreement set forth in a 29-page online Solutions Manual. The Agreement set forth a dispute resolution process culminating in arbitration, to be administered by a Dispute Resolution Organization (DRO) of GE's choosing, according to that DRO's rules. It provided that the DRO's rules "may be amended, without notice by the DRO," and that some DRO rules were superseded by GE's own "presumptive guidelines," set forth in four pages of the Manual. Murrey sued GE for sexual harassment and retaliation, and GE moved to compel arbitration. Murrey opposed, arguing that the Arbitration Agreement was unconscionable. The court granted GE's motion to compel, and Murrey appealed.

  The Court of Appeal, Fourth District, Division 3, California reversed, holding GE's Arbitration Agreement unconscionable. The Agreement was procedurally unconscionable, presenting a "higher degree of oppressiveness" because Murrey was given such a short time to review and agree to multiple lengthy documents. It was substantively unconscionable because of its "highly secretive and one-sided provisions." The agreement did not identify the DRO or the arbitration location. It did not say how or when the DRO would be selected, as GE had the option to select a different DRO for each location, and GE retained the unilateral right to change the DRO for any location without notice and for its benefit. Its incorporation of an "unnamed DRO's Rules" was

"meaningless" when GE retained the option to change the DRO at any time, and the addition of GE's own rules created uncertainty and confusion.

Georgia

- **ARBITRATOR DID NOT OVERSTEP IN ORDERING PAYMENT OF ARREARAGE**

  Brooks v Brooks
  Court of Appeals of Georgia
  2023 WL 1773066
  February 6, 2023

  The divorce settlement between Charles and Vinci Brooks provided that, upon Charles's retirement, he would pay alimony equal to 50% percent of his earnings plus 32.5% of all Form 1099 income. After Charles retired, he sued for a declaratory judgment that he was no longer required to pay alimony because the post-divorce structure unfairly allowed Vinci to "double-dip": Charles's pension payments now counted both as earnings and Form 1099 income, netting Vinci 82.5% of his pension. Vinci moved to compel arbitration under the settlement agreement, which required arbitration of any future disputes over the calculation of alimony. Charles opposed, arguing that he disputed the obligation to pay alimony, not its calculation. The court granted arbitration, and the arbitrator ordered Charles to continue paying alimony under the settlement agreement, and to pay arrearage by a certain date. The court confirmed the award and ordered Charles to pay Vinci's attorney fees. Charles appealed.

  The Court of Appeals of Georgia affirmed. The Court rejected Charles's argument that the arbitration award lacked sufficient evidence because it went against the intention of the divorce degree. Sufficiency of the evidence is not a ground for vacatur, nor did Charles demonstrate that the arbitrator showed manifest disregard of the law. The arbitrator did not overstep his authority in requiring arrearage, as the remedy of establishing the arrearage amount and requiring timely payment "drew its essence" from the settlement agreement. The arbitrator did not overstep in awarding attorney fees, as the settlement agreement expressly provided that the prevailing party in arbitration was entitled to recover attorney fees and expenses.

Texas

- **EQUITABLE ESTOPPEL BOUND FAMILY MEMBERS LIVING IN FAMILY HOME TO CONSTRUCTION CONTRACT'S ARBITRATION AGREEMENT**

  Taylor Morrison of Texas, Inc. v Ha
  Supreme Court of Texas
  2023 WL 443891
  January 27, 2023

  and

  Taylor Morrison of Texas, Inc. v Skufca
  Supreme Court of Texas
  2023 WL 443852
  January 27, 2023

  Tony Ha signed a purchase agreement with contractor Taylor Morrison for construction of a new home; Jack and Erin Skufca did as well. Both families moved into their homes only to discover multiple problems, including significant mold issues which made several family members ill. In both cases, the husband, wife, and children all sued Taylor for breach of contract; the Has also filed claims in negligence, and violation of the Deceptive Trade Practices Act. Taylor moved to compel arbitration under the purchase agreements. Both courts granted the motion only as to the

signatories and were confirmed on appeal. The respective Courts of Appeals petitioned for review.

The Supreme Court of Texas granted review and reversed in both cases, holding that all the non-signatories were bound to arbitration by direct-benefit-estoppel. According to the *Ha* Court, a non-signatory seeking the benefits of a contract cannot simultaneously avoid that contract's arbitration clause. A family's shared home benefits the entire family, and, by occupying the home, Michelle Ha and her children accepted the benefits of Tony Ha's purchase agreement. Their equitable claims were therefore covered by the purchase agreement's broad arbitration clause. In *Skufca*, the claims rested on breach of contract, and the petition demonstrated that the children's actions were based on their parents' purchase agreements. It was irrelevant that some the children's claims were primarily based on illness caused by mold exposure, as it was necessary to determine all the claims "by reference" to the purchase agreement.

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

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