March 1, 2023

ADR Case Update 2023 - 5

Federal Circuit Courts

- **§1981 RACE DISCRIMINATION CLAIM NOT PRECLUDED BY RAILWAY LABOR ACT**

  Giles v National Railroad Passenger Corporation
  United States Court of Appeals, Fourth Circuit
  2023 WL 1872313
  February 10, 2023

  Amtrak terminated train conductor Duncan Giles for insubordination. Giles filed a §1981 racial discrimination suit, claiming that a similarly situated white conductor had been treated more leniently. The court granted summary judgment for Amtrak, holding that Giles failed to demonstrate that his job performance was otherwise satisfactory at the time of his termination, or that the other conductor's situation, which did not implicate the same safety concerns, was sufficiently similar to his own. Giles appealed.

  The United States Court of Appeals, Fourth Circuit affirmed summary judgment based on Giles's failure to create triable issues of fact. The Court rejected Amtrak's assertion that the lower court should have dismissed the claim as precluded by the Railway Labor Act, which provides for mandatory arbitration of grievances. Giles's claim did not constitute an arbitrable grievance under the RLA. He did not claim that Amtrak had violated the CBA or improperly applied its provisions, but instead asserted a right to equal treatment under an independent federal statute.

- **NON-PARTY APPEAL FROM DENIAL OF MOTION TO COMPEL INVALID**

  Stanton v Cash Advance Centers, Inc.
  United States Court of Appeals, Eighth Circuit
  2023 WL 1790686
  February 7, 2023

  Kamisha Stanton filed a putative class action against Cash Advance Centers, Inc. (CAC) for

violating the Telephone Consumer Protection Act. Counsel purporting to represent CAC moved to compel arbitration under loan agreements between Stanton and non-party Advance America, Cash Advance Centers of Missouri, Inc. (AA), and to substitute AA for CAC as the defendant. The court denied both motions. Attorneys purporting to represent both CAC and AA filed notice of appeal to the order denying the motion to compel. Stanton moved to strike the appeal.

The United States Court of Appeals, Eighth Circuit dismissed the appeal for lack of jurisdiction and denied the motion to strike as moot. Only parties to a lawsuit may appeal an adverse judgment. The motion to compel was purportedly filed by CAC alone. The appeal was purportedly filed by CAC and AA, but counsel conceded in oral argument that she represented only non-party AA. CAC's notice of appeal, filed by counsel who did not represent CAC, was therefore unauthorized and invalid.

- **ARBITRATION RIGHTS NOT WAIVED WHERE PARTY CONSISTENTLY STATED ITS INTENTION TO ARBITRATE AND LIMITED DISCOVERY TO NON-ARBITRABLE CLAIM**

  Armstrong v Michaels Stores, Inc.
  United States Court of Appeals, Ninth Circuit
  2023 WL 1954693
  February 13, 2023

  Teresa Armstrong filed a putative class action against Michael Stores for state employment claims and a PAGA claim. Michaels asserted arbitration rights as an affirmative defense to Armstrong's complaints and, in multiple case management statements and conferences, repeatedly stated its plan to move to compel arbitration following discovery. Michaels served five interrogatories and a request for 28 pages of documents relating to the non-arbitrable PAGA claim. Meanwhile, the Supreme Court decided *Epic Systems Corp. v Lewis*, overruling Ninth Circuit law to hold that class action waiver does not render an arbitration agreement unenforceable under the NLRA. Two weeks later, Michaels moved to compel arbitration of Armstrong's employment claims. Armstrong opposed on waiver grounds. The court found no waiver and compelled arbitration, which concluded in a summary judgment award to Michaels. The court dismissed the remaining PAGA claim. Armstrong appealed the order compelling arbitration.

  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 based on "the totality" of its actions. From the outset, Michaels was repeatedly and "consistently vocal" about its intention to assert arbitration rights, and moved to compel arbitration "promptly" after the *Epic Systems* decision. Michaels did not act inconsistently to those rights, as it did not actively litigate the merits of the case, engaged only in limited discovery relating to the non-arbitrable PAGA claim, and moved to compel arbitration within a year of Armstrong's complaint.

- **WEBSITE'S "CONSPICUOUSLY DISPLAYED" NOTICES OF TERMS PROVIDED CONSTRUCTIVE NOTICE**

  Oberstein v Live Nation Entertainment, Inc.
  United States Court of Appeals, Ninth Circuit
  2023 WL 1954688
  February 13, 2023

  Mitch Oberstein and others (Purchasers) purchased concert tickets online from Live Nation and Ticketmaster (Sellers). At three "independent stages" of Sellers' website, Purchasers were notified that, by clicking a button to continue, they agreed to the site's Terms of Use. Purchasers filed a class antitrust action against Sellers for charging "supra-competitive fees," and Sellers moved to compel arbitration under the Terms. Purchasers opposed, arguing that the Terms were invalid because they identified Sellers by trade names rather than full legal names, and that the websites failed to put them on constructive notice of the Terms. The court granted Sellers' motion to compel, and Purchasers appealed.

  The United States Court of Appeals, Ninth Circuit affirmed that the Terms constituted a valid arbitration agreement between the parties. Sellers were not legally required to use their full legal

names within the Terms, particularly as those names could be accessed elsewhere on the site. The site admittedly fell short of being a "pure clickwrap agreement," which is favored by the courts. However, the site "did enough" to put a reasonable user on constructive notice: it provided multiple notices of Terms; "conspicuously displayed" them directly above or below action buttons; used language clearly informing users that clicking the button constituted agreement to the Terms; and made the Terms immediately accessible by easily identifiable hyperlinks.

California

- **COLLATERAL ESTOPPEL BARRED RELITIGATION OF ARBITRAL FINDINGS**

  JPV I L.P. v Koetting
  Court of Appeal, First District, Division 3, California
  2023 WL 1791966
  February 7, 2023

  Daniel Koetting was president of Rockhill Consulting Group; his brother, Mark, was managing partner of Redondo Management. Tribal lending entities (TLEs) hired both companies (together, R&R) as executive directors of their online lending programs. The parties' relationships deteriorated, and TLEs fired R&R and demanded arbitration. The arbitrator found that R&R had been methodically using their positions to benefit the Koettings -- siphoning customers away from TLEs and into Koetting-controlled loan portfolios, and committing TLEs to unnecessary high-interest loans from Koetting entities -- while the Koettings diverted TLEs and R&R funds to their personal use. Concluding that the Koettings were R&R alter egos, the arbitrator held R&R and the Koettings jointly and severally liable for $14 million in damages. The court confirmed the award, but the Court of Appeals partially reversed based on the Koettings' lack of consent. On remand, the court vacated the award as to the Koettings, and confirmed the remainder. TLEs' assignee, JPV, moved to amend the judgment to add the Koettings as judgment debtors based on the arbitrator's alter ego finding. The court denied the motion, stating that the arbitrator's findings "were vacated when the arbitrator's award was vacated." The court held that the Koettings were not alter egos, finding that they did not wrongfully make personal use of funds; that R&R were properly funded and registered corporate entities, not "sham" entities created for purposes of defrauding TLEs; and that respecting R&R's corporate identities led to no "inequitable result." JPV appealed.

  The Court of Appeal, First District, Division 3, California reversed and remanded for further proceedings. Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings, including those decided in an arbitration proceeding arising in the same action. The court erred in allowing the Koettings to relitigate issues "identical" to those submitted to arbitration, which were "actually litigated and necessarily decided" as "central to the arbitrator's liability findings and damages award." The court also "misunderstood the proper scope of its discretion." A court may ignore the corporate entity as an alter ego not only when the entity is a "sham" created with the intention to defraud, but also "when the corporate form is used to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose."

- **ARBITRATION AGREEMENT REQUIRING EMPLOYEES TO PAY ARBITRATION FEES NOT UNCONSCIONABLE**

  Rocha v U-Haul Co. of California
  Court of Appeal, Second District, Division 1, California
  2023 WL 1462594
  February 2, 2023

  Brothers Thomas and Jimmy Rocha were terminated from their jobs as U-Haul mechanics after filing EEOC complaints against their manager, Don Sandusky. The Rochas sued U-Haul and Sandusky (Defendants) for retaliation and other Labor Code violations, and Defendants moved to compel arbitration. The Rochas opposed, arguing that U-Haul's Employment Dispute Resolution (EDR) Policy unconscionably 1) required them to pay arbitration filing fees in addition to their

court filing fees, 2) denied them a right to appeal by requiring “final and binding” arbitration, and 3) prevented them from pursuing statutory rights with administrative agencies. The Rochas requested leave to file a second amended complaint to add PAGA claims based on their existing Labor Code claims, as well as a new claim against Sandusky for unpaid work they performed for him, personally, at his home after hours. The court granted Defendants’ motions to compel and denied the Rochas’ leave to file a second amended complaint. The arbitration award found no Labor Code violations. The court denied the Rochas’ motion to vacate and entered judgment in favor of Defendants. The Rochas appealed.

The Court of Appeal, Second District, Division 1, California affirmed in part and reversed in part. U-Haul’s EDR was not unconscionable. The imposition of arbitration fees was not unconscionable simply because the Rochas chose to also incur court fees by “ignoring” their arbitration obligations. The FAA provides for appellate review of arbitration processes and awards, and limiting the Rochas’ resort to administrative forums did not render the arbitration provision unconscionable, as it did not prevent an administrative agency from prosecuting claims on the Rochas’ behalf. Issue preclusion barred the Rochas from asserting PAGA claims against Defendants based on the claims in their initial complaint, as the arbitrator had made a final determination on the merits that those Labor Code violations did not occur. The lower court erred, however, in identifying no basis for denying the addition of a new unpaid wages claim against Sandusky, and no issue preclusion barred a PAGA action based on that claim.

Georgia

- **STATUTORY ATTORNEY'S FEES PROVISION APPLIES ONLY TO LITIGATION ACTIVITY IN "HYBRID" CASE**

  Palazzo Rosa, LLC v Dean
  Court of Appeals of Georgia
  2023 WL 1792672
  February 7, 2023

  Atlanta resident Charles Dean sued Palazzo Rosa, the owner of neighboring property, claiming property damage caused by Palazzo's construction project. After engaging in discovery and setting the trial schedule, the parties agreed to arbitration. During arbitration, Palazzo offered Dean a $20,000 settlement, which Dean rejected. The arbitrator held for Palazzo on all claims. Palazzo sued to confirm the award and for attorney fees under OCGA § 9-11-68, which entitles a defendant to reasonable attorney’s fees and expenses if a plaintiff who has rejected a qualifying settlement offer later loses the case or receives a judgment 75% lower than the offer. The court confirmed the award but denied attorney’s fees because OCGA § 9-11-68 applies only to litigation, not arbitration. The court rejected Palazzo's argument that OCGA § 9-11-68 should apply to the arbitration because the case began in civil litigation. Palazzo appealed.

  The Court of Appeals of Georgia reversed and remanded. OCGA § 9-11-68, by its terms, applies only to litigation, not arbitration. In a “hybrid” case such as this, attorney fees incurred during the litigation portion of the case were recoverable, and those incurred during the arbitration proceedings were not.

Texas

- **JUDGMENT CONFIRMING ARBITRATION AWARD “CLEARLY AND UNEQUIVOCALLY” EXPRESSED COURT’S INTENTION TO RENDER A FINAL JUDGMENT**

  Patel v Nations Renovations, LLC
  Supreme Court of Texas
  2023 WL 1871558
  February 10, 2023

Subcontractor Nations Renovations sued hotel developer CHC and general contractor Huntley Construction over a construction dispute, and the parties submitted to binding arbitration. The arbitrator issued a final award, made in "full and final settlement" of all claims, granting Nations damages against Huntley and attorney's fees to CHC. Nations then added two new defendants to its complaint, alleging that they had engaged in fraudulent transfers as Huntley's alter egos. Nations moved to confirm the award. The court did so in a "final judgment" (Judgment) drafted by Nations, which stated that the Judgment was binding upon Nations, Huntley, and CHC. Nations then added a third new defendant and a conspiracy claim to its complaint. Eighteen months later, Nations moved for modification of the Judgment to "clarify" that it was an interlocutory judgment final only against Huntley. The court, unsure of its jurisdiction, "hesitantly" granted the motion and sua sponte certified interlocutory appeal. The court of appeals denied the petition. All parties petitioned the Supreme Court of Texas for review.

The Supreme Court of Texas treated the petition as a petition for mandamus which it conditionally granted, directing the lower court to withdraw the modification order as void. A judgment cannot be "final as to some parties and interlocutory as to others"; it is "either final or it is not." The Judgment here expressed the court's "clear and unequivocal" intention to render final judgment: it repeatedly stated that its effect was "final" and "appealable," and its language "effectively conveyed" that "all claims and parties are disposed of." If Nations believed the Judgment was erroneous it should have made timely appeal.

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

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