March 15, 2023

ADR Case Update 2023 - 6

Federal Circuit Courts

- **COURT MUST DETERMINE IF EMPLOYEE IS EXEMPT FROM FAA**

  Fraga v Premium Retail Services, Inc.
  United States Court of Appeals, First Circuit
  2023 WL 2342039
  March 3, 2023

  Sara Fraga worked as a merchandiser for Premium, traveling to assigned retail stores to audit and stock product, build product displays, and update pricing and signage. Premium frequently sent point-of-purchase (POP) materials, such as coupons and signage, to Fraga's home. Fraga then sorted and prepared the materials at her home and delivered them to designated stores. Fraga sued Premium for failing to pay her for the work she did at home and for her time traveling to and between stores. Premium moved to compel arbitration under Fraga's employee arbitration agreement and to dismiss the case. The court treated the motions separately and denied the motion to dismiss. The court found that drawing all inferences in favor of Fraga, she plausibly alleged that she was a transportation worker exempt from enforcement under the FAA. Premium appealed.

  The United States Court of Appeals, First Circuit, vacated and remanded. The lower court should have finally decided arbitrability before allowing any litigation on the merits. The Court remanded the case for further findings of fact as to the frequency with which Premium sent POP materials to Fraga's home address and her role in sorting and loading those materials for delivery. If the court found that the POP materials "began their interstate journeys intended for specific retail stores, as part of Premium's contractual obligations to deliver materials to those retailers," then the court must consider whether Fraga was a "last-mile" transporter for purposes of the FAA exemption.

- **ARBITRATION RIGHTS WAIVED BY LITIGATION DELAYS**

  White v Samsung Electronics America, Inc.

United States Court of Appeals, Third Circuit
2023 WL 2379723
March 7, 2023

A class of Samsung SmartTV users (Plaintiffs) filed a 2017 action against Samsung for illegally collecting data online through their SmartTVs. Some of Samsung's SmartTVs required users to agree to Terms in order to set up their online services; others did not. Plaintiffs' initial complaint did not identify their SmartTVs' Model or Serial Numbers, which would have enabled Samsung to determine which Plaintiffs were bound to arbitration under the Terms. Plaintiffs later provided that information in their 2018 initial disclosures. Samsung challenged Plaintiffs' initial and amended complaints on multiple grounds for alleged insufficiencies. After the insufficiencies were corrected, Samsung again moved for dismissal, and the court dismissed all but Plaintiffs' WireTap Act claims. Samsung moved for reconsideration. After the motion was denied, Samsung, for the first time, in 2020, notified the court of its intention to arbitrate and moved to compel arbitration. Plaintiffs opposed on waiver grounds. Samsung argued that its actions were not inconsistent with its arbitration rights and that, before Plaintiffs provided the Model and Serial Numbers, it was unaware of any individual Plaintiff's agreement to arbitrate. The court held that Samsung had waived its arbitration rights and denied the motion. Samsung appealed.

The United States Court of Appeals, Third Circuit, affirmed. Waiver exists where a party has intentionally relinquished or abandoned a known right. Even without Model and Serial Numbers, Samsung was on notice from the outset that a number of Plaintiffs' claims could be arbitrable. Instead of identifying those claims, Samsung continuously sought and agreed to stay discovery that would have yielded this information, engaged in multiple instances of non-merits motions practice, repeatedly requested additional time for its responses, assented to the court's pre-trial orders, and participated in status conferences. At no time before 2020 did Samsung inform Plaintiffs of potential arbitration. Samsung's actions clearly evinced its "preference for litigation over arbitration" and waiver of arbitration rights.

- **ARBITRATOR'S FACTUAL ERROR NOT GROUNDS FOR VACATUR**

Martinique Properties, LLC v Certain Underwriters at Lloyd's of London
United States Court of Appeals, Eighth Circuit
2023 WL 2292274
March 1, 2023

Martinique submitted a claim to its insurer, Lloyd's, for storm damage sustained by multiple properties. The parties disputed the amount owed for repairs. Martinique invoked the dispute resolution provision in its insurance contract, which required disputes over loss determinations or property valuations to be resolved by an appraisal panel. The panel issued a binding award, explaining that it had calculated the repair amounts based on figures provided by a third-party repair company. Martinique sued to vacate the award, claiming it was based on erroneous figures and measurements. Lloyd's filed a motion to dismiss, which the court granted. Martinique appealed.

The United States Court of Appeals, Eighth Circuit affirmed. Martinique's challenge to the award rested entirely on allegations of factual error. The court has no authority to reconsider the merits of an arbitration award, and an arbitrator does not exceed his powers by making a factual error, "even a serious one."

- **EMPLOYEE COULD NOT SUBSTITUTE HIMSELF FOR UNION ON APPEAL**

American Federation of Government Employees, Local 1367 v Department of the Air Force
United States Court of Appeals, Federal Circuit
2023 WL 2229668
February 27, 2023

The Air Force removed Michael Johnson from his air traffic control supervisor position for careless performance. Johnson chose to challenge the decision in arbitration under his Union's CBA. The arbitrator upheld the removal, and the Union appealed the decision to the Federal Circuit. The Air Force moved to dismiss, arguing that the Union lacked standing to appeal. While

the motion was pending, the AFGE placed the Union in receivership and withdrew authorization of the appeal. The Union withdrew from the appeal, and the court denied the Air Force's motion to dismiss as moot. Johnson then moved to reinstate the appeal and to be substituted for the local Union under Rule 43(b).

The United States Court of Appeals, Federal Circuit held that the substitution was not allowed. When an employee challenges an employment decision through CBA arbitration, only the Union may appear as a party to the arbitration. If the arbitration results in an unfavorable decision, however, only the employee may appeal the award. The Union, therefore, was not a proper party to the appeal, and Rule 43(b) allows for substitution only where the original party is or was a proper party to the action.

- **ARBITRATION AGREEMENT NOT UNCONSCIONABLE**

Bernsley v Barclays Bank Delaware
United States District Court, C.D. California
2023 WL 2291251
February 24, 2023

Barclays accepted Mark Bernsley's credit card application and mailed him a credit card and several related documents, including a Cardmember Agreement. Bernsley activated and used the card but canceled it after a months-long billing dispute. Bernsley later applied for and was denied a Home Depot credit card. He blamed Barclays, claiming that it had failed to advise credit reporting agencies that he never owed the disputed charges. Bernsley sued Barclays for engaging in unfair business practices. Barclays moved to compel arbitration under the Cardmember Agreement's arbitration clause. Bernsley opposed, arguing that he had not been made aware of the arbitration provision, that the FAA did not apply, and that the arbitration provision was unconscionable.

United States District Court, C.D. California granted Barclays' motion to compel arbitration. Bernsley understood that using the credit card bound him to certain terms and conditions; it was irrelevant that he did not actually read them. The FAA applies to any commercial dealing – not just to those between businesses -- and California resident Bernsley's contract with Delaware corporation Barclays constituted interstate commerce. The arbitration clause was not unconscionable because it designated an arbitration provider with whom Barclays did repeated business. Bernsley's claim that this relationship necessarily created bias was based solely on conjecture, not actual data.

- **CONCERNS OF POTENTIAL ARBITRATOR BIAS DID NOT RENDER ARBITRATION AGREEMENT UNCONSCIONABLE**

Flores v National Football League
United States District Court, S.D. New York
2023 WL 2301575
March 1, 2023

NFL coaches Brian Flores, Steve Wilks, and Ray Horton (Plaintiffs) sued the NFL and various teams (Defendants) for racial discrimination and retaliation. All three sought to address problems related to the NFL's "Rooney rule," which requires any head coach search to include at least one minority candidate. Although intended to promote diversity, Plaintiffs argued that it has "devolved into a cruel sham," in which Black candidates are subjected to meaningless interviews or, in Wilks's case, hired into a "seat-warming" bridge coach position, only to become later stigmatized as rejected, "stale" candidates. Flores also claimed that he was terminated from the Miami Dolphins in retaliation for his refusal to throw games in pursuit of a higher draft pick and recruit in violation of League tampering rules. Defendants moved to compel arbitration under Plaintiffs' team contracts. The contracts required the Plaintiffs to comply with the NFL Constitution, which provides for mandatory arbitration of "any dispute" between "any coach" and "any member club or clubs," to be overseen by the NFL Commissioner, currently Roger Goodell.

The United States District Court, S.D. New York granted in part and denied in part. All claims based on hiring processes or employment disputes that occurred while each coach was under

contract to an NFL team were subject to mandatory arbitration. Flores remained free to litigate two claims that arose when he was not bound to an approved contract, as well as a third claim that fell within his New England Patriots contract. That contract's arbitration provision was unenforceable under Massachusetts law, as the NFL's right to unilaterally modify terms of the NFL Constitution without notice rendered it "illusory." Equitable estoppel barred Plaintiffs from asserting that the arbitration provisions in their team contracts did not apply to their claims against the NFL. Having alleged discrimination claims against the teams and the NFL "as a single unit," Plaintiffs could not then claim that the entities were distinct in order to avoid arbitration. The Court rejected Plaintiffs' claims that the arbitration provisions were invalid because the NFL Commissioner could not be a neutral arbitrator and because arbitration discovery limitations would prevent them from vindicating their rights. While the Court acknowledged that "this structure creates a risk of biased adjudication," courts must "avoid presupposing that the selected arbitrator will not serve as a conscientious and impartial arbitrator." Plaintiffs' discovery concerns rested "solely on speculation" as to Commissioner Goodell's interpretation of the arbitration rules, and if Plaintiffs proved unable to vindicate their rights in the arbitral forum, they would "have recourse to the Court."

California

- **ONE-SIDED ARBITRATION AGREEMENT UNENFORCEABLE**

  Gostev v Skillz Platform, Inc.
  Court of Appeal, First District, Division 2, California
  2023 WL 2252693
  February 28, 2023

  Pavel Gostev sued online gaming website Skillz for gambling violations and predatory practices. Skillz moved to compel arbitration under the Terms to which Gostev agreed in registering his account. The court denied the motion, holding that 1) Skillz failed to provide clear and unmistakable evidence of Gostev's agreement to delegate threshold arbitrability to the arbitrator, and 2) the arbitration agreement was unenforceable, as it included the "longest list of unconscionable factors" the court had "ever seen." Skillz appealed.

  The Court of Appeal, First District, Division 2, California, affirmed. Given the presumption that the court determines arbitrability, the fact that an unsophisticated party with no bargaining power agreed to a broad arbitration provision incorporating AAA rules did not, of itself, constitute clear and unmistakable evidence that the party agreed to delegate arbitrability to the arbitrator. Skillz drafted its Terms while "presumably" aware of California case law to this effect. It could have "expressly stated" that arbitrability was delegated to the arbitrator, but it did not. The agreement was substantively unconscionable, failing to contain even a "modicum of bilaterality." Among its many one-side provisions, the agreement 1) preserved Skillz's own rights to litigate intellectual property claims, seek equitable remedies, and institute civil proceedings for billing disputes while requiring users to arbitrate all such disputes; 2) required users to share arbitration fees – in Gostev's case, more than $6,000 -- while limiting Skillz's liability for hacking damages to $50; and 3) required all users to arbitrate in San Francisco. The court did not abuse its discretion in refusing to sever offending provisions and enforce the remainder of the agreement, as the unconscionability so "permeated the agreement" that severance was an unavailable option.

- **NURSING FACILITY RESIDENT NOT COMPETENT TO CONSENT TO ARBITRATION**

  Algo-Heyres v Oxnard Manor LP
  Court of Appeal, Second District, Division 6, California
  2023 WL 2257761
  February 28, 2023

  Cornelio Heyres suffered a stroke and, after two weeks' hospitalization, was released to nursing facility Oxnard Manor. After Heyres's death, his Estate filed elder abuse and wrongful death claims. Oxnard Manor moved to compel arbitration under the arbitration agreement Heyres signed on the date of his admittance. The Estate argued that the agreement lacked consent.

Hospital evaluations and testimony showed that Heyres's cognitive abilities were significantly impaired at the time and that he never regained sufficient capacity to follow a two-step command. Oxnard argued that Heyres's consent was valid, relying on its own admissions report, on which a nurse had checked boxes describing Heyres as "alert" and "oriented." The court denied the motion to compel, finding that Oxnard failed to establish Heyres's competency. Oxnard appealed.

The Court of Appeal, Second District, Division 6, California, affirmed, finding the court's incompetency determination supported by substantial evidence. The court acted within its authority in crediting detailed hospital reports and testimony over the "bare assertions" set forth in Oxnard's "nearly illegible" notes.

Colorado

- **COURT LACKED AUTHORITY TO COMPEL MEDIATION OF CRIMINAL CASES**

People v Justice
Supreme Court of Colorado
2023 WL 2230743
February 27, 2023

James Justice was charged in three criminal cases for, among other charges, first-degree murder, first-degree assault, and use of explosives. While out on bail considering the People's global plea offer, Justice was arrested in a fourth case. The People conveyed a modified plea offer, which Justice rejected. The People declined to make another offer, and Justice moved to compel mediation. Over the People's opposition, the court ordered the parties to "at least attempt" mediation. The court appointed a mediator, who requested both parties to submit a confidential settlement statement. The court prohibited the parties from changing or canceling the mediation session without good cause, stating that any failure to comply would subject them to sanctions. The People petitioned for the Supreme Court of Colorado to exercise original jurisdiction.

The Supreme Court of Colorado granted original jurisdiction to hold that the trial court lacked authority to compel mediation in a criminal case. The People are statutorily vested with the authority to engage in plea discussions, meaning they are also vested with the authority to refrain from such discussions. Trial judges are statutorily prohibited from participating in plea discussions, as such participation would render a judge "no longer a judicial officer or neutral arbitrator." While the court's order may have been "well-intentioned," a court may not order mediation in the criminal context or compel the People to submit confidential information to a third-party mediator.

Michigan

- **COURT SHOULD HAVE STAYED CASE PENDING ARBITRATION**

Legacy Custom Builders, Inc. v Rogers
Court of Appeals of Michigan
2023 WL 1870446
February 9, 2023

Sally Rogers contracted with Legacy Custom Builders to build a custom home. Rogers refused to pay Legacy's invoices, and Legacy recorded a construction lien against her property. Legacy then sued Rogers for breach of contract and sought foreclosure on the lien. Rogers moved for summary judgment and to compel arbitration. Legacy opposed, arguing that 1) the arbitrator lacked authority to determine the land interest; 2) Rogers failed to identify a specific dispute subject to arbitration; and 3) enforcement of arbitration would prevent Legacy from complying with the one-year limitation period for recording and foreclosing on its lien. The court granted

Rogers summary judgment and ordered arbitration. Legacy appealed.

The Court of Appeals of Michigan affirmed in part and reversed in part. The court properly enforced the arbitration provision, which unambiguously applied to any dispute arising between the parties. The provision did not require Rogers to identify a "specific dispute," and the issues were plainly apparent from "a cursory review of the facts." The court erred, however, in granting summary judgment. Arbitration does not toll the limitations period for acting on the lien. The court should have stayed the case pending arbitration, which "would have enforced the arbitration agreement while protecting Legacy's compliance with the limitations period and the ability to enforce the lien after arbitration."

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

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