April 5, 2023

ADR Case Update 2023-7

Federal Courts

ACTION PROPERLY DISMISSED WHEN ALL CLAIMS SUBJECT TO ARBITRATION

Forrest v Spizzirri
United States Court of Appeals, Ninth Circuit
2023 WL 2532059
March 16, 2023

Delivery Drivers sued employer Intelliserve for misclassifying them as independent contractors. Intelliserve moved to compel arbitration and dismiss the case. Drivers agreed that their claims were subject to mandatory arbitration but argued that FAA § 3 required the court to stay, rather than dismiss, the case and that staying the case would provide administrative benefits. The court granted the motion to compel and dismissed the case without prejudice. Drivers appealed.

The United States Court of Appeals, Ninth Circuit, affirmed that the court was not required to stay the case but could dismiss the action after determining that all claims were subject to arbitration. FAA § 3 states that a court "shall" stay trial of the action pending arbitration. However, a long line of jurisprudence has held that, "notwithstanding" that language, a court may, after determining that all claims are subject to arbitration, "either stay the action or dismiss it outright." The court did not abuse its discretion in rejecting Drivers' administrative benefits arguments; it considered those arguments and provided "sound reasons for rejecting them."

NO WAIVER WHERE MOVED TO COMPEL UPON LEARNING OF AGREEMENT

Alvarez v Experian Information Solutions, Inc.
United States District Court, E.D. New York
2023 WL 2519249
March 15, 2023

Alvarez signed up with a credit monitoring service, CreditWorks, offered by ConsumerInfo.com (ECS), a corporate affiliate of Experian Information Solutions (Experian). In 2019, Alvarez filed a putative class action against Experian for erroneously stating on a credit report that he was on the Treasury Department's Foreign Assets Control List. The parties engaged in limited discovery relating to the merits and class certification. In 2021, Experian moved to compel arbitration under the Arbitration Agreement contained in the ECS Terms, to which Alvarez had agreed when registering for CreditWorks. Alvarez opposed, arguing that non-signatory Experian could not enforce the Arbitration Agreement and that Experian had waived its arbitration rights by opportunistically exploiting litigation tools while withholding its own knowledge of the Agreement. Experian asserted that it had been previously unaware of the Agreement until the deposition of Alvarez's son. After learning of the Agreement, Experian immediately notified Alvarez's counsel of its intention to arbitrate and, soon after, moved to compel.

The United States District Court, E.D. New York, held that a valid arbitration agreement existed. The Arbitration Agreement expressly identified ECS to include its "respective parent entities, subsidiaries, affiliates," and corporate affiliate Experian was "repeatedly referenced" throughout the Terms. Experian did not waive its arbitration rights, as it asserted those rights immediately after learning of the Agreement. The Court rejected Alvarez's claims that Experian "should have known" of the Agreement earlier. Any failure by Experian to discover the Agreement on its own constituted "ordinary negligence," which was insufficient for a finding of waiver.

FORUM SELECTION CLAUSE GIVEN "CONTROLLING WEIGHT"

Ipsen Biopharm Ltd. v Galderma Laboratories, L.P.
United States District Court, N.D. Texas, Fort Worth Division
2023 WL 2412838
March 8, 2023

Multinational bio-pharmaceutical companies Ipsen and Galderma S.A. (Galderma) signed a Partnership Agreement to jointly develop a Botox-like drug, QM-114. Eventually, Galderma felt ready to seek regulatory approval. Ipsen did not. Ipsen initiated ICC arbitration in Brussels per the Partnership Agreement's Arbitration Provision. Despite the ongoing arbitration, Galderma and subsidiary Galderma Labs, which was not party to the arbitration, declared their intention to apply for approvals unilaterally. Ipsen, concerned about revealing trade secrets, requested interim relief from the ICC Tribunal and sued Galderma Labs in Texas federal district court. The

Tribunal issued an interim order barring Galderma and Galderma Labs from seeking regulatory approvals while arbitration was pending. Undeterred, Galderma directed a second subsidiary, Galderma R&D, to submit a license application to the FDA. Ipsen amended its Texas complaint to add Galderma R&D and moved for a preliminary injunction. Shortly thereafter, Galderma Labs and Galderma R&D suddenly consented to ICC jurisdiction and moved to dismiss the Texas action for forum non conveniens in favor of the ICC arbitration.

The United States District Court, N.D. Texas, Fort Worth Division granted dismissal. When parties have agreed to a forum-selection clause, that clause should be given "controlling weight in all but the most exceptional cases," provided that the clause is "mandatory, valid, and enforceable." Here, the plain language of the clause showed it to be mandatory. Further, the Tribunal interpreted it to be both mandatory and enforceable and emphasized the need to avoid inconsistent decisions in multiple fora. Ipsen's only argument against enforceability was the ICC's lack of jurisdiction over Galderma Labs and Galderma R&D, which was moot following their consent. Noting that neither party had clean hands -- Ipsen failed to disclose its Tribunal application to the Texas Court, and Galderma subsidiaries withheld consent to Tribunal jurisdiction until it served their motion to dismiss – the Court found that no public interest factors weighed against enforcement of the forum-selection clause and dismissed the case.

California

ARBITRATION OF INDIVIDUAL PAGA CLAIM DID NOT DIVEST PLAINTIFF OF STANDING IN REPRESENTATIVE PAGA ACTION - #1

Gregg v Uber Technologies, Inc.
Court of Appeal, Second District, Division 4, California
2023 WL 2624590
March 24, 2023

Driver Jonathan Gregg filed a PAGA action against Uber for mischaracterizing him as an independent contractor rather than employee. As part of his registration, Gregg agreed to an Arbitration Provision that included a PAGA waiver. The waiver barred Gregg from bringing any representative action and provided for severability if the waiver was found unenforceable. Uber moved to compel arbitration. The court denied the motion, holding the PAGA waiver unenforceable, and the Court of Appeals affirmed. Following the United States Supreme Court's decision in *Viking River Cruises v Moriana*, the California Supreme Court granted Uber's petition for certiorari, vacating and remanding the case for further consideration in light of *Viking*.

The Court of Appeal, Second District, Division 4, California, affirmed in part and reversed in part. The Arbitration Provision's PAGA waiver was invalid, and therefore severable, under *Viking*, which upheld California's prohibition of PAGA waivers. As

the PAGA waiver applied only to representative actions, Gregg's individual claim remained subject to arbitration. Departing from *Viking*'s holding, the Court held that Gregg nonetheless retained standing to support his representative PAGA action. The Court is "not bound by the Supreme Court's interpretation of PAGA and its standing requirements." In *Kim v Reins International California, Inc.*, the California Supreme Court established that the only PAGA standing requirements are those set forth in the Labor Code: the plaintiff must be 1) an "aggrieved employee" 2) "against whom one or more of the alleged violations was committed." PAGA nowhere requires a plaintiff to "resolve certain portions of his or her PAGA claim in a judicial – as opposed to an arbitral – forum." An "aggrieved employee" is therefore "not stripped of standing to assert non-individual PAGA claims in court simply because he or she has been compelled to arbitrate his or her individual PAGA claim."

ARBITRATION OF INDIVIDUAL PAGA CLAIM DID NOT DIVEST PLAINTIFF OF STANDING IN REPRESENTATIVE PAGA ACTION - #2

Piplack v In-N-Out Burgers
Court of Appeal, Fourth District, Division 3, California
2023 WL 2384502
March 7, 2023

In 2019, Tom Piplack and other employees (Plaintiffs) filed individual and PAGA actions for wage theft against In-N-Out Burgers. Each Plaintiff had signed an arbitration agreement containing a PAGA waiver, providing that the waiver was severable if held unenforceable. The parties proceeded in litigation until 2022 when the United States Supreme Court decided *Viking River Cruises v Moriana*. In-N-Out quickly moved to compel arbitration of Plaintiffs' individual claims and dismiss the remaining PAGA claims for lack of standing. The court denied both motions, and In-N-Out appealed.

The Court of Appeal, Fourth District, Division 3, California, vacated and remanded. The arbitration agreement mandated arbitration of Plaintiffs' individual claims. This did not, however, mean that Plaintiffs' lacked standing to support their remaining PAGA claims. Despite "deep deference" to the United States Supreme Court, the California Supreme Court has the "final say" in interpreting California law. In *Kim v Reins International California, Inc.*, the California Supreme Court held that a plaintiff retained PAGA standing following settlement of all his individual claims. The Labor Code states only two requirements for PAGA standing: that the plaintiff be 1) an "aggrieved employee" 2) "against whom one or more of the alleged violations was committed." Plaintiffs met both requirements, and the Court was bound by stare decisis to follow *Kim* in holding that "paring away the plaintiff's individual claims does not deprive the plaintiff of standing to pursue representative claims under PAGA." In-N-Out did not waive its arbitrations by litigating the action for more than two years, as it raised its right to arbitrate "as soon as it had any chance of success."

Massachusetts

NEW UNION STEPPED INTO PREDECESSOR'S SHOES FOR PURPOSES OF CBA

City of Chelsea v New England Police Benevolent Association, Inc., Local 192
Supreme Judicial Court of Massachusetts, Suffolk
2023 WL 2394575
March 8, 2023

In 2020, NPBA Local 192 replaced the local Teamsters as the exclusive bargaining representative for the City of Chelsea's emergency dispatchers, and the Teamsters disclaimed any further representation. Although NPBA and the City exchanged proposals for a new CBA, the parties continued to operate under the existing CBA between the City and the Teamsters, which, by its terms, remained effective until February 2021. After the City terminated one of its dispatchers, NPBA filed a grievance and submitted to arbitration, asking the arbitrator to determine arbitrability. The City argued that all arbitration obligations had ceased when the Teamsters disclaimed their interest in the CBA. The court granted NPBA's motion to confirm, and the City appealed.

The Supreme Judicial Court of Massachusetts, Suffolk, affirmed that the City was required to arbitrate the grievance, as NPBA "stepped into the shoes" of its predecessor, the Teamsters, for purposes of the CBA. To hold otherwise would penalize and intrude upon the employee's right to select new representation, enabling an employer to unilaterally change terms to which it had agreed. A public employer must negotiate employment terms and conditions in good faith, and "until the successor union and the city agree to a new contract or bargain to impasse, all key terms and conditions of the prior contract must remain in effect, including the arbitration provision."

New York

VACATUR PROPERLY DENIED

In Re: Long Beach Professional Firefighters Association v City of Long Beach
Supreme Court, Appellate Division, Second Department, New York
2023 WL 2396272
March 8, 2023

The Union filed a grievance and arbitration demand against the City of Long Beach challenging the employment terms of new paramedic hires. The City unsuccessfully sued to stay the arbitration, and the arbitrator issued an award finding the City in violation of the CBA. The Union petitioned to confirm the award. The City filed cross-motions to dismiss, vacate, or reassign the petition to the Justice who had presided over

the stay action. The court held that the City's motions were untimely, declined to consider the City's reply papers, and confirmed the award. The City appealed.

The Supreme Court, Appellate Division, Second Department, New York affirmed. The proper procedure would have been for the Union to confirm the arbitration award in the prior action, but the court appropriately disregarded the defect. The court did not err in denying vacatur, as the City failed to show by clear and convincing evidence that the arbitration award was irrational or that the arbitrator engaged in misconduct. The court erred in holding the City's cross-motion untimely and in declining to consider its reply papers, but those were harmless errors, as the court did consider the City's arguments in support of its cross-motions, and the arguments raised in the reply papers were without merit.

Texas

COURT ABUSED DISCRETION IN ATTEMPTING TO CHANGE ARBITRATOR SELECTION METHOD

Taylor Morrison of Texas, Inc. v Glass
Court of Appeals of Texas, Fourteenth District, Houston
No. 14-21-00398-CV
March 21, 2023

Contractor Taylor Morrison built a home for Thomas and Kittee Cart, who later sold the home to Matthew and Madeline Glass. The Glasses sued Taylor for construction defects, and Taylor moved to compel arbitration pursuant to its Purchase Agreement with the Carts. The Glasses opposed, arguing that their claims did not arise under the Agreement because they were non-signatories raising common law claims. Alternatively, they argued that the arbitration clause unconscionably 1) required "winner takes all" fee-splitting; 2) delegated gateway issues to the arbitrator, and 3) designated JAMS arbitration, thereby allowing Taylor to dictate the arbitral forum. The court denied the motion to compel, finding that several provisions unconscionably waived substantive rights and remedies and rendered arbitration prohibitively expensive. The court then ordered the parties to agree to "an alternative arbitration service or arbitrator." Taylor appealed.

The Court of Appeals of Texas, Fourteenth District, Houston, reversed. The court's order "effectively denied" Taylor's contractual right to have JAMS serve as the arbitral forum. The arbitration agreement provided only one contractual exception under which using a different arbitrator would be appropriate: if JAMS were unwilling or unable to serve. As that exception was not met here, the court abused its discretion in "attempting to modify" the "agreed-upon primary method of selection as outlined in the arbitration agreement."

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