April 19, 2023

ADR Case Update 2023 - 8

Federal Courts

- **EQUITABLE ESTOPPEL BOUND PARTY TO ARBITRATION**

  Ribadeneira v New Balance Athletics, Inc.
  United States Court of Appeals, First Circuit
  2023 WL 2806086
  April 6, 2023

  Peruvian Sporting Goods (PSG) distributed New Balance (NB) products in Peru pursuant to a Distribution Agreement containing an Arbitration Clause. While the Distribution Agreement was still in effect, NB and PSG negotiated a New Agreement, containing an identical Arbitration Clause, which provided that a new entity, Superdeporte, would eventually replace PSG as distributor. Superdeporte notified NB that it was ready to distribute, but NB denied that the New Agreement had been concluded. NB gave notice that it was discontinuing any distribution relationship with PSG or Superdeporte. PSG and Superdeporte assigned their legal rights to their common controlling owner, Rodrigo Ribadeneira. Ribadeneira sued NB in Peru for breach of the New Agreement, and NB was temporarily enjoined from using any distributor in Peru. NB initiated arbitration against PSG, Rivadeneira, and Superdeporte under the Distribution Agreement. The arbitrator found PSG in breach of the Distribution Agreement and imposed damages against both PSG and Superdeporte. The award held Ribadeneira, PSG, and Superdeporte liable for tortious interference based on Rivadeneira's pursuit of the injunction in Peru. Ribadeneira and Superdeporte moved to vacate the award. The court granted the motion, holding that the arbitrator lacked jurisdiction over non-signatories Rivadeneira and Superdeporte. NB appealed.

  The United States Court of Appeals, First Circuit, reversed and remanded, holding that the arbitrator properly exercised jurisdiction over Superdeporte and Ribadeneira. Superdeporte was PSG's successor-in-interest and assumed PSG's obligation to arbitrate under the Distribution Agreement. Rivadeneira was bound to arbitration under the New Agreement by equitable estoppel, as he had sued in Peruvian court to enforce the New Agreement, thereby "knowingly receiving a direct benefit from that contract." NB's tortious interference claims were arbitrable under the New Agreement, as Rivadeneira had obtained the Peruvian injunction based on

allegations that NB was in breach of the New Agreement.

- **CASE REMANDED FOR FURTHER FINDINGS BEFORE GOING TO ARBITRATION**

  Direct Biologics, L.L.C. v McQueen
  United States Court of Appeals, Fifth Circuit
  2023 WL 2750660
  April 3, 2023

  Adam McQueen left his Executive Vice President position at Direct Biologics to work for its competitor, Vivex Biologics. Direct sued McQueen and Vivex for breach of covenant not to compete and misappropriation of trade secrets. McQueen moved for a preliminary injunction requiring McQueen to return and/or stop accessing confidential trade secret information. The court denied the request, finding that Direct had failed to demonstrate irreparable harm. The court held that all of Direct's claims were subject to arbitration under McQueen's Employment Agreement and dismissed the case. Direct appealed.

  The United States Court of Appeals, Fifth Circuit, vacated and remanded. The lower court did not abuse its discretion in holding that Direct failed to demonstrate that McQueen actually used or disclosed Direct's trade secrets. However, the court failed to assess whether such disclosure was likely to occur in the future and what damages were likely to accrue. The parties did not dispute that Direct's claims "must ultimately be submitted to arbitration." However, as the lower court's dismissal constituted a final judgment, it was necessary for the Court to vacate the judgment in order to remand the case for further findings.

- **MEDIATION COULD NOT BE USED TO PUT DISPUTE IN A "HOLDING PATTERN"**

  Ayanian v Garland
  United States Court of Appeals, Ninth Circuit
  2023 WL 2754356
  April 3, 2023

  In 2000, Nshan Ayanian, who had fled his native Armenia to escape military conscription, was charged with overstaying his 1996 visitor's visa. The Immigration Judge denied his request for asylum and granted him a voluntary departure, which the BIA affirmed. Ayanian moved to reopen the decision, unsuccessfully appealed denial of that motion, moved a second time to reopen the decision, and again appealed the denial. The Ninth Circuit agreed to stay his petition until May 2, 2022, based on a USCIS decision rendering him eligible to adjust his status once a visa number was available. The stay expired, and Ayanian filed a second motion to stay, which the Court denied. In oral argument, counsel for both sides conceded their intention to buy Ayanian time until he obtained lawful permanent resident status. To that end, government counsel, for the first time, suggested that the case be placed in mediation.

  The United States Court of Appeals, Ninth Circuit, affirmed the denial of the motion to reopen based on a lack of new evidence. The Court denied the request to transfer the case to mediation. Ayanian's petition for review was "not the sort of dispute that is appropriate for mediation." Rather, the parties viewed mediation as a device for putting Ayanian's dispute into a "holding pattern." The Court pointed out that the government had "numerous means to avoid enforcement" against Ayanian, including "simply deciding not to execute Ayanian's final order for removal."

- **SEXUAL HARASSMENT DISPUTE ARISING BEFORE EFAA WAS ARBITRABLE**

  Hodgin v Intensive Care Consortium, Inc.
  United States District Court, S.D. Florida
  2023 WL 2751443
  March 31, 2023

  Katherine Hodgin sued ICC for sexual harassment and wrongful termination. ICC moved to compel arbitration under the Arbitration Agreement in her employment contract. Hodgin opposed, arguing that arbitration would violate the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) and that the Agreement violated public policy and was

unconscionable.

The United States District Court, S.D. Florida granted the motion to compel arbitration. The EFAA did not apply, as Hodgin's dispute arose when she filed discrimination charges with the EEOC in January 2022, preceding the EFAA's March 2022 enactment. The Arbitration did not violate public policy, as Congress had not identified excluding sexual harassment claims from arbitration as a public policy prior to the EFAA. The "take-it-or-leave-it" nature of the Agreement was not, of itself, unconscionable, and Hodgin, as an MD, was "a sophisticated actor who could have understood the agreement or even obtained legal counsel to do so.

- **MOTIONS TO DISMISS INCONSISTENT WITH RIGHT TO ARBITRATION**

Speerly v General Motors, LLC
United States District Court, E.D. Michigan, Southern Division
2023 WL 2572457
March 20, 2023

Automobile Purchasers brought a class action against GM based on their cars' defective transmissions. GM moved to dismiss for failure to state a claim, which the court granted in part and denied in part. GM then filed a motion to exclude some of the Purchasers experts, which the court also denied. When Purchasers then moved to certify the class, GM argued that certification was precluded because "an unidentified but substantial minority of absent class members may have bought their vehicles under purchase agreements that included arbitration clauses."

United States District Court, E.D. Michigan, Southern Division granted Purchaser's motion to certify the class. The Court held that GM had waived its arbitration rights by engaging in the litigation and "seeking dispositive rulings from the Court on the plaintiffs claims – some of which were forthcoming in its favor." If a party moves to dismiss on a key merits issue before moving to compel arbitration, "then the party's action is inconsistent with the right to arbitrate."

- **ONE-SIDED ARBITRATOR SELECTION PROVISION WAS SEVERABLE**

Trout v Organización Mundial de Boxeo, Inc.
United States District Court, D. Puerto Rico
2023 WL 2549543
March 16, 2023

Professional boxer Austin Trout sued the World Boxing Organization (WBO), claiming that WBO wrongfully changed his weight class, thereby costing him a chance at the world championship. WBO successfully moved to compel arbitration under the mandatory arbitration clause in its regulations, and Trout appealed. The First Circuit reversed, holding that the arbitration clause unconscionably gave WBO "unfettered discretion" to select the arbitrator, and remanded for the court to determine whether the arbitrator-selection provision was severable.

The United States District Court, D. Puerto Rico, held that, under Puerto Rico law, "courts have authority to sever the terms of an agreement without extinguishing the remaining obligations the parties undertook in executing the agreement." Here, the arbitration agreement embodied the parties' intention to arbitrate disputes, and both federal policy and Puerto Rico law favor arbitration. The Court severed the arbitration-selection provision, ordered the parties to arbitration, and granted the parties thirty days to meet and confer on the selection of an arbitrator.

- **CLAIMS EXEMPT FROM ARBITRATION WHERE THEY CONFLICT WITH BANKRUPTCY CODE**

In re: Johnson v S.A.I.L. LLC
United States Bankruptcy Court, N.D. Illinois, Eastern Division
2023 WL 2668710
March 28, 2023

Joan Johnson filed for Chapter 13 bankruptcy, listing a $750 debt to lender S.A.I.L. as an unsecured claim. Johnson's bankruptcy Plan could not be confirmed while S.A.I.L.'s claim

remained unresolved, and the Trustee moved to dismiss her case for unreasonable delay. Johnson objected to S.A.I.L.'s claim and filed three counterclaims asking the court to: I) void S.A.I.L.'s claim and underlying loan under the PLPA; II) award statutory damages for violations of the Illinois Interest Act; and III) void S.A.I.L.'s claim and underlying loan under the Consumer Fraud Act. In response, S.A.I.L. moved to compel arbitration under the arbitration agreement in Johnson's loan documents. The Trustee's motion to dismiss and confirmation of Johnson's Plan were both put on hold pending resolution of S.A.I.L.'s motion to compel.

The United States Bankruptcy Court, N.D. Illinois, Eastern Division granted the motion to dismiss as to Count II and denied the motion as to Counts I and III. While nothing in the Bankruptcy Code or case law excepts claims from arbitration, sending some matters to arbitration inherently conflicts with the Bankruptcy Code by imposing bilateral dispute resolution on a process designed to "bring together various parties in interest" and "centralize their needs." Johnson's Count II claim for damages under the Illinois Interest Act did not inherently conflict with the Bankruptcy Code, as it arose solely under Illinois law, and any recovery would not impact Johnson's plan. Counts I and III, however, inherently conflicted with the Bankruptcy Code, as they both involved actions by the Debtor against a creditor in her bankruptcy case, and resolution of those claims involved the allowance or disallowance of a claim against the estate.

California

- **ARBITRATOR'S DISCLOSURES MET STATUTORY REQUIREMENTS**

  Sitrick Group, LLC v Vivera Pharmaceuticals, Inc.
  Court of Appeal, Second District, Division 2, California
  2023 WL 2705284
  March 30, 2023

  Corporate communications manager Sitrick Group initiated arbitration against its client, Vivera Pharmaceuticals, for lack of payment. The parties selected a JAMS Arbitrator, who timely provided them a written Disclosure Checklist for All Arbitrations. The Checklist stated that the case was a non-consumer arbitration and set forth the disclosures required by California's Ethics Standards in non-consumer arbitrations: namely, that while the arbitration was pending, the Arbitrator would "entertain offers of employment or new professional relationships" and would not inform the parties of "any offers or new matters received." Vivera made no objection. Prior to the arbitration hearing, JAMS notified Vivera that the Arbitrator would be serving in another arbitration involving Sitrick and its counsel. Vivera moved to disqualify the Arbitrator. The JAMS National Arbitration Committee denied the motion, as Vivera had not objected to the Arbitrator within the 15-day statutory window, and the second arbitration raised no suggestion that the Arbitrator was biased or "unable to be fair or impartial." Vivera elected not to participate in the arbitration hearing. The Arbitrator awarded Sitrick contract damages, as well as attorney's fees and costs. Sitrick successfully sued to confirm the award, and Vivera appealed.

  The Court of Appeal, Second District, Division 2, California, affirmed. The Checklist met the Ethics Standards' disclosure requirements for a non-consumer arbitration, and Vivera failed to object to the Arbitrator or the disclosures within the statutory 15-day window. The Arbitrator was not required to disclose the second arbitration to Vivera, and his failure to do so did not provide a basis for vacating the arbitration award.

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

  Seifu v Lyft, Inc.
  Court of Appeal, Second District, Division 4, California
  2023 WL 2705285
  March 30, 2023

  Driver Million Seifu filed a PAGA action against Lyft for mischaracterizing him as an independent contractor. Lyft moved to compel arbitration under the Arbitration Agreement in its Terms of

Service. The court denied the motion, holding the Arbitration Agreement's PAGA waiver unenforceable, and was confirmed on appeal. The U.S. Supreme Court subsequently decided *Viking River Cruises v Moriana* and, a month later, granted Lyft's certiorari petition. The Supreme Court vacated the Court of Appeal's decision and remanded for further consideration in light of *Viking River.*

The Court of Appeal, Second District, Division 4, California, affirmed in part and reversed in part. The parties agreed that the PAGA waiver barring Seifu from bringing a representative action was unenforceable and that Seifu's individual claim was subject to arbitration. Departing from *Viking's* holding, the Court held that Seifu nonetheless retained standing to support his representative PAGA action. Noting that it is "not bound by the Supreme Court's interpretation of California law," the Court chose instead to follow the holding in *Kim v Reins International California, Inc.* There, 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." Having met this standard, arbitration of Seifu's individual claim did not strip him of PAGA standing. To hold otherwise would be inconsistent with PAGA's "remedial purpose," as it would "severely curtail" PAGA's "availability to police Labor Code violations."

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

Nickson v Shemran, Inc.
Court of Appeal, Second District, Division 4, California
2023 WL 2820860
April 7, 2023

Blaine Nickson filed a single-count PAGA claim against his employer, grocery store operator Shemran, for wage-and-hour violations. Shemran moved to compel arbitration under their arbitration agreement, which included a PAGA waiver and a severability clause. The court denied the motion, holding the PAGA waiver was unenforceable. Shemran appealed.

The Court of Appeal, Second District, Division 4 reversed. Consistent with the United States Supreme Court's intervening decision in *Viking River Cruises v Moriana*, the Court held that Nickson's individual claim was arbitrable. However, the Court rejected the Supreme Court's holding that arbitration of a PAGA plaintiff's individual claim divests that plaintiff of standing to support the remaining representative action. Finding that the holding was "not binding and incorrect," the Court instead followed the California Supreme Court's decision in *Kim v Reins International California, Inc*. Finding that Nickson met the two standing requirements set forth in the Labor Code, as he was 1) an "aggrieved employee" 2) "against whom one or more of the alleged violations was committed," the Court ruled that Nickson retained standing to bring his representative PAGA claim.

- **MFAA PRECLUDES ENFORCEMENT OF ATTORNEY'S FEE PROVISIONS**

Soni v Cartograph, Inc.
Court of Appeal, Second District, Division 5, California
2023 WL 2780612
March 23, 2023

Timothy Tierney disputed his legal bill from attorney Surjit Soni, claiming that a portion of the work had been unauthorized. In MFAA fee arbitration, the arbitrator held that Tierney was not liable for the unauthorized work but, after subtracting a file transfer fee and credit balance to which the parties had stipulated, awarded $2.50 to Soni. Soni then sued Tierney for breach of contract. The court held that Tierney was responsible for the unpaid charges and awarded Soni the unpaid fees and attorney's fees. Tierney's appealed, and the appellate court held that the arbitration award was binding, as Soni failed to file his legal action within 30 days after service of the award. On remand, the court confirmed the award and, after an attorney's fees hearing, awarded Tierney attorney's fees as the prevailing party in the arbitration. Soni appealed.

The Court of Appeal, Second District, Division 5, California, affirmed. The Court rejected Soni's

claim that he was the prevailing party in his trial to vacate the award and was therefore entitled to attorney's fees under his engagement contract with Tierney. The MFAA precludes the application of contractual attorney's fee provisions, which are inconsistent with the MFAA's purposes to "promote the finality of arbitration awards and discourage frivolous additional litigation." Under the MFAA, Tierney was the prevailing party, as he had obtained a judgment confirming the arbitration award, and the court below properly awarded him attorney's fees.

- **AUTOMOBILE MANUFACTURER COULD NOT ENFORCE ARBITRATION AGREEMENT BETWEEN DEALER AND PURCHASER**

  Ford Motor Warranty Cases v Ford Motor Company
  Court of Appeal, Second District, Division 8, California
  2023 WL 2768484
  April 4, 2023

  When purchasing Ford cars from a Dealership, Purchasers signed a Sales Contract between Purchaser as "Buyer" or "you," and the Dealership as "Creditor-Seller" or "us." The Contract's arbitration provision gave both parties the right to invoke mandatory arbitration of any dispute "between you and us or our employees, agents, successor or assigns" arising out of "this contract or any resulting transaction or relationship (including any such relationship with third parties who did not sign this contract)." After experiencing transmission problems, Purchasers brought breach of warranty claims against Ford Motor Company (FMC). FMC moved to compel arbitration under the Sales Contract on grounds of equitable estoppel or as a third-party beneficiary or undisclosed principal. The court denied the motion, and FMC appealed.

  The Court of Appeal, Second District, Division 8, California, affirmed that non-signatory FMC held no rights to enforce the Sales Contract's arbitration provision. Equitable estoppel did not apply, as Plaintiffs' claims arose from FMC's statutory warranty obligations, not from the Sales Contract. FMC was not a third-party beneficiary: while FMC benefited generally from the sales of Ford products, the Sales Agreement offered no "direct benefit" to FMC and indicated no intention to do so. The fact that the Dealership acted as FMC's agent for vehicle repair services did not render it also an agent for sales purposes, and there was no connection between Plaintiffs' claims, the alleged agency relationship, and the Sales Contract.

Florida

- **MOTION FOR TRIAL DE NOVO MET NOTICE REQUIREMENT DESPITE MINOR ERROR IN FORM OF NOTICE**

  Vitesse, Inc. v MAPL Associates, LLC
  District Court of Appeal of Florida, Fourth District
  2023 WL 2590365
  March 22, 2023

  Eighteen days following a non-binding arbitration against MAPL, Vitesse filed for a trial de novo. The court denied the motion, finding that a "scrivener's error" rendered Vitesse's request inadequate under Florida Rule 1.820(h) and therefore failed to meet the twenty-day deadline for requesting trial de novo. Vitesse appealed.

  The District Court of Appeal of Florida, Fourth District, reversed and remanded. Rule 1.820(h) was intended to provide the opposing party with sufficient notice that the movant intends to reject the arbitration award in favor of trial. Nothing in the rule "requires strict compliance regarding the form of notice." The "trivial" error "did not substantially impair either appellee or the lower court from having reasonable notice of appellants' desire to proceed to trial."

New York

- **VACATUR PROPERLY DENIED**

  In re: Village of Spring Valley v Civil Service Employees Association, Inc.
  Supreme Court, Appellate Division, Second Department, New York
  2023 WL 2506336
  March 15, 2023

  The Village of Spring Valley unilaterally changed the process by which court attendants were assigned in the Village Justice Court. The Union initiated a grievance and arbitration, and the arbitrator held that the changes violated the CBA. The Village petitioned to vacate the award as contrary to public policy. The court denied the petition, and the Village appealed.

  The Supreme Court, Appellate Division, Second Department, New York affirmed. Noting the "heavy burden" of evidence required to establish vacatur, the Court held that the Supreme Court properly determined that the arbitrator's award was "neither irrational nor violated a strong public policy."

- **ARBITRATION AWARD VACATED AS "IRRATIONAL"**

  In re: Arbitration Between County of Chemung and Chemung County Deputy Sheriff's Association
  Supreme Court, Appellate Division, Third Department, New York
  2023 WL 2529714
  March 16, 2023

  The Sheriff Union's CBA with the County of Chemung provided, in section 5.08, that the granting of personal business days "shall be at the discretion of the Sheriff" with the "work of the Department taking priority." The Sheriff denied two personal leave applications, and the Union initiated a grievance and arbitration. The arbitrator held that the leave denials violated the CBA. The arbitrator held that the Sheriff's discretion was "not unlimited" but must be "exercised in a reasonable fashion." As the only statutorily limiting factor was the Department's needs, the Sheriff was required to grant every personal leave application absent a showing that "pressing and current" Department needs took precedence. The County successfully sued to vacate the award. The Union appealed.

  The Supreme Court, Appellate Division, Third Department, New York affirmed. The arbitrator violated public policy by giving section 5.08 "a completely irrational construction." Rather than define the limits of the Sheriff's discretion, the arbitrator instead "entirely eliminated any discretion on the part of the County and replaced it with a burden-shifting standard."

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

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