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June 5, 2024

ADR Case Update 2024 - 10

U.S. Supreme Court

- **COURT MUST STAY LITIGATION PENDING ARBITRATION**

  Smith v Spizzirri
  Supreme Court of the United States
  2024 WL 2193872
  May 16, 2024

  On-demand delivery Drivers filed wage theft claims against their employer, Keith Spizzirri. Spizzirri moved to compel arbitration and dismiss. Drivers conceded that their claims were subject to arbitration but contended that the court could not dismiss, as FAA § 3 required the court to stay the case pending arbitration. The court ordered arbitration and dismissed. While § 3 "suggested" that the action should be stayed, Ninth Circuit precedent established that a court could also exercise its discretion to dismiss. The Ninth Circuit affirmed, noting that it was bound by Circuit precedent to recognize the court's "discretion to dismiss." The two-judge concurrence urged the Court to grant certiorari to resolve the circuit split on this issue.

  The Supreme Court of the United States granted certiorari and, in a unanimous opinion, reversed. The trial court erred in dismissing the case and denying the motion to stay. The plain language of §3 dictates that 1) when a district court finds that a lawsuit involves an arbitrable dispute and 2) a party requests a stay pending arbitration, the court "shall . . . stay the trial of the action" until completion of the arbitration. The term "shall" renders the court's obligation "impervious to judicial discretion," and "stay" cannot be read to mean "dismiss." Discretionary dismissal undermines the FAA's purpose of facilitating the transition from the judicial to the arbitral forum, as dismissal "triggers the right to an immediate appeal where Congress sought to forbid such an appeal."

- **COURT, NOT ARBITRATOR, MUST DECIDE SUPERSESSION**

  Coinbase, Inc. v Suski
  Supreme Court of the United States
  114 S.Ct. 1186
  May 23, 2024

  When creating accounts with Coinbase, an online cryptocurrency exchange, David Suski and other users (Plaintiffs) agreed to an online User Agreement containing an arbitration clause with a delegation provision. Plaintiffs later opted into Coinbase's Dogecoin Sweepstakes, which provided its own Official Rules. The Official Rules included a forum selection clause, providing for

California courts to have "exclusive jurisdiction" over any controversy arising from the Sweepstakes. Plaintiffs sued Coinbase, claiming that the Sweepstakes violated consumer protections. Coinbase moved to compel arbitration under the User Agreement. Plaintiffs opposed, arguing that the Official Rules superseded the User Agreement. The court denied the motion. It was for the court, rather than the arbitrator, to determine which contract governed the dispute. As the two agreements could not be reconciled, California law dictated that the Official Rules superseded the User Agreement. The User Agreement's arbitration clause, therefore, did not apply. The Ninth Circuit affirmed.

The Supreme Court of the United States granted certiorari on the question of whether supersession was an issue for the court to decide. The Court affirmed that the court, not an arbitrator, "must decide whether the parties' first agreement was superseded by their second." Arbitration agreements are "simply contracts," and traditional contract principles apply. The substance of a supersession dispute is, essentially, whether there is an agreement to arbitrate – a formation question that must be answered by the court. The Court rejected Coinbase's argument that the Ninth Circuit should have evoked the severability principle to address only the challenge to the delegation provision. The severability principle "does not require that a party challenge only the arbitration or delegation provision." Basic contract principles dictate that a challenge to the validity of a contract must be resolved before ordering compliance with that contract. To hold otherwise would "impermissibly elevate" a delegation provision over other forms of contract.

Federal Circuit Courts

- **AGREEMENT PROVIDED SUFFICIENT NOTICE OF ACCEPTANCE TERMS**

  Aldea-Tirado v PricewaterhouseCoopers, LLP
  United States Court of Appeals, First Circuit
  2024 WL 2104601
  May 10, 2024

  Jennifer Aldea-Tirado sued her employer, PricewaterhouseCoopers (PWC), for gender discrimination and retaliation. PWC moved to compel arbitration, relying on an arbitration agreement PWC sent by mass email and first-class mail to all its employees. Aldea-Tirado claimed that she had not received the agreement and was unaware that, by its terms, her continued employment following receipt of the agreement constituted acceptance. The court granted PWC's motion to compel. Aldea-Tirado appealed.

  The United States Court of Appeals, First Circuit affirmed. Aldea-Tirado failed to rebut testimony and digital forensic evidence PWC presented to show that the mass emailing was sent to an email that she used, or to rebut the presumption that sent mail has been received. The agreement itself provided sufficient notice that Aldea-Tirado's continued employment constituted acceptance of the agreement.

- **MEDIATION AGREEMENT REMAINED IN EFFECT ABSENT EXPRESS TERMINATION**

  Puerto Rico Fast Ferries LLC v SeaTran Marine, LLC
  United States Court of Appeals, First Circuit
  2024 WL 2287217
  May 21, 2024

  Fast Ferries, which provided ferries to the PRMTA, chartered vessels and crew from Mr. Cade, LLC, pursuant to a Master Agreement. The Agreement stated that neither party was obligated to hire or provide vessels, and provided no expiration date or means of termination. Believing that Mr. Cade had verbally agreed to a specific charter, Fast Ferries committed to providing those vessels to the PRMTA. Meanwhile, Mr. Cade contracted the vessels and crew to Fast Ferries' competitor. Fast Ferries sued Mr. Cade and its operating company, SeaTran, for breach of contract. Mr. Cade and SeaTran moved to compel mediation under the Agreement. Fast Ferries argued that the Agreement had expired and that SeaTran, as a non-signatory, held no

enforcement rights under the Agreement. The court held that the Agreement was still in effect and enforced its mediation and forum-selection clauses without addressing SeaTran's non-signatory status. Fast Ferries appealed.

The United States Court of Appeals, First Circuit affirmed. The Master Agreement had an indefinite duration and was terminable by either party. There was no evidence that Fast Ferries had notified Mr. Cade of a decision to terminate, and the Agreement, therefore, remained in effect. Fast Ferries was equitably estopped from avoiding mediation against SeaTran. Its claims against SeaTran were "sufficiently intertwined" for equitable estoppel purposes, as resolution of those claims required "reference to" and were "in part based" on the Agreement.

- **ARBITRATION AWARD REMANDED FOR CLARIFICATION**

Trustees of the New York Nurses Association Pension Plan v White Oak Global Advisors, LLC
United States Court of Appeals, Second Circuit
2024 WL 2280632
May 21, 2024

The Trustees of the New York Nurses Association Pension Plan (the Plan) sued to enforce an arbitration award that held the Plan's investment manager, White Oak, liable for multiple ERISA violations, failing to return Plan property, and abusing its fiduciary authority. The award 1) ordered White Oak to disgorge the Net Asset Value of the Plan as of the date of the award, including pre-judgment interest; 2) allowed White Oak to retain management fees; and 3) awarded attorney's fees and costs. White Oak cross-petitioned to vacate. The court confirmed the award but ordered that pre-judgment interest should accrue from the date the parties' Investment Management Agreement (IMA) expired rather than from the date of the judgment. White Oak appealed.

The United States Court of Appeals, Second Circuit, affirmed in part and vacated and remanded in part. The Court affirmed the arbitrator's "unambiguous" grant of pre-award interest on the disgorgement and held that the court did not err in adjusting the prejudgment interest date. The Court rejected White Oak's claim that disgorgement should not include "Day One" fees, which it equated with performance or management fees. The arbitrator determined that the Day One fees constituted a "standalone ERISA violation" because they were not management fees that White Oak could collect under the IMA. However, the Court found that the term "profits" in the disgorgement award was insufficiently specific and remanded for clarification.

- **PARTIES AGREED TO DELEGATE ARBITRABILITY**

Work v Intertek Resource Solutions, Inc.
United States Court of Appeals, Fifth Circuit
2024 WL 2716871
May 28, 2024

Joseph Work filed a putative class action against his former employer, Intertek, for labor violations. The parties entered into an Arbitration Agreement, providing for JAMS arbitration "pursuant to" its employment rules, which included a delegation clause. When Work sought arbitration of his class claims, Intertek moved to compel individual arbitration only. Work opposed, arguing that the issue of individual vs. class arbitration was for the arbitrator to decide under the delegation clause. The court held for Work, finding that the Agreement effectively incorporated by reference the JAMS rules, including the delegation clause. Intertek appealed.

The United States Court of Appeals, Fifth Circuit affirmed. The Agreement's "express adoption" of specific arbitration rules, which included a delegation clause, presented "clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."

- **NON-INDIVIDUAL PAGA CLAIMS NOT ARBITRABLE**

Diaz v Macys West Stores, Inc.
United States Court of Appeals, Ninth Circuit
2024 WL 2098206

May 10, 2024

Yuriria Diaz filed individual and non-individual PAGA claims against her former employer, Macy's. Macy's moved to compel arbitration under the Arbitration Agreement Diaz signed as a condition of her employment. The Agreement included a class action waiver and prohibited the arbitrator from consolidating claims or hearing arbitration "on a class or collective action." The court ordered the parties to arbitrate both individual and non-individual claims. Citing language in *Viking River* that distinguished class actions from non-individual PAGA claims, the court held that the class action waiver did not apply to those claims. Diaz appealed.

The United States Court of Appeals, Ninth Circuit, affirmed in part and vacated in part. The Court rejected the lower court's "algebraic" distinction between "class" and "non-individual" claims." At the time of the agreement, the parties consented only to arbitration of Diaz's individual claims and did not contemplate that non-individual claims would be subject to arbitration. California law prohibits waiver of PAGA claims, and the non-individual claims could "neither be arbitrated nor dismissed." The Court directed the lower court, on remand, to grant the parties' request to stay the non-individual claims pending completion of arbitration.

- **SUBSEQUENT FOREIGN RULING DID NOT MANDATE RELIEF FROM JUDGMENT**

Micula v Government of Romania
United States Court of Appeals, District of Columbia Circuit
2024 WL 2140289
May 14, 2024

Brothers Ioan and Viorel Micula built food production facilities in Romania in reliance on tax incentives that Romania later repealed. The Miculas initiated ICSID arbitration, where they were awarded $350M. The Miculas confirmed the award in a 2019 action in D.C. district court, which the D.C. Circuit affirmed. Subsequent EU court proceedings held that the arbitration agreement had been rendered void and unenforceable when Romania entered the EU. Romania filed a Rule 60(b) motion for relief from judgment, arguing that the award was now void. The court denied the motion based on the "jurisdictional fact" that "there was a valid agreement to arbitrate before Romania acceded to the EU." Romania appealed.

United States Court of Appeals, District of Columbia Circuit affirmed. The Court rejected Romania's argument that the lower court's decision rested on an "erroneous" interpretation and application of EU law. The lower court based its jurisdiction on "careful examination of the underlying arbitral award" and reasonably concluded that the award did not relate to the interpretation or application of EU law. The court, therefore, properly exercised jurisdiction under the FSIA arbitration exception. The United States' treaty commitments to give "full faith and credit" to ICSID awards obliged the court to enforce the Miculas' valid ICSID award.

- **WEBSITE PROVIDED CONSTRUCTIVE NOTICE OF TERMS**

Myers v Experian Information Solutions Inc.
United States District Court, D. Arizona
2024 WL 2278398
May 20, 2024

Tierra Myers sued Experian, a credit reporting agency, for failing to correct her online credit report. Experian moved to compel arbitration. Experian submitted a declaration from Dan Smith, its Director of Product Operations, explaining that the online Experian CreditWorks program Myers used implemented a hybrid Browserwrap and Clickwrap agreement. The agreement provided notice of the site's Terms of Use and required the user to click a button stating, in bold text, "I accept and agree to your Terms of Use Agreement." Myers opposed the motion to compel, arguing that 1) Smith's affidavit provided insufficient evidence to support the existence of a valid arbitration agreement and 2) she did not recall agreeing to the Terms and was unaware of an agreement to arbitrate.

The United States District Court, D. Arizona, granted the motion to compel. Mr. Smith's affidavit met Federal Rules of Civil Procedure evidentiary requirements. His affidavit demonstrated

personal knowledge of the facts and the CreditWorks enrollment process. Smith asserted, under penalty of perjury, that Myers had enrolled in CreditWorks, which she could not have done without accepting the Terms of Use Agreement. Myers's actual knowledge of the Terms was irrelevant, as the site provided constructive notice of the Terms. The notice was "conspicuously displayed" and clearly stated that clicking a designated button constituted acceptance of the Terms of Use Agreement. The Terms were made available by a clearly labeled hyperlink "conspicuously displayed in bright blue font, making its presence readily apparent." A "reasonable user" would have "seen the notice and been able to locate the Terms of Use Agreement via hyperlink."

- **EQUITABLE ESTOPPEL REQUIRED LITIGATION OF INTERTWINED CLAIMS**

  Hunt v Meta Platforms, Inc.
  United States District Court, N.D. California
  2024 WL 2503118
  May 24, 2024

  Justin Hunt filed RICO claims against H&R Block, Meta, and Google, claiming that tracking tools on the H&R Block tax services website unlawfully transmitted his personal information to Meta and Google. A previous action granted H&R Block's motion to compel arbitration under its Online Services Agreement. Meta and Google then moved to compel arbitration of their claims under the Agreement on equitable estoppel grounds.

  The United States District Court, N.D. California granted the motion to compel. Hunt was equitably estopped from pursuing his claims against Meta and Google in court rather than in arbitration. Equitable estoppel applies when claims are "intimately founded in and intertwined with the underlying contract." Hunt's RICO claims, "by their own terms," were closely intertwined with the H&R Block Agreement, alleging that the three defendants engaged in a "pattern of racketeering activity" by sharing Hunt's private information and data. Because H&R Block's "privacy and data security policy" was set forth in the Agreement, his mail and wire fraud claims "depended" on the Agreement and the determination of whether it was fraudulent.

- **NON-SIGNATORY COULD ENFORCE ARBITRATION UNDER EQUITABLE ESTOPPEL**

  Calcaterra v Baptist Health South Florida, Inc.
  United States District Court, S.D. Florida
  2024 WL 2109349
  May 9, 2024

  Domenico Calcaterra, Chief of Cardiac Surgery at Bethesda Health Physician Group, sued Bethesda Health and its owner, Baptist Health, for retaliatory termination and False Claims Act violations. Both defendants moved to compel arbitration under Calcaterra's Employment Agreement with Bethesda Health. Calcaterra opposed, arguing that non-signatory Baptist Health held no enforcement rights under the Agreement and that his FCA claims fell outside the scope of the Agreement because they did not arise out of or relate to the Agreement.

  The United States District Court, S.D. Florida granted the motion to compel. Baptist Health could enforce the Agreement under principles of equitable estoppel. Under Florida law, a non-signatory may compel arbitration when a claim "raises allegations of concerted conduct by both a signatory and a non-signatory." Here, Calcaterra's complaint described Baptist Health and Bethesda Health as a "single entity" that shared "fully integrated" human resource functions. Calcaterra's FCA claims fell within the scope of the Agreement, as they rested on complaints and disputes that arose in connection with his employment.

- **EMPLOYEE FAILED TO FOLLOW CBA GRIEVANCE PROCESS**

  Puig v City of New York
  United States District Court, S.D. New York
  2024 WL 2007829
  May 7, 2024

Juan Puig, a school custodian, telephoned his Union representative requesting a grievance filing to recoup unpaid overtime. The representative declined to file a grievance and told Puig that he could not do so on his own. Puig filed a putative class action against the City for labor violations and breach of the CBA. The City moved to compel arbitration under the CBA. Puig opposed, arguing that the CBA was unenforceable because it did not allow an employee to "commence arbitration himself" if the Union "unilaterally" denied his claim.

The United States District Court, S.D. New York granted the City's motion to compel. Puig's claim fell within the scope of the CBA's arbitration provision. Puig had not been denied access to the grievance process. He had failed to comply with CBA requirements to submit his wage dispute to the Grievance Committee in writing, and instead called his Union representative. He failed to show that he had been prevented from arbitrating his claim simply because the Union declined to initiate. If Puig were to follow the procedures set forth in the CBA and then remained "unable to vindicate his statutory claims in the arbitral forum," he could "then seek redress from the Court."

- **ARBITRATOR DID NOT EXCEED AUTHORITY**

Subway Intl., B.V. v Subway Russia Franchising Company, LLC
United States District Court, S.D. New York
2024 WL 2720266
May 28, 2024

Subway International (SIBV) declined to renew its Master Franchise Agreement (MFA) with Subway Russia Franchising Company. Subway Russia initiated New York arbitration under the MFA. The arbitrator issued a partial final award in favor of SIBV, finding that Subway Russia had no automatic renewal rights because it was in default of several MFA provisions. On the parties' cross-motions to confirm/vacate the award, the court remanded for the arbitrator to address Subway Russia's alternate claim that negotiations to cure its defaults had resulted in the offer and acceptance of a new MFA. The arbitrator issued a second partial final award rejecting this claim, and the parties again cross-petitioned to confirm/vacate.

The United States District Court, S.D. New York confirmed the award. The Court rejected Subway Russia's claims that the arbitrator exceeded her authority by 1) ignoring the MFA's plain language and 2) deciding an offer revocation issue not previously raised. The arbitrator based her award on the MFA's plain language, which conditioned Subway Russia's automatic renewal rights on the absence of default. The offer revocation issue was actually raised in SIBV's pre-hearing brief, but regardless, the arbitrator has the right to resolve "any issue inextricably tied up with the merits of the underlying dispute." Subway Russia failed to show that the award was substantively wrong or "the product of partiality."

- **FAILURE TO RECALL SIGNING AGREEMENT RAISED NO GENUINE ISSUE OF FACT**

Ward v Charter Communications
United States District Court, E.D. Wisconsin
2024 WL 2349995
May 17, 2024

Tiwana Ward sued her former employer, Charter Communications, for ADA violations. Charter moved to compel arbitration. Charter provided an employee affidavit attesting that Ward had completed Charter's onboarding process, including clicking "I Agree" to Charter's Mutual Arbitration Agreement. Ward opposed, claiming that she did not recall agreeing to the Arbitration Agreement; that the Agreement lacked consideration; and that the Agreement was unconscionable because it was presented to her on a "take-it-or-leave-it basis."

The United States District Court, E.D. Wisconsin granted the motion to compel. Ward's mere assertion that she did not recall signing the Arbitration Agreement failed to create a genuine issue of fact. The Agreement did not lack consideration, as both parties waived litigation rights. The Agreement was not unconscionable: although it was a contract of adhesion, Ward was given "significant opportunity" to review it before signing and had the choice to seek employment elsewhere.

California

- **EMPLOYER FAILED TO PROVE ARBITRATION AGREEMENT'S AUTHENTICITY**

  Garcia v Stoneledge Furniture LLC
  Court of Appeal, First District, Division 3, California
  2024 WL 2234833
  May 17, 2024

  Isabel Garcia sued her employer, RAC, for placing her in a work situation in which she suffered sexual harassment and assault. RAC moved to compel arbitration under an Arbitration Agreement it claimed that Garcia had electronically signed during onboarding. RAC submitted a declaration by its Human Resources Information Systems Analyst, Jared Dale, relating that Garcia used a unique user ID and password to access a Taleo platform where she electronically signed six documents, including the Arbitration Agreement. Garcia denied signing the Agreement. Garcia averred that Dale was not present while she signed onboarding documents and that, unlike the other five documents, the Agreement showed no evidence of her password login, contained no IP address, and used a different signature form. The court found that Garcia had shifted the burden of proof and that Dale's declaration was insufficient to prove the document's authenticity by a preponderance of the evidence. The court denied the motion to compel, and RAC appealed.

  The Court of Appeal, First District, Division 3, California, affirmed. The existence of an arbitration agreement is an issue for the court, not the arbitrator, to decide, as "the delegation of such questions presupposes the existence of an agreement between the parties." The court did not err in finding no agreement to arbitrate. RAC met its initial burden of proof by attaching a copy of the Arbitration Agreement to its motion. Garcia shifted the burden by denying she had signed the document. The denial, of itself, was sufficient to shift the burden but was bolstered by her evidence comparing the Agreement with contemporaneously signed documents. Dale's declaration failed to meet its burden to prove authenticity, as it detailed no security precautions regarding the use of the Taleo username and password and failed to explain why the agreement lacked a date, time, IP address, or other indication it had been created within the Taleo platform.

- **ARBITRATION AGREEMENT UNCONSCIONABLE**

  Cook v University of Southern California
  Court of Appeal, Second District, Division 4, California
  2024 WL 2495500
  May 24, 2024

  Pamela Cook sued her employer, the University of Southern California (USC), for racial discrimination, failure to accommodate disability, and sexual harassment. USC moved to compel arbitration under the Arbitration Agreement Cook signed as a condition of her employment. The court denied the motion on unconscionability grounds. The Agreement 1) lacked mutuality, as it required Cook to arbitrate all claims against USC and its related entities but did not require those entities to arbitrate claims against Cook; 2) was too broad, applying to all claims "whether or not arising out of" her employment, and covering an unlimited range of claims; 4) survived beyond Cook's termination, and was therefore indefinite in time; and 5) could be modified only by a written document signed by Cook and the University President. The Agreement was so permeated with unconscionability that terms could not be severed. USC appealed.

  The Court of Appeal, Second District, Division 4, California, affirmed. The lower court did not err in finding the Arbitration Agreement unconscionable based on its broad scope, infinite duration, and lack of mutuality. It was "difficult to see" how USC could justifiably expect Cook, as a condition of employment, "to give up the right to ever sue a USC-related entity in court" for claims "completely unrelated to Cook's employment."

- **FAA PREEMPTS CAL. CIV. PROC. CODE SECTION 1281.97**

Hernandez v Sohnen Enterprises, Inc.
Court of Appeal, Second District, Division 5, California
2024 WL 2313710
May 22, 2024

As a condition of her employment with Sohnen Enterprises, Massiel Hernandez signed an Arbitration Agreement "governed by the FAA." Hernandez filed an arbitration demand with JAMS, claiming disability discrimination, but the arbitration did not commence because Sohnen failed to pay its share of the initial arbitration fees. Sohnen's fees remained unpaid more than 30 days following the due date, and Hernandez moved to withdraw from the arbitration and vacate the stay of proceedings under Cal. Civ. Proc. Code § 1281.97. Section 1281.97 provides that if a company enforcing its own arbitration agreement against a consumer or employee fails to pay its share of initial arbitration fees within 30 days of the due date, that failure constitutes a "material breach" of the arbitration agreement, triggering mandatory attorney fees and costs, and the opposing party may opt to continue arbitration at the company's expense or to proceed in litigation. The court granted the motion and vacated the stay. Sohnen appealed.

The Court of Appeal, Second District, Division 5, California, reversed. By its terms, the Arbitration Agreement was governed by the substantive and procedural provisions of the FAA, not California law, and §1281.97, therefore, did not apply. Even if the provision did apply, however, the decision would be reversed. When an agreement "falls within the scope of the FAA" and "does not expressly select California arbitration procedures," the FAA "preempts the portion of section 1281.97 that requires findings of material breach and a waiver of the right to arbitrate as a matter of contract law." The Court recognized that its holding "respectfully disagreed" with other California appellate decisions, holding that the FAA did not preempt § 1281.97 because the provision facilitated arbitration by preventing companies from thwarting arbitration through nonpayment. Section 1281.97 is, in fact, contrary to FAA policy, as it enables "consumers and employees to elect to avoid arbitration even in cases of minor, inadvertent, or inconsequential delay" and imposes a "higher standard of enforcement" for consumer and employment disputes.

- **NO AGREEMENT TO ARBITRATE**

Mar v Perkins
Court of Appeal, Second District, Division 7, California
2024 WL 2313700
May 22, 2024

Winston Mar gave written notice to SierraConstellation Partners (Sierra) of his intention to resign from the partnership, requesting that it repurchase his interest within the 120-day statutory deadline. Sierra failed to respond, and Mar sued. Sierra moved to compel arbitration under the Arbitration Agreement it distributed to every employee, along with its Employee Handbook, for signature. Mar had refused to sign either document. Sierra responded by email, stating that Mar's continued employment would constitute consent to the Agreement and Handbook. Within minutes, Mar responded: "Again, I am not signing this handbook. And will not be bound by it. If you would like, please feel free to terminate me due to that." The court denied the motion to compel, finding no agreement to arbitrate. Sierra appealed.

The Court of Appeal, Second District, Division 7, California, affirmed. Sierra failed to show the existence of a valid arbitration agreement. Sierra proposed a bilateral agreement, which Mar rejected. Its attempt to form an implied-in-fact contract, with Mar's continued employment constituting acceptance, failed because Mar expressly stated that he refused to be bound by the agreement. "Where an employee promptly and unequivocally rejects an arbitration agreement as a modified term of employment, mutual assent to arbitrate is lacking."

- **CLICKWRAP AGREEMENT FAILED TO PUT USERS ON INQUIRY NOTICE OF TERMS**

Herzog v Superior Court of San Diego County
Court of Appeal, Fourth District, Division 1, California
2024 WL 2205295
May 16, 2024

Dexcom, Inc. manufactures the Dexcom G6 Continuous Monitoring System, a medical device prescribed to diabetes patients, consisting of a subcutaneous sensor patch that monitors glucose and transmits real-time glucose information to the User. The User may use a Dexcom receiver or download a "G6 App," enabling transmission to a mobile device. A group of Users sued Dexcom, claiming that product malfunctions had caused serious diabetic injury. Dexcom moved to compel arbitration under Terms set forth in a Clickwrap Agreement to which Users agreed when launching the G6 App. The court granted the motion to compel, and Users petitioned for a writ of mandate to vacate.

The Court of Appeal, Fourth District, Division 1, California, granted the motion to vacate. The Clickwrap Agreement failed to put Users on inquiry notice of an agreement to arbitrate. Clickwrap Agreements are generally favored, as they require the user to manifest agreement by actively clicking a button. Here, however, the notice of Terms misleadingly stated, "By ticking the boxes below, you understand that your personal information . . . will be collected, used, and shared consistently with the Privacy Policy and Terms of Use." A reasonable user would believe that they were agreeing only to information sharing, not to the Terms of Use as a whole. Further, the Terms were presented as part of the G6 App, while the real purchase was the Dexcom G6 itself. Users would "have no reason" to anticipate that a device "they had already acquired with their medical provider's prescription" was governed by Terms set forth in an optional App launch.

- **PARTIES DID NOT AGREE TO EXTEND FEE DEADLINES FOR PURPOSES OF CAL. CIV. PROC. CODE SECTION 1281.98**

  Reynosa v Superior Court of Tulare County
  Court of Appeal, Fifth District, California
  2024 WL 1984884
  May 6, 2024

  Andrew Reynosa filed a motion to withdraw from arbitration with his former employer, Advanced Transportation Services (ATS). Reynosa alleged that ATS had breached the arbitration agreement by twice failing to pay fees necessary to continue arbitration within thirty days of the due date and that he wished to exercise his right to proceed in litigation under Cal. Civ. Proc. Code § 1281.98. The court denied the motion. Section 1281.98(a)(2) allows the parties to agree to extend the due date. Here, Reynosa was privy to numerous emails in which ATS requested extensions from the provider, and his failure to object to those extensions manifested his agreement. ATS paid the fees within the extended deadlines and, therefore, did not materially breach the arbitration agreement. Reynosa petitioned for a writ of mandate to vacate the order and grant his motion to withdraw.

  The Court of Appeal, Fifth District, California, granted Reynosa's petition for a writ of mandate. Section 1281.98(a)(2) specifically states that "any" extension of the due date "shall be agreed upon by all the parties." Nothing in the submitted emails established that the parties "directly discussed and/or agreed to a payment deadline" beyond the statutory requirements of § 1281.98(a). Section 1281.98(a)(1) establishes a "simple bright-line rule" and makes "no exceptions for substantial compliance, unintentional nonpayment, or absence of prejudice."

New York

- **ARBITRATOR SHOWED NO MANIFEST DISREGARD OF THE LAW**

  Patel v Macy's Inc.
  Supreme Court, Appellate Division, First Department, New York
  2024 WL 2279130
  May 21, 2024

  Zubair Patel sued his former employer, Macy's, for employment discrimination and retaliation. Court-ordered arbitration concluded in an award in favor of Macy's. Patel petitioned to vacate the award, arguing that 1) the arbitrator gave insufficient weight to evidence in his favor; 2) the award made no mention of a discrimination argument Patel put forward; and 3) the arbitrator should

have credited his testimony over that of Macy's witnesses. The court denied Patel's petition to vacate and granted Macy's motion to confirm. Patel appealed.

The Supreme Court, Appellate Division, First Department, New York affirmed. The arbitrator issued a "detailed award and applied the proper standard in assessing petitioner's claims." Under the "high bar for vacatur," Patel failed to establish that the arbitrator lacked a "plausible basis" for his determination or deliberately refused to apply a legal principle.

Washington

- **NON-SIGNATORY COULD ENFORCE ARBITRATION UNDER EQUITABLE ESTOPPEL**

  Norwood v Multicare Health System
  Court of Appeals of Washington, Division 2
  2024 WL 2282848
  May 21, 2024

  Dr. Patricia Norwood, an anesthesiologist, worked as an independent contractor with LT Medical, which staffs medical professionals in temporary placements with Medical Facilities. Norwood was terminated from placements at two Facilities. She sued LT Medical and the Facilities for wrongful termination and retaliation. The Facilities moved to compel arbitration on equitable estoppel grounds under Norwood's Services Agreement with LT Medical. The court granted the motion, finding that Norwood's claims against the Facilities were intertwined with the Services Agreement. Norwood appealed.

  The Court of Appeals of Washington, Division 2, affirmed. The Facilities could enforce the Services Agreement under intertwined claims estoppel. Norwood's relationships with the Facilities "cannot be understood without reference to the Services Agreement." The Services Agreement provided that, despite having an employment relationship with the Facilities, Norwood would "at all times be acting and performing as an independent contractor of LT." Further, Norwood's claims for interference with a contractual relationship depended on the existence of a contract, i.e., the Services Agreement, and her wrongful termination claims could not be addressed without reference to the Agreement's termination provision.

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

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