June 26, 2024

ADR Case Update 2024 - 11

Federal Circuit Courts

- **ARBITRATION AGREEMENT VOID UNDER LOUISIANA LAW**

  S.K.A.V., L.L.C. v Independent Specialty Insurance Company
  United States Court of Appeals, Fifth Circuit
  2024 WL 2839835
  June 5, 2024

  SKAV, the owner of a Best Western hotel in Louisiana, sued Independent Specialty Insurance for denying coverage of hurricane damages under SKAV's surplus lines insurance policy. Independent moved to compel arbitration pursuant to the policy. The court denied the motion, holding that the policy's arbitration agreement was void under La. Rev. Stat. § 22:868, which prohibits insurance contracts in Louisiana from containing any agreement "depriving" its state courts of jurisdiction. Independent appealed.

  The United States Court of Appeals, Fifth Circuit affirmed. Resolving a split among district courts, the Court confirmed that the policy's arbitration agreement was void under § 22:868. General principles of contractual freedom "cannot trump specific statutory commands." The Court rejected Independent's argument that the question should be sent to the arbitrator. "When a statute prevents the valid formation of an arbitration agreement, as we read § 22:868 to do, we cannot compel arbitration, even on threshold questions of arbitrability."

- **SANCTION DID NOT EXCEED ARBITRATOR'S AUTHORITY**

  American Zurich Insurance Company v Sun Holdings, Inc.
  United States Court of Appeals, Seventh Circuit
  2024 WL 2813826
  June 3, 2024

  American Zurich Insurance initiated arbitration against its insured, Sun Holdings, for repeatedly refusing to make reimbursement payments required by Sun's workers compensation policy. The arbitrator awarded American Zurich the full reimbursement amounts, as well as $175,000 in attorneys' fees, as a sanction for Sun "wasting everyone's time." Sun again refused to pay, and American Zurich sued to enforce the award. Sun opposed, claiming that the arbitrator exceeded her authority in imposing the attorneys' fees award. Sun cited language in the policy that provided for each party to pay its own costs and prohibited the award of damages "in excess of compensatory damages." The court ordered Sun to pay the award. Sun appealed.

  The United States Court of Appeals, Seventh Circuit affirmed. The attorneys' fees award was not

punitive but compensatory: it was “designed to put American Zurich in the position it would have occupied had Sun refrained from frivolous tactics.” The award did not, as Sun alleged, disregard the policy’s language but expressly stated that the arbitrator interpreted those provisions as a “restatement of the American Rule on legal fees,” which is “not understood to forbid sanctions for frivolous litigation.” Whether that conclusion was wrong or right was “none of the Court’s business.” Criticizing Sun’s “unabashed requests” for the Court to “reexamine” and “contradict” the arbitrator’s findings, the Court gave Sun fourteen days to show cause why sanctions “should not be imposed for this frivolous appeal.”

- **ARBITRATION AGREEMENT WAIVED SOVEREIGN IMMUNITY**

  Caremark, LLC v Choctaw Nation
  United States Court of Appeals, Ninth Circuit
  2024 WL 2887396
  June 10, 2024

  The Choctaw Nation signed provider agreements with Caremark, a pharmacy benefits management company, to facilitate insurance reimbursement of pharmacy costs to its tribal members. The Nation sued Caremark in the Eastern District of Oklahoma for unlawfully denying reimbursement claims in violation of the Indian Health Care Improvement Act. Caremark petitioned to compel arbitration in the District of Arizona as provided in the arbitration provisions set forth in Caremark’s Provider Manuals. The Nation opposed, arguing lack of formation, sovereign immunity waiver issues, and lack of jurisdiction. The court ordered arbitration, holding that threshold arbitrability issues should be submitted to the arbitrator under the delegation clause. The Nation appealed.

  The United States Court of Appeals, Ninth Circuit affirmed. The Ninth Circuit previously resolved the issues of formation and sovereign immunity waiver in its 2022 decision, Caremark, LLC v Chickasaw Nation. The Court rejected the Nation’s remaining jurisdictional argument. By entering into arbitration agreements in which they expressly agreed to arbitration in Arizona, the Nation waived sovereign immunity for purposes of arbitration proceedings over which the District of Arizona held jurisdiction.

- **FOREIGN ANTI-SUIT INJUNCTION DENIED**

  Ensambles Hyson, S.A. DE C.V. v Sanchez
  United States District Court, S.D. California
  2024 WL 2859576
  June 6, 2024

  Francisco Sanchez was hired by RBC, a California-based manufacturer, to manage a manufacturing plant owned and operated by Hyson, a Mexican company owned by an RBC subsidiary. Sanchez filed a wrongful termination action against Hyson and its California parent companies (together, Hyson) with the Labor Board in Tijuana, Mexico (Mexico Proceedings). Hyson filed a federal district court action to compel Sanchez to raise his claims in arbitration as provided in his Arbitration Agreement and requested an anti-suit injunction against the Mexico Proceedings. The Court granted the petition to compel arbitration, finding that the Agreement’s delegation clause required arbitrability to be decided by the arbitrator. The Court denied the anti-suit injunction without prejudice. Following complications that delayed the arbitration, Hyson renewed its petition to enjoin the Mexico Proceedings.

  The United States District Court, S.D. California again denied the anti-suit injunction. A foreign anti-suit injunction requires the court to determine that the domestic action will be “dispositive” of the action to be enjoined. An arbitration agreement’s delegation clause necessarily “throws a spanner” into this determination. As an enforceable delegation clause commits “nearly all” arbitrability determinations to the arbitrator, the only decision left to the court is whether an arbitration agreement exists. Here, the Court could not determine whether the arbitration would be dispositive of the Mexico Proceedings, because it had no authority to determine whether issues raised in the Mexico proceeding were subject to the Agreement, or whether an arbitration award favorable to Sanchez would resolve those issues. The Court denied the petition without

prejudice, leaving “the door open” to an anti-suit injunction as issues resolved.

- **ARBITRATOR DID NOT ACT WITH MANIFEST DISREGARD FOR THE LAW**

  Leviathan Group LLC v Delco LLC
  United States District Court, E.D. Michigan, Southern Division
  2024 WL 2730451
  May 28, 2024

  Delco contracted for Leviathan to provide marketing and social media services at a monthly rate. Leviathan initiated arbitration for Delco’s failure to pay, resulting in an award to Leviathan for the unpaid amounts and attorney fees. Delco had counterclaimed, in hearing, that Leviathan had failed to deliver some of its promised services, and the award gave Delco seven days in which to transmit any outstanding contract deliverables. On the parties’ cross-motions to confirm/vacate the award, Delco argued that 1) the arbitrator acted in disregard of applicable Michigan law in awarding attorney’s fees; 2) Leviathan’s itemized legal bills were insufficient to show that the fees were reasonable; and 3) the arbitrator “ignored” Delco’s counterclaims for outstanding deliverables.

  The United States District Court, E.D. Michigan, Southern Division, confirmed the award and denied the motion to vacate. The arbitrator was not contractually required to provide any explanation of the award, and the award was “silent on its details and rationale.” It was, therefore, “all but impossible to determine” whether the arbitrator acted in manifest disregard of the law. The record showed that the arbitrator did not accept Leviathan’s legal fee representations “without question.” The itemized legal bills contained “detailed descriptions of the work performed,” and the arbitrator held a hearing on the fee request, at which “all relevant factors were discussed.” The award “expressly” recognized Delco’s claim of unreceived deliverables by granting Delco seven days following the award in which to provide documentation.

- **ARBITRATION UNENFORCEABLE AGAINST NON-SIGNATORY CO-DEFENDANTS**

  Texas Green Star Holdings, LLC v Certain Underwriters at Lloyd’s London
  United States District Court, N.D. Texas, Dallas Division
  2024 WL 2888156
  May 21, 2024

  Texas Green Star Holdings, a start-up hydroponic produce company, filed insurance claims for property damage caused by a severe winter storm. After its claims were subject to repeated and, Green Star believed, intentional delays, Green Star sued its multiple Insurers, their Adjuster, and their insurance Brokers. Insurers and the Adjuster moved to compel arbitration of all claims under the insurance policies, including Green Star’s claims against the non-signatory Brokers, arguing that the claims against all parties were intertwined. Alternatively, they asked the court to stay claims against the Brokers pending completion of arbitration. In opposition, Green Star contended that Insurers and the Adjuster had waived their arbitration rights by their conduct in the parties’ previous state court litigation.

  The United States District Court, N.D. Texas, Dallas Division granted the motion in part and denied in part. Insurers and the Adjuster had not waived their enforcement rights. Their time in state court was not spent pursuing a judgment on the merits but in attempting to extricate themselves from the litigation and prevent transfer. The non-signatory Adjuster could enforce arbitration under equitable estoppel, as the claims against him raised allegations “of substantially interdependent and concerted misconduct” by the Adjuster and the signatory Insurers. However, the Insurers and Adjuster could not compel arbitration against the Brokers, as they failed to show any authority “for a defendant/signatory to an arbitration agreement compelling a non-signatory co-defendant to join the arbitration.” The Court declined to stay the action against the Brokers as the Insurers and Adjuster, now proceeding to arbitration, were no longer “live parties to this action” and had no authority to request a stay of claims “they are not litigating.”

California

- **COLLABORATIVE LAW PROCESS CONTRACT UNENFORCEABLE**

  Mueller v Mueller
  Court of Appeal, First District, Division 5, California
  2024 WL 2809599
  June 3, 2024

  During their marriage, Ling and Paul Mueller grew and sold cannabis and buried the profits on their property. The Muellers sought to end their marriage through a collaborative law process, during which Ling conceded that she had dug up and taken some of the money. In the Mueller's subsequent divorce proceeding, Ling sought to exclude testimony relating to those statements, citing the confidentiality clause in the couple's Collaborative Law Agreement. The court denied the motion. The Agreement clearly stated multiple times that it created "no enforceable legal rights or contractual obligation," and the confidentiality clause was therefore unenforceable. Ling appealed.

  The Court of Appeal, First District, Division 5, California affirmed. "Unlike mediations," there is no statutory evidentiary privilege for collaborative law processes. The Agreement stated multiple times that it created "no enforceable rights or obligations." The language left "no room for ambiguity," and the lower court correctly declined to enforce the confidentiality provision.

Georgia

- **ARBITRATION RIGHTS NOT WAIVED**

  Milliken v C. Merrill Construction, LLC
  Court of Appeals of Georgia
  2024 WL 2745183
  May 29, 2024

  C. Merrill Construction (CMC), a construction contractor, sued a project owner, Jeff Milliken, for non-payment. Milliken moved to compel arbitration under their contract. In opposition, CMC argued that 1) Milliken waived his arbitration rights by engaging in discovery negotiations before filing the motion; 2) Milliken failed to meet the condition precedent of engaging in mediation prior to arbitration; and 3) CDC's claims relating to an "open account" for repairs were outside the scope of the arbitration agreement. Milliken argued that these issues, including waiver, were for the arbitrator to decide, as the arbitration agreement incorporated by reference a designated provider's Construction Industry Rules, which included a delegation clause. The court denied the motion. Milliken appealed.

  The Court of Appeals of Georgia affirmed in part and reversed in part. Waiver was for the court to decide. Designation of a provider and the provider's rules did not constitute "clear and convincing evidence" of an intention to "displace the usual presumption that a court will decide conduct-based waiver of arbitration rights." Milliken's limited discovery participation did not constitute waiver, as it was "less accurately characterized as active litigation" than as an "effort to protect" his position. Issues of condition precedent and coverage of the "open account" were scope issues for the arbitrator to decide. The Court directed the trial court on remand to order the parties to submit to arbitration.

Massachussetts

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

  Good v Uber Technologies, Inc.
  Supreme Judicial Court of Massachusetts, Suffolk

2024 WL 2869582
June 7, 2024

William Good, a Boston chef, sued Uber after suffering severe spinal injuries in a car crash caused by his Uber driver. Uber moved to compel arbitration under its Terms, which were presented in a Clickwrap agreement on Uber's app. At the time of Good's use, the app opened with a "block page." Text on the block page notified users that Uber had updated its Terms, and that users could proceed into the app only after clicking a checkbox to indicate that they had "reviewed and agreed to" the updated Terms, and a subsequent "Confirm" button. The court denied Uber's motion to compel, holding that the Clickwrap agreement failed to provide sufficient notice of the Terms and that Good's actions in clicking the checkbox and button did not manifest agreement to those Terms. Uber appealed.

The Supreme Judicial Court of Massachusetts, Suffolk reversed. The app provided sufficient notice of the Terms. The block page's interface was "focused and uncluttered" and included a "large graphic image of a clipboard holding a document" with a "pencil poised as if to sign a legal instrument." The Terms were made available by a clearly identifiable hyperlink, and the first section of the Terms, in all-caps, notified the user that they were agreeing to "final and binding" arbitration. The process of clicking an initial checkbox and a second "Confirm" box manifested Good's agreement to the Terms. The Court remanded the case with directions for the lower court to order arbitration.

Pennsylvania

- **SLC CHALLENGES FOR COURT, NOT ARBITRATOR, TO DECIDE**

  MBC Development, LP v Miller
  Supreme Court of Pennsylvania
  2024 WL 2789125
  May 31, 2024

  James Miller, a limited partner in two real estate development LPs, served demands that the LPs initiate breach of contract and fiduciary duty actions against other partners under Pennsylvania Uniform Limited Partnership Act (PULPA) § 8692. The LPs appointed a special litigation committee (SLC), which recommended against such actions. Miller filed an arbitration asserting derivative claims, including a claim that the SLC failed to comply with PULPA § 8694(f) requirements. The LPs and SLC (together, Defendants) moved to permanently stay the arbitration. The court granted the stay, finding that the claims arose statutorily and not under the limited partnership agreements. The Superior Court vacated the order,

  The Supreme Court of Pennsylvania reversed and remanded. The limited partnership agreements provided that they were to be "construed and enforced" according to Pennsylvania law. The clear and unambiguous language of PULPA § 8694(f) mandates court review of an SLC's determination, while § 8615(c)(18) provides that a partnership agreement "may not vary" the provisions of § 8694. Miller's challenges to the SLC were, therefore, subject to review only by the court, not the arbitrator. The Court remanded the case for proceedings consistent with its opinion.

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

Contact Information
David Brandon
Program Manager
JAMS Institute
415-774-2648
DBrandon@jamsadr.com