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ADR Case Update 2024 - 13

Federal Courts

- **AWARD VACATED FOR MANIFEST DISREGARD OF THE LAW**

Stonemor, Inc. v International Brotherhood of Teamsters, Local 469
United States Court of Appeals, Third Circuit
2024 WL 3352936
July 10, 2024

A Union of cemetery maintenance workers ratified a tentative Agreement with their employer, StoneMor, on October 5, 2020. The Agreement, by its terms, took effect upon ratification, and its grievance provisions required the Union to give written notice of any disagreement "as to the interpretation of or alleged violation of" the Agreement within ten days of such violation. Following ratification, StoneMor sent the Union multiple proposed changes to a wage bump provision and failed to implement the wage bump on October 30th as the existing provision required. The Union rejected the proposed changes, but filed no grievance over the wage provision until seven days after the parties executed the Agreement on December 29. The resulting arbitration held the Union's filing timely. The Union was "not required" to file a grievance while the parties continued to "clarify and negotiate," and the Union's notice obligation did not arise until the December 29 execution date. StoneMor filed a petition to vacate, which the court granted. The Union appealed.

The United States Court of Appeals, Third Circuit affirmed. Despite the "steep climb to vacate an arbitration award," a court will reverse if an arbitrator "rewrites the contract." Here, the arbitrator "did just that." The Agreement, by its terms, became final once ratified. The award was properly vacated for manifest disregard of the law, as it "was not based on anything in the Agreement" and "directly contradicts the Agreement's express language setting ratification, and not execution, as the binding date for the Agreement."

- **AWARD VACATED FOR NONCOMPLIANCE WITH STATUTE**

Allied Painting & Decorating, Inc. v Internat'l Painters and Allied Trades Industry Pension Fund
United States Court of Appeals, Third Circuit
2024 WL 3366492
July 11, 2024

In 2006, Robert Smith closed his company, Allied Painting, and withdrew from the IUPAT Pension Fund. A few years later, Smith opened a new painting business that did not contribute to the Fund. This strategy for evading pension plan obligations is prohibited under the Multiemployer Pension

Plan Amendments Act (MPPAA), which allows a pension plan to recoup "withdrawal liability" from such employers by serving notice and demand for payment "as soon as practicable" after the employer withdraws from the plan. Due to a poor tracking and enforcement system, the Fund did not issue a notice and payment demand to Allied until 2017. Allied demanded arbitration, asserting laches as a defense. The arbitrator held for the Fund, assessing a withdrawal fee against Allied. While the arbitrator found that the Fund did not act "as soon as practicable" in issuing its notice and payment demand, it rejected Allied's laches defense for lack of prejudice. The district court vacated the award, finding that Allied was in fact prejudiced by the delay. The Fund appealed.

The United States Court of Appeals, Third Circuit affirmed. MPPAA Section 1399(b)(1) required the Fund to act "as soon as practicable" in providing withdrawal liability notice. "No one" challenged the arbitrator's conclusion that the Fund's notice, given twelve years after Allied's Fund obligations ceased, met this requirement. The statute did not require a showing of prejudice, and the arbitrator erred in requiring one. As the statute's notice requirements were not met, the Fund could not recover withdrawal liability from Allied under the MPPAA.

- **AWARD DID NOT VIOLATE PUBLIC POLICY**

Zimmer Biomet Holdings, Inc. v Insall
United States Court of Appeals, Seventh Circuit
2024 WL 3381286
July 12, 2024

Dr. John Insall, an orthopedic surgeon, contracted to develop and patent knee replacement devices and related products for Zimmer Biomet, which manufactured and sold the devices under the brand "NexGen." Early agreements between the parties provided for Zimmer to pay Insall royalties until the last of Insall's patents had expired. The parties' final agreement, however, set royalty payments at 1% net sales of all products "marketed by Zimmer as part of the NexGen Knee family." Insall's last patent expired twenty years later, and Zimmer notified his Estate that it would no longer pay royalties, as intervening Supreme Court law prohibited licensors from collecting royalties on expired patents. The parties submitted to arbitration, where the panel held the royalty provision valid and ordered Zimmer to pay continuing and past royalties. Zimmer sued to vacate on public policy grounds. The court denied the motion and confirmed the award. Zimmer appealed.

The United States Court of Appeals, Seventh Circuit affirmed. The arbitration panel found that the parties' final agreement implemented a new royalty structure that explicitly departed from the parties' previous agreements. The royalty payment was "no longer dependent on Insall's patents, products, or technology," but instead granted Insall a share in the NexGen product line as a whole. Because the panel concluded that the royalties were "not grounded in any patent rights," the award was not contrary to, and thus "did not offend" Supreme Court precedent relating to expired patents.

- **ARBITRATION RIGHTS WAIVED**

In re: Pawn America Consumer Data Breach Litigation
United States Court of Appeals, Eighth Circuit
2024 WL 3366702
July 11, 2024

Cybercriminals hacked into "a chain of pawnshops, a payday lender, and a prepaid-card company" (Defendants) and stole Customer information. The Customers filed class actions, which were consolidated, and Defendants moved to dismiss for lack of standing and failure to state a claim. Defendants then "fully briefed the issues raised in their motion to dismiss, prepared a joint discovery plan, and requested a pretrial conference," and the judge held a hearing on the motion. Two months later, as the parties were about to enter mediation, the Defendants, for the first time, gave notice of their intent to arbitrate, claiming that they had mentioned it previously at the pretrial conference. The court held that Defendants had waived their arbitration rights, as they provided "no credible explanation" why, if they had in fact determined to arbitrate at the time of the pretrial conference, they then "sat on their hands" for three months and proceeded in litigation. Defendants appealed.

The United States Court of Appeals, Eighth Circuit affirmed. Defendants waived their right to arbitrate, as they knew of their arbitration rights and acted inconsistently with them. Defendants, as drafters of the arbitration provisions at issue, faced "an uphill battle" in "claiming ignorance" of those provisions and, by their own account, were aware of their arbitration rights at the time of the pretrial conference. Yet, for three months following that conference, they "substantially invoked the litigation machinery" to seek "immediate and total victory" through their attack on the complaint. Only after "they had a chance to preview the district court's thinking," one week before mediation, did they push for arbitration – "just in time to use the threat of arbitration as a powerful bargaining

chip."

- **WEBSITE PROVIDED REASONABLY CONSPICUOUS NOTICE OF TERMS**

Scribner v Trans Union LLC
United States District Court, E.D. California
2024 WL 3274838
July 2, 2024

Robert Scribner opened an online CreditWorks account with Experian's credit monitoring service, and later sued Experian for failing to correct inaccuracies in his credit report. Experian moved to compel arbitration under its Terms, to which Scribner agreed in creating his account. Scribner opposed, arguing that there was no mutual agreement to arbitrate, as the CreditWorks website failed to put him on actual or constructive notice of the Terms, and he did not unambiguously manifest agreement to those Terms.

The United States District Court, E.D. California granted the motion to compel. CreditWorks' hybrid clickwrap/browserwrap agreement provided Scribner "reasonably conspicuous notice" sufficient for him to understand that he was bound to arbitration. Bold black text just above a button conspicuously labeled "Submit Secure Order" notified the user that, "By clicking 'Submit Secure Order: I accept and agree to your Terms of Use Agreement." The Terms were made available by a hyperlink clearly identified in blue font and, within the Terms, an all-caps heading in contrasting font identified the section, "DISPUTE RESOLUTION BY BINDING ARBITRATION." Scribner unambiguously manifested his assent to be bound by the Terms when he clicked the "Submit Secure Order" button.

- **EMPLOYER MUST PAY ONGOING ARBITRATION FEES**

Frazier v X Corp.
United States District Court, S.D. New York
2024 WL 3370887
July 4, 2024

Seven former Twitter employees (Claimants) initiated JAMS arbitration, in accordance with Twitter's Dispute Resolution Agreement (DRA), seeking unpaid severance. JAMS notified Twitter that, as Claimants had agreed to the DRA as a condition of employment, Rule 31(c) of JAMS' Policy on Employment Arbitration Minimum Standards of Procedural Fairness required Twitter to pay all ongoing fees associated with the arbitration. Twitter refused to pay, arguing that the DRA was not imposed as a condition of employment. Twitter asserted that fees were governed by the DRA's fee provision, which authorized the arbitrator to apportion arbitration fees, and delegated "any disputes in that regard" to the arbitrator. Twitter requested that ongoing fees be apportioned between Twitter and Claimants or, alternatively, that the arbitrator decide fee apportionment in each individual case. To resolve the impasse, Claimants' counsel fronted the fees for one of the arbitrations, in which the arbitrator held that Rule 31(c) did apply, as the DRA was a condition of employment, and that Twitter was responsible for all ongoing fees. Twitter again refused to pay. Claimants sued to compel arbitration and require Twitter to pay all ongoing fees.

The United States District Court, S.D. New York held for Claimants. While the DRA fee provision delegated final fee apportionment to the arbitrator, it did not address fee disputes preceding arbitration. Twitter's position, that only the arbitrator may decide pre-arbitration disputes, would, as was "already evident from this case," allow Twitter to "effectively resist arbitration altogether." However, the DRA also incorporated JAMS Rules and Minimum Standards, which "vest JAMS with discretion to make the initial determination about whether the Minimum Standards apply, and hence whether Twitter is obligated to pay all ongoing fees." The Court granted the motion to compel arbitration and ordered Twitter to pay all ongoing fees "unless and until the individual arbitrator in each of petitioners' respective arbitrations rules to the contrary."

California

- **ARBITRATION AGREEMENT WAS UNCONSCIONABLE**

Ramirez v Charter Communications, Inc.
Supreme Court of California
2024 WL 3405593
July 15, 2024

Angelica Ramirez filed FEHA claims against her former employer, Charter Communications, for

discrimination and retaliation. Charter moved to compel arbitration under Ramirez's employee Arbitration Agreement. The court denied the motion, holding that the Agreement was unconscionable in excluding most employer claims from arbitration, shortening times for claim-filing, failing to limit attorney fee awards to cases involving "frivolous or bad faith" claims, and requiring an interim fee award to be paid to a party who successfully compelled arbitration. The Court of Appeals affirmed. The court disagreed that the interim fee award was unconscionable but found that the Agreement's discovery limits were unconscionably truncated, citing Ramirez's testimony that she required seven depositions to make her case, but the Agreement allowed her only four. Charter petitioned for review.

Supreme Court of California reversed and remanded. The Court of Appeals properly held the arbitration agreement unconscionable. The Agreement lacked mutuality, as it directed a "wide range of statutory and policy-based" employee claims into arbitration, compared to "only a small subset" of employer claims. It set filing deadlines "as much as two years" shorter than applicable FEHA deadlines, raising the possibility that Ramirez could be compelled to arbitrate before the DFEH had investigated and issued a right-to-sue letter. The attorney fees provision was unconscionable in creating the potential that the winning party in an arbitration would nonetheless be required to pay the losing party's attorney fees. The Court of Appeals erred, however, in finding the discovery limitations unconscionable, as the arbitrator's authority to resolve "all discovery disputes" included the authority to authorize additional discovery as deemed necessary.

- **VACATUR PETITION DID NOT MEET STATUTORY DEADLINE**

Valencia v Mendoza
Court of Appeal, Second Division, Division 7, California
2024 WL 3248655
July 1, 2024

Arbitration between home purchasers, Miguel and Lizette Valencia, and the seller, Armando Mendoza, held Mendoza liable for negligence and failure to disclose that recent renovations were done without necessary permits and were not up to code. The Valencias petitioned to confirm the award. Mendoza opposed, arguing that the arbitrator had exceeded her powers by excluding evidence, and stated that he was "in the process" of drafting a petition to vacate. Mendoza submitted a petition to vacate four weeks later, on the eve of the confirmation hearing. The court confirmed the award, as Mendozo had failed to serve a petition to vacate within the ten-day statutory deadline. The court further held that there was no statutory support for vacatur based on a refusal to hear evidence absent a showing of prejudice.

The Court of Appeal, Second Division, Division 7, California affirmed. The court below properly confirmed the award. Mendoza failed to file his vacatur petition within the statutory deadline, and made no showing as to why he was "unable to submit evidence or a more developed argument" in support of his opposition. The arbitrator did not exceed her authority in excluding the evidence at issue: a building permit card Mendoza "discovered" on the eve of the arbitration hearing and expert testimony on a topic not identified to the Valencias prior to the expert's deposition.

Rhode Island

- **NO MANIFEST DISREGARD OF THE LAW**

University of Rhode Island Board of Trustees v Hellenic Society Paideia
Supreme Court of Rhode Island
2024 WL 3282151
July 3, 2024

The University of Rhode Island signed a Ground Lease with the Hellenic Society, which agreed to complete the building of a Center for Hellenic Studies on the site within thirty months of beginning construction. The Society failed to do so, and the parties submitted to arbitration. The arbitrator found the Society in breach of the Lease, rejected the Society's claim that the building project was a "joint venture," and ordered the Society to reimburse the University for all costs and expenses of returning the site to its prior state. The Superior Court confirmed the award and denied the Society's motion to vacate for manifest disregard of the law, specifically declining to "reexamine or reconstrue" the Lease or to disturb the arbitrator's finding that the parties were not engaged in a joint venture. The Hellenic Society appealed.

The Supreme Court of Rhode Island affirmed. The award showed no manifest disregard of the law, as the arbitrator issued a "thorough, well-reasoned award" reflecting "more than a plausible interpretation" of the Lease. It was undisputed that Society failed to complete construction within

the thirty-month deadline, and the arbitrator's finding that there was no joint venture reasonably relied on a Lease provision specifically stating that the Lease did not give rise to "an agency, joint venture, or partnership relationship" between the parties. The reimbursement remedy was consistent with these findings. The Court chided the Society for its "poorly concealed" attempt to "relitigate" its breach of contract claim and "seek a ruling from this Court invalidating this lease agreement."

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

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