August 22, 2024

## ADR Case Update 2024 - 15

# Federal Circuit Courts

- **ARBITRATOR PARTIALITY OBJECTIONS WAIVED**

  *B.R.S. Real Estate, Inc. v Certain Underwriter's at Lloyd's, London*
  United States Court of Appeals, First Circuit
  2024 WL 3755352
  August 12, 2024

  Frozen pipes burst in one of B.R.S. Real Estate's buildings, and B.R.S. disputed Lloyd's assessment of its resulting water damages claim. The parties submitted to an appraisal panel of two party-appointed appraisers and neutral umpire, which issued an award favorable to Lloyd's. B.R.S. sued to vacate the award, claiming that 1) Lloyd's appointed appraiser was "impermissibly partial" because Lloyd's had previously retained him to assess the property, and 2) the umpire, a lawyer "without specific construction knowledge," was not a "competent" appraiser. The court granted summary judgment in favor of Lloyds, finding that "no reasonable jury" could find in B.R.S.'s favor, and confirmed the award. B.R.S. appealed.

  The United States Court of Appeals, First Circuit affirmed. Under governing Rhode Island state law, a losing party may not raise a post-decision challenge to an arbitrator's neutrality based on information that "ought to have been discovered before the proceeding commenced." Here, B.R.S. sought an appraisal "redo" based on facts it had acquired about the panelists "well before the appraisal began." B.R.S.'s objections were "too little and too late" and its motion to vacate was properly denied.

- **ARBITRATION AGREEMENT INVALID AND UNENFORCEABLE UNDER EFAA**

  *Olivieri v Stifel, Nicolaus & Company, Inc.*
  United States Court of Appeals, Second Circuit
  2024 WL 3747609
  August 12, 2024

In January 2021, Patricia Olivieri, a financial services client associate, sued her employer, Stifel, Nicolaus, for sexual harassment, sexual assault, and fostering an ongoing hostile work environment. Stifel successfully moved to compel arbitration but, following passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), the court vacated the order upon Olivieri's motion to reconsider. Stifel opposed, arguing that the EFAA, which took effect on March 3, 2022, did not apply to Olivieri's 2021 claims. The court held that Olivieri's claims fell within the EFAA under the continuing violation doctrine, which authorized her to elect for the arbitration agreement to be invalid and unenforceable. Stifel appealed.

The United States Court of Appeals, Second Circuit affirmed. The EFAA, by its terms, applies to "any dispute or claim that arises or accrues on or after the date of the Act." The Court focused on the meaning of "accrues," seeking guidance in statutes of limitation cases where "accrual," is the starting point for the limitations period. When the underlying actions are repeated and ongoing – as in a hostile work environment claim -- the cause of action accrues "serially," accruing and re-accruing with "each successive act that is a part of the singular unlawful practice." Under the continuing violation doctrine, the statute of limitations does not begin to run "until the last discriminatory act in furtherance of" the hostile work environment. Olivieri's complaint identified retaliatory conduct that occurred following the EFAA's enactment, which was all part of the "same course of conduct" underlying her hostile work environment claims. Olivieri's claims therefore accrued after March 3, 2022 and fell with the EFAA. Accordingly, the arbitration agreement was, at Olivieri's election, invalid and unenforceable.

- **ARBITRATION AGREEMENT INVALID AND UNENFORCEABLE UNDER EFAA**

*Famuyide v Chipotle Mexican Grill, Inc.*
United States Court of Appeals, Eighth Circuit
2024 WL 3643637
August 5, 2024

Eniola Famuyide sued her employer, Chipotle, for workplace sexual assault and harassment in a July 2022 state action, which she voluntarily dismissed before filing a federal action. Chipotle moved to compel arbitration under her employment contract. The court held that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) allowed Famuyide to elect for the arbitration provision to be invalid and unenforceable. Chipotle argued that the claims fell outside of the EFAA which, by its terms, applied only to a "dispute or claim that arises or accrues on or after" the EFAA's March 3, 2022 effective date. Famuyide's claims arose prior to that date, Chipotle argued -- either upon the first instance of sexual harassment, in May 2021, or in February 2022, when Famuyide's counsel notified Chipotle that it was "investigating potential claims." The court rejected these arguments and denied the motion to compel. Chipotle appealed.

The United States Court of Appeals, Eighth Circuit affirmed. Famuyide's claims fell within EFAA and, at her election, the arbitration was invalid and unenforceable. The Court focused on the term, "dispute," which is undefined within the EFAA. Adopting the term's "ordinary meaning" as a "conflict or controversy," the Court found that no "dispute" was raised before Famuyide filed the July 2022 state action. Underlying events and exploratory letters did not raise a dispute, as neither involved Famuyide asserting "any right, claim, or demand against Chipotle," or Chipotle registering "disagreement with any position of Famuyide's."

- **EQUITABLE ESTOPPEL DID NOT BIND NONSIGNATORY TO ARBITRATION**

*NCMIC Insurance Company v Allied Professionals Insurance Company*
United States Court of Appeals, Eighth Circuit
2024 WL 3643635
August 5, 2024

Kristin Schantzen filed a malpractice action against her massage therapist, Charlotte Erdman. Erdman was individually insured by APIC and her employer, Valley Chiropractic, was insured by NCMIC. NCMIC sued Schantzen, Erdman, and APIC seeking a declaratory judgment that it was not obliged to defend or indemnify Erdmann, and that any liability would be excess to APIC's

coverage. Meanwhile, Schantzen agreed to a settlement requiring Erdman to pay $1.6M and Valley $250,000. It was undisputed that NCMIC would pay the $250,000 award against Valley, but unclear whether NCMIC or APIC must pay Erdman's share. APIC moved to compel arbitration against NCMIC under its policy with Erdmann, claiming that NCMIC was bound to arbitration under direct-benefits estoppel. The court denied the motion, and APIC appealed.

The United States Court of Appeals, Eighth Circuit affirmed. APIC could not compel NCMIC to arbitrate under APIC's policy with Erdmann. Applying governing Minnesota law, the Court predicted that the Minnesota Supreme Court would embrace, "at most," a minimal estoppel standard, under which APIC could compel NCMIC to arbitrate only if NCMIC "directly benefitted" from the APIC-Erdmann policy. Here, NCMIC did not seek or receive any direct benefit under the policy: it never claimed to be a third-party beneficiary and never argued that it was entitled to rights or benefits under policy.

- **ARBITRATOR PARTIALITY OBJECTIONS WAIVED**

*Biscayne Beach Club Condominium Assoc., Inc. v Westchester Surplus Lines Ins. Co.*
United States Court of Appeals, Eleventh Circuit
2024 WL 3659584
August 6, 2024

Biscayne Beach Club Condominium filed damages claims with its insurer, Westchester Surplus, after storms "ravaged" its properties. Underwhelmed by Westchester's payout, Biscayne invoked its policy rights to submit to an appraisal panel of two party-appointed appraisers and a neutral umpire. Westchester rejected Biscayne's first appointee for conflict of interest after the appointee disclosed that he was working on contingency fee, and the appraisal proceeded with Biscayne's replacement, Blake Pyka. As the panel entered into "final negotiations," Pyka suddenly and, mistakenly, disclosed that he, too, was working on contingency. Westchester raised no objection and, two months later, the panel issued an award favorable to Biscayne. One month later, Westchester moved to vacate the award for partiality. The court denied the motion on waiver grounds and confirmed the award. Westchester appealed.

United States Court of Appeals, Eleventh Circuit affirmed. Westchester waived its objection by not raising it sooner. A party must "timely object" to an arbitrator's partiality; the "general rule" is that a party who knows of arbitral bias must object before the award issues or else "waive the right to object in the future." The Court rejected Westchester's claim that it sought to preserve resources by, essentially, waiting to see if an objection would be necessary. Westchester "had its chance" to object and could not now ask the court to "restart the process – all the while claiming that it would be wasteful to have objected any earlier."

- **AWARD ENFORCEMENT DID NOT VIOLATE PUBLIC POLICY**

*Commodities & Minerals Enterprise, Ltd. v CVG Ferrominera Orinoco C.A.*
United States Court of Appeals, Eleventh Circuit
2024 WL 3709074
August 8, 2024

CME, a British Virgin Islands trading intermediary, contracted to purchase iron ore from Venezuelan mining company FMO. FMO failed to meet its production minimums, and CME initiated arbitration under their contract. The arbitration held FMO in breach of contract and awarded CME $187.9M in damages. CME moved to confirm the award in federal district court. FMO opposed on public policy grounds, arguing that CME had secured the underlying contract through "fraud, bribery, and corruption." The court barred FMO's opposition, holding that FMO's failure to assert the claim in a vacatur action within the 3-month FAA deadline barred it from asserting the claim as a defense under the New York Convention. FMO appealed.

The United States Court of Appeals, Eleventh Circuit affirmed. The Court rejected the lower court's finding that FMO was barred from raising public policy as an affirmative defense. The FAA does not recognize public policy as a vacatur ground and FMO could not have raised it in a vacatur action. The defense failed, however, because the "very narrow" public policy defense applies only where the award's enforcement would violate public policy. FMO's claim did not

address enforcement, but instead challenged the validity of the underlying contract, which had been determined by the arbitration panel. The defense was “nothing more” than a “thinly veiled effort to relitigate factual determinations made by the Panel.”

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

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