November 6, 2024

ADR Case Update 2024 - 18

Federal Circuit Courts

- **COURT ERRED IN GRANTING DISCOVERY BEFORE RULING ON MOTION TO COMPEL**

  Young v Experian Information Solutions, Inc.
  United States Court of Appeals, Third Circuit
  2024 WL 4509767
  October 17, 2024

  Meghan Young was denied a mortgage because of an erroneous credit report prepared by Experian Information Solutions. Soon after, Young enrolled in a credit monitoring service, CreditWorks, unaware that CreditWorks was operated by Experian's parent company. Young sued Experian for violations of the Fair Credit Reporting Act, and Experian moved to compel arbitration under CreditWorks' Terms. Young opposed, arguing that her claims were unrelated to CreditWorks, and requested limited discovery before the court considered the motion. The court denied the motion to compel and granted discovery. Because Young's complaint made no reference to any arbitration agreement, the court followed precedent holding that a court may order limited discovery before ruling on motion to compel where the agreement to arbitrate is unclear or additional facts place the agreement in dispute. Experian appealed.

  The United States Court of Appeals, Third Circuit reversed. No arbitration agreement was "unclear" or "in dispute" in the case at hand; indeed, Young "freely acknowledged" her agreement to arbitrate disputes with CreditWorks. The question here was whether Young's dispute with Experian fell within the scope of the CreditWorks arbitration provision, an issue for the arbitrator, not the courts to decide.

- **TICKET USERS BOUND BY PURCHASER'S AGREEMENT TO ARBITRATE**

  Naimoli v Pro-Football, Inc.
  United States Court of Appeals, Fourth Circuit
  2024 WL 4597029
  October 29, 2024

Brandon Gordon purchased tickets which he and his friends used to attend an NFL game at FedEx Field. Four of his friends (Plaintiffs) were injured when a railing broke, dropping them to a concrete floor one level below. Plaintiffs sued the Washington Football Team (WFT) and FedEx Field, and WFT moved to compel arbitration under its ticket Terms. The court left open the question of whether Gordon had agreed to arbitrate under WFT's Terms when purchasing the tickets online. Instead, the court held that Plaintiffs would not be bound by any such agreement, as they did not engage Gordon as their agent for purposes of purchasing the tickets and were "unaware" that the tickets were governed by any arbitration agreement. Defendants appealed.

The United States Court of Appeals, Fourth Circuit vacated and remanded. Plaintiffs were bound to any arbitration agreement binding upon Gordon with respect to the tickets, as WFT reasonably relied on Gordon's apparent authority to act on behalf of Plaintiffs. It was reasonable for WFT to assume that, by purchasing nine tickets, Gordon intended at least eight of them to be used by other people. Plaintiffs used those tickets to enter the stadium, "manifesting their acceptance that Gordon had acted and was acting on their behalf in purchasing the tickets and presenting them at the game." The Court remanded for the lower court to determine whether Gordon had entered into an arbitration agreement with WFT.

- **RETALIATION CLAIMS EXEMPT FROM RLA ARBITRATION UNDER "ANIMUS EXCEPTION"**

  Southwest Airlines Pilots Association v Southwest Airlines Company
  United States Court of Appeals, Fifth Circuit
  2024 WL 4588782
  October 28, 2024

  The pilots' Union sued Southwest Airlines, claiming that, after Captain Timothy Roebling joined the Union's Check Pilot Committee, Southwest began a campaign of retaliation culminating in Roebling being terminated and stripped of his qualifications. The court granted Southwest's motion to dismiss, holding that the Union's claims constituted a "minor dispute" subject to mandatory RLA arbitration. The Union appealed.

  The United States Court of Appeals, Fifth Circuit reversed and remanded. While Southwest had an "arguable basis" for categorizing the Union's complaint as an arbitrable "minor dispute," Roebling's case fell within the "animus exception," which provides for litigation of a minor dispute when necessary to "address claims that carrier actions reflect anti-union animus or undermine the effective functioning of the union." Here, Southwest had previously prohibited check pilots from participating in the Check Pilot Committee and, after Roebling joined, he was "shunned" and excluded from his usual work, and eventually singled out for termination on the pretext of an incident for which the other officers involved faced only mild disciplinary consequences. The Court remanded the case to the district court for further litigation proceedings.

- **ARBITRABILITY DELEGATED TO ARBITRATOR**

  New Heights Farm I, LLC v Great American Insurance Company
  United States Court of Appeals, Sixth Circuit
  2024 WL 4490713
  October 15, 2024

  Farmers Nicholas and Stacy Boerson filed a claim against their crop insurance carrier, Great American, after suffering a poor harvest. Great American's adjustment investigation reported a high amount of stored corn, triggering a Department of Agriculture investigation against the Boersons for insurance fraud. The insurance claim was then put on hold, as the policy barred payment until completion of any government investigation. The Boersons sued Great American for failing to pay on the policy, and for reporting "false measurements" and "false statements" during its investigation. Great American moved to dismiss under the policy's arbitration agreement. The Boersons opposed, arguing that their false reporting claims fell outside the scope of the agreement. The court dismissed the non-payment claims as unripe, and held that arbitrability of the false reporting claims must be determined by the arbitrator. The Boersons appealed.

  The United States Court of Appeals, Sixth Circuit affirmed. The Boersons' non-payment claims

were unripe, as the policy stated that no claim could be paid until completion of any pending government investigation. It was for the arbitrator, not the court, to determine arbitrability of the false reporting claims, as the policy incorporated AAA rules of arbitration, which delegate arbitrability to the arbitrator.

- **MASS ARBITRATION RULES UNCONSCIONABLE**

  Heckman v Live Nation Entertainment, Inc.
  United States Court of Appeals, Ninth Circuit
  2024 WL 4586971
  October 28, 2024

  Ticketmaster modified its Terms to provide for mandatory arbitration with a newly formed arbitration company, New Era. New Era offers its clients subscriptions to a "prophylactic" program for managing mass arbitrations. Under its Expedited/Mass Arbitration Rules, neutrals sort complaints into "batches" that share "common issues of law or fact." A neutral then decides three "bellwether cases" from each batch. Those rulings become binding "precedent" on the remaining non-bellwether cases, which are heard together at a single settlement conference. A non-bellwether claimant may argue for removal from the mass arbitration, but those claimants have no access to the bellwether arbitration proceedings, record, or -- until the settlement conference -- outcomes. Parties may appeal an injunction award, but not denial of injunctive relief. A group of ticket Purchasers filed Sherman Act claims against Ticketmaster, which moved to compel arbitration. The court denied the motion, holding that the Rules were procedurally and substantively unconscionable. Ticketmaster appealed.

  The United States Court of Appeals, Ninth Circuit affirmed. The Rules were procedurally unconscionable: they allowed Ticketmaster to unilaterally change the Terms retroactively and without notice, and were "so dense, convoluted and internally contradictory" as to be "borderline unintelligible." The rules were substantively unconscionable, as it is "black-letter law" that "binding litigants to the rulings of cases in which they have no right to participate – let alone cases of which they have no knowledge – violates basic principles of due process." The Rules effectively deprived claimants of their statutory right to vindicate arbitral claims, as claimants were allowed no discovery; briefing restrictions were so limited as to "border on the absurd"; and Ticketmaster had the unilateral right to replace any arbitrator. Finally, the Rules' appeals provision was harshly one-sided, rendering the denial of injunctive relief "final for the entire batched class of plaintiffs," while allowing Ticketmaster to "arbitrate thousands of claims in a single go" and take an appeal if it loses.

- **ARBITRATION TRIBUNAL DID NOT EXCEED ITS AUTHORITY**

  Hidroelectrica Santa Rita S.A. v Corporacion AIC, SA
  United States Court of Appeals, Eleventh Circuit
  2024 WL 4500962
  October 16, 2024

  Guatemalan company Hidroelectrica Santa Rita (HSR) contracted for AICSA to construct a hydroelectric plant in Guatemala. Once construction began, however, the project encountered significant and violent local backlash, and HSR terminated the contract under force majeure. The parties submitted their damages and reimbursement claims to Florida arbitration, which awarded reimbursement to HSR. AICSA sued to vacate the award, arguing that the arbitration Tribunal exceeded its authority by misinterpreting the contract and governing law. Following binding Eleventh Circuit precedent, the court and the Eleventh Circuit both held that excess of authority could not support vacatur of a non-domestic arbitration award. The Eleventh Circuit then reversed en banc, and the district court, on remand, denied vacatur and granted HSR's petition to confirm. AICSA appealed.

  The United States Court of Appeals, Eleventh Circuit affirmed. The Tribunal did not exceed its authority. The arbitrator's authority was so broad, and the Court's scope of review so limited, that the Court need only determine "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Here, the Tribunal clearly identified and interpreted the contractual language and legal premises on which it relied. It made "no difference"

if the Tribunal erred in doing so, "as long as the Tribunal construed and applied the underlying contract."

- **FOR PURPOSES OF §1281.98(b)(1) WAIVER, ARBITRATION "CONTINUES" UNTIL CLOSED BY THE ARBITRATOR**

  O'Dell v Aya Healthcare, Inc.
  United States District Court, S.D. California
  2024 WL 4510583
  October 15, 2024

  Several travel nurses sued their employer, Aya Healthcare, challenging Aya's bait-and switch practice of cutting pay rates mid-contract, after nurses had already incurred relocation costs. Aya moved to compel arbitration under their contracts' arbitration agreement. The court stayed the case pending an arbitration filed by one of the nurses, Lauren Miller, limited solely to determining arbitrability. The arbitrator held that three provisions of the arbitration agreement were unconscionable but could be severed, leaving the remainder of the agreement enforceable. Following the award, Aya failed to pay its final arbitration invoice within 30 days, and Miller notified AAA that she was exercising her right, under Cal. Proc. Civ. Pro. §1281.98(b)(1), to withdraw from the arbitration and proceed in litigation. AAA then issued a letter to both parties closing the arbitration. Aya moved to confirm the arbitration decision and maintain the litigation stay. Aya argued that §1281.98, which applies to non-payment of fees necessary to continue arbitration, did not apply to their arbitration, in which an award had already issued. Miller moved to lift the stay, and for fees, costs, and sanctions.

  The United States District Court, S.D. California denied Aya's motion to confirm, lifted the stay, awarded fees and costs, and denied sanctions. Under §1281.98(b)(1), Aya's failure to pay its arbitration costs within 30 days of the due date constituted waiver of its enforcement rights. It did not matter that this failure occurred after the award issued. An arbitration continues until it is closed by the arbitrator, which typically occurs upon final payment of all invoices. Here, the arbitrator closed the arbitration upon Miller's withdrawal, well after Aya failed to meet its 30-day deadline, and Aya's breach therefore occurred during a continuing arbitration. The Court rejected Aya's claim that the FAA preempted §1281.98. Where, as here, the arbitration agreement provides for CAA arbitration, application of §1281.98 is consistent with the FAA's "first goal of honoring the parties' intent."

California

- **NO AGREEMENT TO ARBITRATE**

  West v Solar Mosaic LLC
  Court of Appeal, Second District, Division 8, California
  2024 WL 4499313
  October 16, 2024

  A door-to-door sales representative for Elite Home Remodeling persuaded Harold and Lucy West, both in their 90s and suffering from dementia, and their daughter, Deon, to have solar panels and a new bathroom installed in their home, based on Deon's understanding that the improvements would be paid for by a government program. Elite's lender, Solar Mosaic, sent a loan contract to Deon's email address, which was quickly completed with Harold's signature and initials. A Mosaic agent then asked to speak to Harold, who had difficulty answering basic questions, and several times did so only after prompting from a female voice in the background. The Wests failed to pay on the loan, and Mosaic filed a mechanic's lien on the property. Harold and Lucy sued Elite and Mosaic, and Mosaic moved to compel arbitration under the loan contract. The court denied the motion, finding that Mosaic had failed to prove either that Harold had completed the loan documents, or that Deon had the authority to bind Harold to arbitration. Mosaic appealed.

  The Court of Appeal, Second District, Division 8, California affirmed. Mosaic failed to establish

the existence of an arbitration agreement, as the Wests presented evidence sufficient to establish a factual dispute as to Harold's agreement to arbitrate. Evidence showed that Harold, who did not use email, computers, or a mobile phone, was incapable of executing a digital signature in seven places on an electronic document within the documented space of 23 seconds. Mosaic failed to establish that Deon held herself out as Harold's representative, or that Harold ratified the agreement in his subsequent conversation with the Mosaic representative, in which he appeared confused and "insufficiently clear" to demonstrate "any ratification or even awareness" that Deon was executing a loan agreement on his behalf.

Colorado

- **DENIAL OF MOTION TO REMAND FOR CLARIFICATION NOT APPEALABLE**

  The Pool Company, Inc. v MW Golden Constructors
  Court of Appeals of Colorado, Division 1
  2024 COA 116
  October 17, 2024

  The Pool Company (TPC) refused to pay for allegedly "faulty" work performed by its subcontractor, MW Golden Constructors, and the parties submitted to arbitration. The arbitrators issued a Final Award in favor of MW Golden and against TPC in the amount of $131,818.92. The arbitrators provided no explanation of the decision or how the award amount was calculated. TPC asked the arbitrators for clarification, and the arbitrators denied the request, stating that they lacked authority to clarify the Final Award. MW Golden moved to confirm the award, and TPC moved to remand for clarification. The court denied remand based on the arbitrators' denial of TPC's previous request and confirmed the award. TPC did not appeal the confirmation, but filed a separate motion to remand for clarification, which the court denied. TPC appealed.

  The Court of Appeals of Colorado, Division 1 dismissed for lack of jurisdiction. The mere fact that a party may file a motion does not mean that denial of the motion is subject to appeal. C.R.S. 13-22-228(1) "narrowly circumscribes" the Court's jurisdiction to a specific list of appealable arbitration-related orders. The list does not include the denial of a motion to remand for clarification, and the "precise language" of C.R.S. 13-22-228(1) "leaves no room" for permitting other appeals.

Georgia

- **SETTLEMENT AGREEMENT WAS ACCEPTED**

  Diaz v Thweatt
  Court of Appeals of Georgia
  2024 WL 4500692
  October 16, 2024

  Daria and Delhi Thweatt were injured when their vehicle was struck by a vehicle driven by Alexander Diaz. The Thweatts rejected the initial settlement offer made by Diaz's insurer, Allstate, and submitted their own offer, stating that any response imposing additional terms or conditions would be deemed a rejection of the offer. If Allstate required a liability release, they stated, they would agree only to release of their bodily and personal injury claims against Diaz. Allstate accepted the offer in a letter to the Thweatt's counsel, expressly stating that the letter was an acceptance, not a counteroffer. The letter stated that Allstate had drafted two liability releases, which it did not include, and invited Thweatt's counsel to call or email with any questions or concerns. Allstate then sent proposed liability releases, which discharged Diaz, Allstate, and the policyowner from liability, and invited the Thweatts to edit or revise them as appropriate. Instead, the Thweatts sued Diaz, taking the position that Allstate's response constituted a counteroffer because the draft liability releases included additional terms and

conditions. Diaz moved to enforce the settlement. The court denied the motion, finding that, even if the liability release terms did not amount to actual counteroffers, "neither were they acceptances." Diaz appealed.

The Court of Appeals of Georgia reversed. A binding contract was formed when Allstate accepted the Thweatt's offer. Allstate made clear that its letter was an acceptance, not a counteroffer. The Thweatt's offer did not require Allstate to draft any release, and Allstate did not condition its acceptance on execution of releases. Allstate "merely proposed" draft releases, repeatedly inviting participation by the Thweatts and their counsel. Given Allstate's "clear intent" to accept the offer, the releases did not constitute a material rejection of the Thweatts' offer, and a binding settlement contract was formed.

- **ARBITRATOR DID NOT OVERSTEP AUTHORITY**

  Smith v Blackhall Real Estate, LLC
  Court of Appeals of Georgia
  2024 WL 4500180
  October 16, 2024

  Ryan Millsap, owner of Blackhall Real Estate (BRE), fired his in-house counsel, John Da Grosa Smith. Smith then submitted a $24M payment request for work Smith allegedly provided to other Millsap-owned entities outside the scope of his employment agreement. BRE and non-BRE entities named in Smith's invoice (together, Claimants) filed an arbitration demand for punitive damages and attorney fees. Smith counterclaimed for non-payment of his fees and demanded that all non-BRE Claimants be removed as parties, claiming that many of them were non-existent "Bogus entities." The arbitrator declined to remove the non-BRE Claimants and, in a "well-reasoned and comprehensive 66-page order," held Smith in breach of his employment contract and fiduciary duty and awarded Claimants $5M in damages and attorney fees. The court confirmed the award and denied Smith's petition to vacate. Smith appealed.

  The Court of Appeals of Georgia affirmed. OCGA §9-9-13(b)(3) provides for vacatur if "the rights of the party were prejudiced by an overstepping by the arbitrator of their authority." Smith made no showing of such "overstepping," as he failed to identify any instance in which the arbitrator "knew the correct law and explicitly chose to ignore it." Nor did the arbitrator overstep in failing to dismiss the non-BRE Claimants. A party "cannot complain of an error he invited," and Smith expressly listed those "alleged Bogus entities" in his request for payment, which "formed the basis" of BRE's claims. The Court rejected Smith's claim that the arbitrator's jurisdiction was precluded by Georgia's abusive litigation statute. That statute applies only to "civil proceedings," not arbitration, and abusive litigation is not a statutorily recognized ground for vacatur.

Louisiana

- **EQUITABLE ESTOPPEL CANNOT CIRCUMVENT STATUTORY PROHIBITIONS OF ARBITRATION PROVISIONS**

  Policy Jury of Calcasieu Parish v Indian Harbor Insurance Co.
  Supreme Court of Louisiana
  2024 WL 4579035
  October 25, 2024

  A syndicate of domestic and foreign insurers insured approximately 300 locations in Calcasieu Parish, a political subdivision of Louisiana. The Parish sued all the syndicate insurers for underpaying hurricane damages claims and/or failing to pay in a timely manner, but voluntarily dismissed the two foreign insurers from the action. Louisiana law prohibits arbitration clauses in all domestic insurance contracts and public contracts, so the remaining domestic insurers, lacking their own arbitration provisions, sought to enforce arbitration provisions in the foreign insurers' policies under equitable estoppel. The district court granted Calcasieu's motion to certify three questions to the Supreme Court of Louisiana: 1) whether subsequent legislation implicitly repealed the prohibition of arbitration clauses in all insurance contracts; 2) whether the prohibition

of arbitration clauses in public contracts applied to public insurance contracts; and 3) whether an insurer could enforce arbitration under equitable estoppel.

The Supreme Court of Louisiana accepted certification. The Court held that 1) the prohibition of arbitration clauses in insurance contracts had not been repealed; 2) the prohibition on arbitration provisions in public contracts applied to insurance contracts with a political subdivision such as Calcasieu; and 3) a domestic insurer could not enforce arbitration under equitable estoppel as a means of circumventing these prohibitions.

New York

- **INDIVIDUAL HEARING NOT REQUIRED FOR NON-DISCIPLINARY LEAVE WITHOUT PAY**

  O'Reilly v Board of Education
  Court of Appeals of New York
  2024 WL 4508541
  October 17, 2024

  In the throes of COVID-19, the New York Health Commissioner mandated vaccination for all Board of Education (BOE) employees. The United Federation of Teachers (UFT) entered into negotiations with the BOE over implementation of the mandate, but the parties declared impasse and proceeded to mediation and arbitration. The arbitrator issued an Impact Award which provided for unvaccinated employees to be placed on non-disciplinary leave without pay. Employees on leave remained eligible for health insurance and could voluntarily return to work following vaccination. Four Teachers filed nearly identical petitions to vacate the Impact Award and annul leave placements made without hearing. All four petitions were denied and affirmed by the appellate court. The Teachers appealed.

  The Court of Appeals of New York affirmed. The Teachers were not entitled to hearing procedures before being placed on leave without pay. The leave placement was not disciplinary in nature: it was “unrelated to job performance, misconduct or incompetency” but was instead based on the Teachers’ failure to comply with a condition of employment. Implementation of the Health Commissioners’ mandate was negotiated by the UFT, and the UFT agreed to be bound by the Impact Award. Accordingly, Teachers’ due process rights were not violated, and they were not entitled to individual hearings before being placed on leave under the Impact Award.

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