December 4, 2024

ADR Case Update 2024 - 20

Federal Circuit Courts

- **ARBITRATOR DETERMINES THE PRECLUSIVE EFFECT OF PREVIOUS ARBITRAL AWARDS**

  National Casualty Company v Continental Insurance Company
  United States Court of Appeals, Seventh Circuit
  2024 WL 4866798
  November 22, 2024

  National Casualty and Nationwide Insurance (together, "Reinsurers") reinsured Continental Insurance pursuant to identical Reinsurance Agreements. In 2017, Continental initiated arbitrations with the Reinsurers to determine whether its billing methodology complied with the Agreements' "Loss Occurrence" provision. The arbitrations held in favor of the Reinsurers and adopted the Reinsurers' shared interpretation of "Loss Occurrence." In 2023, the parties again disputed Continental's compliance with the "Loss Occurrence" provision. This time, the Reinsurers sued for a declaratory judgment that the 2017 arbitral awards precluded a new arbitration. The court granted Continental's motion to compel arbitration, holding that preclusion was for the arbitrator to decide. The Reinsurers appealed.

  The United States Court of Appeals, Seventh Circuit affirmed. Precedent is clear that "the preclusive effect of an arbitral award is an issue for the arbitrator to decide, not the federal court." Observing that the Reinsurers, both well aware of this precedent, might be teeing up for *en banc* or Supreme Court review, the Court noted that neither the Supreme Court's recent holding in *Morgan v Sundance, Inc.* nor FAA Section 13 provided any basis for revisiting that precedent.

- **AWARD WAS NOT FRAUDULENTLY PROCURED**

  Dana Limited v J.J. Ryan Corp.
  United States District Court, N.D. Ohio, Western Division
  2024 WL 4816244
  November 18, 2024

Purchaser Dana Limited, an automotive products supplier, and seller Rex Forge, arbitrated disputes arising under their long-term supply purchase agreement. The arbitrator awarded Dana $1.5M for excess freight charges and non-conforming charges, and $150,000 to Rex Forge for improper debts taken by Dana. Dana petitioned to confirm the award. Rex moved to vacate, claiming that the award was fraudulently procured. Rex claimed to have learned, post-hearing, of evidence showing that Dana could have covered its losses through another supplier. Rex argued that Dana's employee, Doug Lair, "lied" by failing to disclose this fact during his hearing testimony. Rex further argued that the award contradicted the arbitrator's factual findings and contained "significant calculation errors."

The United States District Court, N.D. Ohio, Western Division confirmed the award and denied the motion to vacate. Rex's "discovered" evidence consisted entirely of declarations by Rex's CEO, John Deliso, and a Rex employee claiming that they "heard about" Dana's ability to cover its losses from Dana employees. These "come lately" declarations of "hearsay upon hearsay" failed to show clear and convincing evidence of misconduct or bad faith. Further, they were of "dubious materiality," as the parties did not contest Dana's ability to cover its losses at the hearing. Rex's remaining claims -- that the award was "contradictory" and based on a different calculation than Rex would have liked -- were "merit-based" arguments that improperly asked the Court to "essentially re-write" the award.

- **EFAA DID NOT APPLY TO CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

  Gonzalez v Carnival Corporation
  United States District Court, S.D. Florida
  2024 WL 4863892
  November 22, 2024

  Maurene Gonzalez, a server on a Carnival Cruise ship, sued Carnival for Intentional Infliction of Emotional Distress (IIED) based on an account of ongoing sexual harassment, sexual assault, and hostile work environment. Carnival moved to compel arbitration under Gonzalez's employment agreement. Gonzalez opposed, arguing that the agreement's arbitration clause was invalid and unenforceable under the Ending Forced Arbitration of Sexual Assault and Harassment Act (EFAA). Alternatively, Gonzalez argued that the arbitration clause did not apply to her IIED claim, which alleged an intentional tort and therefore did not arise from or relate to her employment.

  United States District Court, S.D. Florida granted Carnival's motion to compel. Gonzalez's IIED claim failed to invoke the protections of the EFAA. The Act applies to cases that "relate to" a "sexual harassment dispute," which the Act defines as "relating to conduct that is alleged to constitute sexual harassment under applicable . . . law." A complaint does not meet this standard "merely by describing conduct in the vernacular as 'sexual harassment'"; rather, a plaintiff must claim that the conduct described violated sexual harassment laws. The EFAA therefore did not apply to Gonzalez's complaint, which brought only an IIED claim. Gonzalez's remaining argument, that the arbitration clause did not apply to an intentional tort, was a scope issue for the arbitrator to determine pursuant to the agreement's delegation clause.

New York

- **CLICK-WRAP AGREEMENT PUT USER ON INQUIRY NOTICE OF UPDATED TERMS**

  Wu v Uber Technologies, Inc.
  Court of Appeals of New York
  2024 WL 4874383
  November 25, 2024

  Emily Wu filed a negligence action against Uber after sustaining serious injuries while being dropped off from her ride-share. While the action was pending, Uber updated its Terms, making changes to its arbitration provision. Uber notified all users of the update in a mass email, and the

Uber app implemented a clickwrap agreement, which allowed users to enter the site only if they clicked a “Confirm” button indicating that they had read and understood the updated Terms. Uber moved to compel arbitration under the updated Terms. Uber provided evidence that Wu had opened the mass email; that she had used the Uber app after the Terms update; and that she had clicked the “Confirm” button to proceed into the site. Wu opposed, claiming lack of assent and failure to provide inquiry notice. Wu further argued that the Terms were unconscionable in applying retroactively to an existing lawsuit; and that Uber violated ethics rules by soliciting her agreement to arbitrate her claims without prior notice to her attorney. The court granted Uber’s motion to compel, holding that the mass email and click-wrap interface were sufficient to put Wu on inquiry notice of the Terms, and that Wu had manifested her assent to those Terms by completing the clickwrap agreement. The New York Supreme Court, Appellate Division, First Department affirmed. Wu appealed.

The Court of Appeals of New York affirmed. Both the mass email and the clickwrap agreement were sufficient to put a “reasonably prudent user” on inquiry notice of the Terms. The Court cited the email’s “plain language,” clear directions, and hyperlinks easily identifiable by their “signature blue font.” The clickwrap agreement similarly employed “color, underlining” and text placement that “encouraged” users to read the updated Terms,” and provided an “unambiguous means of accepting the terms.” It was “undisputed” that Wu had clicked the agreement’s “Confirm” button, manifesting her assent to the updated Terms. Wu’s claims of unconscionability and misrepresentation were, under the arbitration provision’s delegation provision, for the arbitrator to decide.

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