December 18, 2024

ADR Case Update 2024 - 21

Federal Circuit Courts

- **CONTRACT DID NOT INCORPORATE ARBITRATION AGREEMENT**

  BSI Group LLC v EZBanc Corp.
  United States Court of Appeals, Eighth Circuit
  2024 WL 4984160
  December 5, 2024

  EZBanc provided financial services to BSI Group, a business solutions company. EZBanc subcontracted some of these services to Evolve Bank and Solid Financial. BSI sued all three entities (together, Defendants) for unauthorized withdrawals and failure to process third-party payments. Defendants moved to compel arbitration. EZBanc's Contract with BSI (the Contract) contained no arbitration provision, but Defendants argued that the Contract incorporated by reference the Terms of EZBanc's Account Agreement with Evolve (Evolve Agreement). These Terms were provided on EZBanc's website and on a pop-up screen BSI would have seen in signing up for Evolve accounts. Alternatively, Defendants argued that BSI "accepted benefits" under the Evolve Agreement and was therefore bound by its Terms. The court denied the motion to compel, holding that the Contract's "vague" reference to "General Terms and Conditions" was insufficient to incorporate the Evolve Agreement's Terms, and that Defendants failed to show that the Terms were "known or easily available" to BSI. EZBanc and Solid Financial appealed.

  The United States Court of Appeals, Eighth Circuit reversed and remanded. BSI's agreement to "General Terms and Conditions" did not constitute clear and convincing evidence of the parties' intention to incorporate the Evolve Agreement's Terms. Defendants' "accepted benefits" argument for enforcing the Evolve Agreement remained viable, but a material dispute of fact remained as to whether the Terms were "effectively communicated" to BSI. The Court remanded for the lower court to determine "the narrow question of whether the 'pop-up' and/or other aspects of EZBanc's website" were sufficient to establish BSI's agreement to be bound by the Evolve Agreement's Terms.

- **ARBITRAL FINDING PRECLUDED SARBANES-OXLEY ACT CLAIM**

Hansen v Musk
United States Court of Appeals, Ninth Circuit
2024 WL 5050157
December 10, 2024

Karl Hansen believed that he was wrongfully terminated from Tesla and from Tesla's security company, U.S. Security Associates (USSA), in retaliation for reporting wrongful conduct to his superiors and to the SEC. Hansen sued Tesla, Elon Musk, and USSA (together, Defendants), claiming violations of RICO, Dodd-Frank, and the Sarbanes-Oxley Act (SOX). The court ordered arbitration of all but the SOX claim, as SOX prohibits arbitration of retaliatory termination claims where an employee "reasonably believed" they were reporting criminal fraud or securities law violations. The arbitrator denied all claims before him, finding that Hansen was terminated for valid reasons unrelated to his reports of wrongdoing. The court confirmed the award and dismissed the resolved claims. The court then dismissed Hansen's remaining SOX claim on issue preclusion grounds, as the arbitrator had made a factual determination that Hansen had "no reasonable belief" that the Defendants' actions violated securities laws. Hansen appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. SOX protections adhere only upon a prima facie showing that a claimant held an "objectively reasonable" belief that they were reporting violations of federal securities or fraud laws. Here, the arbitrator resolved this factual issue below, making a specific finding that Hansen "could not have reasonably held" such an objective belief. The arbitral finding therefore precluded Hansen from relitigating that issue, even when it arose in the context of a different claim.

Alaska

- **MEDIATION AGREEMENT DID NOT REPRESENT AGREEMENT BETWEEN THE PARTIES**

Rush v Rush
2024 WL 5000127
Supreme Court of Alaska
December 6, 2024

Following divorce mediation, Diane and Ray Rush asked the court to approve their unsigned Mediation Agreement. The Agreement included a "proviso" requiring Diane to provide "additional information" about her IRA account to "confirm" that her two withdrawals for marital expenses had depleted the marital portion of the account. In hearing, counsel discussed the proviso as a documentation issue, but later emails showed that Ray's counsel believed the entire fund to be marital property. At trial, Diane argued that the Mediation Agreement represented the parties' joint agreement that the remainder of the account was her separate asset. The court held that the Mediation Agreement did not resolve the issue, and that Diane's use of account funds to cover marital expenses transmuted the entire account into a marital asset. Diane appealed.

The Supreme Court of Alaska vacated and remanded. The Mediation Agreement did not represent the parties' agreement that the account was non-marital property. The record shows that the parties "never manifested the same understanding" of the proviso, and the parties refused to sign the Agreement. However, the court below erred in holding that Diane's marital expenditures transmuted the nature of the entire account. When funds are withdrawn for marital expenditures, the "default rule" is that marital funds are withdrawn before separate funds. The Court remanded for the lower court to apply this rule in determining the value of separate and marital portions of the account following each withdrawal.

California

- **CLAIMANT EQUITABLY ESTOPPED FROM OPPOSING ARBITRATION AGAINST NONSIGNATORIES**

Gonzalez v Nowhere Beverly Hills LLC
Court of Appeal, Second District, Division 1, California
2024 WL 4948533
December 3, 2024

Edgar Gonzalez was an employee at Nowhere Santa Monica, one of ten "Nowhere" grocery store LLCs in the Los Angeles area. He filed a putative class action for wage violations against all ten LLCs as "joint employers," and the ten Nowheres moved to compel arbitration under Gonzalez's employment agreement. The Court granted the motion to compel as to Nowhere Santa Monica, but denied the motion as to the remaining nine nonsignatory Nowheres, finding "no evidence" that Gonzalez's claims against them were "intimately founded in and intertwined with" his claims against Nowhere Santa Monica. The nine nonsignatory Nowheres appealed.

The Court of Appeal, Second District, Division 1, California reversed. Gonzalez's complaint alleged violations of Labor Code and employment law provisions governing the relationship between an employee and an employer. His claims were therefore "intimately founded in and intertwined with" with the Employment Agreement that established his relationship with his employer. Gonzalez alleged that the remaining nine Nowheres were "joint employers," who exercised "significant control" over Nowhere Santa Monica, meaning that their obligations also arose from his Employment Agreement. Gonzalez was therefore equitably estopped from using their nonsignatory status to oppose arbitrating his wage violation claims against them.

- **SECTION 1281.98 DID NOT APPLY TO POST-DISPUTE ARBITRATION STIPULATION**

Trujillo v J-M Manufacturing Company, Inc.
Court of Appeal, Second District, Division 8, California
2024 WL 4929245
December 2, 2024

Stephnie Trujillo sued her former employer, J-M Manufacturing (JMM) for sexual harassment, discrimination, and retaliation. JMM requested arbitration under Trujillo's employment agreement. The parties disputed some of the terms, and, at Trujillo's suggestion, the parties negotiated and entered into a new Stipulation to Arbitration, which the court approved. The Stipulation required JMM to timely pay all arbitral fees and costs. When JMM failed to pay an invoice within 30 days of the due date, Trujillo notified JMM that she was invoking her right under Cal. Code Civ. Pro. § 1281.98 to withdraw from the arbitration and proceed in litigation. The court granted Trujillo's motion to withdraw, and JMM appealed.

The Court of Appeal, Second District, Division 8, California reversed. Section 1281.98 did not apply to the parties' arbitration pursuant to their post-dispute Stipulation. Section 1281.98, by its terms, applies only to arbitrations conducted pursuant to a pre-dispute arbitration agreement. The provision was enacted to remedy situations in which a company required a pre-dispute arbitration agreement as a condition of sale or employment, then stalled resulting arbitrations by refusing to pay arbitration fees, leaving consumers and employees stranded without arbitral or judicial remedies. To this end, the provision applies only to the delinquent payments of a "drafting party," defined as a company that "included a pre-dispute arbitration provision" in its sales or employment contract. Section 1281.98's remedies were not implicated by the instant arbitration, governed by a Stipulation negotiated between the litigants, where Trujillo not only proposed the Stipulation but was primarily the "drafting party."

Montana

- **ARBITRAL AWARD SHOWED NO MANIFEST DISREGARD OF THE LAW**

City and County of Butte-Silver Bow v Butte Police Protective Association
Supreme Court of Montana
2024 WL 4948474
December 3, 2024

After 16 years as a Butte-Silver Bow (BSB) police officer, Rhonda Staton stated that she felt "overwhelmed" by her role as a detective, and began to exhibit performance issues such as tardiness, misplacing files, and losing her department-issued taser. BSB ordered Staton to submit to a Fit for Duty Evaluation (FFDE) and subsequently terminated her employment. Staton's union, the BPPA, filed a grievance and arbitration, which the held that the termination lacked good cause. Staton's minor disciplinary infractions were insufficient to support termination, and the FFDE was "insufficient and unreliable," as it relied on "rampant" conjecture and offered no diagnoses or rehabilitative strategies. The award ordered BSB to reinstate Staton, and to comply with CBA requirements to "determine what rehabilitative strategies might be available" to her. BSB petitioned to vacate the award for manifest disregard of Montana law, arguing that the award required BSB to "place an unfit officer on the streets." The court denied vacatur, and BSB appealed.

The Supreme Court of Montana affirmed. The award showed no manifest disregard of Montana law, but was clearly based "upon the CBA and employment policies governing the relationship between BPPA and BSB." The award did not require BSB to "place an unfit officer on the streets." Rather, the award required BSB to comply with the CBA by ensuring that Staton would be offered any necessary rehabilitative strategies, with termination reliant upon a finding that those strategies proved unsuccessful.

North Dakota

- **NO ABUSE OF DISCRETION**

Lowe v Workforce Safety and Insurance
Supreme Court of North Dakota
2024 WL 49886015
December 5, 2024

North Dakota passed legislation limiting the dosage and duration of opioid treatment therapies. If a patient requires treatment exceeding these limits, their provider must show that such treatment is a "medical necessity" by submitting to Workforce Safety and Insurance (WSI) a Provider's Request for Medication Prior Authorization (M11) and supporting documentation. James Lowe, a workers compensation recipient, was undergoing chronic opioid therapy at the time the law took effect, and his medical provider submitted a M11 request on his behalf. WSI denied the request, citing several areas where the provider's treatment course "did not align" with guidelines for long-term assessment and management of opioid pain. The provider did not respond to or remedy these discrepancies, and WSI issued the denial as a binding dispute resolution. Lowe appealed the resolution, which the court confirmed. Lowe appealed.

The Supreme Court of North Dakota affirmed. WSI's binding dispute resolution was supported by the record. Specifically, the record showed no attempts to reduce the high dosage of Lowe's therapy, or to "reconcile the success of alternative treatments" with a need to continue Lowe's high dosage therapy. The record therefore did not support a finding of medical necessity and WSI did not abuse its discretion in denying Lowe's request.

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

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