February 21, 2024

ADR Case Update 2024 - 4

Federal Courts

- **COURT LACKED SUBJECT MATTER JURISDICTION TO CONFIRM ARBITRAL AWARD**

  Smartsky Networks, LLC v DAG Wireless, Ltd.
  United States Court of Appeals, Fourth Circuit
  2024 WL 560717
  February 13, 2024

  Wireless communication company Smartsky Networks filed a federal district court action against DAG Wireless for trade secret misappropriation. The court granted DAG's motion to compel arbitration, which resulted in an award favorable to Smartsky. Smartsky returned to the district court to file an FAA Section 9 action to confirm the award, and DAG filed two Section 10 actions to vacate. The court confirmed the award, finding subject matter jurisdiction in the federal nature of Smartsky's original claims. DAG appealed.

  The United States Court of Appeals, Fourth Circuit reversed. The lower court lacked subject-matter jurisdiction to confirm or vacate the arbitral award. Although courts may, in the context of a Section 4 action to compel arbitration, "look through" to the underlying controversy to support subject matter jurisdiction, that analysis is "inadequate" to actions under Sections 9 and 10. The lower court did not retain jurisdiction over the arbitral award by virtue of staying the action pending arbitration. Section 8, governing libel in admiralty, is the only FAA provision that specifically provides for a district court to retain jurisdiction to enforce, vacate, or modify a subsequent arbitration award. Sections 9 and 10 contain no such language, and an "independent basis for subject matter jurisdiction" is therefore required for applications to enforce or vacate an arbitration award.

- **PLAINTIFF RETAINED STANDING TO LITIGATE NON-INDIVIDUAL PAGA CLAIMS**

  Johnson v Lowe's Home Centers, LLC
  United States Court of Appeals, Ninth Circuit
  2024 WL 542830
  February 12, 2024

  Maria Johnson filed a PAGA action against her employer, Lowe's Home Centers, raising both individual and non-individual claims. The mandatory arbitration provision in Johnson's employment contract included a "representative action waiver" prohibiting any dispute from being "arbitrated as a representative action or as a private attorney general action." Shortly after the Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana*, Lowe's successfully moved to compel arbitration of Johnson's individual PAGA claim and dismiss her non-individual claims.

Johnson appealed.

The United States Court of Appeals, Ninth Circuit, affirmed in part and vacated and remanded in part. In the time since the lower court's decision, the California Supreme Court, in *Adolf v Uber Techs, Inc.*, had "corrected *Viking River*'s misunderstanding of PAGA." Under California law, "where a plaintiff has filed a PAGA action comprised of individual and non-individual claims, an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court." Accordingly, the Court affirmed its decision to compel arbitration of Johnson's individual PAGA claim but vacated the order dismissing Johnson's non-individual PAGA claims. The Court directed the court below, on remand, to "apply *Adolf*."

- **WEBSITES PROVIDED SUFFICIENT NOTICE OF TERMS**

Patrick v Running Warehouse, LLC
United States Court of Appeals, Ninth Circuit
2024 WL 542831
February 12, 2024

Consumers filed a class action against multiple online sports Retailers, alleging that Consumers' personal information was stolen in a security breach of Retailers' websites. Retailers moved to compel arbitration under the Arbitration Provision set forth in the websites' Terms. Consumers opposed, arguing that 1) the websites failed to provide inquiry notice of the Terms; 2) the Provision's class/representative action waiver prevented Consumers from seeking public injunctive relief, rendering it invalid and unenforceable; 3) the Provision was unconscionable because the Terms included a unilateral modification clause in favor of Retailers; and 4) the Provision's delegation clause dictated that arbitrability be determined by the arbitrator. The court granted Retailers' motion to compel, and Consumers appealed.

The United States Court of Appeals, Ninth Circuit affirmed. The browserwrap agreements in Retailers' websites were sufficient to put Consumers on inquiry notice of the Terms. An explicit notice of the Terms was posted in clear, legible typeface on an uncluttered page, and the Terms were made available by hyperlink identified by contrasting typeface. The class/representative action waiver did not prevent Consumers from seeking public injunctive relief, as the language said "nothing about the consumer's ability to pursue, or the arbitrator's ability to award, any certain type of relief." The Terms' unilateral modification clause, without more, was insufficient to render the Provision unconscionable, as the "implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable." On an issue of first impression, the Court joined other circuits in holding that the Provision's incorporation of JAMS rules "evidenced a clear and unmistakable intent to delegate questions of arbitrability to an arbitrator." The Court declined to determine whether this holding should extend to consumer contracts between a "sophisticated entity" contracting with an "average unsophisticated consumer." Consumers offered no evidence on that question, and its resolution was unnecessary to the Court's decision.

- **CONTINUED USE OF SERVICES RATIFIED TERMS**

Hopgood v Experian Information Solutions, Inc.
United States District Court, C.D. California
2024 WL 629861
February 13, 2024

Hackers accessed Walter Hopgood's account with financial services provider, Experian, and filed fraudulent credit card applications. Hopgood signed up for a "CreditLock" on his account and paid Experian a monthly fee to freeze his credit file. Hopgood filed a class action against Experian, and Experian moved to compel arbitration under the account Terms. Hopgood opposed, arguing that he was no longer subject to the Terms after terminating the account and that the hackers had reopened the account and agreed to the updated Terms in doing so.

The United States District Court, C.D. California granted Experian's motion to compel. The court found the existence of an agreement to arbitrate. It was uncontested that Hopgood agreed to the Terms when he opened the account and that the Terms then, and in each following upgrade,

stated that any "order, access, or use of" Experian's services or website signified the account holder's "acceptance and agreement, without limitation or qualification, to be bound by the then current Agreement." Hopgood subsequently ratified the Terms by continuing to use the account following the hacking and purchasing additional Experian services. Whether Hopgood continued to be bound by the Terms after Experian froze his accounts was, under the arbitration agreement's delegation clause, an issue for the arbitrator to determine.

New York

- **FRAUD ON THE COURT NOT FOUND**

  In re: PricewaterhouseCoopers, LLP v Cahill
  Supreme Court, Appellate Division, First Department, New York
  2024 WL 187047
  January 18, 2024

  John Cahill, a partner at PricewaterhouseCoopers, LLP (PwC), sued PwC in Minnesota. PwC successfully petitioned to stay the Minnesota action and compel arbitration under Cahill's partnership agreement. Cahill moved to vacate the order to compel. Cahill argued that PwC had committed fraud on the court by quoting only "a portion" of the governing arbitration provision without the full partnership agreement to its motion to compel. The court denied Cahill's motion, and Cahill appealed.

  The Supreme Court, Appellate Division, First Department, New York affirmed. PwC's failure to submit the full partnership agreement with its motion to compel did not constitute fraud on the court. The failure was discussed in hearing, at which time PwC offered to provide a full copy to the court. Cahill "had the full document, but neither submitted it nor made specific arguments as to which other portions were relevant." The parties and the court "expressly understood the situation," and there was "no deception and no fraud."

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

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