JAMS Institute

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March 7, 2024

ADR Case Update 2024 - 5

Federal Courts

- **ARBITRATOR TO DECIDE TERMINATION ISSUES**

  Mikoff v Unlimited Development, Inc.
  United States Court of Appeals, Fourth Circuit
  2024 IL App (4th) 230513
  February 1, 2024

  Luann Mikoff's mother, Bonnie Stone, was admitted to Jerseyville Manor, a skilled nursing facility. Mikoff, acting as her mother's Medical POA, signed an Admission Agreement and an Arbitration Agreement on her behalf. Stone died of COVID-19 contracted during her stay, and Mikoff sued Jerseyville Manor and its owner (together, the Facility), bringing claims under the Survival Act and the Wrongful Death Act. The Facility moved to compel arbitration. Mikoff opposed, arguing that 1) she had lacked authority under the Medical POA to bind her mother to the Arbitration Agreement; 2) her wrongful death claims were not subject to arbitration; 3) both the Admission Agreement and Arbitration Agreement terminated upon Stone's death. Mikoff appealed.

  The United States Court of Appeals, Fourth Circuit, affirmed in part and reversed in part. The lower court did not err in finding an agreement to arbitrate. Even if Mikoff lacked authority to enter into the arbitration agreement as her mother's Medical POA, she was also acting as her mother's Financial POA. Mikoff's wrongful death claims were not subject to arbitration. The real parties in interest to a wrongful death action are decedent's next of kin, and those parties are not bound by an agreement signed by or on behalf of the decedent. Under the Arbitration Agreement's delegation clause, it was for the arbitrator to decide termination issues relating to the remaining Survival Act claims.

- **EXISTENCE OF VALID ARBITRATION AGREEMENT WAS A MATTER OF LAW**

  Cameron Parish Recreation #6 v Indian Harbor Insurance Company
  United States Court of Appeals, Fifth Circuit
  2024 WL 667691
  February 19, 2024

  Cameron Parish's Recreation Department, School Board, and Police Jury (together, Plaintiffs) each had identical surplus insurance policies with a group of Insurers. Insurers denied Plaintiffs' claims for coverage of damages caused by Hurricane Laura, and Plaintiffs sued. Insurers moved to compel arbitration and stay the case. The court refused the stay and ordered "limited discovery" into arbitrability. Insurers appealed.

The United States Court of Appeals, Fifth Circuit, vacated and remanded. The court below improperly refused to grant the stay. Discovery "is not needed" to determine the existence of a valid arbitration agreement "because the dispute can be decided as a matter of law." The Court directed the lower court, on remand, to determine whether to grant arbitration based on Plaintiffs' insurance policies.

- **NONPARTY MINORS NOT BOUND TO GUARDIANS' ARBITRATION AGREEMENTS**

Coatney v Ancestry.com DNA, LLC
United States Court of Appeals, Seventh Circuit
2024 WL 629858
February 15, 2024

Ancestry.com allows a Guardian – whether a parent or legal guardian -- to purchase and activate a DNA test kit for a minor between the ages of thirteen and eighteen and to create and manage an account for the minor. The Guardian agrees to Ancestry's Terms, which include an Arbitration Agreement, and signs a DNA Consent Form consenting to Ancestry's use of the minor's DNA to 1) generate data for Ancestry reports; 2) identify the child's potential relatives; and 3) help the Guardian and their child "discover other details" about their family history. Ancestry was acquired by Blackstone, Inc., and a group of Plaintiffs, whose DNA had been acquired through Guardian accounts when they were minors, sued Ancestry for violating their privacy by disclosing their confidential genetic information. Ancestry moved to compel arbitration under the Terms. The court denied the motion, based on its findings that the Plaintiffs were nonparties to the Terms and DNA Consent Forms, had not opened Ancestry accounts, and did not activate their DNA tests. Ancestry appealed.

The United States Court of Appeals, Seventh Circuit, affirmed. Neither the Terms nor the DNA Consent Forms were binding upon the Plaintiffs. Plaintiffs were not express parties to the Terms, and the Terms did not state that Guardian accounts were made "on behalf" of the children. Some language in the Consent Forms referred to the Guardian acting "on behalf" of the children, but the Consent made no reference to the Terms. The Terms specifically excluded third-party beneficiaries, and nothing in the Terms stated that Ancestry's use of the DNA was for the "direct benefit" of the minors. Although a "special relationship" existed between Plaintiffs and their Guardians, that relationship did not "join their identities," and Plaintiffs were not "closely related" parties foreseeably bound by the Terms.

- **ARBITRATOR DID NOT ACT WITH MANIFEST DISREGARD OF THE LAW**

New Frontier Investment AG v BitCenter, Inc.
United States District Court, N.D. California
2024 WL 459070
February 6, 2024

New Frontier, a shareholder in Hungarian software company XAPT, entered into a Framework Agreement (FWA) with BitCenter, in which BitCenter agreed to loan money to XAPT. The FWA was governed by California law "to the extent permissible by Hungarian law." A separate Convertible Loan Agreement (CLA) gave BitCenter the option to convert the outstanding loan to XAPT shares, and New Frontier agreed to vote in favor of such conversion. When BitCenter exercised the option, however, New Frontier declined to vote, and the option failed. In subsequent arbitration, the arbitrator held New Frontier in breach of the CLA and mandated specific performance of New Frontier's obligation to vote "for" the conversion. In the event New Frontier failed to comply, the arbitrator also awarded BitCenter the option to substitute a written legal declaration of "for" in place of New Frontier's vote. New Frontier moved to vacate the award, claiming that the arbitrator had acted with manifest disregard for the law by "misinterpreting" or "incorrectly" applying Hungarian law, which makes a "fundamental distinction" between corporate law and contract law and would not have allowed for specific performance or a substitute declaration.

The United States District Court, N.D. California denied New Frontier's petition to vacate. "Manifest disregard" means "something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law." The arbitrator here was fully briefed on the

corporate and contract law distinctions and "made a good faith determination of the applicability of Hungarian law." The risk that an arbitrator may "construe the governing law imperfectly" is a risk "that every party to arbitration assumes," and such legal errors "lie far outside the category of conduct" that would constitute manifest disregard.

- **WEBSITE FAILED TO PROVIDE REASONABLY CONSPICUOUS NOTICE OF TERMS**

  Massel v SuccessfulMatch.com
  United States District Court, N.D. California
  2024 WL 802194
  February 27, 2024

  Michael Massel filed a putative class action against a millionaire dating service, Millionaire Match, for violating the Illinois Biometric Information Privacy Act. Millionaire moved to compel arbitration under its Service Agreement, to which Massel had agreed in registering his account. The notice of Consent to Our Service Agreement and Privacy Policy was provided on the website's sign-up page, which was headlined by a warning, "no sugar daddies or sugar babies," in large, bold, capitalized type. In contrast, the notice appeared at the bottom of the page in "normal-weight gray type." To proceed into the site, Massel was required to check a box accompanied by text stating, "Agree to both the Service Agreement and Privacy Policy." The underlined terms provided hyperlinks to their respective documents. Massel opposed the motion to compel, arguing that the signup page failed to provide reasonably conspicuous notice of the Service Agreement.

  The United States District Court, N.D. California denied Millionaire's motion to compel. The Ninth Circuit has held that to provide reasonably conspicuous notice of terms, a website "must do more than simply underscore the hyperlinked text." Without size or color to distinguish the hyperlinks, the underlining, therefore, was, of itself, insufficient to put Massel on notice of the Service Agreement or its arbitration agreement. While these distinctions "may seem picayune," the Court noted, Millionaire could and did use bold, capitalized texts when it wished to prioritize user awareness of other considerations.

- **ARBITRATION PROVISION NOT UNCONSCIONABLE**

  Davenport v Nvidia Corporation
  United States District Court, N.D. California
  2024 WL 832387
  February 28, 2024

  Electronic device manufacturer Nvidia sold "Shield" gaming devices that included a GameStream feature, which enabled gamers to stream games from their computers to their televisions. Nvidia subsequently removed the GameStream feature, frustrating users who had purchased the device specifically for that feature. Consumers filed a putative class action against Nvidia for breach of implied warranty and consumer law violations. Nvidia moved to compel arbitration under the Terms to which users agreed in a clickwrap interface when setting up their devices. The Terms provided for binding arbitration before a JAMS arbitrator located in Santa Clara County "under the Optional Expedited Arbitration Procedures then in effect for JAMS." Nvidia argued that under JAMS' "Streamlined Arbitration Rules," arbitrability was delegated to the arbitrator. Consumers opposed the motion to compel, arguing that the Terms' arbitration provision was unconscionable.

  The United States District Court, N.D. California granted Nvidia's motion to compel. Arbitrability was for the Court to decide, as the Terms' arbitration provision did not incorporate a delegation clause. Although the provision designated a JAMS arbitrator, it did not explicitly incorporate JAMS rules. There was no delegation provision in the referenced "Optional Expedited Arbitration Procedures." Nvidia argued that JAMS "Streamlined Arbitration Rules" applied, but JAMS offers a "menu of rules" to its clients; it was not apparent from the provision that Nvidia had chosen the "Streamlined" rules. The provision was procedurally unconscionable, as purchasers had no way to review the Terms "until after they had purchased their devices, opened them, turned them on, and begun the setup process." However, the provision was not substantively unconscionable: there were no significant obstacles to seeking arbitration; the $250 arbitration fee was not unduly

harsh, and the requirement to use a Santa Clara County arbitrator was not unfair, as the arbitration need not take place in person at that location.

Florida

- **ARBITRATION PROVISION APPLIED TO DISPUTE OVER UNAUTHORIZED CONDUCT**

  Walsh Group v Zion Jacksonville, LLC
  District Court of Appeal of Florida, Fifth District
  2024 WL 387536
  February 2, 2024

  Archer Western, a road repair contractor, entered into an agreement with a local business, Zion Jacksonville, to use Zion's property for beach access to procure sand it needed for its work. Zion later sued Archer, complaining that Archer had dumped "imported, unsuitable, non-native fill material" and debris on Zion's property. Archer moved to compel arbitration under their contract's broad arbitration clause. Zion conceded that its claims for breach of contract and unjust enrichment claims were subject to arbitration but opposed arbitration of its claims for littering, trespass, organized fraud, and gross negligence, as those claims "could have arisen without the existence of a contract." The court agreed that those claims were not subject to arbitration. Archer appealed.

  The District Court of Appeal of Florida, Fifth District, reversed. The Court rejected Zion's claim that, as the contract addressed only access to and removal of beach sand, its arbitration provision did not extend to Archer's actions of dumping materials onto the property. The "pervasive theme" of Zion's complaint was that Archer "deviated from what the parties' contract authorized." Zion's claims were therefore "inextricably intertwined' with the contract, and subject to its broad arbitration clause.

New York

- **ARBITRATOR DID NOT EXCEED POWERS**

  In re: New Millennium Pain & Spine Medicine P.C. v Garrison Property & Casualty Insurance Company
  Supreme Court, Appellate Division, First Department, New York
  2024 WL 436476
  February 6, 2024

  Medical provider New Millennium petitioned to vacate master arbitration awards that denied New Millennium's claims for no-fault benefits for medical services. New Millennium argued that the arbitrator exceeded their power by following First Department precedent, rather than Second Department precedent, in declining to award a claim after the insurance policy was exhausted. New Millennium also argued that the insurer improperly took a 20% wage offset twice: once when issuing payment against gross wages and again when applied against the no-fault personal injury protection limit of liability. The court denied the petition, and New Millennium appealed.

  The Supreme Court, Appellate Division, First Department, New York affirmed. First Department precedent indicated that an insurer's duties ceased upon insurer's payment of the contractual limit of its no-fault policy. Accordingly, the arbitrator's decision declining to award a claim after the policy was exhausted was not made in excess of the arbitrator's powers. Although New Millennium was "entitled to argue" that insurer's wage offset was improper, the offset was actually allowable under N.Y. Insurance Law § 5102(b).

Pennsylvania

- **CLAIMS FELL OUTSIDE SCOPE OF ARBITRATION AGREEMENT**

  McCrossin v Comcast Spectacor, LLC
  Superior Court of Pennsylvania
  2024 WL 439416
  February 6, 2024

  Two trainers with the Philadelphia Flyers, James McCrossin, and Salvatore Raffa (together, Trainers), sued Comcast Spectacor and FPS Rink (Defendants), claiming that exposure to chemicals used in Zamboni machines caused them personal injuries. The trainers' Wives filed claims for loss of consortium, and Raffa filed retaliation claims against the Flyers. Comcast filed preliminary objections seeking dismissal, arguing that the Trainers' Employment Agreements required them to first seek arbitration under the Comcast Solutions Program. The court overruled Defendant's objections, holding that Defendants, as non-parties, held no enforcement rights under the Employment Agreements. Defendants appealed.

  The Superior Court of Pennsylvania affirmed in part, reversed in part, and remanded. The trial court erred in denying Defendants' enforcement rights, as the Comcast Solution Program, by its terms, applied to Comcast subsidiaries and affiliates. However, only Raffa's retaliation claims against the Flyers were subject to arbitration. The Wives' claims were not arbitrable: they were non-parties to the Employment Agreements, and their claims, although derivative of their husbands', raised separate causes of action. The Trainers' personal injury claims were not arbitrable, as they fell outside the scope of the arbitration agreement. The agreement applied only to employment disputes between the Trainers and the Flyers. Trainers' claims – that Defendants use of chemicals caused them physical harm – were not asserted against the Flyers and did not arise from any conduct by the Flyers. The exceptions were Raffa's retaliation claims, which were employment claims made against the Flyers and, therefore, subject to the Comcast Solutions Program under his Employment Agreement.

Texas

- **NONPARTY MINOR BOUND TO ARBITRATION AGREEMENT BY EQUITABLE ESTOPPEL**

  Pearland Urban Air, LLC v Cerna
  Court of Appeals of Texas, Houston
  2024 WL 479478
  February 8, 2024

  On August 30, 2020, Abigail Cerna took her minor son, R.W., to Urban Air, an indoor trampoline park. Acting on R.W.'s behalf, Cerna signed a Release and Indemnification Agreement with a mandatory arbitration provision. On a second visit to Urban Air on November 21, 2020, R.W. sustained a cut to his foot while jumping on a trampoline. Cerna sued Urban Air on his behalf, and Urban Air moved to compel arbitration. Cerna opposed, arguing that 1) R.W., as a non-party, was not bound to the Agreement; 2) the Agreement had expired before the November visit; and 3) the arbitration provision was unenforceable under the Texas Arbitration Act, which bars arbitration of personal-injury claims absent an agreement signed by both parties and their attorneys. The court denied the motion to compel, and Urban Air filed an interlocutory appeal.

  The Court of Appeals of Texas, Houston, reversed. R.W. was bound to the Agreement under direct benefits estoppel. Cerna had signed the Agreement on R.W.'s behalf, representing that she had authority to do so. By entering the premises and enjoying the activities offered, R.W. benefitted from the Agreement in a way that equitably bound him to its terms. The Agreement's expiration was an issue of scope to be decided by the arbitrator. Cerna's enforceability challenge

under the Texas Arbitration Act was, under the arbitration provision's delegation clause, "clearly and unmistakably delegated to the arbitrator."

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

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