March 20, 2024

ADR Case Update 2024 - 6

Federal Courts

- **TICKET USE CONSTITUTED AGREEMENT TO TERMS**

  Jackson v World Wrestling Entertainment, Incorporation
  United States Court of Appeals, Fifth Circuit
  2024 WL 1007870
  March 8, 2024

  Ashton Mott treated his uncle, Marvin Jackson, to a WWE event at AT&T Stadium for Jackson's birthday. In purchasing the tickets on SeatGeek.com, Mott agreed to the AT&T Stadium COVID waiver. The waiver, a subsequent email purchase confirmation, and the SeatGeek app Mott used to access the tickets each stated in bold print that entering the event constituted agreement to the waiver's arbitration provision. After the event, Jackson sued the WWE, claiming that he suffered hearing loss from a pyrotechnic blast near his seat. The WWE moved to compel arbitration. Jackson opposed, arguing that he was not bound to arbitration because he did not purchase the ticket, nor had Mott purchased the ticket as his agent. The court granted the WWE's motion to compel, holding that Mott had acted as Jackson's agent and that Jackson's use of the ticket charged him with notice of its terms. Jackson appealed.

  The United States Court of Appeals, Fifth Circuit, affirmed that the arbitration provision was enforceable against Jackson. Although Mott did not act as Jackson's agent in purchasing the ticket, he did act as Jackson's agent "when Jackson allowed him to present the ticket on his behalf for his admittance to the stadium." SeatGeek had provided "ample" notice that use of the ticket constituted acceptance of the arbitration provision, and event attendees "routinely purchase and present tickets on behalf of family and friends, and in doing so, accept the required terms and conditions."

- **APPRAISAL UMPIRE NOT BARRED FROM APPLYING "BROAD EVIDENCE RULE"**

  Meier v Wadena Insurance Company
  United States Court of Appeals, Seventh Circuit
  2024 WL 995716
  March 8, 2024

  Margrit Meier filed a coverage claim with her insurer, Wadena, after her restaurant was damaged by fire. The policy entitled her to up to $1.1 million of the restaurant's "actual cash value" at the time of the fire. Wadena assessed the damage using the "Broad Evidence Rule" method, which weighs multiple variables, and issued payment of approximately $845,000. Meier, displeased, invoked the policy's panel appraisal option. The panel umpire, who also applied the Broad Evidence Rule, issued an appraisal award of approximately $939,000. Meier sued to set aside

the award, alleging breach of contract and bad faith. The court granted Wadena's motion to dismiss, finding that Wadena had properly complied with the policy's ADR process and that "nothing in either Wisconsin law or the policy prohibited use of the Broad Evidence Rule." Meier appealed.

The United States Court of Appeals, Seventh Circuit, affirmed. The parties had mutually agreed to the panel appraisal process, and Meier herself invoked it. The result was a payout of approximately 85% of the coverage limit. The Wisconsin Supreme Court has upheld use of the Broad Evidence Rule when the term was not otherwise defined within the contract, and the umpire's application of the Rule was not in breach of contract or bad faith.

- **CLAIMANTS EQUITABLY ESTOPPED FROM AVOIDING ARBITRATION**

Herrera v Cathay Pacific Airways Limited
United States Court of Appeals, Ninth Circuit
2024 WL 1040277
March 11, 2024

Winifredo and Macaria Herrera purchased round-trip tickets on Cathay Pacific Airways through a travel website, ASAP Tickets. The ASAP Terms provided that any ticket refunds were subject to the airline's restrictions and an ASAP processing fee. The Cathay tickets, which Cathay issued to ASAP, incorporated General Conditions providing that Cathay could issue refunds to either the ticketholder or the purchaser. The Herreras' return flight was canceled, forcing them to return on another airline. A Cathay employee assured the Herreras that they would receive a full refund, but ASAP told them that any refund would be made only in short-dated travel vouchers, which were unusable due to COVID-19 restrictions. The Herreras sued Cathay for breach of contract. Cathay invoked equitable estoppel in moving to compel arbitration under the ASAP Terms. The court held that Cathay held no arbitration enforcement rights under the ASAP Terms, as the Herreras' claims went to Cathay's breach of its General Conditions obligations and alleged no misconduct against ASAP. Cathay appealed.

The United States Court of Appeals, Ninth Circuit reversed and remanded. The Herreras were equitably estopped from avoiding arbitration against Cathay under the ASAP Terms. California law bases equitable estoppel upon "the relationship between the parties and their connection to the alleged violation." Here, ASAP was essentially a "middleman" for any refund: Cathay issued the tickets to ASAP; was entitled to issue the refund to ASAP, and any refund would be subject to the ASAP Terms. Further, Cathay denied that ASAP had requested a refund on behalf of the Herreras, placing ASAP's conduct at issue. The Herreras' allegations were therefore "intimately founded in and intertwined" with the ASAP Terms. The Court directed the lower court, on remand, to dismiss or stay the action pending arbitration.

- **STATE LAW GOVERNED ARBITRATION AGREEMENT NOT SUBJECT TO FAA**

Ortiz v Randstad Inhouse Services, LLC
United States Court of Appeals, Ninth Circuit
Nos. 23-55147, 23-55149
March 12, 2024

Adan Ortiz was hired by a staffing company, Randstad Inhouse Services, to perform temporary work unloading planes for GXO Logistics. Ortiz signed an arbitration agreement which included a choice of law provision stating: "This Agreement shall be governed by the Federal Arbitration Act ('FAA'). Any federal, state, or local laws preempted by the FAA shall not apply to this Agreement or its interpretation." Ortiz sued Randstad and GXO, and they moved to compel arbitration. The court denied the motion, holding that Ortiz was an interstate transportation worker exempt from arbitration enforcement under FAA Section 1 and that state law did not apply in the FAA's absence. Randstad and GXO appealed.

The Ninth Circuit, in an unpublished opinion, affirmed in part and reversed in part. The Court affirmed that Ortiz was exempt from FAA arbitration enforcement under Section 1. It "did not follow," however, that Ortiz was "necessarily exempt from arbitration altogether." FAA exemption is "not the same thing as a definitive statement that such contracts are categorically

unenforceable in all circumstances." The choice of law provision "unambiguously contemplated" application of state law to the extent not preempted by the FAA. Under traditional choice-of-law analysis, California was the applicable state law, and California's arbitration laws, which are "substantially similar to the FAA," were not preempted by the FAA. The Court concluded that "the parties unambiguously agreed to apply California law when, as here, the FAA provides no basis to enforce the agreement." As the court below did not previously consider whether the agreement was enforceable under California law, the Court directed it, on remand, to do so.

- **TERMINATION NOTICE EFFECTIVE**

Lewis v Federal Bureau of Prisons
United States Court of Appeals, Federal Circuit
2024 WL 900253
March 4, 2024

Once a Federal Bureau of Prisons (BOP) corrections officer completes probation, they are entitled to due process protections including advance written notice of termination and the right to appeal to the MSPB. Nine days short of her April 8, 2022, probation end date, Sha'Lisa Lewis was placed on administrative leave. The terms of her leave required her to be subject to recall "at any time" and reachable by telephone "at all times during normal duty hours." BOP decided to terminate Lewis before the end of her probation and made concerted efforts to deliver Lewis's termination letter. Lewis, however, failed to comply with BOP's request to appear at work on April 6, ignored the BOP's voicemails, and claimed not to receive letters delivered to her by USPS and FedEx on April 7. Lewis finally stated that she received the letter on April 12, after her probation period had expired. The Union proceeded to grievance and arbitration claiming that Lewis had been removed without due process. The arbitrator held that Lewis had been terminated during her probation and was, therefore, not entitled to the due process protections of a full employee.

The United States Court of Appeals, Federal Circuit affirmed. 5 C.F.R. § 315.804(a) provides that an agency shall terminate an employee's services "by notifying him in writing as to why he is being separated and the effective date of the action." The regulation does not state that this notification must be received before the end of the probationary period. The BOP's termination was effective because the agency did "all that could be reasonably expected under the circumstances" to timely deliver the notice.

- **ARBITRATOR MUST RESOLVE CBA INTERPRETATION ISSUE**

Postal Police Officers Association v United States Postal Service
United States District Court, District of Columbia
2024-WL 860665
February 28, 2024

The USPS issued a Memo stating that Postal Police Officers (PPOs) "may not" exercise law enforcement authority outside Postal Service premises without prior written authority. The Union filed a grievance and arbitration, claiming that the Memo contravened the CBA, which incorporated the Postal Service Handbook. The Handbook allowed PPOs to exercise law enforcement authority off-site without prior written approval in cases of hot pursuit, citizen's arrests, or "situations requiring mobile patrol or escort protection." The arbitrator held for the Union, directing that the Memo be rescinded and that future PPO action would be governed by the Handbook. The Union petitioned to confirm the award, and the USPS, citing the fact that the memo had been rescinded, moved to dismiss on mootness grounds.

The United States District Court, District of Columbia, confirmed the award. The case was not moot despite rescission of the Memo, as USPS practice and policy still failed to recognize the Handbook exemptions. The USPS could have moved to vacate or modify the award within 90 days but did not. As the Court must confirm an award unless it is vacated, modified, or corrected, the Court confirmed the award. However, it was unclear whether the Handbook required the USPS to allow the exemptions or merely allowed them to do so. The Court remanded the case for the arbitrator to resolve this CBA interpretation issue.

- **STREAMIING APP FAILED TO PROVIDE REASONABLE NOTICE OF TERMS**

  Campos v Tubi, Inc.
  United States District Court, N.D. Illinois, Eastern Division
  2024 WL 496234
  February 8, 2024

  Sylvia Campos sued Tubi, an online streaming service, for violating the Video Privacy Protection Act. Tubi moved to compel arbitration under its Terms, to which Campo had agreed in registering on the Tubi app. The Notice of Terms – stating that the user agreed to the Terms by registering -- was located at the very bottom of the App's first page, in small low-contrast gray font against a dark background. Large colored banners more prominently displayed gave users the option to continue to register via email, Google, or Facebook. Once the user selected an option, a new page containing the registration form appeared. Campos opposed Tubi's motion to compel, arguing that the site failed to provide reasonable notice of the Terms.

  The United States District Court, N.D. Illinois, Eastern Division denied Tubi's motion to compel, finding there was no agreement to arbitrate. Applying 7th Circuit guidelines, the Court's "fact-intensive inquiry" concluded that a reasonable user of the site would not have realized that they were assenting to the Terms when they completed the registration form. The Court criticized the Notice's small, non-contrasting font and inconspicuous location but particularly objected to the fact that the Notice was "not even on the same screen" as the "Register" button by which the user signified assent. This made it particularly "unlikely that a prospective user like Campos would receive the warning before performing the act of consent." The Court rejected Tubi's argument that reasonable users of any app should "already expect that they will be subject to terms of use." As a streaming site, Tubi was "meaningfully different" than more interactive sites in which users are actively engaged in activities– whether in commenting on content, generating content, or interacting with other users – whose "hazards" may "suggest that account usage may be tied to certain terms and conditions."

California

- **SECTION 998 PRECLUDED ATTORNEY'S FEES RECOVERY**

  Ayers v FCA US, LLC
  Court of Appeal, Second District, Division 8, California
  2024 WL 805660
  February 27, 2024

  After experiencing numerous problems with his new Jeep Grand Cherokee, Jacob Ayers sued the seller, FCA, under the Song-Beverly Consumer Warranty Act for restitution and penalties equal to three times the $57,300 purchase price. FCA made multiple section 998 settlement offers, the highest for $163,409, which Ayers rejected. Ayers, meanwhile, traded in the Jeep for $13,000 credit on a new vehicle. Soon after, a California court held that a Song-Beverly recovery should exclude any amount received on a trade-in, effectively reducing Ayers's recovery by $39,000. The parties finally settled the case for $125,000. Ayers filed a motion to recover attorney fees. FCA opposed, arguing that section 998 precludes such recovery, as the case was resolved for less than FCA's highest previous settlement offer rejected by Ayers. The court granted the attorney fees, holding that 1) section 998 did not apply to a case resolved by pretrial settlement, and 2) Ayers should not be penalized for the fact that his settlement was reduced by an intervening change in the law. FCA appealed.

  The Court of Appeal, Second District, Division 8, California, reversed and remanded. Section 998 applies to cases that end in settlement. Section 998 bars a plaintiff from recovering costs after the date of a section 998 offer where "an offer made by a defendant is not accepted" and "the plaintiff fails to obtain a more favorable judgment or award." The provision makes no exception for cases that are terminated by settlement. Similarly, Section 998 did not exempt Ayers from the consequences of intervening changes in California law that reduced his final settlement amount. Nothing in the statute excuses an offeree from "considering the risk of changes in the legal

landscape" when evaluating a Section 998 settlement offer.

- **ARBITRATOR PROVIDER COULD NOT UNILATERALLY EXTEND FEE DEADLINE**

  Hohenshelt v Superior Court of Los Angeles County
  Court of Appeal, Second District, Division 8, California
  2024 WL 805658
  February 27, 2024

  Dana Hohenshelt sued his employer, Golden State Foods, for FEHA violations. Golden State successfully moved to stay litigation and compel arbitration. Once arbitration commenced, the arbitration provider sent Golden State two invoices "due upon receipt," dated July 29, 2022 and August 29, 2022, respectively. On September 30, 2022, the provider notified Golden State that "all fees must be paid in full by October 28, 2022," or the arbitration would be canceled. The same day, Hohenshelt notified the provider and the court that, based on Golden State's failure to pay the invoices within 30 days of their due dates, he was exercising his unilateral right under Cal. Civ. Pro. § 1281.98(b)(1) to withdraw from arbitration. Hohenshelt moved to lift the stay and proceed in litigation. The court denied the motion, holding that § 1281.98(b)(1) no longer applied, as Golden State did ultimately pay the fees within the new, later deadline set by the provider. Hohenshelt appealed.

  The Court of Appeal, Second District, Division 8, California reversed. The lower court erred in allowing the provider to unilaterally change the deadline. Section 1281.98(a)(2) expressly provides that an extension of the due date must be agreed upon by all parties. The Court directed the lower court, on remand, to vacate the order denying the Hohenshelt's motion and lift the stay.

Illinois

- **FAA ENFORCEMENT DENIED ABSENT SHOWING OF CONNECTION TO INTERSTATE COMMERCE**

  Key v Accolade Healthcare of the Heartland, LLC
  Appellate Court of Illinois, Fourth District
  2024 IL App (4th) 221030
  February 13, 2024

  Thomas Key filed Nursing Home Care Act (NHCA) claims against the Accolade Healthcare nursing facility in which his mother, Lois Key, died. Accolade moved to compel arbitration under the contract Lois Key signed upon her admission, which incorporated an attached Arbitration Agreement. Key opposed, arguing that NHCA §§ 3-606 and 3-607 prohibit a nursing home resident's waiver of the right to commence a negligence action or right to a jury trial. Key conceded that these provisions "might arguably be" preempted by the FAA but argued that the FAA did not apply because Accolade failed to show that the contract "evidenced a transaction involving commerce." The court granted the motion to compel, holding that the FAA preempted state laws such as the NHCA, which invalidate agreements "simply because they waive a party's right to file a lawsuit." Key appealed.

  The Appellate Court of Illinois, Fourth District, reversed. The FAA did not apply. Accolade failed to address the contract's connection to commerce below, or to submit an affidavit specifying the contract's "particular connections to commerce." Absent such evidence, it was "inappropriate" for the Court to "fill the evidentiary gap by making broad assumptions about the nursing home industry." In the absence of the FAA, NHCA §§ 3-606 and 3-607 applied to invalidate the arbitration agreement signed by Lois Key.

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