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JAMS Institute

LEARNING FROM EACH OTHER

April 17, 2024

ADR Case Update 2024 - 7

Federal Circuit Courts

EQUITABLE ESTOPPEL COMPELLED ARBITRATION

<u>Bufkin Enterprises, L.L.C. v Indian Harbor Insurance Co.</u> United States Court of Appeals, Fifth Circuit 2024 WL 1262225 March 26, 2024

Bufkin Enterprises purchased a surplus lines insurance policy issued by eight Domestic Insurers and two Foreign Insurers. The policy stated that it should "be constructed" as a separate contract between Bufkin and each Insurer. Dissatisfied with a claim pay-out, Bufkin filed an action against all Insurers, making identical claims against each for breaches of contract and good faith. On Bufkin's petition, the court dismissed Foreign Insurers with prejudice. Domestic Insurers moved to compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The court denied the motion, concluding that the Convention did not apply because each Domestic Insurer's contract was made solely with Bufkin, not with any foreign citizen party, and the Convention could not be invoked under equitable estoppel because all the remaining claims were made against Domestic Insurers. Domestic Insurers appealed.

The United States Court of Appeals, Fifth Circuit reversed. The lower court abused its discretion in holding that equitable estoppel did not compel arbitration under the Convention. Equitable estoppel may compel arbitration under a contract when a signatory raises allegations of substantially "interdependent and concerted misconduct" by a non-signatory and one or more signatories. Bufkin's claims met this test: it submitted its claims to all ten Insurers and alleged that all ten Insurers "collectively engaged in the same culpable conduct." It was "of no moment" that Bufkin was "no longer pursuing" claims against Foreign Insurers. The lower court abused its discretion in "neglecting" to consider Foreign Insurers' part "in the seamless coverage agreement struck by the parties."

FAA SECTION 1 TRANSPORTATION WORKER EXEMPTION DID NOT APPLY

<u>Tillman Transportation, LLC v MI Business Incorporated</u>
United States Court of Appeals, Sixth Circuit
2024 WL 1153970
March 18, 2024

Tillman Transportation, LLC entered into three trucking contracts with a fellow motor carrier company, Red D Freight. In two of the contracts, Tillman Transportation, LLC was identified as the contracting party; Vernon Tillman was the contracting party to the third. Tillman Transportation, LLC sued Red D for Motor Carrier Act violations, and Red D moved to compel arbitration under the three contracts. Tillman Transportation, LLC opposed, arguing that it was an independent contractor subject to the FAA Section 1 transportation worker exemption. The court denied the motion, holding that Section 1 did not apply to a limited liability company. Tillman Transportation, LLC appealed.

The United States Court of Appeals, Sixth Circuit affirmed. The FAA's Section 1 exemption does not apply to limited liability companies. Judicial authority favors a narrow interpretation of Section 1, and courts have "uniformly declined" to extend the transportation worker exemption to contracts between business entities. The Court rejected Tillman Transportation, LLC's argument that the exemption should apply to Vernon Tillman as an individual. Vernon Tillman was not a party to the suit; even if he were, he offered no evidence that he was a truck driver or transportation worker.

ARBITRATION RIGHTS WAIVED

<u>Schwebke v United Wholesale Mortgage LLC</u> United States Court of Appeals, Sixth Circuit 2024 WL 1298149 March 27, 2024

Jason Schwebke was terminated from his software development position at United Wholesale Mortgage (UWM) and sued for retaliation and failure to provide ADA accommodations. For seven months, the parties engaged in "extensive" discovery: UWM produced "tens of thousands of pages of documents," issued fourteen third-party subpoenas, produced witnesses, and conducted depositions. The parties had just agreed to extend the discovery deadline when UWM suddenly moved to compel arbitration. At hearing, UWM counsel explained that he hadn't raised arbitration earlier because he "didn't know that there was an arbitration clause" in Schwebke's employment agreement. The court denied the motion, holding that UWM had waived its right to compel arbitration because its litigation conduct was "completely inconsistent with reliance on its arbitration rights." UWM appealed.

The United States Court of Appeals, Sixth Circuit affirmed. UWM's active participation in the litigation "implicitly waived" its arbitration rights. In particular, the Court noted that UWM 1) failed to mention the arbitration agreement in response to the complaint, 2) "actively scheduled and requested discovery," and 3) first mentioned the agreement only after "extensive discovery" was "nearly complete." The Court rejected UWM's argument that its failures resulted from an excusable "mistake." UWM had imputed knowledge of the employment agreement, which it produced in its first set of discovery documents. While it appeared that UWM had sought no tactical advantage in the delay, "neither can counsel's failure to read the employment agreement be attributed to an 'otherwise excusable purpose."

• NO AGREEMENT TO ARBITRATE

Anhui Powerguard Technology Co., Ltd. v DRE Health Corporation United States Court of Appeals, Eighth Circuit 2024 WL 1103107 March 14, 2024

Anhui Powerguard, a PPE manufacturer, contracted to sell disposable gloves to DRE Health Corporation. DRE fell behind in its payments, and the parties entered into an Agreement in which Anhui reduced the debt to three installment payments in exchange for DRE's commitment to purchase more gloves. The Agreement stated:

After the initial payment of \$1,970,000.00 USD and in consideration of future payment commitments, Anhui Powerguard agrees to release DRE Health from all legal claims (granted DRE completes installment payments) agree that the venue for any future disputes shall be binding arbitration . . . , and agree to deliver nitrile gloves to DRE Health

DRE made only one \$1M payment. Anhui sued DRE for breach of the Agreement, and DRE moved to compel arbitration. The court denied the motion, finding no agreement to arbitrate because DRE had failed to make the initial \$1.97M payment. DRE appealed.

The United States Court of Appeals, Eighth Circuit affirmed. The prefatory phrase, "After the initial payment of \$1,970,000.00," set a condition precedent to all three of the subsequently listed obligations, including the agreement to arbitrate. DRE failed to meet that condition precedent, and there was, therefore, no agreement to arbitrate.

ARBITRATION AGREEMENT UNENFORCEABLE

McBurnie v RAC Acceptance East, LLC
United States Court of Appeals, Ninth Circuit
2024 WL 1101845
March 14, 2024

The mandatory arbitration agreement in Rent-A-Center (RAC) stores' standard rent-to-own contract included a class action waiver barring any relief "that would affect RAC account holders other than you." In a 2019 decision, *Blair v Rent-A-Center*, the Ninth Circuit held the Agreement unenforceable under the *McGill* rule, which "invalidates contractual provisions that waive the right to seek injunctive relief on behalf of the general public." In 2020, a group of Consumers filed a putative class action seeking a public injunction against RAC's \$45 processing fee. The parties proceeded in litigation until 2022 when the U.S. Supreme Court's *Viking River Cruises, Inc. v Moriana* decision prompted RAC to move to compel arbitration. *Viking River Cruises RAC* also argued that Consumers' complaint became moot following a Consent Decree that prohibited RAC from charging processing fees unrelated to reasonable and actual costs incurred. The court denied RAC's motion to compel on waiver grounds but also held that *Viking River* did not abrogate *Blair* and that Consumers' claims were not moot. RAC appealed.

The United States Court of Appeals, Ninth Circuit affirmed. *Viking River* did not abrogate *Blair*, but, rather, was consistent with *Blair* in upholding the California rule prohibiting waiver of the right to bring a "representative" claim in any forum. *Blair*, therefore, continued to dictate that RAC's class action waiver rendered its arbitration agreement unenforceable. Consumers' claims were not moot, as the Consent Decree did not determine whether RAC's \$45 processing fee met the requirement that any processing fee be reasonable and represent actual costs.

ARBITRATION AGREEMENT DID NOT INCORPORATE ARBITRATION RULES

Goceri v Amazon.com, Inc.

United States District Court, N.D. California 2024 WL 1007868 March 8, 2024

Spring Design, LLC, an internet seller, sued Amazon for breach of contract and fraud. Amazon moved to compel arbitration under its Amazon Services Business Solutions Agreement. Amazon argued that arbitrability issues were for the arbitrator, rather than the Court, to decide, as the Agreement's arbitration provision "expressly incorporated" AAA "commercial" rules that included a delegation clause.

The United States District Court, N.D. California granted Amazon's motion to compel but held that it was for the Court, not the arbitrator, to decide arbitrability. The Agreement's arbitration provision did not "clearly and unequivocally" incorporate AAA "commercial rules." The provision stated only that arbitration would be conducted by the AAA, "under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes," which contained no delegation clause. The provision made no mention of the "commercial rules" Amazon cited. Amazon, therefore, failed to satisfy its burden to "establish the incorporation of a specific set of rules incorporating a delegation provision into the parties' agreement." The Court concluded that the Agreement's broad arbitration provision covered Spring Design's claims and granted the motion

to compel.

PLAINTIFFS NOT EQUITABLY ESTOPPED FROM PROCEEDING IN LITIGATION

Smith v Google, LLC United States District Court, N.D. California 2024 WL 1171653 March 19, 2024

Mary Smith, Cary Goldberg (Users), and other plaintiffs who had used online tax preparation services filed a class action against Google (Case 1), claiming that Google's tracking tools caused their financial data to be sent to Google without their consent. Meanwhile, different plaintiffs filed an unrelated class action, *Hunt v Meta Platforms* (Case 2), raising similar claims against Google, Meta Platforms, and H&R Block. In Case 2, H&R Block moved to compel arbitration under its Online Services Agreement (OSA). While that motion was pending, Google moved in Case 1 to compel arbitration against Users, the only Case 1 plaintiffs known to have used H&R Block's online tax services. If Case 2 plaintiffs were subject to arbitration enforcement under H&R Block's OSA, Google argued, equitable estoppel principles required that the OSA be enforced against Users, who were similarly situated in Case 1, even though H&R Block was not a party to the action. Alternatively, Google moved to stay Case 1 pending arbitration of Case 2.

The United States District Court, N.D. California denied the motion to compel. Google failed to show that Users were equitably estopped from pursuing their claims in litigation against Google. Google made no showing that Users' claims were "found in and intertwined with" the H&R Block OSA. Case 1 asserted only statutory claims against Google, "none of which" relied on the OSA or the duties or obligations it imposed. Users alleged no "substantial interdependent and concerted conduct" by Google and H&R Block, as Google's tracking tools interacted with H&R Block's tax program only to the extent they interacted with "any other third parties that used its tracking tools." The Court denied Google's request to stay Case 1 pending arbitration of Case 2. Users would not be bound by any outcome in Case 2, and given that all other Case 1 plaintiffs had used different online tax services, Case 1 would move forward regardless of any stay against Users' claims.

DISPUTE NOT COVERED BY ARBITRATION AGREEMENT

Hartford Accident and Indemnity Co. v Lin
United States Court of Appeals, Seventh Circuit
2024 WL 1355515
April 1, 2024

Zhen Feng Lin was seriously injured in an automobile accident while working as a food delivery driver. Lin filed a claim under his employer's underinsured motorist policy with Hartford Accident. Hartford Accident agreed to coverage, but the parties failed to agree as to whether the workers' compensation benefits Lin had received should be deducted from the recovery. Hartford sued for a declaratory judgment. Lin accused Hartford of bad faith and moved to compel arbitration under the policy's arbitration agreement, which provided that disputes relating to the insured's entitlement to recover damages and/or the amount of recovery "may be arbitrated." The court denied the motion, holding that the arbitration agreement did not apply to policy limit "setoffs" or claims of bad faith. The court held that the workers' compensation benefits should be deducted from Lin's recovery. Lin appealed.

The United States Court of Appeals, Seventh Circuit affirmed. The policy's "unambiguous" and "narrow" arbitration provision did not cover Lin's bad faith claims. The policy terms required that, unless the parties reached a "settlement agreement," recovery should be reduced by any sums "paid or payable" by anyone legally responsible for the insured's injuries or under workers' compensation. Lin failed to prove the existence of such a settlement agreement, and Lin's workers' compensation benefits were, therefore, properly deducted from his recovery.

FAA SECTION 1 EXEMPTION DID NOT APPLY TO COMMERCIAL CONTRACT

Fli-Lo Falcon, LLC v Amazon.com, Inc.

United States Court of Appeals, Ninth Circuit 2024 WL 1547091 April 10, 2024

Amazon.com contracts with local transportation companies to serve as "delivery service partners" (DSPs). To qualify as a DSP, each company must create a business entity to execute a DSP Agreement, which requires the DSP to confirm that it is a "legal entity duly formed or incorporated, validly existing, and in good standing." Three DSPs filed a class action against Amazon, and Amazon moved to compel arbitration under the DSP Agreement. The DSPs opposed, arguing that they were transportation workers exempt from arbitration enforcement under FAA Section 1. The court held that Section 1 did not apply to commercial agreements between business entities for the delivery of goods and that, under the arbitration provision's delegation clause, arbitrability issues should be determined by the arbitrator. The DSPs appealed.

The United States Court of Appeals, Ninth Circuit affirmed. As an issue of first impression, the Court held that Section 1's transportation worker exemption did not apply to a commercial contract between two business entities. The Court rejected the DSPs' argument that the arbitration provision's delegation clause was unconscionable because the DSPs were non-sophisticated parties. To enter into the Agreement, the DSPs represented themselves as independent business entities, and each had a corporate structure and employees who performed the "timely delivery of large numbers of packages." This evidence contradicted any "supposed lack of sophistication."

WEBSITE FAILED TO PUT REASONABLE USER ON INQUIRY NOTICE OF TERMS

Tejon v Zeus Networks, LLC United States District Court, S.D. Florida 2024 WL 1293757 March 26, 2024

Roger Tejon sued Zeus Networks, a paywalled video website, for disclosing his personal information to other websites in violation of the Video Privacy Protection Act. Zeus moved to compel arbitration under the website's Terms. The site utilized a browserwrap agreement, in which a user agreed to the Terms by choosing one of two subscription options, both identified in large red banners on a page labeled "Choose your plan." The notice of Terms was set forth below the banners in significantly smaller gray typeface against a non-contrasting black background, with the Terms hyperlink identified by underline.

The United States District Court, S.D. Florida denied the motion to compel. Zeus's notice of Terms was insufficient to put a reasonably prudent user on inquiry notice of the Terms' arbitration provision. Browserwrap agreements require courts to make a case-specific inquiry into the "color, size, positioning, language, and design" of the Terms hyperlink and accompanying text. It is "generally recognized" that hyperlinks "are usually displayed in a blue font, as a means to stand out from the rest of the page." Here, "merely underlining the hyperlinks, without more," failed to provide "sufficient contrast from the other gray font of identical size and capitalization on the webpage and black background."

ARBITRATION AGREEMENT INVALID UNDER EFFECTIVE VINDICATION DOCTRINE

Williams v Shapiro

United States District Court, N.D. Georgia, Atlanta Division 2024 WL 1208297 March 20, 2024

Plaintiffs, all former participants in the ESOP Plan of A360, Inc., a financial services technology company, filed equitable and ERISA claims against A360's founder and its CEO (Defendants). Plaintiffs alleged that Defendants had successfully conspired with outside investors to seize the Plan's 100% holdings of A360 stock, manipulating stock values for their own benefit and costing the Plan \$35M. The Plan was terminated after the stock liquidation. The Board subsequently amended the Plan: first to add an arbitration provision with a class action waiver, and later, after

Plaintiffs sued, to clarify that the arbitration provision should not be construed to preclude injunctive relief. Defendants then moved to compel arbitration under the post-termination amendments.

The United States District Court, N.D. Georgia, Atlanta Divisions denied the motion to compel. The Court distinguished between equitable claims for rescission and reformation, which belonged to the participants, and statutory claims, which the Plan held in trust for the participants. The participants' equitable claims were not subject to arbitration, as the participants had been given no notice or opportunity to give meaningful assent to the post-termination arbitration amendment. While the Plan's legal existence continued post-termination, allowing it to assent to arbitration, arbitration of the ERISA claims would prevent the "effective vindication of an ERISA right." The claims arose from actions that "ostensibly harmed the assets of the plan collectively." Under the Supreme Court's holding in *Viking River Cruises v Mariana*, "parties cannot agree to restrict the scope of an arbitration to disputes arising out of a particular 'transaction' or 'common nucleus of facts." The arbitration clause was, therefore, invalid under the effective vindication doctrine and, by its own terms, was not severable.

ACCOUNT HOLDER COMPELLED TO ARBITRATE

Lucero v PayPal, Inc.

United States District Court, D. Massachusetts 2024 WL 1258821 March 25, 2024

Manuel Lucero opened an account with Venmo, an online payment processing service owned by PayPal, and attempted to transfer \$5,000 from Venmo to an outside checking account. Venmo notified him that it was locking his account pending review of the transaction. Seven months later, after his attempts to resolve the issue with Venmo proved unsuccessful, Lucero, acting *pro se*, sued PayPal for embezzlement and conversion. PayPal moved to compel arbitration under Venmo's User Agreement. Lucero opposed, arguing that PayPal could not compel arbitration because 1) PayPal had breached the User Agreement by refusing to close the account at Lucero's request; 2) PayPal froze his Venmo account for more than the 180 days allowed by law; and 3) Lucero was unable to prepare his case for arbitration because he no longer had access to his account information.

The United States District Court, D. Massachusetts, granted the motion to compel. PayPal's actions did not alter Lucero's arbitration obligations, as 1) closing the account would not, as Lucero seemed to believe, render him no longer subject to the User Agreement; 2) violation of the 180-day limitation went to the merits of the Lucero's claim, rather than to arbitrability; and 3) Lucero had not followed the User Agreement instructions for initiating arbitration, where discovery processes would have enabled him to access the information he needed to pursue arbitration.

California

• NO AGREEMENT TO ARBITRATE

Harrod v Country Oaks Partners, LLC
Supreme Court of California
2024 WL 1319134

March 28, 2024

When Charles Logan was admitted to Country Oaks Care Center, his nephew, Mark Harrod, as Logan's health care power of attorney, signed an admissions agreement and a separate arbitration agreement on Logan's behalf. Harrod, as guardian ad litem, later filed a negligence action against Country Oaks, and Country Oaks moved to compel arbitration. The court denied the motion, holding that Harrod's authority as Logan's health care agent "did not encompass the power to sign the optional arbitration agreement." The Court of Appeal affirmed. Country Oaks appealed.

The California Supreme Court affirmed. Logan's power of attorney stated that it was created under the authority of California's Health Care Decisions Law (HDCL), which defines a "health care decision" as one "regarding the patient's health care." This definition, the HDCL states, includes decisions relating to choices of health care providers and institutions, and to reject or accept forms of testing, medical procedures, and medication. The list does not include the power to "enter optional, separate dispute resolution agreements," and canons of construction "weigh against" construing HDCL's definition "expansively." Harrod, therefore, lacked authority to bind Logan to arbitration, and the motion to compel was properly denied.

WEBSITE FAILED TO PUT REASONABLE USER ON INQUIRY NOTICE OF TERMS

Weeks v Interactive Life Forms, LLC
Court of Appeal, Second District, Division 1, California
2024 WL 1250215
March 25, 2024

Consumer Brinan Weeks filed a putative class action against Interactive Life Forms, an online sex toy retailer, claiming that the product he purchased from Interactive's website failed to produce the promised results. Interactive moved to compel arbitration under the website's Terms. The site used a browserwrap agreement, which notified the user that placing an order on the site constituted agreement to its Terms. The court denied the motion. Noting that browserwrap agreements are disfavored by California courts, the court held that the hyperlinks to the website's Terms, identified in grey font on a dark background in the far lower right corner of each page, were too "tiny, illegible, and inconspicuous" to put a reasonable user on inquiry notice of the Terms. Interactive appealed.

The Court of Appeal, Second District, Division 1, California, affirmed. The website's tiny hyperlinks, which were difficult to find "even when one is looking for them," were insufficient to put a reasonable user on notice of the Terms. The Court rejected Interactive's argument that, as internet users have "become more familiar with the use of websites generally," a reasonable user should expect all websites to include Terms. There is little empirical evidence as to the average user's perceptions of website terms, and, given that uncertainty, the burden remains on providers, who have "complete control over the design of their websites," to make Terms clear to their users.

EMPLOYEE ARBITRATION AGREEMENT TERMINATED UPON RESIGNATION

Vasquez v SaniSure, Inc.
Court of Appeal, Second District, Division 6, California 2024 WL 1430507
April 3, 2024

When SaniSure hired Jasmin Vazquez in November 2019, it required Vazquez to sign multiple documents, including an arbitration agreement, as a condition of employment. Vazquez resigned from SaniSure in May 2021. Four months later, she negotiated a new employment offer and returned to work at SaniSure. Although she signed some new documentation upon her rehiring, SaniSure did not ask her to sign a new arbitration agreement. In July 2022, Vazquez again resigned and filed a class action alleging that, during her second term of employment, SaniSure failed to provide accurate wage statements. SaniSure moved to compel arbitration under the 2019 arbitration agreement. The court denied the motion, finding that the agreement did not apply to Vazquez's subsequent re-employment. SaniSure appealed.

The Court of Appeal, Second District, Division 6, California, affirmed. The 2019 arbitration agreement terminated upon Vazquez's May 2021 resignation. Vazquez negotiated a new employment offer following that resignation, and upon her re-hiring, she was not asked to sign a new arbitration agreement, nor was she told that her previous arbitration agreement would apply to her new term of employment. SaniSure, therefore, failed to show the existence of an arbitration agreement applicable to claims arising from the second term of Vazquez's employment.

COURT LACKED JURISDICTION TO DISMISS CASE FOR FAILURE TO PROSECUTE

Lew-Williams v Petrosian

Court of Appeal, Second District, Division 7, California 2024 WL 1404151 April 2, 2024

Gail Dee Lew-Williams sued her late husband's business partner, Sevana Petrosian, for embezzlement. Petrosian successfully moved to compel arbitration under the parties' Management Agreement, but Williams failed to initiate arbitration. After two years, the court set an order to show cause hearing and dismissed the claims against Petrosian without prejudice. Williams's failure to proceed in litigation, the court found, left Petrosian in limbo, as Petrosian had no "affirmative demands" against Williams and, therefore, could not initiate arbitration on her own. Williams appealed.

The Court of Appeal, Second District, Division 7, California, reversed. The trial court lacked jurisdiction to dismiss the case for failure to prosecute. A trial court retains very limited jurisdiction after compelling arbitration, and it becomes the arbitrator's job to "resolve all questions needed to determine the controversy." Williams's argument, on appeal, that she was unable to afford arbitration should have been raised in opposition to Petrosian's motion to compel or before the arbitration provider. The court erred in finding that Petrosian could not initiate arbitration herself, as the AAA Rules incorporated by the Management Agreement's arbitration provision expressly recognized that a defending party may initiate arbitration.

NON-SIGNATORY MANUFACTURER COULD NOT ENFORCE ARBITRATION

Davis v Nissan North America, Inc.

Court of Appeal, Fourth District, Division 1, California 2024 WL 1130508 March 15, 2024

After repeated attempts to repair his Nissan, Damien Davis filed a Song-Beverly action against the manufacturer, Nissan North America, for breach of implied and express warranties. Nissan moved to compel arbitration under Davis's Purchase Agreement with his car dealership. Nissan claimed enforcement rights under equitable estoppel, arguing that all warranties to Davis were received as part of the sale. Alternatively, Nissan claimed enforcement rights as a third-party beneficiary. The court denied the motion, and Nissan appealed.

The Court of Appeal, Fourth District, Division 1, California, affirmed. Noting that the California Supreme Court had recently granted review that would resolve a circuit split on this issue, the Court joined the majority of California cases in holding that "a vehicle manufacturer who is not a party to the dealership sale contract containing an arbitration clause may not compel arbitration under equitable estoppel." Nissan's express and implied warranties existed separately from the Purchase Agreement, and nothing in the Purchase Agreement indicated that the parties intended Nissan to be a third-party beneficiary.

New York

• NO VALID ARBITRATION AGREEMENT

Lisi v New York Center for Rehabilitation and Nursing

Supreme Court, Appellate Division, Second Department, New York 2024 WL 950081 March 6, 2024

Carmella Lisi, as administrator of the estate of her mother, Maria, filed a wrongful death action against Pavilion at Queens, the nursing facility where Maria resided until her death. Pavilion moved to compel arbitration under Maria's admission agreement, which Lisi had signed as the "Responsible Party." The court granted the motion to compel, finding that Lisi had been "cloaked with the apparent authority to act for the decedent" when signing the agreement. Pavilion appealed.

The Supreme Court, Appellate Division, Second Department, New York reversed. Pavilion failed to establish that it reasonably relied on Lisi's "apparent authority" to bind Maria to arbitration. "Apparent authority" requires that a third party relied on misleading representations made by the principal, not the agent, as to the existence or extent of agent's authority. It was irrelevant that Lisi signed the agreement and identified herself as the Responsible Party, as an agent cannot, by her own acts, "imbue herself with apparent authority." Pavilion failed to demonstrate that it had "reasonably relied" on any word or action made by Maria as to Lisi's authority and, therefore, failed to establish the existence of a valid arbitration agreement.

NON-PARTY LACKED STANDING TO CHALLENGE ARBITRATION AWARD

<u>Baksh v New York Racing Association, Inc.</u>
Supreme Court, Appellate Division, Second Department, New York 2024 WL 1081206
March 13, 2024

The New York Racing Association terminated Haroon Baksh from his job as a parking attendant and his Union filed a grievance under the CBA. The resulting arbitration between the Union and the Racing Association upheld Baksh's termination, and Baksh sued to vacate the award. The court denied vacatur, and Baksh appealed.

The Supreme Court, Appellate Division, Second Department, New York, affirmed. Baksh was not a party to the CBA or the arbitration and, therefore, lacked standing to seek vacatur of the award.

Texas

• DELEGATION CLAUSE WAS NOT UNCONSCIONABLE

<u>Lennar Homes of Texas Inc. v Rafiei</u> Supreme Court of Texas 2024 WL 1470909 April 5, 2024

Mohammad Rafiei was injured when his home garbage disposal exploded and sued the builder, Lennar Homes, seeking more than \$1M in damages. Lennar moved to compel arbitration under the Purchase Contract. In opposition, Rafiei argued that the Contract's arbitration agreement and delegation clause were unconscionable, because arbitration of his claims' arbitrability would be so prohibitively costly as to prevent him from pursuing those claims. In support of his opposition, Rafiei submitted the arbitration provider's fee schedule, his own affidavit, and an affidavit from his attorney. The court denied the motion. The Court of Appeals, affirmed, finding that the trial court could have concluded that both the arbitration agreement and delegation clause were unconscionable. Arbitration of arbitrability would cost more than \$8,000, the court found, and any cost above \$6,000 would preclude Rafiei from pursuing his claims. Lennar appealed.

The Supreme Court of Texas reversed and remanded. Because arbitrability was delegated to the arbitrator, Rafiei could preclude arbitration only by showing that the delegation provision was unconscionable. Rafiei failed to do so, as he failed to produce evidence of 1) the cost for an arbitrator to decide arbitrability; 2) the cost for a court to decide arbitrability; and 3) his ability "to afford one but not the other." Although Rafiei did submit a fee schedule, he failed to "adduce" evidence from the schedule "as it applied to resolve an arbitrability issue in his particular case," or to show that he could afford litigation rather than arbitration. The record therefore failed to support a finding that the delegation clause was unconscionable, and it remained for the arbitrator to determine unconscionability of the arbitration agreement as a whole.

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

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