May 1, 2024

ADR Case Update 2024 - 8

Federal Circuit Courts

- **FAA §1 DOES NOT REQUIRE TRANSPORTATION WORKER TO BE EMPLOYED IN TRANSPORTATION INDUSTRY**

  Bissonnette v LePage Bakeries Park St., LLC
  Supreme Court of the United States
  No. 23-51
  April 12, 2024

  Neal Bissonnette, an independent distributor for a national bakery corporation, Flower Foods, delivered baked goods from warehouses to local restaurants and stores. Bissonnette filed a putative class action against Flower Foods for labor violations, and Flower moved to compel arbitration under Bissonnette's Distribution Agreement. The court granted the motion, rejecting Bissonnette's argument that he was a "transportation worker" exempt from arbitration under FAA § 1. The United States Court of Appeals, Second Circuit affirmed. A "transportation worker," the court held, works in the "transportation industry," i.e., an industry that "pegs its charges chiefly to the movement of goods or passengers" and in which "the industry's predominant source of commercial revenue is generated by that movement." The court found that Bissonnette's revenue derived from the sale of baked goods rather than from the movement of those goods and that he, therefore, was not a transportation worker for purposes of § 1. Bissonnette petitioned for certiorari.

  The Supreme Court of the United States vacated and remanded. FAA § 1 does not require a "transportation worker" to be employed within the "transportation industry." The class of workers exempt under § 1 "are connected by what they do, not for whom they do it." As established in *Southwest Airlines Co. v Saxon*, the exemption does not apply to all transportation industry employees, but only to workers "actively" "engaged in transportation of goods across borders via the channels of foreign or interstate commerce." The Second Circuit's revenue-based standard, fashioned "without any guide in the text of § 1 or this Court's precedents," would require parties to engage in "extensive discovery" of a company's "internal structure and revenue models" before a court could decide a "simple motion to compel arbitration." "Mini-trials on the transportation industry issue," the Court predicted, "could become a regular, slow, and expensive practice in FAA cases," breeding litigation "from a statute that seeks to avoid it."

- **IFPA CLAIMS SUBJECT TO ARBITRATION**

  Government Employees Insurance Co. v Mount Prospect Chiropractic Center, P.A.
  United States Court of Appeals, Third Circuit
  2024 WL 1611904
  April 15, 2024

  GEICO filed fraud and Insurance Fraud Protection Act (IFPA) claims against three New Jersey medical Practices, claiming that the Practices abused personal injury protection (PIP) benefits through exaggerated claims, unnecessary billing, and illegal kickbacks. The Practices sought arbitration based on GEICO's complaint, its Pre-Certification and Decision Point Review Plan, and its assignment of benefits form, which required the Practices to comply with all Plan requirements. The court denied the Practices' motions to compel, holding that IFPA claims could not be arbitrated. The Practices appealed.

  The United States Court of Appeals, Third Circuit reversed. Nothing in the IFPA prohibits arbitration. Its provision that insurers "may sue" for IFPA violations does not imply that such claims cannot be arbitrated. Arbitration was enforceable under N.J. Stat. Ann. § 39:6A-5.1(a), which allows "any party" to compel arbitration of any dispute "regarding the recovery of medical expense benefits" or other "benefits provided under" PIP coverage and under the FAA.

- **COURT LACKED JURISDICTION OVER INTERLOCUTORY APPEAL**

  Varela v State Farm Mutual Automobile Insurance Company
  United States Court of Appeals, Eighth Circuit
  2024 WL 1546985
  April 10, 2024

  Yasmin Varela sued State Farm for breaches of contract, good faith and fair dealing, and for engaging in "deceptive business practices" in violation of the Minnesota Consumer Fraud Act (MCFA). State Farm moved to dismiss for lack of subject matter jurisdiction because Varela's claims were subject to mandatory arbitration under Minnesota's No-Fault Automobile Insurance Act. The court granted State Farm's motion in part and denied in part. The court dismissed Varela's non-statutory claims, finding that they were subject to mandatory arbitration under the No-Fault Act. The court denied the motion to dismiss as to Varela's MCFA claim, which did not fall within the Act. State Farm appealed. Varela moved to dismiss the appeal, asserting that the Court lacked subject matter jurisdiction over the interlocutory appeal.

  The United States Court of Appeals, Eighth Circuit dismissed the appeal for lack of subject matter jurisdiction. The Court rejected State Farm's claim that because the lower court's decision rested on a determination of arbitrability, it was "equivalent" to the denial of a motion to compel arbitration and, therefore, subject to judicial review under the FAA. State Farm did not file a motion to compel arbitration or invoke the FAA in seeking dismissal of Varela's MCFA claim. The court's decision rested on its interpretation of state law and did not require the court to "interpret a bargained-for arbitration provision."

- **COURT LACKED JURISDICTION OVER FLRA ARBITRATION DECISIONS**

  American Federation of Government Employees v Federal Labor Relations Authority
  United States Court of Appeals, District of Columbia Circuit
  2024 WL 1724907
  April 23, 2024

  The American Federation of Government Employees (the Union) filed a grievance claiming that a HUD job listing violated the CBA. The parties disputed whether the grievance involved job reassignment, which was subject to arbitration, or job classification, which was not. The arbitrator determined that the grievance was an arbitrable reassignment issue and ruled in favor of HUD. FLRA reversed and remanded multiple times, rendering eight decisions, but finally determined that the grievance raised non-arbitrable classification claims and vacated all of the arbitrator's awards and its own prior decisions. The Union then sued, claiming that FLRA's action was made "ultra vires." The court denied FLRA's motion to dismiss for lack of jurisdiction and granted

summary judgment in favor of the Union, finding that FLRA had "exceeded its delegated powers." FLRA appealed.

The United States Court of Appeals, District of Columbia Circuit, vacated and remanded. The Federal Service Labor-Management Relations Statute (FSLMRS) precludes both the district court and court of appeals from reviewing FLRA arbitration decisions. The FSLMRS does not, however, limit FLRA's review of jurisdictional defects, and FLRA did not violate the statute by vacating the arbitrator's awards and its own prior decisions.

- **ARBITRATION PROVISION NOT UNCONSCIONABLE**

Hunt v Meta Platforms, Inc.
United States District Court, N.D. California
2024 WL 1561469
April 11, 2024

Justin Hunt sued H&R Block, Meta, and Google, claiming that tracking tools on the H&R Block tax services website unlawfully transmitted his personal information to Meta and Google. H&R Block moved to compel arbitration under its Online Services Agreement. In opposition, Hunt argued that 1) his consent to the Agreement was fraudulently induced, as the Agreement led him to believe that his data was protected; 2) the Agreement was an unconscionable contract of adhesion; and 3) the Agreement's arbitration provision did not cover his claims.

The United States District Court, N.D. California granted H&R Block's motion to compel. Hunt's fraud claim went to the validity of the Agreement as a whole and, under the delegation clause, was for the arbitrator to decide. The Agreement was not unconscionable because it included a "clear opt-out provision." Hunt's claims were covered by the arbitration provision, which applied to "all disputes and claims" between the user and H&R Block. Hunt's claim that language elsewhere in the Agreement narrowed coverage to disputes relating to H&R Block's "products and services" was irrelevant, as Hunt's claims all related to his use of H&R Block's products and services.

- **ARBITRATOR'S FINDINGS NOT CLEARLY ERRONEOUS**

Employees' Retirement Plan of the National Education Assoc. v Clark County Education Assoc.
United States District Court, District of Columbia
2024 WL 1377330
March 28, 2024

The Clark County Education Association (CCEA) gave notice that it wished to withdraw from the NEA's Employee Retirement Plan. The Plan assessed approximately $3M in "withdrawal liability" against CCEA. CCEA challenged this amount in arbitration. The arbitrator found that the Plan relied on "unreasonable" assumptions in calculating the amount and directed the Plan to recalculate using a 7.3%, rather than a 5%, discount rate. The Plan moved to vacate the award, and CCEA moved to confirm. The court agreed that the 5% rate "did not reflect the Plan actuary's "best estimate of anticipated experience under the Plan." However, the arbitrator had failed to provide any reasoning to justify the adoption of the 7.3% rate, and the court remanded to the arbitrator for clarification. The arbitrator issued a supplemental award explaining that the Plan's actuary had calculated the 7.3% rate based on a three-year study of the Plan's valuation assumptions, "taking into account the experience of the plan and reasonable expectations." The parties again cross-moved to vacate/confirm the supplemental award.

The United States District Court, District of Columbia, confirmed the award. Emphasizing its highly deferential standard of review, the Court held that it was reasonable for the arbitrator to accept the actuary's findings. It was also reasonable, the Court noted, for the Plan to have a "different reading" of the valuation. However, where there are "two permissible views of the evidence," the factfinder's choice between them "cannot be clearly erroneous."

California

- **ARBITRATION RIGHTS WAIVED**

  Semprini v Wedbush Securities, Inc.
  Court of Appeal, Fourth District, Division 3, California
  2024 WL 1672269
  April 18, 2024

  Joseph Semprini sued his employer, Wedbush Securities, bringing eleven individual claims, seven putative class action claims, and one representative PAGA claim. In a June 2015 stipulation, the parties agreed to arbitrate the individual claims. For the next five years, the parties litigated the class and PAGA claims. Following the Supreme Court's 2022 holding in *Viking River Cruises, Inc. v Moriana*, allowing an employer to enforce arbitration of individual PAGA claims, Wedbush asked its workforce to sign arbitration agreements. Wedbush, meanwhile, continued to actively litigate class certification and conduct aggressive discovery, with a trial set for May 1, 2023. On March 23, 2023, Wedbush moved to compel arbitration of the named plaintiffs' individual PAGA claims and claims of twenty-four class members who had signed the 2022 arbitration agreements. The court denied the motion, holding that Wedbush had waived its arbitration rights by agreeing, in the 2015 stipulation, that the class and PAGA claims would "proceed before" the court. Wedbush appealed.

  The Court of Appeal, Fourth District, Division 3, California, affirmed. The Court declined to rely on the 2015 stipulation, as the arbitration rights Wedbush asserted "did not exist at that time." Under California case law, a party preserves latent arbitration rights so long as that party raises those rights "as soon as" it has "any chance of success." Here, Wedbush made no mention of arbitration until nine months after *Viking River* and five months after collecting the 2022 arbitration agreements – significant delays given the "looming trial date." These delays, "coupled with Wedbush's other litigation conduct during that window," supported the trial court's finding of waiver.

North Carolina

- **NON-PARTY COULD NOT ENFORCE ARBITRATION**

  Griffing v Gray, Layton, Kersh, Solomon, Furr & Smith, P.A.
  Court of Appeals of North Carolina
  2024 WL 1392400
  April 2, 2024

  Attorney John Griffing filed breach of contract claims against his former law firm, Gray Layton, based on 1) Griffing's Shareholder Agreement with the firm; 2) a Property Agreement in which Griffing bought into COBRA Properties; 3) an Office Lease between COBRA Properties and Gray Layton; and 4) a Class Action Agreement committing Gray Layton funding to a litigation run by two firm attorneys. Griffing claimed, among other things, that Gray Layton had failed to pay i) adequate compensation and stock repurchase, ii) rent increases required by the Lease, and iii) reimbursement for Griffing's cash advances to the class action. The Shareholder Agreement contained no arbitration agreement, but Gray Layton moved to compel arbitration under the Property Agreement and Class Action Agreement. The court denied the motion, as Gray Layton was not a party to the Property Agreement, and Griffing was not a party to the Class Action Agreement. Gray Layton appealed.

  The Court of Appeals of North Carolina affirmed that Griffing's claims were not subject to any arbitration agreement. Griffing was not equitably estopped from avoiding arbitration under the Property Agreement, as Gray Layton's duty to pay rent accrued under the Office Lease. Griffing

was not a third-party beneficiary of the Class Action Agreement, which was formed without any intent to benefit Griffing.

Pennsylvania

- **ARBITRATION AGREEMENT RAISED QUESTION OF FACT**

  Schwartz v Kelly Services, Inc.
  Superior Court of Pennsylvania
  2024 WL 1317062
  March 28, 2024

  Nancy Schwartz, a teacher in Haddon Township, New Jersey, sued Kelly Services, a staffing company, for negligence and tortious interference. Schwartz claimed that Kelly had induced her to resign her Haddon position for a higher paying job in Radnor, which then turned out to be unavailable. Kelly moved to compel arbitration under an Arbitration Agreement Schwartz signed when retaining Kelly's placement services. The Agreement defined "Covered Claims" as claims "relating to my employment." Kelly argued that this definition covered claims relating to Schwartz's "pre-employment," including the application process. Schwartz argued that "my employment" referred only to employment procured through Kelly and that her claims, which arose from past employment, were not covered. The court agreed with Schwartz that the Agreement applied only to "prospective jobs procured by Kelly" and not to claims arising from Schwartz's Haddon employment. Kelly appealed.

  The Superior Court of Pennsylvania vacated and remanded. The court below erroneously resolved a question of fact based on an inadequate record. Schwartz alleged in her complaint that she contracted with Kelly for placement services, but the contract did not appear in the record. The Arbitration Agreement, the only document submitted to the court, conveyed no information about the terms of the parties' relationship, such as "how Kelly was to be compensated" or "the process by which Schwartz would begin a new position." Absent such basic information, the term "employment" was susceptible "to each of the parties' competing interpretations." The Court remanded for the lower court to "consider evidence by deposition or otherwise."

Washington

- **AWARD CONFIRMATION NOT MOOT**

  AURC III, LLC v Point Ruston Phase II, LLC
  Supreme Court of Washington
  2024 WL 1561657
  April 11, 2024

  Following arbitration between a lender, AURC III, LLC, and its borrower, Point Ruston, the arbitrator issued an interim, and then final, $10M award to AURC. As required by the parties' arbitration agreement, the award included a "concise written statement setting forth the reasons for the judgment and for the award." AURC moved to confirm. Point Ruston agreed that AURC was "entitled" to confirmation but argued that the awards should not be attached to the confirmation order, as doing so would "serve as an independent judicial review of the 'correctness' of the arbitration." Point Ruston then paid the full award amount and moved to dismiss the action as moot. The court denied the motion to dismiss and issued a confirmation order with the two awards attached. The Court of Appeals affirmed, and Point Ruston petitioned for review.

  The Supreme Court of Washington affirmed *en banc.* Payment of the arbitration award did not render the confirmation action moot. The plain language of RCW 7.04A.220 makes clear that,

when faced with a motion to confirm an arbitration award, the court “shall issue such an award” unless the award is modified, corrected, or vacated. Confirmation is distinct from enforcement, and payment of the award did not prevent the court from “providing the originally requested and effective relief of granting the confirmation motion.” The court did not err in attaching the awards to the judgment. Such attachment does not constitute a judicial endorsement of an arbitrator’s finding or reasoning but merely “clarifies what is being confirmed.”

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

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