May 15, 2024

ADR Case Update 2024 - 9

Federal Courts

- **ARBITRATION PROVISION UNENFORCEABLE**

  Cedeno v Sasson
  United States Court of Appeals, Second Circuit
  2024 WL 1895053
  May 1, 2024

  Ramon Cedeno filed a putative class action against his employer, Strategic Finance Solutions, and the trustee of the company's Employee Benefit Plan (together, Defendants) for fiduciary breaches that caused the Plan significant financial loss. Cedeno sought Plan-wide remedies under ERISA § 502(a)(2), including restoration, disgorgement of profits, and other equitable relief. Defendants moved to compel arbitration. The Plan's mandatory arbitration provision required all claims to be brought in an "individual," rather than "representative" capacity; restricted any restoration of losses to be made only to the claimant's individual account; and prohibited a claimant from seeking or receiving any relief that would benefit any other employee or participant. The court denied the motion. The arbitration provision constituted an unenforceable "prospective waiver of a statutory right," as it would prevent Cedeno from pursuing 502(a)(2) remedies which were, "by their nature, Plan-wide." Defendants appealed.

  The United States Court of Appeals, Second Circuit affirmed. The FAA "does not require courts to enforce contractual waivers of substantive rights and remedies." The effective vindication doctrine invalidates an arbitration agreement that "purports to waive" enforcement of federal statutory rights. The arbitration provision here would prevent Cedeno from pursuing Plan-wide remedies that ERISA "unequivocally" provides. Due to the Plan's non-severability clause, the arbitration provision was therefore "null and void."

- **GAME APP PROVIDED SUFFICIENT NOTICE OF TERMS**

  Keebaugh v Warner Bros. Entertainment, Inc.
  United States Court of Appeals, Ninth Circuit
  2024 WL 1819651
  April 26, 2024

  Mobile game app Users sued Warner Bros. Entertainment for alleged misrepresentations relating to its Game of Thrones Conquest app. Warner Bros. moved to compel arbitration under its Terms, which were made available on the game's initial screen. Text below a bright blue "Play" bar gave notice that "tapping" the Play button – which was the only way to open and download the game -- constituted agreement to the Terms. Beneath, two distinct boxes provided hyperlinks

to the Privacy Policy and Terms. The court denied the motion to compel, finding insufficient notice of Terms. Because game users were not required to open an account, a reasonable user would not infer that they were entering into a continuing relationship subject to terms and conditions. Warner Bros. appealed.

The United States Court of Appeals, Ninth Circuit reversed and remanded. A reasonable user would expect a continuing relationship subject to Terms. Unlike a typical website purchaser, who might engage in only a single transaction, a mobile game user downloads the game specifically for the purposes of having "continued access" and makes in-app purchases within the game. The sign-in screen satisfied the visual requirements for conspicuous notice by using contrasting font size and color and distinctive design elements on an uncluttered field. The Court rejected Users' claim that the Terms' arbitration provision was unconscionable because its ban on public injunctive relief was unenforceable under California law. The unenforceable waiver did not render the remainder of the provision unconscionable.

- **ARBITRATION OPT-OUT AVAILABLE ONLY TO EMPLOYEES NOT BOUND BY AN EXISTING ARBITRATION AGREEMENT**

  Agha v Uber Technologies, Inc.
  United States District Court, N.D. Illinois, Eastern Division
  2024 WL 1719348
  April 22, 2024

  Uber requires its drivers to agree to a Platform Access Agreement (PAA) with a broad arbitration provision that "survives after the relationship terminates." The provision includes a delegation clause, a class action waiver, and an opt-out clause. Uber periodically updates the PAA, and an Uber driver may enter into several updated PAAs over the course of their work. Four Drivers filed a putative FLSA class action against Uber, claiming they were misclassified as independent contractors rather than employees. Each Driver had agreed to at least one PAA without exercising the arbitration opt-out but exercised the opt-out in subsequent PAAs. Uber moved to compel arbitration. Drivers opposed, arguing that they had opted out of arbitration and, alternatively, that the arbitration provision's class action waiver rendered the provision unenforceable under Illinois law.

  The United States District Court, N.D. Illinois, Eastern Division granted the motion in part and denied in part. The Court denied Uber's motion to compel as to one Driver, Ken Zurek, who had previously sued Uber in the Circuit Court of Cook County. That court had decided that Zurek was not bound to arbitration, and Uber was therefore precluded from relitigating the issue as to Zurek. The remaining three Drivers were bound to arbitration under their PAAs. The opt-out clauses on which the Drivers relied specifically stated that if the Driver was bound to an arbitration agreement at the time of receiving the new PAA, "that existing arbitration agreement will remain in full force and effect." Drivers failed to show that the class action waiver was unconscionable. Unconscionability of class action waivers "must be determined on a case-by-case basis, considering the totality of the circumstances." Here, Drivers presented no evidence to support their claim that arbitration costs would likely exceed the value of any recovery.

- **ONLINE AGREEMENT PUT USER ON "INQUIRY NOTICE" OF ITS TERMS**

  Smith v RPA Energy, Inc.
  United States District Court, S.D. New York
  2024 WL 1869325
  April 30, 2024

  Joint homeowners James Smith and Tylar Spencer filed a putative class action against RPA Energy for deceptively pricing its energy services. RPA moved to compel arbitration under the energy service contract, a "modified click-wrap agreement," which Spencer had signed online. The first screen of the agreement, which an RPA sales representative sent to Spencer's mobile device, stated, "Your contract with Green Choice Energy is ready to sign." A subsequent page invited her to "Preview your contract(s)," which was available immediately below by hyperlink. To accept the contract, Spencer clicked a blue box labeled "Click to add signature" and a "Continue" button that led her to a signature screen. Spencer opposed the motion to compel, arguing that

she did not realize she was signing a contract and was unaware of its Terms.

The United States District Court, S.D. New York granted the motion to compel. A "reasonably prudent person" using the sign-up agreement would have been on "inquiry notice" of the Terms. The site used clearly identifiable hyperlinks set apart in colored boxes on an uncluttered white background. Had Spencer chosen to preview the contract, she would have seen that the draft contract was only six pages long and that the arbitration provision appeared on the fifth page in all caps. A reasonable user would also have understood that clicking the signature button "unambiguously" manifested assent to the contract.

California

- **INSUFFICIENT EVIDENCE THAT PARTIES AGREED TO DELEGATE ARBITRABILITY**

  Mondragon v Sunrun
  Court of Appeal, Second District, Division 7, California
  2024 WL 1731764
  April 23, 2024

  Angel Mondragon filed a PAGA action against his employer, Sunrun, for wage theft against himself and other employees. Sunrun moved to compel arbitration under the two-and-a-half-page Arbitration Agreement Mondragon, an hourly employee, signed as a condition of employment. Sunrun argued that 1) arbitrability should be determined by the arbitrator, as the Agreement incorporated provider rules that included a delegation clause, and 2) although the Agreement specifically "carved out" an exclusion for PAGA claims, that exclusion applied only to "representative" PAGA claims, not to Mondragon's individual claim. The court denied the motion, holding that the Agreement did not clearly delegate arbitrability to the arbitrator and that the PAGA "carve-out" applied to both individual and representative claims. Sunrun appealed.

  The Court of Appeal, Second District, Division 7, California affirmed. Arbitrability was for the court to decide. In the context of a lengthy Arbitration Agreement presented to an "unsophisticated" hourly employee, designation of a provider and that provider's rules was insufficient to establish that the parties "clearly and unmistakably" agreed to delegate arbitrability. Further, general delegation rules "do not apply where the arbitration agreement creates a carve-out for certain claims and the arbitrability dispute is whether the carve-out covers the claims at issue." Sunrun's motion to compel was properly denied, as the PAGA carve-out excluded all "claims brought by Employee in state or federal court as a representative of the state of California as a private attorney general under the PAGA (to the extent applicable)." The carve-out's language referred to Mondragon acting as a "representative" of the attorney general, and made no distinction between individual claims and those made as a "representative" of fellow employees.

- **ARBITRATION PROVISION MET STATUTORY REQUIREMENTS**

  Dougherty v U.S. Behavioral Health Plan
  Court of Appeal, Fourth District, Division 2, California
  2024 WL 1752872
  April 24, 2024

  Christine Dougherty sued U.S. Behavioral Health Plan (USB), claiming that her son's fatal drug overdose resulted from USB's refusal to cover a residential treatment program. Dougherty had enrolled herself and her son in a UnitedHealthcare HMO Plan, and their coverage was governed by three documents: 1) Dougherty's Enrollment Form, which included an Arbitration Agreement governing disputes with United Healthcare; 2) an "Evidence of Coverage" (EOC) booklet outlining the terms of the Arbitration Agreement; and 3) a Behavioral Health Supplement, which explained that USB would provide the Plan's mental health and substance abuse care, and included an arbitration provision covering disputes with USB. USB moved to compel arbitration under the Supplement, which, it argued, constituted a "health care contract" between USB and Dougherty. Dougherty opposed, arguing that the Supplement's arbitration provision failed to comply with the arbitration disclosure requirements of California Health & Safety Code § 1363.1. The court

agreed and denied USB's motion to compel. USB appealed.

The Court of Appeal, Fourth District, Division 2, California reversed. The Supplement – which had required no signature from Dougherty – was not a separate contract between Dougherty and USB. Rather, the Supplement and EOC were both components of the Plan to which Dougherty had agreed by signing the Enrollment Form. Section 1363.1 applies to "any health care service plan" that requires arbitration: here, the United Healthcare Plan. The parties were in agreement that the Enrollment Form's arbitration provision complied with § 1363.1, and the court below erred in denying USB's petition to compel.

Colorado

- **INSUFFICIENT EVIDENCE OF ARBITRATOR BIAS**

Brightstar LLC v Jordan
Colorado Court of Appeals, Division 1
2024 WL 1665721
April 18, 2024

The two minority members (Plaintiffs) of a marijuana distribution LLC, Native Roots, initiated arbitration against the majority member, Brightstar, LLC, and its sole owner, Peter Knobel (Defendants) for breach of the company's Operating Agreement. Arbitration concluded in a $100M award in favor of Plaintiffs. The parties cross-motioned to confirm/vacate the award. The court vacated on bias grounds and held that Knobel, a non-signatory to the Operating Agreement, was not subject to arbitral jurisdiction. Plaintiffs appealed.

The Colorado Court of Appeals, Division 1 affirmed in part and reversed in part. The lower court erred in finding partiality. Exercising de novo review, the Court found insufficient evidence in the record to show bias. The court was correct in finding that Knobel was not subject to arbitral jurisdiction. He was not a party to the Operating Agreement, and Plaintiffs failed to establish that Brightstar and Knobel were alter egos.

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

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