June 16, 2021

**ADR Case Update 2021 - 12**

## Federal Circuit Courts

- **CLASS WAIVER UPHELD; REMAINING DISPUTE WITHIN SCOPE OF VALID ARBITRATION CLAUSE**

  *Donelson v. Ameriprise Financial Services, et al.*
  2021 WL 2231396
  United States Court of Appeals, Eighth Circuit
  June 3, 2021

  When Donelson opened an investment account with Ameriprise, he did so with the help of investment advisor Mark Sachse, who completed the Account Application for Donelson and instructed him to sign it. Donelson did so, without reading it. The application included language acknowledging receipt and review of the Client Agreement, which included an arbitration clause providing for arbitration of "all controversies that may arise between us…except for putative or certified class actions." After alleged mishandling of his account, Donelson sued Sachse, Ameriprise, and others (Defendants) for violations of federal securities law and sought to represent other Sachse and Ameriprise clients in a class action. Defendants moved to strike the class-action allegations and compel arbitration. The court denied both motions and Defendants appealed.

  The United States Court of Appeals for the Eighth Circuit reversed and remanded for entry of an order striking the class-action allegations and compelling arbitration. The Court established jurisdiction to hear the appeal of the denial under section 4 of the FAA. By moving to strike Donelson's class action allegations, Defendants did not substantially invoke the litigation machinery and thus did not waive their right to arbitrate. The court's decision to address the issue of enforceability of the arbitration clause and not to leave this issue for the arbitrator was not plain error. The arbitration clause was valid. Though Donelson never signed the client agreement that contained the arbitration clause, he assented to it by signing an account application in which he expressly acknowledged reading the client agreement and consenting to its terms. The arbitration clause was supported by consideration because Ameriprise provided a client account to Donelson. The clause was not unconscionable, despite Donelson's argument that the arbitration clause required him to arbitrate all his claims but did not require Ameriprise to do the same. Even

if true, the fact that an arbitration provision applies to one party but not the other does not itself render the provision unconscionable. Whether the arbitration clause encompassed this case turned on whether the class action allegations should be stricken. Given that it was apparent from the pleadings that the class could not be certified, the class actions should have been stricken, and the dispute between the parties should have been deemed one encompassed by the arbitration clause.

*Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.*

**Contact Information**
David Brandon
Program Manager
JAMS Institute
415-774-2648
**DBrandon@jamsadr.com**