August 25, 2021

ADR Case Update 2021 - 15

Federal Circuit Courts

- **UBER DRIVERS DO NOT FALL WITHIN THE INTERSTATE COMMERCE EXEMPTION TO MANDATORY ARBITRATION UNDER THE FAA**

  Capriole, et al. v. UBER
  2021 WL 3282092
  United States Court of Appeals, Ninth Circuit
  August 2, 2021

  Capriole, El Koussa, and Leonidas (plaintiffs) are Massachusetts residents who work as Uber drivers. All agreed to Uber's Technology Services Agreement, which included an arbitration provision. Plaintiffs filed a putative class action, alleging labor law violations, and simultaneously requested a preliminary injunction prohibiting Uber from classifying them as independent contractors. Uber moved to compel arbitration. Following transfer pursuant to a forum selection clause in the agreements, the U.S. District Court for the Northern District of CA denied the drivers' motion for a preliminary injunction and granted Uber's motion to compel arbitration. Drivers appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. As a nationwide class of workers, Uber drivers do not fall within the "interstate commerce" exemption to mandatory arbitration under the FAA. Even when crossing state lines or transporting passengers to airports, Uber drivers merely convey interstate passengers between their homes and their destination in the ordinary course of their independent local service. Interstate movement cannot be said to be a central part of the class members' job description. Because plaintiffs' claims and requested injunctive relief were arbitrable by the terms of the arbitration agreement, and plaintiffs' requested injunctive relief would have upended the status quo rather than maintained it, the Court found that the district court properly addressed the motion to compel arbitration first. The panel also concluded that the injunctive relief requested, reclassifying drivers' status from independent contractors to employees, was not a public injunctive relief that may be allowed to them to avoid arbitration. Here, the relief sought by the plaintiffs was overwhelmingly directed at the plaintiffs and other rideshare drivers who would be the primary beneficiaries of access to overtime and

minimum wage laws.

- **PARTIES CLEARLY AND UNMISTAKABLY DELEGATED QUESTIONS OF ARBITRABILITY**

  Communications Workers of America, AFL-CIO v. AT&T
  2021 WL 3355183
  United States Court of Appeals, District of Columbia Circuit
  August 3, 2021

  The AFL-CIO and AT&T entered into a contract governing certification of the Union and the relationship between the parties. The Agreement required the parties to arbitrate disputes over the description of an appropriate unit for bargaining and the definition of non-management employees. After AT&T acquired Time Warner, the Union initiated discussions about appropriate bargaining units and, when the parties could not agree which employees counted as non-management workers, demanded arbitration under the Agreement. AT&T disagreed, and the Union brought an action in district court to compel arbitration. Asserting that the dispute did not fall within the scope of the Agreement's arbitration coverage, AT&T moved to dismiss the complaint for failure to state a claim. The court granted the motion to dismiss and denied the Union's motion to compel arbitration. The Union appealed.

  The United States Court of Appeals for the District of Columbia Circuit vacated and remanded with instructions. Threshold questions of arbitrability are generally presumed to be for a court to decide. Still, parties may delegate them to the arbitrator if their agreement does so by clear and unmistakable evidence. The requisite clear and unmistakable delegation occurs when the parties' agreement incorporates arbitral rules that assign arbitrability questions to the arbitrator. Here, the Agreement expressly incorporated AAA rules for arbitration, and those rules, in turn, assign threshold questions of arbitrability to the arbitrator. Thus, the parties clearly and unmistakably delegated arbitrability questions to the arbitrator by incorporating the AAA rules. It follows that the district court lacked jurisdiction to determine whether the parties' dispute must be submitted to arbitration.

- **PARTIES DID NOT FORM AN AGREEMENT TO ARBITRATE**

  Southard v. Newcomb Oil Company
  2021 WL 3378933
  United States Court of Appeals, Sixth Circuit
  August 4, 2021

  Southard, a convenience store attendant for Newcomb Oil, filed a putative class action in KY state court, alleging violations of the FLSA, various state-law claims, and a common-law unjust enrichment claim. Newcomb removed the claim to federal court and moved to dismiss or stay the action pending arbitration, pursuant to various alternative dispute resolution provisions in the employee handbook and application. The court concluded that the parties did not form an agreement to arbitrate under the FAA and denied Newcomb's motion to dismiss or stay. Newcomb appealed.

  The United States Court of Appeals for the Sixth Circuit affirmed. The Court evaluated whether an agreement qualifies as an FAA arbitration based on how closely it resembles classic arbitration, the common features of which include 1) a final, binding remedy by a third party, 2) an independent adjudicator, 3) substantive standards, and 4) an opportunity for each side to present its case. The agreement between Southard and Newcomb bore none of those hallmarks. The application and the handbook provisions made it apparent that Newcomb and Southard agreed to alternative dispute resolution generally, not arbitration specifically. Given that Newcomb did not draft an arbitration agreement, it could not now turn to the FAA for its arbitration-specific remedies.

- **TRUMP ET AL. NOT ENTITLED TO ARBITRATION UNDER EQUITABLE ESTOPPEL PRINCIPLES OR OTHERWISE**

  Doe v. Trump
  2021 WL 3176760

United States Court of Appeals, Second Circuit
July 28, 2021

Anonymous plaintiffs filed a putative class action against The Trump Corporation, Donald J. Trump, and various family members, alleging that the defendants fraudulently induced them to enter into business relationships with non-party appellant, ACN Opportunity, LLC, by making a series of deceptive and misleading statements. As a result, the plaintiffs – and many others like them – entered into business relationships with ACN as Independent Business Owners (IBOs) and suffered significant monetary losses. Each of the plaintiffs paid ACN a fee to enroll as an Independent Business Owner and agreed to submit any disputes that might arise between them to arbitration. The plaintiffs brought suit in the U.S. District Court for the Southern District of NY. After ten months of litigation, the defendants moved to compel arbitration. Although not parties to the arbitration agreements between the plaintiffs and ACN, the defendants sought to enforce the agreements against the plaintiffs under principles of equitable estoppel. The court denied the defendants' and ACN's motions to compel arbitration, and the defendants and ACN appealed.

The United States Court of Appeals for the Second Circuit affirmed. The defendants were not entitled to have the district court enforce the arbitration agreement under equitable estoppel principles or otherwise. The defendants did not adequately raise their argument that the issue of arbitrability was for the arbitrator to determine or, more broadly, that an arbitrator should have determined the questions of equitable estoppel and waiver - nor did they assert that the court lacked authority to resolve these issues. To the contrary, they briefed the questions and asked the court to compel arbitration on equitable estoppel grounds. While the Court may exercise its discretion to consider forfeited arguments, the defendants failed to present a compelling reason for doing so here. To establish equitable estoppel in the present context to bind a signatory of a contract (the plaintiffs) to arbitrate with one or more non-signatories (the defendants), there must be a close relationship among the signatories and non-signatories such that it can reasonably be inferred that the signatories had knowledge of, and consented to, the extension of their agreement to arbitrate to the non-signatories. There was no corporate relationship between the defendants and ACN, of which the plaintiffs knew. The defendants did not own or control ACN, and the defendants were not named in the IBO agreements between ACN and the plaintiffs. The plaintiffs also alleged that the defendants made false, misleading, and deceptive statements to induce the plaintiffs to enter into the IBO agreements with ACN. There is no unfairness in denying estoppel to a third-party wrongdoer aligned with a signatory in effectuating allegedly wrongful business practices. The district court correctly concluded that it lacked an independent jurisdiction to grant ACN's motion to compel and forfeited its argument regarding equitable estoppel by failing to raise the argument before the district court.

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

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