

October 8, 2021

ADR Case Update 2021 - 18

Federal Circuit Courts

- **DELEGATION PROVISION WAS NOT ITSELF INVALID AS PROSPECTIVE WAIVER**

Brice v. Plain Green v. Haynes Investments
2021 WL 4203337
United States Court of Appeals, Ninth Circuit
September 16, 2021

Brice and others (Borrowers) obtained short-term, high-interest loans from Plain Green or Great Plains Lending, both of which represented themselves as "tribal lending entities." The Tribal Lenders' standard loan contracts contained an agreement to arbitrate any dispute arising under the contract and included a delegation provision requiring an arbitrator to decide "any issue concerning the validity, enforceability, or scope of [the loan] agreement or [arbitration agreement]." The loan contracts also referenced Tribal Law. Borrowers filed class action complaints against Lenders and Investors, asserting claims for unjust enrichment and violations of RICO and CA's usury laws. Investors moved to compel arbitration. The court denied the motions, concluding that the arbitration agreement as a whole in each contract was unenforceable because it prospectively waived Borrowers' right to pursue federal statutory claims by requiring arbitrators to apply Tribal Law. Lenders appealed.

The United States Court of Appeals for the Ninth Circuit reversed and remanded. An agreement delegating to an arbitrator the gateway question of whether the underlying arbitration agreement is enforceable must be upheld unless that specific delegation provision is itself unenforceable. The delegation provision in question was not. It did not eliminate Borrowers' right to pursue in arbitration their prospective-waiver challenge to the arbitration agreement as a whole, even though the challenge arose under federal law. The plain language of the delegation provision did not foreclose the arbitrator from considering disputes arising under "federal, state, or Tribal Law...based on any legal or equitable theory." Borrowers' rights to pursue their prospective-waiver argument remained intact at this stage of the proceedings, and the delegation provision was not facially a prospective waiver.

- **ORDERS COMPELLING ARBITRATION AND AFFIRMING AWARD UPHELD**

Dodson International v. Williams International
2021 WL 4142693
United States Court of Appeals, Tenth Circuit
September 13, 2021

After purchasing two used jet engines manufactured by Williams, Dodson contracted with Williams to inspect the engines and prepare an estimate of repair costs. Williams determined that the engines were so badly damaged that they could not be rendered fit for flying, but it refused to return one of the engines because Dodson had not paid its bill in full. Dodson sued Williams in federal court, alleging antitrust and state-law tort claims, and Williams moved to compel arbitration, relying on an arbitration clause in the original invoices. The court granted the motion, and the arbitrator found in favor of Williams. Dodson moved to reconsider the order compelling arbitration and to vacate the arbitrator's award. The court denied both motions and, construing Williams's opposition to the motion for vacatur as a request to confirm the award, confirmed the award. Dodson appealed.

The United States Court of Appeals for the Tenth Circuit affirmed. The first task of a court asked to compel arbitration is to determine whether the parties agreed to arbitrate that dispute. The arbitration clause at issue stated, "All disputes arising from or in connection with maintenance performed by Williams shall be submitted to binding arbitration." For each count of the complaint, an essential component of the cause of action was closely connected to some action by Williams in performing maintenance (inspecting the engines or preparing estimates for repairs) on Dodson's engines. The court rejected Dodson's argument that the clause did not encompass the claims because each claim arose either before its contracts with Williams were executed or after they were terminated, noting that the arbitration clause had no temporal element. The court did not abuse its discretion in denying Dodson's motion for untimeliness, given that it was filed more than three years after entry of the order compelling arbitration. Dodson failed to demonstrate the extraordinary circumstances that would warrant an arbitration award's vacatur (or denial of confirmation).

- **ARBITRATION BOARD'S POWERS LIMITED BY FUNCTUS OFFICIO DOCTRINE**

Verizon PA v. Communications Workers of America, AFL-CIO
2021 WL 4075326
United States Court of Appeals, Third Circuit
September 8, 2021

After the Union filed a grievance against Verizon, alleging that Verizon violated the CBA by contracting out Union work, the parties proceeded to arbitration. In its Merits Award, the Arbitration Board held that Verizon violated the CBA by contracting with common carriers to deliver FiOS TV set-top boxes to existing customers for self-installation, work that used to be performed exclusively by Union Service Technicians (Workers). The Board referred the issue of money damages back to the parties for resolution and retained jurisdiction if the parties could not agree on a monetary remedy. The parties failed to reach an agreement and submitted the remedy issue back to the Board. The Board issued a Remedy Award that included deliveries to existing customers and new customers and the accompanying self-installations of the set-top boxes. Verizon challenged both awards. The court granted summary judgment in part for Verizon, vacating the Remedy Award because it 1) amended the Merits Award in violation of the functus officio doctrine and 2) awarded punitive damages. The Court remanded the case to the Board for "calculation of a remedy consistent with [its] opinion." The Union appealed.

The United States Court of Appeals for the Third Circuit affirmed. By including deliveries to new customers and backpay for self-installations, the Remedy Award revised the Merits Award and thus exceeded the Board's statutory authority under the functus officio doctrine. The Board was not permitted to re-decide that issue merely because it reserved jurisdiction on the remedy. The Court remanded to the Board for a re-determination of what compensatory damages, if any, were appropriate based on the evidence and the scope of the work assignment identified in the Merits Award and Merits Opinion.

- **STATE LAW QUESTIONS OF ARBITRABILITY SHOULD BE RESOLVED FIRST**

Harper v. Amazon.com Services
2021 WL 4075350
United States Court of Appeals, Third Circuit
September 8, 2021

Robert Harper was a part-time flex driver for Amazon. He registered through the Amazon Flex phone app, agreeing to Terms of Service that included: an arbitration clause, language specifying that the parties "agree[d] that the FAA and applicable federal law would govern any dispute that may arise between the parties, and a choice of law provision providing that WA law controlled the rest of the Terms of Service. Harper filed a putative class action on behalf of similarly situated NJ Amazon Flex drivers, alleging that Amazon misclassified them as independent contractors and failed to pay overtime, minimum wage, and customer tips in violation of NJ labor laws. Amazon moved to compel arbitration, and Harper objected, arguing that NJ Amazon Flex drivers fell within the FAA §1 exemption. Amazon disagreed but added that it didn't matter because the claim was also arbitrable under state law. The court denied Amazon's motion and ordered discovery to determine whether Harper fell within the FAA exception. The court declined to reach Amazon's argument about state law, and Amazon appealed.

The United States Court of Appeals for the Third Circuit vacated and remanded for consideration under state law. When state law grounds exist that would enforce arbitration even if the FAA did not apply, the federal court sitting in diversity must turn to that threshold question before ordering discovery. This decision clarified the steps courts should follow – before discovery about the scope of §1 – when the parties' agreement reveals a clear intent to arbitrate. Whether Harper or Amazon must arbitrate their dispute was a matter of both federal and state law, an analysis best considered by the District Court.

- **COMPANY WAIVED ITS RIGHT TO ARBITRATE ACTION**

Sitzer, et al., v. National Association of Realtors, et al.
2021 WL 4125787
United States Court of Appeals, Eighth Circuit
September 10, 2021

Scott and Rhonda Burnett signed a listing agreement with a realtor to sell their home. The agreement contained a provision requiring "any controversy or claim between the parties to this Contract, its interpretation, enforcement or breach...to be settled by binding arbitration." Along with other homeowners, the Burnetts brought a putative class action against various real-estate entities, including HomeServices of America, alleging that defendants engaged in anti-competitive practices. Over the next year, HomeServices fully participated in the case, joining motions to dismiss, negotiating a proposed scheduling order, answering the complaint, and replying to written discovery. 305 days after the Burnetts filed the lawsuit, HomeServices sought to compel arbitration. The court denied the motion, mainly because HomeServices was not a party to the Burnetts' listing agreement. In a footnote, the court questioned whether HomeServices had waived its right to arbitrate by litigating the case for almost a year. HomeServices appealed.

The United States Court of Appeals for the Eighth Circuit affirmed. Arbitration is a waivable contractual right. One way in which waiver can occur is when a party decides to invoke the litigation machinery rather than promptly seek arbitration. Waiver occurs when a party 1) knows of an existing right to arbitration; 2) acts inconsistently with that right; and 3) prejudices the other party with its inconsistent acts. HomeServices aggressively pursued this case in court for close to a year. Doing so prejudiced the Burnetts. Having followed this course, HomeServices had to "live with the consequences."

- **WAIVER OF RIGHT TO ARBITRATE ORIGINAL STATE LAW CLAIMS DID NOT EXTEND TO LATER-PLED FEDERAL CLAIMS**

Forby v. One Technologies et al.
2021 WL 4167262

United States Court of Appeals, Fifth Circuit
September 14, 2021

Forby registered for a free credit report on a website operated by OneTech. She checked a box agreeing to the terms, which included authorization for OneTech to charge Forby's charge card month-to-month until she canceled, a process known as negative billing. The terms also contained an arbitration clause. Forby sued OneTech in IL, claiming violations of the IL Consumer Fraud and Deceptive Business Practices Act (ICFA) and unjust enrichment under IL law. OneTech removed the case and moved to dismiss for failure to state a claim. The court granted OneTech's motion as to the unjust enrichment claim but denied it as to the ICFA claim. OneTech then moved to compel arbitration. The court denied the motion, but this court reversed on appeal, finding that OneTech had waived its right to arbitrate by showing a desire to resolve the dispute in litigation rather than arbitration – and in doing so, prejudiced Forby. Forby was then granted leave to file a second complaint. In it, she added a new claim under the Credit Repair Organizations Act (CROA). OneTech again moved to arbitrate, arguing that OneTech's waiver should be rescinded because Forby's second amended complaint had broadened the case. The court denied the motion, and OneTech filed an interlocutory appeal of the order denying arbitration.

The United States Court of Appeals for the Fifth Circuit reversed and remanded. For waiver purposes, a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate. OneTech never tried to litigate Forby's CROA claims. To the contrary, once Forby amended her complaint to add those federal claims, OneTech moved to compel their arbitration. Because OneTech did not take any overt act in court that displayed a desire to resolve the dispute through litigation rather than arbitration, it did not waive its right to arbitrate Forby's CROA claims.

- **WALMART WAIVED ITS RIGHT TO ARBITRATE**

McCoy v. Walmart
2021 WL 4228182
United States Court of Appeals, Eighth Circuit
September 17, 2021

McCoy purchased Walmart gift cards, only to find that one of the cards was deactivated and one had no balance. McCoy sued Walmart in Missouri state court, and Walmart immediately removed the case and filed a motion to dismiss. Over the next fifteen months, Walmart gave no hint that it was interested in arbitration. After McCoy served interrogatories and a request for production, Walmart moved to amend its answer to add arbitration as an affirmative defense and requested the case be sent there. The court refused, and Walmart appealed.

The United States Court of Appeals for the Eighth Circuit affirmed. Arbitration is a waivable contractual right. One way in which waiver can occur is when a party decides to invoke the litigation machinery rather than promptly seek arbitration. Walmart took several actions that were inconsistent with its right to arbitrate – most notable of which were its two attempts to dismiss the case "in its entirety." The delay prejudiced McCoy because she had to litigate substantial issues on the merits. For that reason, the case will remain where Walmart litigated it for well over a year: in federal court.

- **RULE PROHIBITING ARBITRATION OF PUBLIC INJUNCTIVE RELIEF DID NOT APPLY TO THE REQUESTED INJUNCTIVE RELIEF**

Hodges v. Comcast Cable Communications, LLC
2021 WL 4127711
United States Court of Appeals, Ninth Circuit
September 10, 2021

Cable subscriber Hodges brought a putative class action against Comcast, challenging Comcast's privacy and data collection practices and seeking various monetary and equitable damages, including seven specified forms of public injunctive relief. Comcast removed the case to federal court and moved to compel arbitration. Because Hodges' complaint sought public

injunctive relief, the court held that the complaint implicated the so-called *McGill* rule, under which a contractual provision that waives the right to seek public injunctive relief in all forums is unenforceable. Comcast filed an interlocutory appeal.

The United States Court of Appeals for the Ninth Circuit reversed and remanded. Public injunctive relief within the meaning of *McGill* is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole, as opposed to a particular class of persons, and that do so without the need to consider the individual claims of any non-party. At least some of the requested forms of reliefs in Hodges' complaint sought forward-looking prohibitions against future violations of law. But that alone was not enough to classify the remedy as public injunctive relief within the meaning of *McGill*. Unlike public relief in other cases, the requests encompassed here stood to benefit a group of individuals similarly situated to the plaintiff: Comcast subscribers. Moreover, it was apparent that administering any injunctive relief of the sort sought here would entail the consideration of the individualized claims of numerous cable subscribers.

- **SECTION OF CA LABOR CODE NOT PREEMPTED BY FAA; CIVIL AND CRIMINAL PENALTIES ASSOCIATED WITH CA LABOR CODE WERE PREEMPTED**

Chamber of Commerce of the US et al., v. Bonta, et al.
2021 WL 4187860
United States Court of Appeals, Ninth Circuit
September 15, 2021

Business groups brought an action challenging California Law AB 51, signed into law in 2019, which prohibited CA employers from requiring employees and applicants to waive any right, forum, or procedure, including the right to file a civil action or complaint, as a condition of employment or continued employment and added §432.6 to the CA Labor Code. Concluding that AB 51 placed agreements to arbitrate on unequal footing with other contracts and stood as an obstacle to the purposes and objectives of the FAA, the court preliminarily enjoined the enforcement of the statute.

The United States Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, vacated the injunction, and remanded. If Congress enacts a law that imposes restrictions or confers rights on private actors and a state law confers rights or imposes restrictions that conflict with the federal law, then the federal law takes precedence, and the state law is preempted. §432.6 of the Labor Code, which prohibited employers from requiring employees and applicants to waive any right, forum, or procedure established in the CA Fair Employment and Housing Act or CA Labor Code, as a condition of employment or continued employment, was not preempted by the FAA. §432.6 did not make invalid or unenforceable any agreement to arbitrate, even if such agreement was consummated in violation of the statute. Rather, while mandating that employer-employee arbitration agreements be consensual, it expressly provided that "nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the FAA." Placing a pre-agreement condition on the waiver of any right, forum, or procedure did not undermine the validity or enforceability of an arbitration agreement – its effects were aimed entirely at conduct that took place before the existence of any such agreement. Because nothing in §432.6 interfered with the right conferred by the FAA to have consensual agreements to arbitrate enforced according to their terms, it did not stand as an obstacle to the purpose and objectives of the FAA. However, the civil and criminal sanctions attached to a violation of §432.6 did run afoul of the FAA. The accompanying enforcement mechanisms that sanctioned employers for violating §432.6 included punishment for entering into arbitration agreements. An arbitration agreement cannot simultaneously be valid under federal law and grounds for a criminal conviction under state law.

Missouri

- **"SHALL BE" IN SETTLEMENT AGREEMENT IMPOSED FUTURE OBLIGATION NOT IMMEDIATE PERFORMANCE**

Pelopidas, LLC v. Keller
No. ED109395
Missouri Court of Appeals, Eastern District
August 10, 2021

Ex-spouses Keller and Brown jointly owned the commercial enterprise Pelopidas. In 2016, Keller sued Brown and Pelopidas, seeking damages and other relief arising from Brown's management of the company. The parties proceeded to mediation and, after an all-day mediation session, entered into a written agreement, whereby Keller agreed to transfer her 50% ownership interest to Respondents in exchange for compensation of \$8.85 million. The transfer of Keller's 50% membership interest in Pelopidas to Respondents was memorialized in ¶7 of the Settlement Memorandum as follows: "Plaintiff's stock shall be surrendered/sold, escrowed and pledged back to the plaintiff." The Settlement Memorandum did not contain a date of transfer, and the parties had different interpretations of the meaning of the language in ¶7, with Respondents asserting that "shall be" contemplated an immediate transfer of the stock and Keller arguing that "shall be" indicated that a transfer at some future date. Respondents sued to enforce the terms of the agreement, claiming that Keller had transferred her 50% ownership interest effective as of the date of the agreement. Keller counterclaimed, seeking damages for Respondents' alleged failure and refusal to make an accelerated payment of \$8.6 million under the settlement agreement terms. The court granted summary judgment in favor of Respondents, finding that "Keller surrendered, transferred, and assigned all right, title, and interests in Pelopidas effective" on the date the agreement was signed. The court also denied Keller's cross-motion for summary judgment and awarded attorneys' fees to Respondents. Keller appealed.

The Missouri Court of Appeals for the Eastern District reversed and remanded. On appeal, Keller argued that the lower court erred because the settlement agreement contained a promise of future performance. Keller argued that she was entitled to summary judgment, ordering that payment be made at some reasonable future date. The Court agreed. The only issue here was when the stock transfer should occur. On the matter of contract interpretation, the judiciary should use the "plain, ordinary, and usual meaning of the contract's words" to give effect to the contracting parties' intention. In determining the timing of Keller's stock transfer to Respondents, the court ruled that the use of "shall be" in the settlement agreement imposed a future obligation on Keller and did not create a requirement for immediate performance. Based on their findings, the Court reversed the grant of summary judgment against Keller and instead directed the lower court to enter judgment for Keller, plus interest and attorneys' fees.

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

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