November 4, 2020

ADR Case Update 2020 - 20

Federal Circuit Courts

- **WEBSITE VISIT INSUFFICIENT TO BIND PARTIES TO NEW CONTRACT TERMS**

  Stover v. Experian Holdings, Inc.
  2020 WL 6156048
  United States Court of Appeals, Ninth Circuit
  October 21, 2020

  For a short time in 2014, Stover had a subscription with Experian Credit Score; her agreement with Experian included an arbitration clause. When Stover visited the Experian site in 2018, the arbitration provision had changed to include a carve-out provision for disputes arising out of or relating to the Fair Credit Reporting Act. Soon after, Stover sued Experian for violating the FCRA and the CA and FL Unfair Competition Laws (UCLs), seeking damages and injunctive relief. Experian moved to compel arbitration. The court granted the motion, finding that while the 2018 terms applied because of the 2014 plain language assuming assent to new terms based on a consumer's use of the website, Stover's claims did not fall within the carve-out. The court also found that Stover's claims were not exempt from arbitration based on McGill (which holds that a provision in any contract purporting to waive the statutory right to seek public injunctive relief under the CA UCL is invalid and unenforceable) because Stover was not seeking public injunctive relief. Experian and Stover appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. As a matter of first impression, the Court found that Stover's visit to the Experian site four years after agreeing to a contract that permitted changes in terms was insufficient to bind Stover and Experian to the terms of the 2018 contract. The CA UCL did not prohibit arbitration of Stover's claims because Stover failed to sufficiently allege that she had standing to pursue a claim for public injunction under the CA UCL.

- **NON-SIGNATORY AGENT MAY COMPEL ARBITRATION**

Neal v. Navient Solutions LLC
2020 WL 6122790
United States Court of Appeals, Eighth Circuit
October 19, 2020

Troy Neal's student loan agreement with JP Morgan Chase Bank included a cap on the interest rate at the maximum rate allowed in OH and a clause providing for arbitration with Chase, its successors and assigns, and any other holders of the agreement. Chase sold the loan to Jamestown Funding Trust and Navient became the loan servicer. Neal sued Chase and Navient for excessive interest charges. After learning that Jamestown was the loan owner, Neal dismissed Chase as a defendant but did not add Jamestown. Navient moved to compel arbitration and stay proceedings. The court denied the motion on the grounds that Navient was an agent to Chase's successor and not a successor, assign or holder of the Credit Agreement. Navient appealed.

The United States Court of Appeals for the Eighth Circuit reversed and remanded with instructions. Under OH law, a non-signatory agent may compel arbitration when the alleged liability was based on the principal's contractual obligations to the plaintiff. As a non-signatory agent, Navient was bound by the terms of the original Credit Agreement, with the basis of its potential liability – an interest rate higher than that permitted under OH law –in the Credit Agreement. Neal was attempting to both hold Navient liable and circumvent his promise to arbitrate by suing Navient separately from Jamestown. Neal was estopped from disavowing the arbitration clause.

California

- **COMPANY COULD NOT REQUIRE PLAINTIFF TO ARBITRATE PAGA CLAIM**

  Provost v. YourMechanic
  2020 WL 6074632
  Court of Appeal, Fourth District, Division 1, California
  October 15, 2020

  Provost worked with YourMechanic, a company that matched independent mechanics with customers needing auto repair services. Provost brought a putative class action against YM, alleging violations of the Labor Code and seeking civil penalties under the Private Attorneys General Act of 2004 (PAGA). YM moved to compel arbitration, asserting that the complaint was subject to a binding arbitration provision in the Technology Services Agreement executed by Provost when he clicked the "I accept" button at the end of the agreement. The court denied the motion, and YM appealed.

  The Court of Appeal, Fourth District, Division 1, California affirmed. Requiring Provost to arbitrate whether he was an aggrieved employee with standing to bring a representative PAGA action would require splitting the single action into an arbitrable individual claim (whether Provost was an independent contractor or employee) and a non-arbitrable representative claim. Based on a series of cases holding that a PAGA-only representative action was not an individual action at all, but instead was one that was indivisible and belonged solely to the state, the Court held that YM could not compel Provost to arbitrate whether he was an aggrieved employee and could not require that he submit any part of his representative PAGA claim to arbitration.

- **DISPUTE RESOLUTION PROCESS NOT PROHIBITED BY STATE LAW; AGREEMENT ENFORCEABLE**

  Epstein v. Vision Service Plan
  2020 WL 6165494
  Court of Appeal, First District, Division 1, California
  October 22, 2020

  Epstein, an optometrist, entered into a Network Doctor Agreement with Vision Service Plan

(VSP) that contained a two-step dispute resolution procedure. The first step, Fair Hearing, provided for an internal appeal process. The second step, Binding Arbitration, required arbitration under the FAA if the dispute remained unresolved. After VSP conducted an audit of Epstein's reimbursement claims, it concluded he was knowingly purchasing lenses from an unapproved supplier and terminated the agreement. Epstein invoked the first step of the process and appealed VSP's action. A three-member panel upheld the audit findings and termination. Instead of invoking the second step of the dispute resolution process, Epstein filed an administrative mandamus proceeding, alleging that the second step of the dispute resolution process was contrary to state regulatory law requiring certain network provider contracts to include a procedure for prompt resolution of disputes and expressly stating that arbitration shall not be deemed such a provider dispute resolution mechanism. He claimed that the FAA did not preempt the state law by virtue of the McCarran-Ferguson Act, which generally exempts from federal law, state laws enacted to regulate the business of insurance. Epstein secondly maintained that the second step of the process was unconscionable and unenforceable. The court rejected Epstein's challenges.

The Court of Appeal, First District, Division 1, California affirmed. State regulatory law requiring certain network provider agreements to include a dispute resolution process that is not arbitration pertained only to the dispute resolution process's first step. It did not foreclose the parties agreeing to arbitration in lieu of subsequent judicial review through administrative mandamus. While the arbitration provision was procedurally unconscionable in minor respects, Epstein failed to establish that it was substantively unconscionable.

Georgia

- **MINOR NOT ESTOPPED FROM VOIDING ARBITRATION AGREEMENT**

  Smith v. Adventure Air Sports Kennesaw, LLC
  2020 WL 5904448
  Court of Appeals of Georgia
  October 6, 2020

  Noah Smith, age 17, forged his father's name when he executed an agreement at Adventure Air Sports (AAS). Tragically, Noah suffered permanent injuries while performing a maneuver on one of the facility's trampolines. Noah and his parents sued AAS and its CEO. AAS moved to dismiss and compel arbitration pursuant to the arbitration clause in the agreement. The trial court granted the motion, finding that Noah was estopped from voiding the contract, and the Smith family appealed.

  The Court of Appeals of Georgia affirmed in part, vacated in part, and remanded. Estoppels do not apply to minors except in cases in which a minor's fraudulent act or representation was made with a view to deceive or defraud. Noah had the capacity to conceive and execute a fraudulent intent and could be estopped from voiding the contract. The agreement was not void on the ground of unconscionability. An agreement is not unconscionable merely because it appears to favor one party over another or leads to hardship. AAS used reasonable diligence to determine whether Noah's father authorized the "signature" on the agreement. Remand was required to determine whether Noah's parents' separate claims were subject to mandatory binding arbitration.

- **SUCCESSOR TRUSTEE BOUND BY AGREEMENT TO ARBITRATE**

  Merrill Lynch Pierce, Fenner & Smith, et al. v. Landau-Taylor as trustee of Sortor Lerangis Trust
  2020 WL 6156077
  Court of Appeals of Georgia
  October 21, 2020

  Harvey Investment Partners (HIP) and the successor trustees for the Sortor Lerangis and Harvey families' trusts sued Merrill Lynch and its loan manager Barbara Bart after money was allegedly stolen from various accounts for the trust and HIP. Lynch and Bart moved to compel arbitration,

asserting that the accounts' client agreements contained an arbitration clause. The court denied the motion, and Lynch and Bart appealed.

The Court of Appeals of Georgia reversed. The court correctly ruled that it was authorized to decide whether the arbitration agreements bound the plaintiffs. The record showed that Randall Bart (Barbara's husband) was the trustee for the Sortor Lerangis family and the Harvey family and a registered HIP agent. Randall opened numerous Merrill Lynch accounts and entered into client relationship agreements that contained arbitration clauses. The trust instruments demonstrated that Randall's trustee power to execute the client relationship agreement was not a personal power but a power that was annexed to the trustee's office such that the successor trustees would be "clothed" with his contractual duties, including the contractual duty to arbitrate. At the time when Randall executed the client relationship agreements for HIP, he was the CEO, CFO, and registered agent. He thus had the agency authority to bind HIP to the arbitration clauses in the client relationship agreements.

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

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