April 1, 2020

ADR Case Update 2020 - 6

Federal Circuit Courts

- **EMPLOYER DID NOT ESTABLISH THAT EMPLOYEE AGREED TO ARBITRATE**

  Camara v. Mastro's Restaurants LLC
  2020 WL 1263998
  United States Court of Appeals, District of Columbia Circuit
  March 17, 2020

  Kyle Camara, a former server at Mastro's Steakhouse in DC, sued Mastro's, alleging that the restaurant deprived him and other servers of minimum wage, in violation of the FLRA and the DC Minimum Wage Revision Act. Mastro's motion to compel arbitration was denied and it filed an interlocutory appeal.

  The United States Court of Appeals for the District of Columbia Circuit affirmed. Mastro's policy was to require its employees to sign an agreement to arbitrate any work-related dispute; however, it was unable to produce a copy of the agreement bearing Camara's signature or any direct evidence of Camara's intent to be bound by the agreement. Camara submitted an affidavit stating that he had neither seen nor signed an arbitration agreement. The lower court correctly treated Mastro's motion as a summary judgment motion on whether Camara had agreed to arbitrate. The summary judgment standard did not require Camara to prove a negative; he only needed to offer evidence sufficient to create a genuine dispute about whether he agreed to be bound by Mastro's arbitration policy.

- **DEFENDANT WAIVES ITS RIGHT TO COMPEL ARBITRATION**

  Brickstructures, Inc. v. Coaster Dynamix
  2020 WL 1164270
  United States Court of Appeals, Seventh Circuit
  March 11, 2020

Brickstructures is a product design firm that creates LEGO sets. Coaster Dynamix creates and sells model roller coasters. The two companies joined forces to design a roller coaster kit that would be compatible with LEGOs. When the relationship soured and Coaster independently launched a LEGO compatible coaster, Brickstructures sued, claiming that Coaster breached the agreement and fiduciary duties and falsely advertised in violation of the Lanham Act. Coaster moved to dismiss for improper venue due to the agreement provision that made arbitration the exclusive forum for claims. Brickstructures's attorneys sent them a letter demanding that they withdraw this argument. Coaster did, clearly informing the court that it withdrew its arbitration-based venue argument. Coaster later put the arbitration issue back on the table when it moved to compel arbitration. The court declined the motion, finding that Coaster waived its right to arbitration by withdrawing its first demand. Coaster appealed.

The United States Court of Appeals for the Seventh Circuit affirmed. While federal law favors arbitration, a waiver can be expressed or implied through action. Coaster clearly waived its right to arbitrate. The company expressly invoked the agreement's arbitration provision and urged dismissal of Brickstructure's suit because arbitration was the exclusive venue. It then withdrew this argument – a litigation choice inconsistent with the right to arbitrate. "Having put the arbitration card on the table and then taken it back, Coaster was not permitted to play that card again later."

- **LRRA PREEMPTED WASHINGTON'S ANTI-ARBITRATION STATUTE**

  Allied Professionals Insurance Company v. Anglesey, et al.
  2020 WL 1179772
  United States Court of Appeals, Ninth Circuit
  March 12, 2020

  The Product Liability Risk Retention Act (LRRA) was enacted to address a crisis in insurance markets during which businesses were unable to obtain product liability coverage. The act supported the formation of risk retention groups, which assume and spread all or any portion of the liability exposure of group members. Risk retention group APIC brought an action against an insured chiropractor, his patient, and the patient's spouse to compel arbitration of their claims against APIC. The court dismissed for lack of standing and the Court of Appeals reversed and remanded. On remand, the court granted APIC's motion to compel arbitration and certified an interlocutory question of law: whether the LRRA preempts the Wash. Rev. Code §48.18.200(1)(b), which prohibits binding arbitration agreements in insurance contracts.

  The United States Court of Appeals for the Ninth Circuit affirmed and remanded. The LRRA was not reverse preempted by the McCarran-Ferguson Act, which protects the state regulation of insurance. This Court has repeatedly held that the LRRA is an exception to the McCarran-Ferguson Act's preference for state regulation of insurance. The Court dispensed with defendants' assertion that the LRRA was designed not to preempt all state laws – including those like the Washington anti-arbitration statute. Washington's anti-arbitration statute offended the LRRA's preemption language and did not fall into any of LRRA's exceptions.

California

- **PROCEDURAL PROVISIONS OF FAA INCORPORATED INTO REAL ESTATE AGREEMENT**

  Victrola 89, LLC v. Jaman Properties 8 LLC et al.
  2020 WL 1163448
  Court of Appeal, Second District, Division 4, California
  March 11, 2020

  Victrola purchased a house from Jaman Properties and later sued Jaman and others (including JP and Manheim) for allegedly undisclosed and unrepaired defects. Jaman moved to compel arbitration under the FAA. The court denied the motion, finding that the procedural provisions of the California Arbitration Act (CAA), rather than the FAA, applied. Under CAA §1281.2, a court may refuse to compel arbitration if a party to the arbitration agreement is also a party to a

pending court action with a third party. Both Victrola and Jaman were parties to a pending court action with third-party defendants not required to arbitrate. Jaman appealed.

The Court of Appeal, Second District, Division 4, California, vacated and remanded. The agreement provided that "enforcement of this agreement to arbitrate shall be governed by the FAA." Based on previous cases finding that when an arbitration agreement provides for enforcement governed by California law, the CAA governs a party's motion to compel arbitration, it followed that when an arbitration agreement provided that enforcement would be governed by the FAA, the FAA governed. The parties' incorporation of the FAA prevented Victrola from using state law as an escape hatch. The agreement's numerous references to California law failed to override the agreement's explicit provision that enforcement of the Agreement was to be governed by the FAA. Victrola's argument that JP and Manheim did not have standing to enforce the arbitration provision of the agreement – because Victrola did not agree to arbitrate with either of them – was unavailing. Victrola named JP and Manheim in seven of its nine causes of action, all of which were intimately founded in and intertwined with the Agreement. The Agreement's arbitration clause encompassed all of Victrola's claims against Jaman. Victrola argued that Jaman should be estopped from asserting that the FAA applied because they successfully argued that the lower court should stay the litigation until the arbitration was complete. The Court thus vacated the trial court's order, with instructions to determine whether the defendants were prejudicially estopped from claiming that the FAA's procedural provisions applied.

- **ARBITRATION AGREEMENT WAS UNCONSCIONABLE AND COULD NOT BE SEVERED**

  Lange v. Monster Energy Company
  2020 WL 1180470
  Court of Appeal, Second District, Division 1, California
  March 12, 2020

  When Gerald Lange was hired as a Monster Ambassador in 2006, he signed an employment agreement with an arbitration clause that included a punitive damages and a jury trial waiver, among other things. After Monster terminated Lange, Lange sued Monster for disability discrimination, failure to provide accommodations, and wrongful termination. Monster moved to compel arbitration. The court denied the motion, concluding that the arbitration agreement was unconscionable and severance was not appropriate. Monster appealed.

  The Court of Appeal, Second District, Division 1, California, affirmed. The Court agreed with the trial court that the agreement represented a low level of procedural unconscionability because it was an adhesion contract. The Court then looked to the two punitive damages waivers in the contract and found them substantively unconscionable: the first provided that the arbitrator "shall have no authority to award punitive damages…for the purposes of imposing a penalty" and the second provided that the employee and the company "waive any claims for punitive or exemplary damages or for any other amounts awarded for the purposes of imposing a penalty." The Court also found substantively unconscionable the waiver of a bond and waiver of the requirement that a party show irreparable harm, which essentially granted Monster pre-dispute relief from having to establish all of the essential elements for the issuance of an injunction. The jury trial waiver, in the context of the language "in the event that any controversy or claim is determined in a court of law" constituted an unconscionable predispute jury trial waiver. The trial court appeared to base its severability ruling on two grounds: that there was more than a single unconscionability term in the arbitration agreement AND that one of those terms so permeated the agreement with unconscionability that the trial court could discern no reasonable means of severance that would remedy the unconscionability. The Court agreed with Monster that the trial court relied on an erroneous understanding of applicable law regarding the number of unconscionable provisions that may render an agreement irreparable by severance. Because Monster made no argument about the alternative ground, the Court could not conclude that the trial court abused its discretion, agreeing with the lower court that the agreement was permeated with too high a degree of unconscionability for severance to rehabilitate.

Georgia

- **MOTHER HAD NO AUTHORITY TO SIGN ARBITRATION AGREEMENT FOR SON**

  Lynn v. Lowndes County Health Services, LLC
  2020 WL 1129669
  Court of Appeals of Georgia
  March 9, 2020

  Elnora Lynn's son, Thomas, was born with Down syndrome and was only able to communicate by facial expressions and vocalizations. When Elnora moved Thomas to the Parkwood Development Center, she signed an arbitration agreement as Thomas' representative. Thomas' health deteriorated while at Parkwood and he later died. Elnora sued the facility (Lowndes County Health Services) for negligence and violations of the Bill of Rights for Residents of Long-Term Care Facilities. When Lowndes County moved to compel arbitration, Elnora challenged the motion, asserting that she had no authority to sign the agreement for Thomas. The court granted the motion and the arbitration panel awarded Elnora $125K in compensatory damages. Elnora moved to confirm the award and to tax costs against Lowndes County. The court confirmed the award and denied the motion to tax costs. Elnora appealed.

  The Court of Appeals of Georgia reversed and remanded. Though Elnora prevailed in the arbitration, the Court considered her appeal because she attacked the subject matter jurisdiction of the arbitrator. There was no evidence in the record that Elnora had actual or apparent authority to sign the arbitration agreement for Thomas. She had no power of attorney or any other document that authorized her to sign the arbitration agreement or take action on Thomas' behalf, something attested to by the admissions director of the facility in an affidavit. There was no evidence of words or conduct by Thomas which could have caused Lowndes County to believe that Thomas consented to Elnora signing the agreement. The Court rejected the argument that even if Elnora lacked authority to sign the agreement for Thomas, the agreement was ratified upon her appointment as the administratrix of Thomas' estate. Ratification occurs when a principal knows of an agent's unauthorized act and, with full knowledge of the facts, accepts and retains the benefits of the act. That did not happen here. There was no evidence that Thomas had any knowledge at any time of the arbitration agreement or that Elnora had signed the agreement on his behalf. Also, since Thomas' death, Elnora consistently maintained that she did not have authority to sign the agreement and opposed arbitration. This defeated Lowndes County's argument that she should be judicially estopped because she relied on inconsistent positions. The Court also rejected the argument that the agreement should be enforced under the third party beneficiary doctrine. Elnora disputed any benefits and did not seek to enforce the agreement.

- **PETITION DISMISSAL APPROPRIATE BUT COURT LACKED JURISDICTION TO ADOPT FINAL ARBITRATION AWARD AS ITS OWN JUDGMENT**

  Ultra Group of Companies, Inc. v. Inam International, Inc. et al.
  2020 WL 1149635
  Court of Appeals of Georgia
  March 10, 2020

  Coin operated amusement machine (COAM) operator, Ultra, disputed with Inam Group and others, including the Georgia Lottery Corporation (GLC). Disputes among COAM operators are governed by the statutory framework of the GLC, which provides for arbitration before a hearing officer or an approved arbitration service. Unhappy with the arbitration results, Ultra appealed to GLC's CEO pursuant to GLC Rules and Regulations. The CEO took no action and Ultra filed for a petition for certiorari in Superior Court. GLC failed to file an answer within 30 days of receipt of the petition, as required by the Georgia Code. The court granted a motion to dismiss, finding that it was Ultra's responsibility to compel an answer from GLC or request additional time, which it did not. The court entered judgment in favor of Inam, as set forth in the arbitration award. Ultra appealed.

  The Court of Appeals of Georgia affirmed in part and reversed in part. The burden was on Ultra to see that an answer to its petition was filed in a timely manner. Because it did not do so, dismissal of the petition was the proper remedy. The trial court erred, however, when it entered

judgment on the merits. The trial court's dismissal for GLC's failure to file an answer was a dismissal on procedural grounds, not a dismissal in the sense that it overruled the petition. When a superior court dismisses a petition on procedural grounds, rather than overrules it, it is without jurisdiction to enter a judgment on the merits.

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

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