September 19, 2018

ADR Case Update 2018 - 18

Federal Circuit Courts

ARBITRATOR DID NOT EXCEED POWERS WHEN DECIDED QUESTION OF ARBITRABILITY OF CLASS AND COLLECTIVE CLAIMS

Dish Network LLC and Echosphere v. Ray
2018 WL 3978537
United States Court of Appeals, Tenth Circuit
August 21, 2018

Ray was a former sales associate with Dish Network, LLC. Ray and Dish had an arbitration agreement, providing "any claim, controversy and/or dispute between [Ray and Dish], arising out of and/or in any way related to Employee's application for employment, employment and/or termination of employment…shall be resolved by arbitration." The Agreement provided for Arbitration with AAA in accordance with the AAA National Rules for the Resolution of Employment Disputes. Ray filed a putative collective and class action with AAA, alleging that Dish violated the Fair Labor Standards Act, Colorado's Wage Claim act, and the Colorado Minimum Wage Act, and breached the contract. The arbitrator concluded the Agreement permitted collective action covering the FLSA and state law claims. Dish's petition to vacate the award was denied. Dish appealed, asserting that the arbitrator exceeded his powers in determining the gateway issue of jurisdiction over the arbitrability of class and collective claims and manifestly disregarded the law.

The United States Court of Appeals for the Tenth Circuit affirmed. The question of whether parties have submitted a dispute to arbitration is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. In this case, the parties clearly and unmistakably evidenced their intent to delegate questions of arbitrability to the arbitrator. The language of the agreement provided that any claim arising out of or in any way related to employment shall be resolved by arbitration. The Agreement incorporated AAA Rules, Rule 6(a) of which provides that the arbitrator "shall have the power to rule on his or her own jurisdiction." The broad language of the Agreement and incorporation of AAA Rules clearly and unmistakably demonstrated that the parties intended the arbitrator to decide all questions of arbitrability. Dish contended that even if the arbitrator had the authority to determine whether the Agreement permitted classwide arbitration, the award should be vacated because the arbitrator manifestly disregarded the law or impermissibly based his decision on public policy. An arbitral decision even arguably construing or applying the contract must stand. Here, the arbitrator spent ten pages laboring over the issues, pointing out the exceptions to broad descriptions of arbitral matters, considering the three factors weighing in favor of Dish's argument. The decision reflected that the arbitrator interpreted the contract – he considered it

when deciding whether it reflected an agreement to permit class proceedings. He did not exceed his powers.

NON-SIGNATORY NOT BOUND TO ARBITRATE

Outokumpu v. GE Energy Power Conversion
2018 WL 4122807
United States Court of Appeals, Eleventh Circuit
August 30, 2018

ThyssenKrupp Stainless, the predecessor to Outokumpu, contracted with general contractor Fives to provide three cold rolling mills. Each contract contained an arbitration clause requiring that arbitration take place in Germany, in accordance with the Rules of Arbitration of the International Chamber of Commerce. The contract broadly defined the general contractor to include all subcontractors that Five might engage. Five engaged Defendant GE Energy Power Conversion to build the motors for the mills. The motors failed and Outokumpu brought suit against GE Energy in a state court in Alabama. GE removed the action under 9USC§205. Outokumpu moved to remand and GE moved to dismiss and compel arbitration. The court denied the motion to remand and granted the motion to dismiss and compel. Outokumpu appealed.

The United States Court of Appeals for the Eleventh Circuit affirmed in part, reversed in part, and remanded. Removal of the case was proper. In amending the FAA in 1970 to incorporate the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention), Congress included broad grounds for removal: "where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." On this matter of first impression, the Court held that the term "relates to" only required that the arbitration agreement be sufficiently related to the dispute such that it conceivably affected the outcome of the case. Outokumpu's claims against GE related to an arbitration agreement under the Convention, as required for removal. The motion to compel should not be granted, however, because there was no agreement to arbitrate between Outokumpu and GE. Under the Convention, a party may compel arbitration if: there is an agreement in writing within the meaning of the Convention; the agreement provides for arbitration in the territory of a signatory of the Convention; the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and a party to the agreement is not an American citizen, or that the commercial relationship had some reasonable relation with one or more foreign states. There was no agreement in writing between Outokumpu and GE Energy. GE Energy, a stranger to the contracts at the time they were signed, was at most a potential subcontractor. GE was not a signatory. The Court held that to compel arbitration, the Convention required that the arbitration agreement be signed by the parties before the Court or their privities. The fact that non-signatory GE moved to enforce the arbitration provision did not alter the analysis. Private parties cannot contract around the Convention's requirement that the parties actually sign an agreement to arbitrate their disputes in order to compel arbitration.

California

ARBITRATOR DID NOT EXCEED POWERS BY GRANTING SUMMARY JUDGMENT

Branches Neighborhood Corporation v. CalAtlantic Group, Inc.
2018 WL 4042726
Court of Appeal, Fourth District, Division 3, California
August 24, 2018

Branches is a community association that operates subject to the Davis-Stirling Common Interest Development Act and to its own Covenants, Conditions, and Restrictions (CC&R). Branches filed an arbitration claim against condo developer CalAtlantic for construction defects. CalAtlantic moved for summary judgment, asserting that Branches failed to comply with CC&R Section 12.4.2, which provides that the association must obtain the vote or written consent of 51% of the association's members prior to initiating a construction defect claim. Branches asserted that it held a meeting soon after serving CalAtlantic with notice, at which the membership ratified the claim. The arbitrator granted the motion for summary judgment. Branches moved to vacate the award, asserting that the arbitrator exceeded his

powers. The court confirmed the award and Branches appealed.

The Court of Appeal, Fourth District, Division 3, California affirmed. The threshold question was whether according finality to this award would be inconsistent with protecting the statutory rights of Branches. Branches asserted that Section 12.4.2 conflicted with several statutes and was unenforceable – but failed to identify an unwaivable statutory right preventing the association's CC&Rs from requiring member approval prior to bringing a claim. Branches also asserted that the award violated public policy, arguing that the state legislature had a public policy favoring ratification. The Davis-Stirling Act, however, aimed to balance an association's need to operate efficiently with the rights of its members to be informed and participate in decisions that could impact the association. There was no violation of public policy in the decision.

NON-SIGNATORY TO ARBITRATION AGREEMENT UNABLE TO ENFORCE AGREEMENT

Fuentes v. TMCSF
2018 WL 4020562
Court of Appeal, Fourth District, Division 2, California
August 23, 2018

Fuentes entered into a purchase agreement with TMCSF (Riverside/Harley Davidson) to buy a motorcycle. At the same time, he entered into a security agreement with Eaglemark Savings Bank to finance the purchase. The purchase agreement did not include an arbitration clause; the security agreement did. Fuentes sued Riverside, alleging negligence, false advertising, unfair competition, and violations of the Consumers Legal Remedies Act in connection with Riverside's advertised prices and its fees and charges. Riverside petitioned to compel arbitration based on the arbitration clause in the security agreement. The court denied the petition and Riverside appealed.

The Court of Appeal, Fourth District, Division 2, California affirmed. Riverside argued that the purchase and security agreements constituted a single contract. The contracts were made contemporaneously, but the arbitration clause clearly specified the entities to which it applied – and Riverside was not one of them. Nor was Riverside a non-party able to invoke the arbitration clause. Riverside was not an agent. Eaglemark was a subsidiary of the Harley Davidson Credit Corporation, but the Credit Corporation was not a named defendant. Riverside did not act as an agent simply because it used forms provided by Eaglemark. Even assuming Riverside was an agent, Riverside was sued in its own capacity, with alleged liability arising out of the Purchase Agreement. Riverside was also not a third-party beneficiary. A third-party beneficiary must show that the arbitration clause was made expressly for its benefit. This arbitration clause had a list of the third-party beneficiaries - and Riverside was not one of them. Finally, Riverside was not able to enforce the arbitration agreement under the doctrine of equitable estoppel. The focus was on the nature of the claims asserted. Even if a plaintiff's claims touch matters relating to the agreement, the claims would not be arbitrable unless the plaintiff relied on the agreement to establish its clause of action. Fuentes did not rely on the security agreement to establish his cause of action; equitable estoppel did not apply.

PARTIAL FINAL AWARD NOT AN AWARD UNDER CA ARBITRATION ACT

Maplebear v. Busick
2018 WL 3991259
Court of Appeal, First District, Division 2, California
August 21, 2018

Busick was a shopper and driver for Maplebear/Instacart, a same-day grocery delivery service. Per the Independent Contractor Agreement, disputes between Busick and Instacart were to be submitted to binding arbitration with JAMS. Busick filed a class action arbitration demand on behalf of herself and other Instacart shoppers and drivers, claiming that Instacart violated CA law by classifying them as independent contractors rather than employees. As required by Rule 2 of JAMS Class Action Procedures, the parties submitted to the arbitrator the threshold issue of whether the Agreement allowed Busick to seek certification of a class within the arbitration. The arbitrator issued a partial final award, determining "only that [Busick] may move for class certification as part of the mandated arbitration." It did not "address the appropriateness of such certification, nor the underlying claim that [Instacart] misclassified claimant and others similarly situated." Instacart petitioned to vacate the partial final award, arguing that the arbitrator

made legal errors in concluding that the Agreement authorized class arbitration and exceeded her authority. The court denied the petition for lack of jurisdiction. Instacart appealed.

The Court of Appeal, First District, Division 2, California affirmed. Under Section 1283.4 of the California Arbitration Act, an award "shall include a determination of all the questions submitted to the arbitrator, the decision of which is necessary to determine the controversy." The controversy that Busick placed before the arbitrator raised a host of issues beyond the question of whether the Agreement permitted classwide arbitration – none of them was addressed in the partial final award. The award said nothing about whether the people who worked for Instacart were properly characterized as independent contractors; it did not determine whether class certification was appropriate. Because the partial final award "left unanswered almost every question raised in Busick's arbitration demand" the ruling was not an award under section 1283.4 and the trial court correctly dismissed the petition to vacate.

ARBITRATION CLAUSE VIOLATED PUBLIC POLICY

Sheppard Mullin v. J-M Manufacturing Co
2018 WL 4137013
Supreme Court of California
August 30, 2018

Sheppard Mullin represented J-M Manufacturing in a federal qui tam action brought on behalf of a number of public entities. During the same time period, Sheppard represented one of the public entities, South Tahoe, in a matter unrelated to the qui tam suit. Both J-M and South Tahoe had engagement agreements with Sheppard that purported to waive any conflicts of interest, current or future. Sheppard did not tell either client about the other. South Tahoe discovered the conflict of interest and moved to disqualify Sheppard in the qui tam action. The trial court granted the motion, finding the conflict waiver provision invalid. J-M did not pay the fees owed and Sheppard sued. J-M cross-complained and Sheppard petitioned for arbitration. J-M asserted that the agreement containing the arbitration provision was illegal and void as against public policy because of the conflict of interest between Sheppard's clients. The trial court granted the petition and a three-arbitrator panel found that the ethical violation did not require automatic disgorgement or forfeiture of the fees. The panel awarded Sheppard $1.1 million in unpaid fees. The Court of Appeal reversed, finding that the matter should not have been arbitrated because the firm's undisclosed conflict of interest violated rule 3-310(c)(3) of the Rules of Professional Conduct, rendering the agreement, including the arbitration clause, unenforceable. The Court of Appeal held that the conflict disentitled the firm from receiving compensation for its work. Sheppard appealed.

The Supreme Court of California affirmed, reversed, and remanded. Sheppard argued that because the Rules were not promulgated by the Legislature, a Rules violation afforded no ground for vacating an award. Having previously held that a contract or transaction may be found contrary to public policy even if the Legislature had not spoken to the issue, the Court held here: Where California law governs, a court may invalidate an arbitration award on the ground that the contract containing the parties' arbitration agreement violated the public policy of the state as expressed in the Rules of Professional Conduct.

In this case, Sheppard asked J-M to waive current conflicts as well as future conflicts, but failed to disclose to J-M that a current conflict actually existed, even though it was aware of the conflict. Because this was not disclosed, the waiver that J-M signed was inadequate and insufficient to permit Sheppard to represent J-M notwithstanding the existing conflict. Sheppard argued that the violation did not invalidate the entire agreement because the agreement encompassed other matters as well. But the object of the agreement was representation in the qui tam action. Violation of a Rule of Professional Conduct in the formation of a contract could render the contract unenforceable, which happened here when Sheppard agreed to represent J-M in the qui tam action, while also representing South Tahoe, without obtaining informed consent. The undisclosed conflict rendered the engagement agreement unenforceable in its entirety and Sheppard was not entitled to the benefit of the arbitrators' decision awarding it unpaid contractual fees.

On the question of whether Sheppard was entitled to receive any compensation, the Court concluded that California law did not establish a bright line rule barring all compensation for services performed subject to an improperly waived conflict of interest. When a law firm seeks fees in quantum meruit that it is unable to recover under the contract because it breached an ethical duty, the burden of proof lies with the firm. Whether it meets that burden is a question for the trial court. The Court reversed the judgment of the Court of Appeal insofar as it ordered disgorgement of all fees collected, and remanded for further proceedings.

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

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