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ADR Case Update 2018 - 23

## Federal Circuit Courts

- **EXCEPTION TO FUNCTUS OFFICIO**

General Re Life Corporation v. Lincoln National Life Insurance Company  
2018 WL 6186078  
United States Court of Appeals, Second Circuit  
November 28, 2018

The reinsurance agreement between General Re Life Insurance Corporation (General) and Lincoln National Life Insurance Company (Lincoln) allowed Lincoln to recapture its life insurance policies rather than pay increased premiums proposed by General. The parties submitted a proposed increase to an arbitration panel. The panel found that General was entitled to an increase in premiums. If Lincoln chose to recapture, the panel instructed the parties to work together to determine monies owed, directing that all premium and claim transactions paid by one party to the other following recapture should be unwound. When Lincoln invoked its right to recapture, General and Lincoln disagreed on the unwinding language in the Final Award, particularly with regard to unearned premiums. Lincoln asked the arbitration panel to resolve the disagreement. The panel issued a Clarification, stating that: the Award did not change the terms of the Agreement and General should retain premiums prior to recapture but was liable for claims for covered deaths. General petitioned to confirm the original award and Lincoln petitioned to confirm the Clarification. The Clarification was confirmed and General appealed.

The United States Court of Appeals for the Second Circuit affirmed. General argued that Lincoln waived its right to raise the issue of unearned premiums by not raising it before the arbitration panel. The Court found that Lincoln sufficiently raised the issue to preserve it. General also argued that the panel exceeded its powers in issuing the Clarification, arguing that after issuing the award, the panel was Functus Officio - the panel's authority over the issues had ended and the panel had no further authority to redetermine those issues. Joining other circuits, the Court recognized an exception to functus officio where an award fails to address a contingency that later emerges or when the award is susceptible to more than one interpretation. For the exception to apply: the final award must be ambiguous; the clarification must merely clarify the award rather than substantively modify it; and the clarification must comport with the parties'

intent as set forth in the agreement that gave rise to arbitration. In this case, each party had a different interpretation of what the language meant. The Clarification did not change the remedy provided for in the Final Award. General's argument that the arbitrator's reasoning was flawed was unavailing.

- **SUBSTANTIAL ENGAGEMENT IN LITIGATION WAIVES RIGHT TO ARBITRATE**

*Forby v. One Technologies*

2018 WL 6191349

United States Court of Appeals, Fifth Circuit

November 28, 2018

Forby brought claims against One Tech for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and unjust enrichment. One Tech moved to remove, arguing that the claims were baseless and no class should be certified. One Tech then moved to dismiss and, in the alternative, to transfer the case for forum non conveniens, arguing that Forby's claims were subject to arbitration in Texas and that an Illinois District Court could not compel arbitration outside its district. After the case was transferred to the Northern District of Texas, One Tech moved to dismiss, with no reference to arbitration. The court denied the motion with respect to the ICFA claim and granted the motion as to unjust enrichment. Four days after receiving Forby's requests for production, One Tech moved to compel arbitration. The court granted the motion and dismissed the case with prejudice, finding that One Tech had substantially invoked the judicial process but that Forby had not suffered prejudice. Forby appealed.

The United States Court of Appeals for the Fifth Circuit reversed, vacated, and remanded. The right to arbitrate is subject to waiver if a party substantially invokes the judicial process and thereby causes detriment or prejudice to the other party. One Tech substantially invoked the judicial process. It presented the right to arbitrate to justify a transfer from Illinois to Texas, but did not move to compel arbitration in the alternative to its motion to dismiss, demonstrating desire to litigate rather than arbitrate. One Tech waited thirteen months before moving to compel arbitration. The court erred in failing to find prejudice to Forby's legal position. When a party will have to litigate in the arbitration forum an issue already decided by the district court in its favor, then the party is prejudiced. Here, if the case were to proceed to arbitration, Forby would have to relitigate whether One Tech's website was deceptive in front of an arbitrator after One Tech already tested its arguments (unsuccessfully) with a district court judge.

- **AT-WILL EMPLOYEE ARBITRATION AGREEMENT VALID AND ENFORCEABLE**

*Britto v. Prospect Chartercare LLC*

2018 WL 6257007

United States Court of Appeals, First Circuit

November 30, 2018

Britto was an at-will employee with Prospect Chartercare. His offer of employment, which included an arbitration agreement, provided that Prospect could change the terms of his employment at any time. When Britto was fired in January 2015, he sued Prospect for race and age discrimination under Title VII, the Age Discrimination in Employment Act (ADEA), the Rhode Island Fair Employment Practices Act, and the Rhode Island Civil Rights Act. Prospect moved to dismiss and compel arbitration. Britto contended that the agreement to arbitrate was illusory, unconscionable, and unenforceable for lack of consideration. The court held that a valid and enforceable agreement existed between the parties, granted the motion to compel, and dismissed Britto's suit without prejudice. Britto appealed.

The United States Court of Appeals for the First Circuit affirmed. Britto argued that his at-will employment agreement was illusory and unenforceable for lack of consideration due to Prospect's unfettered discretion to fire him at any time. The Court disagreed. Relying on state law contract principles (Rhode Island), the Court pointed to the decision in *Oken v. Nat'l Chain Co.*, which held that "the continuation of [an employee's] employment was sufficient consideration" to make the agreement enforceable. Britto also argued that the arbitration agreement was unconscionable. Under Rhode Island law, a contract is unenforceable if it is both procedurally and substantively unconscionable. Britto contested that his contract was

procedurally unconscionable because he had to immediately sign key documents at the end of a short meeting, without a lawyer, and without explanation of the significance of the documents. His failure to carry his burden of showing substantive unconscionability, however, proved “devastating” to his unconscionability claim.

- **OFFER OF CONTINUED AT-WILL EMPLOYMENT VALID CONSIDERATION FOR ARBITRATION AGREEMENT**

*Conduragis v. Prospect Chartercare LLC*  
2018 WL 6257005  
United States Court of Appeals, First Circuit  
November 30, 2018

Former employee Conduragis brought action against Prospect Chartercare for violations of the Family Medical Leave Act and the Rhode Island Parental and Family Medical Leave Act. Prospect moved to dismiss and to compel arbitration based on the parties' signed arbitration agreement. The court denied the motion, finding that the agreement failed for lack of consideration. According to the court, the parties' mutual promise to arbitrate constituted insufficient consideration because Prospect reserved the right to change the employment terms for Conduragis, including submitting disputes to arbitration, which made the agreement illusory. The Court also found that Prospect's offer to keep Conduragis as an at-will employee constituted insufficient consideration. Prospect appealed.

The United States Court of Appeals for the First Circuit reversed and remanded. The offer of continued at-will employment was valid consideration for the agreement, in keeping with a Rhode Island Supreme Court opinion in *Britto v. Prospect Chartercare*. The motion by Conduragis to supplement the record with pages from an employee handbook was denied because it made no difference to the result. Conduragis argued for the first time that the arbitration agreement was procedurally unconscionable due to circumstances surrounding the agreement's signing and requested limited discovery on the issue. The Court deemed the argument waived. Conduragis gave no legal basis for how to order discovery and did not explain how the agreement was also substantively unconscionable.

- **LOOK-THROUGH APPROACH APPLICABLE TO §10 AND §11 CLAIMS UNDER THE FAA**

*Alethia McCormack, Administrator for the Estate of Alvin Moore v. America Online*  
2018 WL 6204888  
United States Court of Appeals, Fourth Circuit  
November 29, 2018

In October 2014, the Statesboro, GA Police Department reported to AOL that it was investigating an emergency involving danger of death or physical injury and required disclosure of email records sent from Alvin Moore's address. After AOL complied, Moore complained to AOL that it had violated its privacy policy, as well as Title II of the Stored Communications Act of 1986 by providing his information without a warrant, a subpoena, or his consent. Moore complained that AOL's actions damaged him and requested a settlement of \$74,999. AOL denied Moore's claim and Moore sought and obtained arbitration pursuant to the terms of his AOL service agreement. The arbitrator denied Moore's claims and Moore filed a motion in district court, requesting that the award be vacated under §§10 and 11 of the FAA. The court dismissed the claim for lack of diversity jurisdiction because the claim did not meet the required \$75,000 threshold. Moore appealed, asserting that he had subject matter and diversity jurisdiction.

The United States Court of Appeals for the Fourth Circuit vacated and remanded. The FAA does not create federal jurisdiction for litigation of arbitration controversies, requiring instead an independent jurisdictional basis for access to federal court. Courts have split on the question of establishing subject matter jurisdiction: some take the approach that arbitration is a product of contract and should be resolved in state courts. Others focus on the nature of the underlying dispute, concluding that jurisdiction should be determined by whether the court would have jurisdiction over the dispute but for the arbitration agreement. In *Vaden*, the Supreme Court held that, in determining if there was federal-question jurisdiction over a petition to compel arbitration under §4 of the FAA, the court should look through the §4 petition to the underlying dispute and

determine whether the dispute arose under federal law. Some courts limit the look through approach to §4 petitions, holding that the §4's save for language is unique and look through should not apply to motions to confirm, modify, or vacate awards under §§9-11 of the FAA, which do not contain the save for language. Other courts reason that the difference in language is not dispositive and that the look through approach should apply to §§9-11 motions. The Court held with the latter, concluding that if the district court would have jurisdiction over a §4 petition, were one to be filed, it had jurisdiction over §10 and §11 motions, even if a §4 petition was not filed. In this case, Moore's underlying claim arose out of alleged violations of the Stored Communications Act, a federal statute. Absent the arbitration agreement, the claims could be litigated in federal court; controversies regarding the arbitration of his claim should likewise be resolved in federal court.

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

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