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ADR Case Update 2018 - 4

Federal Circuit Courts

- **PROVISION FOR DE NOVO REVIEW OF ARBITRATION AWARD UNENFORCEABLE AND MATERIAL**

Citizen Potawatomi Nation v. State of Oklahoma
2018 WL 718606
United States Court of Appeals, Tenth Circuit
February 6, 2018

Oklahoma and Citizen Potawatomi Nation (the Nation) entered into a Tribal-State gaming compact (the Compact). Part 12 of the Compact called for arbitration of disagreements arising under the Compact's provisions; it also provided that either party could bring an action against the other in federal district court for de novo review of the arbitration award. When the OK Alcohol Beverage Laws Enforcement Commission (ABLE) initiated proceedings against the Nation for selling alcohol on Sundays in violation of an OK statute, the Nation asserted that arbitration was the only way to resolve this licensing dispute. OK filed a motion to dismiss, arguing that regulatory disputes should be resolved through administrative proceedings, not arbitration. The arbitrator refused to dismiss the demand, conducted a hearing, and issued an award in favor of the Nation. The Nation moved to enforce the arbitration award and OK moved to vacate, asserting that the arbitrator exceeded his authority and that it was entitled to de novo federal court adjudication on the factual and legal issues of the arbitration. The court enforced the award and concluded that OK's argument for de novo review was foreclosed by the Supreme Court decision in *Hall Street Associates*, which provides that parties to an arbitration agreement cannot contract for any review other than the narrow review set out in §10 and §11 of the FAA. OK appealed.

The United States Court of Appeals for the Tenth Circuit remanded to the U.S. District Court to vacate the arbitration award. The Court focused on how to treat the de novo provision given the decision in *Hall*. The Nation asserted that the provision should be excised from the Compact, leaving intact the parties' binding obligation to arbitrate. OK asserted that the de novo review provision was integral to the parties' agreement to arbitrate disputes arising under the Compact and that the Court should sever the entire provision. The Court looked to the language of the agreement to decide whether the provision was a material aspect of the parties' agreement to engage in binding arbitration – and determined that it was and should be severed. First, Compact

Part 12(2), the provision establishing binding arbitration, specifically limited that requirement to the availability of binding arbitration, as set out in Compact 12(3). Second, the Compact linked the parties' waivers of sovereign immunity to the kind of judicial review available, making clear that the parties' waiver of sovereign immunity was only for the purpose of the type of de novo review contemplated in 12(3). Given the importance of immunity as an aspect of sovereignty, the purposeful waiver made clear that the availability of de novo review was a material aspect of the agreement to arbitrate.

- **LATE OPT OUT NOT PERMITTED**

Simpson, Objector-Appellant v. Trump University
2017 WL 718916
United States Court of Appeals, Ninth Circuit
February 6, 2018

Purchasers of Trump University real estate investment seminars brought a class action against Donald Trump, alleging racketeering and violations of various state unfair competition laws. The parties reached a global settlement in which Trump University agreed to pay \$21 million to class members and \$4 million to the New York Attorney General. The settlement expressly prohibited any late opt outs. In submitting her claim, Sherri Simpson affirmed that she would be bound by the judgment and could not file a separate lawsuit for the claims. A month later, she filed an objection to the settlement, asserting that she had a due process right to object. She later argued that she thought she would have a second opportunity to opt out. The court approved the settlement and refused to allow the opt out. Simpson appealed.

The United States Court of Appeals for the Tenth Circuit affirmed. The class notice did not allow a second opt out opportunity. Court precedent foreclosed Simpson's argument that even if a second opportunity was not provided for in the notice, due process required such an opportunity. The Court concluded that the court did not abuse discretion in approving the settlement, finding no evidence that the decision was "illogical, implausible, or without support." The court balanced the difficulty in proceeding to trial with a sitting President against the fairness of the settlement as a whole, which the court estimated would provide class members with almost a full recovery.

Washington State

- **ARBITRATION AGREEMENT DOES NOT ENCOMPASS STATUTORY CLAIMS**

Cox v. The Kroger Company/QFC
2018 WL 703400
Court of Appeals of Washington, Division 1
February 5, 2018

Cox filed suit against his former employer, Kroger Supermarket/Quality Food Centers (QFC), alleging that its policy of rounding hourly employees' clocked-in-time to the nearest quarter hour resulted in underpayment of wages. The court denied QFC's motion to compel arbitration and QFC appealed.

The Court of Appeals of Washington, Division 1, affirmed. At the core of the case was whether the claims were statutory, as argued by Cox, or contractual, as argued by QFC. The Court concluded that the claims were statutory. Cox's assertion that QFC used bad math to manipulate wages owed to employees equated to a statutory claim for withholding wages, and intentional manipulation of the rounding policy would run afoul of Washington's and Oregon's wage and hour statutes. The next question was whether the arbitration agreement encompassed statutory claims. An arbitration agreement does not encompass statutory claims without a clear and unmistakable waiver. A clear and unmistakable waiver can occur if the collective bargaining agreement contains a clause requiring arbitration under the agreement, coupled with a provision that the statutes that are the basis for the claims are part of the agreement. Here, the collective bargaining agreement covering Cox's employment with QFC did not identify any specific statutes

or reference statutory wage claims – it did not make it unmistakably clear that such claims would be subject to arbitration.

Georgia

- **PRIOR LITIGATION NO WAIVER OF RIGHT TO ARBITRATE RENEWAL ACTION**

SunTrust Bank v. Jedon M. Lilliston et al.
2018 WL 575997
Supreme Court of Georgia
January 29, 2018

SunTrust had two loan agreements with Lilliston, the second of which included an arbitration clause. In 2013, Lilliston sued SunTrust over interest charges for both loans; in January 2015, Lilliston voluntarily dismissed the action. In June of 2015, Lilliston filed a renewal action and SunTrust moved to compel arbitration. The trial court denied the motion, concluding that SunTrust waived its right to arbitrate by acting inconsistently with arbitration when it litigated the original action for a year and a half. The Court of Appeals affirmed and SunTrust petitioned for certiorari review, which was granted.

The Supreme Court of Georgia found that the Court of Appeals erred in affirming the trial court's determination. Claims and defenses in a renewal action are considered independently of those in an original action. Here, the Court of Appeals reasoned that SunTrust's demand for arbitration in the renewal action had to be considered in the context of SunTrust's conduct in the original litigation. This was inconsistent with case law. The focus of the analysis should have been on conduct in the renewal action.

- **DISPUTE ABOUT ENFORCEABILITY OF ARBITRATION AGREEMENT PROPERLY SUBMITTED TO ARBITRATION**

Brown et al. v. RAC Acceptance East, LLC
2018 WL 575983
Supreme Court of Georgia
January 29, 2018

In 2012, Brown rented a bedroom set from RAC; she signed a rental purchase agreement that contained an arbitration clause. When Brown failed to make payments on the furniture or return the furniture, RAC submitted an arrest warrant application. Brown did not appear at the hearing on the application and the magistrate issued the warrant for her arrest for theft by conversion. Brown returned the furniture but the warrant remained and she was later arrested. She then sued RAC for malicious prosecution. RAC filed a motion to stay and compel arbitration. Brown contended that RAC waived its right to arbitrate when it obtained the arrest warrant. The trial court disagreed, granting the motion to compel. Brown moved unsuccessfully for reconsideration and for certificate of immediate review. The case proceeded to arbitration, where the arbitrator ruled that RAC did not waive arbitration and found for RAC on each of the tort claims. RAC's motion to confirm the award was granted and Brown appealed. The Court of Appeals affirmed and Brown petitioned for certiorari review, which was granted.

The Supreme Court of Georgia affirmed the judgment of the Court of Appeals. Brown's assertion that RAC had waived its right to arbitrate spoke to the enforceability of the agreement. The Court found this question to be properly submitted to arbitration. The broad delegation provision in the agreement provided clear and unmistakable evidence that responsibility about resolving disputes regarding enforceability were for the arbitrator – not the court – to decide. Brown contended that RAC's conduct-based-waiver of the right to enforce the arbitration agreement rendered the delegation provision unenforceable as well. The Court disagreed, citing Rent-A-Center, which provides that a delegation provision like that in Brown's agreement is simply an additional agreement that the party seeking arbitration is asking the court to enforce. Brown did not make a

waiver-by-conduct argument particular to the delegation provision. As for the arbitrator's award, Brown did not allege the extreme arbitral conduct necessary to vacate the award.

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