March 14, 2018

ADR Case Update 2018 - 6

Federal Circuit Courts

- **ILLUSORY ARBITRATION MECHANISM UNENFORCEABLE**

  MacDonald v. CashCall, Inc. et al.
  2018 WL 1056942
  United States Court of Appeals, Third Circuit
  February 27, 2018

  MacDonald secured a loan from Western Sky – later sold to CashCall - in which he was charged a 116.73% interest rate over a seven-year term. The agreement required that all disputes be resolved through arbitration conducted by the Cheyenne River Sioux Tribe (CRST). The agreement also included a delegation clause, directing all questions about the agreement's enforceability to the arbitrator, and a choice of arbitrator clause giving parties the right to select AAA, JAMS, or another agreed upon arbitration organization to administer the arbitration. MacDonald sued CashCall, alleging violations of RICO and state laws. The court denied CashCall's motion to compel arbitration and CashCall appealed.

  The United States Court of Appeals for the Third Circuit affirmed, finding the arbitration mechanisms outlined in the agreement to be illusory, rendering the delegation clause and the arbitration provisions unenforceable. The Agreement's provision required the CRST's involvement in arbitration – but such a tribal arbitral forum was nonexistent, a point uncontested by CashCall. CashCall asserted that a forum was available through the Choice of Arbitrator provision, permitting arbitration before AAA or JAMS without reliance on a CRST representative or CRST consumer dispute rules. The language in the provision, however, allowed AAA or JAMS to administer the arbitration but not to decide the merits of the case. The invalid provision could not be severed from the agreement because it was integral to the agreement and severing it would "amount to an impermissible rewriting of the contract."

- **NO POWER TO COMPEL THIRD PARTY OR FOR CLAIM OUTSIDE SCOPE OF AGREEMENT**

  Cavlovic v. JC Penney
  2018 WL 1181237

United States Court of Appeals, Tenth Circuit
March 7, 2018

Cavlovic used a JC Penney (JCP) branded credit card to purchase gold earrings at JCP for $171, marked down from an original price of $524. When Cavlovic realized that the original price was, in fact, $225, she sued JCP, alleging that the store's advertisements about original and sale prices were fraudulent and deceptive and violated KS state law. The case was removed to federal court and JCP moved to compel arbitration, based on the credit card agreement between Cavlovic and GE Money Bank for the JCP-branded credit card and a 2014 JCP Rewards Program agreement between Cavlovic and JCP. The motion was denied and JCP filed a motion for review, which was also denied. JCP appealed.

The United States Court of Appeals for the Tenth Circuit affirmed, finding that JCP lacked the power to compel arbitration under the 2012 credit card agreement or the Rewards Program agreement. The 2012 Credit Card Agreement between Cavlovic and GE Capital Retail Bank provided "if either you or we make a demand for arbitration, you and we must arbitrate…" JCP was not a party to the agreement and there was no indication that the parties intended to provide JCP a third party right to demand arbitration. JCP was a party to the Rewards Program agreement but Cavlovic's allegations were outside the scope of the agreement. JCP argued that the broad Rewards Program agreement language "covering all claims arising from or relating to the Rewards Program" encompassed this claim. The Court disagreed, finding that the parties did not intend to have facts like those in Cavlovic's complaint fall within the Program's arbitration provision.

- **CLEAR AND UNMISTAKABLE INTENT TO ARBITRATE AVAILABILITY OF CLASS ARBITRATION**

Wells Fargo Advisors, LLC v. Sappington et al.
2018 WL 1177230
United States Court of Appeals, Second Circuit
March 7, 2018

Two groups of former bank employees filed putative class action proceedings (the Tucker Action and the Sappington Action) against Wells Fargo (WF), seeking unpaid overtime under FLSA and state wage and hour laws. In each action, WF petitioned to compel bilateral arbitration. In separate judgments, the court denied the two motions, holding that the arbitrator, rather than the court, must decide the availability of class arbitration. WF appealed.

Hearing the appeals in tandem, the United States Court of Appeals for the Second Circuit affirmed. Guided by the presumption that gateway questions of arbitrability are for a court to decide, the Court assumed without deciding that whether an arbitration clause authorizes class arbitration is one such gateway question. In both the Tucker and Sappington Actions, the Court found clear and unmistakable evidence in the arbitration agreements that the parties intended the question of arbitrability to be decided by the arbitrator. The Tucker Clause provided that any controversy or dispute arising from the employment relationship was subject to arbitration. It foreclosed certain proceedings from arbitration, but did not foreclose the question of whether an arbitrator could decide if class claims are arbitrable. It also incorporated rules – the May 1993 Securities Arbitration Rules of the AAA – that empowered the arbitrator to decide issues of arbitrability, further "clear and unmistakable evidence of the parties' intent to delegate such issues to the arbitrator." The Sappington Clause committed to arbitration any action instituted as a result of any controversy, broad language reflecting a broad grant of power to the arbitrator. It also included a delegation provision giving the arbitrator the authority to resolve disputes related to enforceability, validity, or applicability, evidence that the parties intended to arbitrate arbitrability.

- **CORE BANKRUPTCY PROCEEDING NON-ARBITRABLE**

Anderson v. Credit One Bank
2018 WL 1177227
United States Court of Appeals, Second Circuit
March 7, 2018

Anderson was a credit card holder with a predecessor in interest of Credit One. In 2012, Credit One "charged off" Anderson's delinquent debt, changing it to a loss in its accounting books and reporting the change and the unpaid debt to credit reporting agencies. In 2014, Anderson filed for bankruptcy and was issued a discharge order, releasing him from all debt. Credit One refused to remove the charge off notation on Anderson's credit report. Anderson filed a putative class action, alleging that Credit One's action was an effort to get Anderson to pay the debt, which violated Section 524(a)(2) of the Bankruptcy Code providing that a bankruptcy discharge "operates as an injunction against the commencement or continuation of an action." Credit One moved to compel arbitration, pursuant to an arbitration clause in Anderson's cardholder agreement with the bank. The bankruptcy court denied the motion, holding that the claim was non-arbitrable because it was a core bankruptcy proceeding that went to the heart of the fresh start guaranteed to debtors under the Bankruptcy Code. The district court affirmed and Credit One appealed.

The United States Court of Appeals for the Second Circuit affirmed. The specific question in this case was whether arbitration could be compelled in this bankruptcy proceeding. The parties agreed that Anderson's claim was a core proceeding involving pressing bankruptcy concerns, which required the bankruptcy court to engage in a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy when weighing the motion to compel arbitration. The Court agreed that the arbitration of a claim based on a violation of Section 524(a)(2) would jeopardize a core bankruptcy proceeding. The discharge injunction is central to the bankruptcy court's ability to provide debtors a fresh start and protecting that injunction is required to ensure this goal. The power of the bankruptcy court to enforce its own injunctions is central to the structure of the Bankruptcy Code. In denying Credit One's motion to compel arbitration, the bankruptcy court properly considered the conflicting policies of the FAA and the Bankruptcy Code and did not abuse its discretion.

- **UBER DID NOT WAIVE RIGHT TO ARBITRATE**

Meyer v. Kalanick
2018 WL 1166641
United States District Court, S.D. New York
March 5, 2018

Uber user Meyer filed a putative class action lawsuit against Uber CEO Kalanick, alleging illegal price-fixing that restricted competition to the detriment of riders such as Meyer. Kalanick moved to dismiss, asserting that Meyer was barred from bringing a class action lawsuit because of the waiver provision in his User Agreement, which should apply even though Kalanick was not then seeking to compel arbitration. The Court denied the motion and the subsequent motion for reconsideration, finding "since no motion to compel arbitration has been made…plaintiff…has not, by agreeing to the Dispute Resolution paragraph, waived any right to proceed via a class action lawsuit." Kalanick's motion to join Uber as a party was granted and Uber moved to compel arbitration. This Court denied the motion, finding that Meyer had not agreed to arbitrate as he had no conspicuous notice of Uber's User Agreement covering arbitration and did not evince "unambiguous assent." Uber appealed and the Second Circuit Court of Appeals remanded, finding that Meyer agreed to arbitrate and instructing this Court to consider whether the defendants "nonetheless" waived their right to arbitrate.

The United States District Court, S.D. New York granted the defendants' renewed motion to compel arbitration and Kalanick's motion for judgment on the pleading. Meyer argued that while registering for Uber, a pop-up keypad obscured the Terms of Service and prevented him from "even inquiry notice" of the requirement that he submit the instant action to arbitration. The Second Circuit had already concluded that the notice provided by Uber was sufficient as a matter of law. This "new" evidence offered by Meyer was discoverable earlier; he waived the issue by failing to raise it prior to appeal. On the question of whether the defendants waived the right to invoke arbitration after the Court ruled on Kalanick's motion to dismiss, the Court found that Uber's right to compel arbitration remained intact. Meyer's arguments were premised on action taken by Kalanick before Uber was a party to the case and Uber moved to compel arbitration as soon as it was joined.

California

- **AGENT DID NOT CONSENT TO ARBITRATE PERSONAL CLAIMS**

  Alex Avila v. Southern California Specialty Care
  2018 WL 1044668
  Court of Appeal, Fourth District, Division 3, California
  February 26, 2018

  Alex Avila (Alex) had power of attorney for his father, Antonio. When Antonio was admitted to Southern California Specialty Care (Kindred), Alex signed a Voluntary ADR Agreement on Antonio's behalf. The signature page provided that by signing, the signatory "is agreeing to have any issue of medical malpractice decided by neutral arbitration and… giving up your right to a jury or court trial." Antonio died five days later due to Kindred's neglect and Alex sued Kindred for negligence, elder abuse, and wrongful death. The court denied Kindred's motion to compel arbitration and Kindred appealed.

  The Court of Appeal, Fourth District, Division 3, California affirmed. Whether Alex could be bound by the agreement hinged on whether the case was about negligence - per section 1295 of the CA Medical Injury Compensation Reform Act (MICRA) - or elder abuse under the Elder Abuse and Dependent Adult Civil Protection Act (the Act). Case law interpreting section 1295 of MICRA carves out an exception to the general rule that arbitration agreements must be the subject of consent rather than compulsion. Given that Avila chose to plead the case under the Act, the Court found the case to be outside the ambit of section 1295 – and not subject to the exception. Turning to whether Alex agreed to arbitrate, the Court found no evidence that when Alex signed the agreement as his father's agent, he intended to waive his right to jury trial for any personal claims.

Pennsylvania

- **PANEL EXCEEDED POWERS IN COMPELLING NON-PARTY TO ARBITRATE**

  Civan (Ethan and Elana) v. Windermere Farms, Inc. and Gambone Brothers
  2018 WL 1061599
  Superior Court of Pennsylvania
  February 27, 2018

  The Civans sued Windermere and Gambone for faulty construction of a home constructed by Windermere. Windermere and the Civans had an agreement of sale with an arbitration clause. The Civans moved to compel arbitration against Windermere and Gambone, arguing that although Gambone wasn't a party to the agreement of sale, it was a third-party beneficiary subject to the arbitration clause. The trial court granted the motion, saying that "the parties shall enter private arbitration in accordance with the parties' agreement." The order did not specify which parties. The Civans and Windermere proceeded to arbitration but Gambone refused to participate. The arbitrators "after finding the panel had jurisdiction over Gambone", entered an award against Windermere and Gambone. Gambone filed a petition to vacate and the Civans filed a motion to confirm the award. The trial court granted the motion to vacate and denied the motion to confirm; the Civans appealed.

  The Superior Court of Pennsylvania affirmed. The trial court's order granting the motion to compel stated "the parties shall enter…arbitration…in accordance with the parties' agreement." "Logic and grammar" dictated that "the parties" referred to the same individuals in both instances: Civans and Windermere. The order did not mandate that Gambone, a non-party to the agreement of sale, submit to arbitration and the Civans did not convince the Court that it should. The Civans argued that the trial court impermissibly substituted its judgment for that of the arbitration panel regarding whether the panel had jurisdiction over Gambone; however, it is well settled that arbitrators do not have the power to decide jurisdictional issues such as this. The

arbitration panel exceeded its power by determining that the panel had jurisdiction over Gambone. Gambone notified the arbitrator of its objections to arbitrate and declined to participate. Gambone was not a party to the agreement and there was no court order mandating Gambone's submission to arbitration.

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