March 28, 2018

ADR Case Update 2018 - 7

Federal Circuit Courts

- **STATUTE OF LIMITATIONS PERIOD IN ARBITRATION AGREEMENT UNENFORCEABLE FOR FLSA CLAIMS**

  Castellanos, et al., v Raymours Furniture Company, Inc.
  2018 WL 1251333
  United States District Court, E.D. New York
  March 12, 2018

  Castellanos and fellow employees (plaintiffs) brought a putative class action against employer Raymours, alleging violations of the Fair Labor Standards Act (FLSA). All plaintiffs were bound by an Employee Arbitration Program, which required arbitration of any employment or compensation related claim. The EAP established a 180-day statute of limitations (SOL) for asserting a claim; contained a class action waiver; and included a provision that disputes about enforceability were for a court to decide. Raymours moved to compel arbitration, strike the class allegations and dismiss the complaint. Plaintiffs opposed the motions, asserting that the SOL provision was unenforceable and should be severed.

  The United States District Court, E.D. New York granted the motion in part and denied the motion in part. Having determined that the SOL argument concerned enforceability rather than procedure and was in the purview of the Court, the Court found the SOL period unenforceable. The FAA's mandate to enforce arbitration agreements according to their terms holds true for claims that allege a violation of a federal statute unless it has been overridden by a "'contrary congressional command.'" The EAP's SOL did just that. The FLSA is a uniquely protected statute with a two-tiered SOL – 2 years to bring a claim and 3 years if the violation is willful. The EAP's SOL eliminated this intended distinction. By limiting the time frame, the EAP SOL also limited plaintiffs' recovery since plaintiffs may recover damages as far back as the SOL reaches under the FLSA. The Court found that the EAP's SOL operated as a waiver of the plaintiffs' rights to pursue the full amount of damages provided by the FLSA and severed the provision. Given the clear class action waiver in the EAP, the Court struck the class allegations and stayed the action while pending arbitration of the individual claims.

California

- **ARBITRATION AGREEMENT DID NOT INCORPORATE STATE LAW THAT WAS PREEMPTED BY FEDERAL LAW**

  Saheli v. White Memorial Medical Center
  2018 WL 1312501
  Court of Appeal, Second District, Division 8, California
  March 14, 2018

  Dr. Saheli brought a cause of action against her supervisor and White Memorial Medical Center (defendants), alleging retaliation, violation of the Bane and the Ralph (hate crime) Acts, and sexual harassment. The defendants moved to compel arbitration pursuant to an arbitration agreement in the employment/training agreement and employee handbook (Agreement). The Agreement provided that it was governed by the FAA and the Arbitration Act of the state and that arbitration would be the exclusive means to address any arbitrable claim. The Agreement had a carve out for claims under the NLRA, the Private Attorney General Act, for workers' compensation, and for any claim that was non-arbitrable under applicable state or federal law. Dr. Saheli argued the Agreement was unenforceable with respect to her claims under the Ralph and Bane Acts because it did not comply with requirements mandated by those acts. The court agreed and compelled Saheli to arbitrate all but those claims. Defendants appealed.

  The Court of Appeal, Second District, Division 8, California reversed. The Court agreed with defendants that the trial court erred in implicitly interpreting the Agreement as incorporating state law that was preempted by federal law. The Agreement provided that parties were not to arbitrate claims that were not "arbitrable under applicable state law". The Court found no meaningful difference between the language "applicable state law" and the "law of your state" language in *Imburgia*, which the U.S. Supreme Court held to unambiguously exclude state law preempted by federal. The Court then concluded that the Ralph and Bane Acts were preempted by the FAA. The FAA was designed to place arbitration agreements on the same footing as other contracts. Under FAA Section 2, a state court could invalidate an arbitration agreement under generally applicable contract defenses but not under a defense specific to arbitration agreements. The Ralph and Bane Acts both provided that any waiver of judicial right or forum shall be knowing and voluntary, in writing, and not made as a condition of the contract or of providing or receiving the goods and services. These special requirements did not apply to contracts generally and limited the enforcement of arbitration agreements related to Ralph and Bane Act claims. As such, they discriminated against arbitration agreements and were preempted by the FAA. The requirements did not escape preemption because they placed restrictions on arbitration agreements but did not ban them outright; it is well established that a law need not prohibit entire arbitration agreements to be preempted. The Court was not convinced that the requirements fell within section 2's saving clause because they were a codification of the existing doctrine of unconscionability. The requirements reflected elements of procedural unconscionability but said nothing about substantive unconscionability. To lend credence to this argument would require the Court to declare all agreements to arbitrate Ralph and Bane Act claims substantively unconscionable and such a blanket rule was not permitted under the FAA. Saheli's argument that the special requirements avoided preemption because they were consistent with general California law restricting the waiver of certain rights and remedies fell short; Saheli failed to identify any substantive rights or remedies that were waived simply by submitting a Ralph or Bane Act claim to arbitration.

Washington State

- **ORDER COMPELLING ARBITRATION NOT IMMEDIATELY APPEALABLE**

  FutureSelect v. Tremont Group et al.
  2018 WL 1321999
  Supreme Court of Washington

March 15, 2018

FutureSelect sued Tremont Group and its auditors after relying on their assurances to invest in the Madoff Ponzi scheme. One of the auditors, KPMG, moved to compel arbitration in 2011. The order was granted and FS appealed. KPMG moved to dismiss, arguing that the order compelling arbitration was not immediately appealable. The motion to dismiss was granted. FS then settled with several defendants and obtained a judgment against auditor Ernst and Young (EY). In 2016, FS filed a notice of appeal of the order compelling arbitration with KPMG, which it had unsuccessfully appealed in 2011. The Court of Appeals dismissed the appeal as untimely and denied FS's motion to modify. FS sought review.

The Supreme Court of Washington affirmed. FS argued that review was appropriate because the rulings in 2011 conflicted with an intervening Supreme Court of Washington decision in *Hill*, which, FS asserted, overturned settled law prohibiting the immediate appeal of an order compelling arbitration. The Court found that FS read too much into *Hill*, which focused on the unconscionability of a particular arbitration agreement and did not decide the appealability of orders compelling arbitration as a matter of right. The Court disagreed that the review was timely following the entry of a final judgment of EY. The judgment against EY did not resolve all claims against all parties, since FS's claims against KPMG remained. The long-standing rule with respect to appeal of arbitration awards is that the relevant final judgment is the judgment confirming the arbitration award – no such judgment had been entered. The Court would not entertain arguments for discretionary review because FS failed to identify extraordinary circumstances to avoid arbitration and failed to justify allowing a second, untimely review of the order compelling arbitration five years after the fact.

Georgia

- **MANDATORY MEDIATION CONDITION PRECEDENT FOR EVIDENTIARY HEARING**

  City of Union Point v. Greene County, et al.
  2018 WL 1324184
  Supreme Court of Georgia
  March 15, 2018

  The City of Union Point (City) brought an action against Greene County (County), alleging that the County had unilaterally discontinued police and fire dispatch and communication services to the city's police and fire departments. The dispute arose out of the Service Delivery Strategy Act (SDS), a statute which prescribed a process for developing a local government service agreement, its components, and criteria for its development. The SDS provided a mechanism to resolve disputes between a county and its municipalities, including mandatory mediation under (d)(1). If an SDS was not achieved by the conclusion of the mediation, (d)(2) provided that any aggrieved party could petition the superior court to seek resolution of the remaining disputed items through an evidentiary hearing. Pursuant to (d)(1), the trial court assigned the City's dispute with the County to mediation, where the parties reached an agreement in principle on a number of issues but were unable to resolve the dispute regarding dispatch and communications services. At the evidentiary hearing, the trial court found (d)(2) to be unconstitutional, but nevertheless ruled on the issues raised. The City appealed.

  The Supreme Court of Georgia affirmed the judgment in part, reversed in part, and vacated in part. Relevant findings are discussed below. The County argued that the statute in question violated the separation of powers doctrine by delegating legislative power to the court. The Court disagreed, finding that the legislature did not authorize the court to substitute its judgment for that of the county and municipalities with respect to the creation of the SDS; the court was only authorized to hear parties' evidence and resolve disputed issues of fact regarding the services provided and funding of such services. That was not an unconstitutional delegation. The Court found the trial court's ruling on road and brick maintenance exceeded the scope of (d)(2). The statute provided that an aggrieved party could petition the court to resolve items remaining in dispute; a party was not authorized to introduce items that were never in dispute at mediation. The mediator's report contained no mention of road and bridge maintenance, nor did the parties note that issue in the consent order to the mediation. On the issue of the changes in

recreation and library funding, the Court found that the parties reached an agreement in principle but did not reduce the terms to an SDS so the trial court could not adopt it. The issue was remanded.

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