April 12, 2018

ADR Case Update 2018 - 8

Federal Circuit Courts

- **VOLUNTARY DISMISSAL OF CLAIM AFTER ARBITRATION ORDERED AND CASE STAYED NOT AN APPEALABLE FINAL DECISION**

  Keena v. Groupon, Inc.
  2018 WL 1474404
  United States Court of Appeals, Fourth Circuit
  March 27, 2018

  In purchasing a voucher for a massage from Groupon, Keena entered into an agreement with an arbitration provision. When she was unable to redeem her voucher, Keena sought reimbursement and received Groupon Bucks, which can only be used for goods and services on Groupon's site. Keena filed suit against Groupon on the basis of the reimbursement policy. Groupon's motion to compel arbitration was granted and the court stayed all further proceedings in the lawsuit pending arbitration. Keena moved to amend the arbitration order, requesting the court to dismiss her complaint because she was concerned that the costs of the process would outweigh the recovery. In the alternative, Keena asked for the court's approval for an interlocutory appeal of the Arbitration order. The Court declined to certify an interlocutory appeal, but agreed to amend the order and grant Keena's request to dismiss the complaint. Keena appealed the dismissal.

  The United States Court of Appeals, Fourth Circuit, dismissed the appeal, finding that Keena's voluntary dismissal of her claim, after being denied interlocutory review of the order staying the action and compelling arbitration, was not an appealable final decision. To appeal from the Arbitration Order, Keena was obligated to participate in the arbitration proceedings and then secure a final judgment. The voluntary dismissal "tactic" that she pursued would contravene a recent Supreme Court decision in *Microsoft v. Baker*, and a long-settled provision that "no appeal lies from judgment of a voluntary nonsuit." The Court distinguished this case from *Green Tree*, where the Supreme Court found that the district court's dismissal of a complaint was an appealable final order. This case was different because it was compelled to arbitration and stayed – and the dismissal was voluntary, rather than initiated by the other side.

California

- **SEQUENTIAL CONFIRMATION OF PARTIAL FINAL AWARD AND COST AWARD IN ARBITRATION AFFIRMED**

  EHM Productions (TMZ) v. Starline Tours of Hollywood
  2018 WL 1516828
  Court of Appeal, Second District, Division 2, California
  March 28, 2018

  Starline and TMZ contracted to operate a Hollywood bus tour. In 2012, several drivers filed a class action complaint against Starline, later amended to include TMZ. TMZ subsequently filed a demand for arbitration, alleging that Starline breached their contract when it refused to defend TMZ in the lawsuit. The arbitrator issued a partial final award in favor of TMZ, finding that Starline was obligated to defend TMZ and ordering Starline to pay TMZ's costs through January 2015. The arbitrator further ordered Starline to pay TMZ's costs going forward. Starline appealed the award under JAMS Optional Appeal Procedure. The panel affirmed the partial final award. TMZ filed a petition to confirm the award, which was granted. Three days later, the JAMS Panel issued a final award on appeal, granting TMZ $41,429.92 in costs. TMZ's petition to confirm the cost award was granted and Starline appealed.

  The Court of Appeal, Second District, Division 2, California affirmed. The Court rejected Starline's argument that the incremental judgments violated the one judgment rule, citing *Hightower*, which suggested that an incremental award may be appropriate in situations where not all issues may be resolved at the time of the initial partial final award. The partial final award did not violate the Code of Civil Procedure 1283.4, which provides that an arbitration award shall include a determination of all the questions submitted to the arbitrator; 1283.4 did not preclude the arbitrator from making a final disposition of a disputed matter in more than one award. Confirmation of the cost award was not in error. Code of Civil Procedure 1285 provides that when presented with a petition to confirm an award, the court may confirm, correct, or vacate the award – or dismiss the petition entirely; the award was not subject to dismissal or vacation. The Court rejected Starline's argument that TMZ should be estopped from seeking separate confirmation of the award and the cost award in sequential fashion when those awards co-existed before the judgment was rejected. Starline argued that TMZ should have presented the initial award and cost award simultaneously but provided no legal authority or suggestion that TMZ was not entitled to confirmation of fees because it did not do so.

Pennsylvania

- **ARBITRATOR EXCEEDED POWERS**

  City of Philadelphia v. Fraternal Order of Police (FOP)
  2018 WL 1462288
  Commonwealth Court of Pennsylvania
  March 26, 2018

  Lieutenant Josey was terminated after using excessive force while making an arrest. The FOP's grievance to challenge the termination was granted by Arbitrator Reilly, who ordered that Josey be reinstated and all references to the termination be deleted from his file. A year later, Josey was denied a promotion in part because of the excessive force incident and its impact on the relationship between the Department and the community. The FOP's grievance to challenge the denial of the promotion was granted by Arbitrator Peck, who ordered the City to retroactively promote Josey to Captain. The City's petition to vacate the arbitration award was granted and the FOP appealed.

  The Commonwealth Court of Pennsylvania affirmed. The Court found that the Arbitrator exceeded his powers by addressing issues not properly submitted to him in accordance with Act

111 (the Policemen and Firemen Collective Bargaining Act) or the parties' CBA, which provided that suspensions, demotions, and dismissals were the only disciplinary actions that can be grieved. The Arbitrator asserted that this case was an exception to well-settled law that matters involving managerial prerogatives, such as promotions, are not subject to mandatory collective bargaining, since it turned on whether the City relied on expunged discipline to deny the promotion. The Court disagreed, finding that expunging an incident from the file – here, the discharge – did not mean the incident never happened. The Arbitrator had no power to decide whether he had the authority to decide the case; the basis of arbitrability was provided by Act 111, which excluded promotions, and the CBA, which the Arbitrator never referenced. The trial court did not substitute its judgment for that of the arbitrator since the arbitrator lacked the authority to decide the matter in the first place. The Arbitrator also exceeded his powers by mandating Josey's promotion from a civil service promotion list that had expired.

- **INTERTWINED CLAIMS WITHIN THE SCOPE OF ARBITRATION AGREEMENT**

  Howard Griest v. Kevin Griest
  2018 WL 1475630
  Superior Court of Pennsylvania
  March 27, 2018

  The mother of Howard and Kevin transferred two parcels of property to them, one rental property and one farm property. Howard filed a complaint to partition the property. In his counterclaim, Kevin introduced a third piece of property (the Elverson Property), saying the parties signed an agreement to purchase the property in 2006. The Agreement included an arbitration provision, providing that any disputes "which arise from this Agreement shall be submitted to binding arbitration." Howard filed objections to the counterclaim and sought to compel arbitration under the terms of the agreement. The court overruled his objections and Howard appealed.

  The Superior Court of Pennsylvania reversed and remanded. Having determined that a valid agreement to arbitrate existed – a fact conceded by the parties – the Court considered whether the dispute was within the scope of the agreement. While it did not mention the rental property, the agreement concerned the purchase of the Elverson property and the joint operation of the farm property. The Court found that all of the properties were intertwined, which brought all claims within the scope of the agreement.

Maryland

- **BILL PROVISIONS THAT LIMITED RIGHT TO COLLECTIVE BARGAINING AND ARBITRATION OVER TERMS AND CONDITIONS OF EMPLOYMENT DEEMED INVALID**

  Atkinson v. Anne Arundel County
  2018 WL 1545846
  Court of Special Appeals of Maryland
  March 28, 2018

  The Anne Arundel County Charter Sections 811 and 812 grant public safety employees the right to "bargain and arbitrate over 'terms and conditions of employment.'" In 2014, the County Council (Council) adopted a bill to exclude employee health insurance benefit options and health insurance plans from collective bargaining and arbitration. Atkinson and Union members (Union) filed a declaratory judgment action, alleging that the County exceeded its legal authority in enacting the bill. The County counterclaimed for declaratory judgment, saying that the bill was a lawful exercise of its legislative powers. The court granted summary judgment in favor of the County and the Union appealed.

  The Court of Special Appeals of Maryland reversed and remanded. Explaining that it would be illogical to read the language of 812 to require arbitration over the terms and conditions of employment during the second step of labor negotiations if the terms and conditions of employment were not subject to collective bargaining in the first step, the Court affirmed a two-step process of collective bargaining and arbitration under 811 and 812. Ambiguity in the phrase

"terms and conditions of employment" was a justiciable issue. Looking to the intent of the drafters of 812, the use of "terms and conditions of employment" in labor statutes, and state and federal court interpretations, the Court deemed "terms and conditions of employment" to be a term of art that included health insurance benefits. The provisions of the bill that rendered meaningless the Union's right to bargain collectively over the costs of their healthcare benefits were invalid under 811 and 812. The Court remanded the case to define the scope of collective bargaining rights intended under 811 and 812.

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