April 25, 2018

ADR Case Update 2018 - 9

Federal Circuit Courts

- **DISTRICT COURT DID NOT ERR IN STAYING STATE COURT ACTION AND ORDERING PARTIES TO ARBITRATE**

  Aptim Corporation v. McCall
  2018 WL 1804868
  United States Court of Appeals, Fifth Circuit
  April 17, 2018

  Shaw sued former employee, Dorsey McCall, in state court for allegedly violating non-compete and non-solicitation agreements. The agreements provided for arbitration in New Orleans and indicated that the employer may sue for injunctive relief without waiving the right to arbitrate the underlying dispute. Soon after, Aptim acquired Shaw's capital services segment, which included rights to McCall's employment agreement with Shaw. Aptim, without Shaw, sued in federal court to compel arbitration and stay the state court proceedings. Before the federal court ruled, the state court issued an order joining Aptim in the state court action, finding that Shaw and Aptim had waived their arbitration rights by initiating the state court action, and granting McCall's motion to stay arbitration. One month later, the federal court ordered Aptim and McCall – and all those in privity - to arbitration and stayed the state court action. McCall appealed.

  The United States Court of Appeals for the Fifth Circuit affirmed. McCall argued that the district court erred by: declining to abstain under *Colorado River* (424 US 800), compelling the parties to arbitrate, and enjoining the state court proceedings in violation of the Anti-Injunction Act. *Colorado River* reflects a "heavy thumb" in favor of exercising federal jurisdiction, a presumption overcome only by exceptional circumstances. Six factors are considered in determining exceptional circumstances. Applied here:
  1) assumption by either court of jurisdiction over a res: weighed against abstention because there was no res;
  2) relative inconvenience of the forums: was neutral because the courthouses were within the same geographic location;
  3) avoidance of piecemeal litigation: weighed against abstention since this is not applicable in the FAA context, given the strong federal policy favoring arbitration;
  4) the order in which jurisdiction was obtained by the concurrent forums: slightly favored abstention because numerous motions were filed in state court before the federal case

began. Not so much progress had been made, however, that the federal court should stay its hand;
5) to what extent federal law provides the rules of decision on the merits: weighed against. Though the FAA is left in large part to state courts, it represents federal policy to be vindicated by the federal courts where otherwise appropriate;
6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction: was neutral.
Exceptional circumstances were not demonstrated.

Aptim did not waive its arbitration rights. Aptim did not substantially invoke the state judicial process – Shaw did. McCall argued that Shaw's conduct was attributable to Aptim, an argument weakened by his assertion in state court that Aptim should not be substituted for Shaw. McCall did not demonstrate prejudice, since the hearings in which he participated were related to the injunctive relief that Shaw was contractually permitted to seek without compromising arbitration rights.

The court did not err in enjoining the state court proceedings under the relitigation exception to the Anti-Injunction Act: the injunction was proper to defend the federal district court's final judgment in the face of a non-preclusive state-court order.

Washington State

- **STATUTORY COSTS TO BE INCLUDED IN MANDATORY ARBITRATION RULE 7.3 COMPARISON**

  Bearden v. McGill
  2018 WL 1750690
  Supreme Court of Washington
  April 12, 2018

  Bearden and McGill were involved in a car accident. Bearden sued McGill and the parties went to mandatory arbitration, where the arbitrator awarded Bearden $44,000 in damages and $1187 in costs, for a total of $45,187. McGill requested a trial de novo, at which the jury awarded Bearden $42,500 in damages and $3296.39 in costs, for a total of $45,796.83. Bearden moved for attorneys' fees pursuant to Mandatory Arbitration Rule (MAR) 7.3, which provides that if a party that requests a trial de novo after mandatory arbitration fails to improve his position at trial, then the opposing party may move for the requesting party to pay attorneys' fees incurred as a result of the trial. The court granted the motion, awarding Bearden an additional $71,800 in attorneys' fees and costs. McGill appealed and the Court of Appeals vacated, finding that the MAR 7.3 comparison is between the common elements of awards in both proceedings. The Supreme Court of Washington remanded to the Court of Appeals to reconsider. The Court of Appeals again vacated the award of fees and costs. McGill appealed.

  The Supreme Court of Washington reversed, finding that statutory costs were to be included in the MAR 7.3 comparison. The Court looked to the language and legislative history of MAR 7.3, finding no reference to any element of the award, damages or costs, and no express provision excluding costs, both of which lean toward inclusion. This interpretation was also consistent with how an ordinary person would compare the arbitral award and the trial de novo judgment: in totality. In holding that, generally, the inclusion of additional statutory costs incurred as a result of the trial de novo did not render the comparison unfair, the Court left it to the trial courts to assess in each case whether unique circumstances rendered an award-to-award comparison unfair.

Minnesota

- **ARBITRATION AWARD VIOLATED PUBLIC POLICY**

  City of Richfield v. Law Enforcement Labor Services, Inc.

2018 WL 1701916
Court of Appeals of Minnesota
April 9, 2018

A videotape captured police officer Nathan Kinsey's verbal and physical interactions with allegedly reckless drivers. An internal investigation ensued, with the resulting report finding that Kinsey used excessive force and failed to report the use of force. The City of Richfield (City) terminated Kinsey. The union grieved the termination and the matter was sent to arbitration, with the arbitrator finding that Kinsey's use of force was not excessive and his failure to report the force was a lapse in judgment. The arbitrator ordered that Kinsey be reinstated and made whole, less three days of unpaid suspension for the lapse in judgment. The City's motion to vacate the award was denied and the City appealed.

The Court of Appeals of Minnesota reversed, holding that the award violated public policy. For the public policy exception to apply in MN, there must be a well-defined and dominant public policy at stake, grounded in laws and legal precedents. The pivotal question was whether Kinsey's reinstatement violated public policy. MN has a well-defined public policy against police officers using excessive force, which hinges on officers' compliance with departments' use-of-force reporting requirements. The public policy is grounded in law: the MN Public Employment Labor Relations Act (PELRA) prioritizes the rights of MN citizens to safety and welfare; MN statute 626.8452 requires police chiefs to establish and enforce written policies governing how officers use force in their departments; and standards of the POST Board, which licenses police officers, provide that it is paramount for peace officers to demonstrate that they are capable of self-regulation. Reinstating Kinsey would interfere with the police department's obligation to establish minimum standards of conduct for its officers, with the policy in favor of self-regulation, and with the policy against use of excessive force, something that can be monitored only through use-of-force reporting by officers.

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