July 3, 2019

ADR Case Update 2019 - 13

Federal Circuit Courts

- **COURT TO DETERMINE PROCEDURAL UNCONSCIONABILITY CHALLENGE**

  Bowles v. OneMain Financial Group, LLC
  2019 WL 2521667
  United States Court of Appeals, Fifth Circuit
  June 19, 2019

  While Bowles worked for OneMain, she agreed - through employment contracts and acknowledgements of employee handbooks - to arbitrate all disputes. After her termination, Bowles sued OneMain for violations of Title VII and the ADEA. OneMain moved to compel arbitration. Bowles contended that there was no meeting of the minds on arbitration and that the agreement was procedurally unconscionable. The court granted the motion, finding that there was a meeting of the minds and the procedural unconscionability objection went to contract enforceability, a question that had been delegated to the arbitrator.

  The United States Court of Appeals for the Fifth Circuit reversed, vacated, and remanded. The Court agreed with the finding that under Mississippi law, there was a meeting of the minds between Bowles and OneMain necessary for contract formation and that Bowles' lack of diligence in reading related electronic communications did not preclude such formation. The court erred, however, in determining that the procedural unconscionability argument went to contract enforcement rather than contract formation. Bowles' objection challenged the formation of the Agreement itself, a question for the court to decide.

Washington State

- **ARBITRATION AGREEMENT PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE**

  Steven Burnett v. Pagliacci Pizza
  2019 WL 2498721
  Court of Appeals of Washington, Division 1

June 17, 2019

When Burnett was hired as a Pagliacci Pizza delivery driver, he was required to sign an Employee Relationship Agreement (ERA) to begin work. He was also given Pagliacci's "Little Book of Answers" and told to read it at home. The ERA directed employees to learn and comply with the rules outlined in the Little Book, including the Fair and Amicable Internal Resolution Policy (FAIR). When his employment was terminated, Burnett filed a putative class action against Pagliacci, alleging wage and break-related claims. Pagliacci moved to compel arbitration pursuant to the Little Book's mandatory arbitration policy. Burnett objected that the policy was procedurally and substantively unconscionable. The trial court did not reach those arguments, but found no agreement to arbitrate because the Little Book was not incorporated by reference into the ERA. Pagliacci's motion for reconsideration was denied and he appealed.

The Court of Appeals of Washington, District 1 affirmed. The lower court erred in concluding that the arbitration policy was not incorporated into the ERA and that there was no agreement to arbitrate. The Court held, however, that the agreement was unenforceable. The ERA was an adhesion contract, presented on a take it or leave it basis, and the circumstances surrounding its formation were procedurally unconscionable. The Court found no evidence that Burnett had a reasonable opportunity to understand the Little Book's terms, specifically the arbitration policy, before he signed the ERA. Pagliacci's arbitration policy was also buried in the book, with nothing to distinguish it from other sections. While procedural unconscionability alone rendered the agreement unenforceable, the agreement was also substantively unconscionable. The FAIR process was a prerequisite to arbitration, requiring employees to first report the matter to a supervisor for review. If the review was unsatisfactory, the employee could proceed to conciliation. An employee could not commence arbitration until he or she complied with all of the FAIR steps. For terminated employees, the process was a bar to arbitration and suit unless the employee was aware of the claim while still employed. The limitations provision also shortened the time frame for employees to assert claims against Pagliacci. An employee needed to build in time to comply with FAIR before applicable limitations periods expired – but the employee had no control over the timeframe. The FAIR policy also contained no exception to review by a supervisor even when the supervisor was the subject of the complaint. Severance was inappropriate because Pagliacci's arbitration policy was both substantively and procedurally unconscionable.

Georgia

- **ARBITRATOR DID NOT MANIFESTLY DISREGARD LAW**

Gainesville Mechanical, Inc. v. Air Data, Inc.
2019 WL 2521145
Court of Appeals of Georgia
June 19, 2019

Gainesville Mechanical contracted with Air Data to test, adjust, and balance the HVAC system for a state university building. After Gainesville fired Air Data, Air Data sued for monies owed. The case proceeded to arbitration, and the arbitrator awarded Air Data compensatory damages. Air Data's petition to confirm the award was granted and Gainesville appealed.

The Court of Appeals of Georgia affirmed. The modified cost approach to damages, upon which Air Data relied, was disfavored by courts unless four conditions were met. The arbitrator determined that although Air Data failed to meet all criteria, it was entitled to relief, leading Gainesville to assert that the arbitrator manifestly disregarded the law. Manifest disregard of the law requires that the governing law alleged to have been disregarded (here, GA law) be well-defined, explicit, and clearly applicable. There were no GA decisions adopting jurisprudence regarding the modified total cost method of damages. Manifest disregard also required that the arbitrator is aware of the law but decides to ignore it. The Court could not say with certainty whether this requirement was met and ambiguity was not sufficient proof. The Court was prohibited from weighing evidence submitted before the arbitrator to determine if there was sufficient evidence to support the award. Additionally, any error by the arbitrator in interpreting

the availability of compensatory damages under GA law would not constitute manifest disregard of the law.

Colorado

- **SUCCESSOR AGENT NOT REQUIRED TO ARBITRATE**

  In re N.A. Rugby Union LLC and Schoninger v. USA Rugby Football Union, Rugby International Marketing (RIM), et al.
  2019 WL 2495649
  Supreme Court of Colorado
  June 17, 2019

  Pro Rugby, formed by financier Schoninger, entered into a Sanction Agreement with USA Rugby Union (USAR) that authorized it to establish a rugby league. The Agreement provided that the Rugby Union LLC would appoint Rugby International Marketing (RIM) to represent players and present commercial rights to sponsors. The Agreement also provided that disputes between the parties "or any agent, employee, successor, or assign of the other" would be arbitrated. At the time of the Agreement, RIM did not exist. After Schoninger folded the league, he and Pro Rugby sued RIM and other defendants, asserting tort and contract claims. The court dismissed contract claims against RIM because it was not a party to the agreement. After claims against other defendants were addressed, RIM became the sole remaining defendant. Plaintiffs moved to dismiss to allow for arbitration. RIM contended that it was never a party to and did not manifest intent to be bound by the arbitration provision. Despite the order dismissing contract claims against RIM, the court granted the motion to arbitrate, finding USAR's control and delegation of obligations to RIM established RIM as USAR's agent and "squarely within" the broad language of the arbitration provision. RIM petitioned for the Supreme Court to exercise its original jurisdiction.

  The Supreme Court of Colorado adopted the general rule that while a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit, a non-signatory may be bound to an arbitration agreement if one of the following is established: incorporation of an arbitration provision by reference in another agreement; assumption of the arbitration agreement by the non-signatory; agency; veil-piercing/alter ego; estoppel; successor in interest; third-party beneficiary. Plaintiffs asserted that RIM was bound because it was: 1) a third-party beneficiary of the Agreement; 2) USAR's agent; and 3) equitably estopped from avoiding the arbitration agreement. RIM was not a third-party beneficiary because the Agreement did not confer specific legal rights on RIM. RIM did not exist at the time the Agreement was signed and any future conferral of rights on RIM would have been bestowed by separate agreement between RIM and PRO. Traditional principles of agency law provide that a principal cannot bind an agent. USAR was the principal and could not bind RIM to the arbitration provision. Equitable estoppel was inapplicable because RIM asserted no claim for rights or benefits under the agreement.

- **NON-SIGNATORIES FAIL TO SHOW DETRIMENTAL RELIANCE/INVOKE EQUITABLE ESTOPPEL**

  Santich, et al. v VCG Holding Group
  2019 WL 2571653
  Supreme Court of Colorado
  June 24, 2019

  Exotic dancers sued club owners and their parent companies, alleging they denied them earned wages and overtime, misallocated gratuities, charged them to work, and subjected them to fines. The club owners successfully compelled arbitration pursuant to the arbitration clause in their agreements with the dancers. The parent companies, not parties to the agreement, sought to do the same, arguing that the dancers should be equitably estopped from litigating the claims against them because they were in compelled arbitration of the same claims with the club owners. A federal magistrate judge recommended that the district court accept the equitable estoppel argument and compel arbitration of the dancers' claims against the parent companies. The dancers challenged the recommendation, urging the federal district court to certify to the

Supreme Court of Colorado the question whether non-signatories to an arbitration agreement may invoke the doctrine of equitable estoppel in the absence of a showing of detrimental reliance. The district court did so.

The Supreme Court of Colorado noted that a recent court of appeals case (Meister) broke from precedent in endorsing an alternative theory of estoppel that would apply even where the party seeking to assert estoppel made no showing of detrimental reliance. The reasoning for doing so appeared to be Colorado's strong policy favoring arbitration agreements; the Court found this insufficient to support a new theory of estoppel that was "unmoored" from the basic premise of detrimental reliance. Non-signatories to a contract containing an arbitration provision might be able to compel arbitration on equitable estoppel grounds, but to do so requires proof of the four traditionally defined elements of the doctrine, including, but not limited to, the element of detrimental reliance.

Florida

- **NON-SIGNATORY BOUND BY ASSOCIATION AND CONTEXT**

  Shawn Cheshire v. Fitness and Sports Clubs, LLC
  2019 WL 2537386
  United States District Court, S.D. Florida
  June 19, 2019

  Shawn Cheshire filed a claim against LA Fitness, alleging that it violated the ADA and ADA Accessibility Guidelines by failing to enforce existing policies and implement new policies and auxiliary aids for the visually impaired. LA Fitness moved to compel arbitration pursuant to the arbitration provision in its Membership Agreement with Cheshire. The Membership Agreement was signed by Greg Anderson, Cheshire's significant other, in Cheshire's presence. Cheshire objected, arguing that she did not manifest her assent to the Agreement because Anderson was not authorized to sign a membership agreement on her behalf and she believed the agreement was for recurring purchase fees only. She also argued that LA Fitness waived its right to arbitrate through participation in litigation.

  The United States District Court, S.D. Florida granted the motion. Cheshire and Anderson did not inform the LA Fitness employee that Anderson had authority to sign for Cheshire but they demonstrated assent through their actions. Cheshire asked to join the club and stated that Anderson would pay for her membership. Cheshire allowed Anderson to sign and initial the contract. Anderson received a copy of the contract. The nature of a gym membership would have put Cheshire on notice that the agreement may include an arbitration provision. LA Fitness did not participate in litigation to a point inconsistent with the intent to arbitrate. It filed an answer, requested information regarding Cheshire's membership, and filed a motion to compel. Cheshire was not prejudiced by these actions.

Connecticut

- **SUBS PRESUMPTIVELY IN PRIVITY WITH GC REGARDING PRECLUSIVE EFFECTS OF ARBITRATION**

  Girolametti v. Michael Horton Associates
  322 Conn. 67
  Supreme Court of Connecticut
  June 25, 2019

  Girolametti (plaintiff) and general contractor Rizzo Corp. arbitrated disputes related to a project to expand the plaintiff's Party Depot Store. On the 33rd day of the arbitration, the plaintiff decided to no longer participate. The arbitrator issued an award ordering the plaintiff to pay Rizzo $500,000,

and rejected plaintiff's claims that the building's 2nd floor remained unoccupied due to construction defects resulting in structural problems. The plaintiff also filed suit against Rizzo and its subcontractors (including Michael Horton) related to design and construction of the steel joists used to support the 2nd floor. Each of the defendants moved for summary judgment on the basis of res judicata. The court granted the motion filed by Rizzo and denied the motions filed by the subcontractor defendants, concluding they were not barred because they were not parties to the arbitration and were not in privity with Rizzo. The subcontractors filed an interlocutory appeal. The Appellate Court reversed the judgment, holding that all of the defendants were in privity with Rizzo for purposes of res judicata and the plaintiff's claims were barred because they could have been raised during the arbitration. The plaintiff appealed.

The Supreme Court of Connecticut affirmed. When a property owner and a general contractor enter binding, unrestricted arbitration to resolve disputes arising from a construction project, subcontractors are presumptively in privity with the general contractor with respect to the preclusive effects of the arbitration on subsequent litigation arising from the project. Here, the plaintiffs should have anticipated that arbitration with Rizzo would be the proper forum to address any existing claims against the defendants. The prime contract required Rizzo to formalize flow-down obligations with the subs by requiring them to assume toward Rizzo the same obligations that Rizzo assumed toward Girolametti, thus preserving and protecting "the rights of the owner." The contract included a standard construction industry arbitration clause allowing for unrestricted submission of all claims to the arbitrator and joinder of other parties who were substantially involved. The plaintiff's conduct throughout the arbitration, from seeking documents related to communication with the subs to requesting information from the subs, suggested that he viewed the subs as integral to the process. The plaintiff argued that the arbitrator's factual finding that the contract did not obligate Rizzo to perform or be responsible for all design and engineering aspects of the project suggested that Rizzo was not in privity with the subs. A reasonable reading of that sentence was that the plaintiff permissibly outsourced some of the design and engineering work to various entities and that Rizzo was not responsible to the plaintiffs for that work.

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