July 31, 2019

ADR Case Update 2019 - 15

Federal Circuit Courts

- **LACK OF VALID DELEGATION CLAUSE OPENS ARBITRATION AGREEMENT TO REVIEW FOR VALIDITY**

  Shockley v. PrimeLending
  2019 WL 3070502
  United States Court of Appeals, Eighth Circuit
  July 15, 2019

  While employed with PrimeLending, Jennifer Shockley accessed the online employee Handbook, which contained both an arbitration clause and a delegation clause. Doing so automatically generated an acknowledgement of review. When Shockley sued PrimeLending for FLSA violations, PrimeLending moved to compel arbitration pursuant to the Handbook. The court denied the motion, finding that the parties did not form an enforceable agreement to arbitrate their disputes. PrimeLending appealed.

  The United States Court of Appeals for the Eighth Circuit affirmed, finding that the parties never entered into a contract relating to the arbitration and delegation provisions. The delegation provision was critical. If it was a valid contract under Missouri law, with offer, acceptance, and bargained for consideration, then the arbitrator would decide the validity of the arbitration agreement. The Court found it was not. Even if the delegation provision in the online Handbook constituted an offer, Shockley did not accept that offer. She was presented with two chances to review the Handbook through a hyperlink on the network. She didn't remember doing so and the record did not establish that she did so. Her mere review of the materials did not constitute acceptance. An arbitration agreement lacking a valid delegation clause leaves the remaining arbitration agreement, as a whole, open to review for validity. Given that the terms of the PrimeLending arbitration provision were presented in the same hyperlink and there was no proof of acceptance, the arbitration provision was not a validly formed contract.

- **SON LACKED CAPACITY TO SIGN ARBITRATION AGREEMENT AS FATHER'S REPRESENTATIVE**

  Northport Health Services of Arkansas, LLC, v. Posey

2019 WL 3295079
United States Court of Appeals, Eighth Circuit
July 23, 2019

When Clyde Posey was admitted to a Northport residential rehab center, he signed an admission agreement that included an arbitration clause. His son, Matt, also signed that agreement, in the capacity of "responsible party," defined as a legal guardian or attorney in fact. Matt was undisputedly not his father's legal guardian or attorney in fact. After Clyde died, Mark Posey, as the representative of his father's estate, sued Northport for wrongful death and Northport moved to compel arbitration. The court granted the motion, using the third-party beneficiary theory to find as a matter of law that Matt, in his individual capacity, entered into a binding arbitration agreement with Northport, for which Clyde was the beneficiary. The court directed Clyde's estate to arbitrate. Mark appealed.

The United States Court of Appeals for the Eighth Circuit reversed and remanded. Arkansas courts have repeatedly declined to find that individuals like Matt – relatives without legal authority who admit a family member to a nursing home – possess authority to bind their relatives to arbitration under the third-party beneficiary theory. Because Matt was not Clyde's legal guardian or attorney in fact, he lacked the capacity to sign the contract as Clyde's representative.

- **ABSENT CLEAR AND UNEQUIVOCAL LANGUAGE TO THE CONTRARY, CLASS ARBITRATION A GATEWAY ISSUE TO BE DECIDED BY COURT**

20/20 Communications, Inc. v. Crawford v. Blevins et al.
2019 WL 3281412
United States Court of Appeals, Fifth Circuit
July 22, 2019

20/20, a national direct-sales and marketing company, requires field managers to sign a Mutual Arbitration Agreement that contains a class arbitration bar. When a number of field sales managers amended their individual claims to assert class claims, 20/20 sought a declaration in federal court that the issue of class arbitration was a gateway issue for the court to decide (the *Blevins* case). While *Blevins* was pending, some employees asked their individual arbitrators to issue clause construction awards holding that the class arbitration bar was prohibited by the NLRA. Of the 6 arbitrators who issued clause construction awards, one arbitrator concluded that the class arbitration bar was unenforceable under the NLRA. 20/20 filed another action in federal district court to vacate the arbitrator's clause construction award. The court confirmed the award (*Crawford*). The court in *Blevins* then held that the arbitration agreement authorized the arbitrator, rather than the court, to determine class arbitrability and dismissed the complaint. 20/20 appealed both rulings. *Blevins* and *Crawford* were consolidated for the appeal.

The United States Court of Appeals for the Fifth Circuit vacated and remanded. The Court noted the substantial differences between class and individual arbitrations and held that class arbitration is a gateway issue that must be decided by courts, not arbitrators – absent clear and unmistakable language in the arbitration clause to the contrary. The parties here did not provide clear and unmistakable language to the contrary. The class arbitration bar in the arbitration agreement provided that the arbitrator would hear only individual claims and did "not have the authority to fashion a proceeding as a class or collective action." The Court noted that it was difficult to imagine why parties would prohibit class arbitrations to the maximum extent permitted by law, only to then take the time and effort to vest the arbitrator with the authority to decide whether class arbitrations should be available.

- **INSURED BOUND BY ARBITRATION PANEL'S FINDING THAT IT HAD NOT REPORTED A CLAIM**

Crowley Maritime Corp. v. National Union Fire Insurance Company
2019 WL 3294003
United States Court of Appeals, Eleventh Circuit
July 23, 2019

Crowley Liner, a subsidiary of Crowley Maritime, had an executive and organization liability

insurance policy with National. The policy provided that National would insure Crowley with respect to claims made against an insured during the policy period or the discovery period and cover defense costs resulting from investigation, adjudication, and defense of a claim. In 2008, supported by a sealed affidavit suggesting that Crowley executive Farmer had been involved in communications that violated the Sherman Act, the FBI/DOJ commenced an investigation and conducted a search warrant at Crowley Liner HQ. Crowley's insurance broker provided details of the investigation to National, characterizing this as a notice of the claim. National concluded that the policy did not provide coverage because no one had been identified as the investigation target. Crowley initiated arbitration on the question of whether the investigation constituted a Claim. The arbitration panel decided in favor of National, holding that the materials provided by Crowley did not constitute a claim. After Crowley's notification that Farmer was offered a plea deal in February 2013, National agreed to treat the FBI/DOJ investigation as a claim as of 2/18/13 and to cover future defense costs. Farmer rejected the plea deal and proceeded to trial, where he was acquitted. In July 2015, Crowley notified National that Farmer was acquitted and that it had received a copy of the unsealed affidavit, which made clear that a claim had been asserted on Farmer's behalf between 2008 and 2013. Crowley sued National for breach of contract, claiming it was entitled to reimbursement of legal fees between 2008 and 2013. National moved for summary judgment, asserting that the prior arbitration was res judicata, that Crowley's action was barred by the applicable statute of limitations, and that the claim for coverage based on the affidavit was untimely under the Policy because it was reported to National after the discovery period expired. The court granted National's motion for summary judgment and Crowley appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. Crowley did not timely report a claim based on the affidavit as required by the policy for three reasons. First, Crowley was bound by the arbitration panel's determination that it had not reported a claim at any time prior to December 31, 2012 – and was precluded from re-litigating this issue. Second, with respect to the reporting period beginning immediately after December 31, 2012 and running through the end of the discovery period on November 1, 2013, Crowley failed to report the claim as required under the policy because it did not report any new information relating to the affidavit until July 2015, after the policy period and discovery period expired. Third, Crowley waived any argument that either its February 2013 notice or its July 2015 notice should relate back to the April 2008 notice under section 7 of the policy.

New York

- **COURT TO DECIDE ARBITRABILITY**

Kent Waterfront Associates v. National Union Fire Insurance Company of Pittsburgh
2019 WL 3210508
Supreme Court, Appellate Division, Second Department, New York
July 17, 2019

Kent Builders' payment agreement with National Union Fire Insurance Company (National) contained an arbitration clause. When a dispute arose between Kent and National, National served a demand for arbitration on Kent Builders as well as on petitioners Kent Waterfront Associates, BFC Partners, and L&M Development. The petitioners commenced a proceeding to stay the arbitration on the grounds that they were not party to or bound by the agreement. In an order appealed from, the court referred the petition to the arbitration panel for determination as to whether the appellants were bound by the arbitration agreement.

The Supreme Court, Appellate Division, Second Department, New York reversed and remitted. The question of arbitrability is an issue generally reserved for judicial determination unless the parties have "evinced a clear and unmistakable" agreement to arbitrate arbitrability. Without that, the arbitrability question was a threshold question for the courts to decide.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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