**August 28, 2019**

# ADR Case Update 2019 - 17

## Federal Circuit Courts

- **ACTION FOR INJUNCTIVE RELIEF NOT SUBJECT TO MANDATORY ARBITRATION**

  *Archer and White Sales, Incorporated v. Henry Schein, Incorporated et al.*
  2019 WL 3812352
  United States Court of Appeals, Fifth Circuit
  August 14, 2019

  Dental equipment distributor Archer and White sued Henry Schein, et al., claiming that the defendants entered into an anti-competitive agreement to restrict Archer's sales and seeking monetary damages and injunctive relief. The contract between the parties provided that "(a)ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief…) shall be resolved by binding arbitration in accordance with the arbitration rules of…AAA." The case was referred to a magistrate judge and Schein moved to compel arbitration. The magistrate judge granted the motion, finding that because the agreement incorporated AAA rules and could be construed to compel arbitration, the arbitrator should decide arbitrability. The district court vacated, holding that the arbitrability question was for the court and that the claim for injunctive relief was excluded. This Court affirmed, concluding that Schein's argument for arbitration was "wholly groundless" and that the threshold arbitrability question should be decided by the court. The United States Supreme Court reversed, eliminating the wholly groundless exception and reaffirming that parties may delegate threshold arbitrability questions to the arbitrator, so long as the agreement does so by clear and unmistakable evidence. The Supreme Court remanded the case to determine if such evidence existed here.

  The United States Court of Appeals for the Fifth Circuit affirmed. The Court held that the agreement delegated arbitrability for all disputes except those under the carve-out and thus did not evince clear and unmistakable intent to delegate arbitrability of this question. The arbitration clause created a carve-out for actions seeking injunctive relief and as this action sought injunctive relief, it was not subject to mandatory arbitration.

- **SUFFICIENT CONSIDERATION FOUND TO SUPPORT AGREEMENT TO ARBITRATE**

  *Doctor's Associates, Inc. v. Alemayehu*
  2019 WL 3806455

United States Court of Appeals, Second Circuit
August 14, 2019

Doctor's Associates, Inc. (DAI) is the parent company of Subway franchises. When Giram Alemayehu completed an application to purchase a franchise in Colorado, he agreed to arbitrate disputes arising out of the franchise application process. After DAI denied the application, Alemayehu filed suit, alleging that DAI discriminated against him on the basis of race. The court denied DAI's motion to compel arbitration, finding that the Franchise Application "contained only unilateral promises" made by Alemayehu and failed to require anything of DAI. Without consideration, there was no agreement to arbitrate. DAI appealed.

The United States Court of Appeals for the Second Circuit vacated and remanded. Parties may not delegate to the arbitrator the fundamental question of whether they formed an agreement in the first place. Given that consideration is an issue of contract formation, the Court concluded that whether a purported promise to arbitrate was supported by consideration must be resolved by the court. The Court found that there was sufficient consideration to support the agreement to arbitrate. Potential franchisees were required to provide background information and promise to maintain confidentiality and arbitrate disputes in exchange for DAI's review of the application. In reviewing the application and considering Alemayehu for the franchise, DAI provided Alemayehu with a benefit in exchange for Alemayehu's earlier promises, concluding a contract between the parties and binding Alemayehu to comply with the promises.

- **SILENCE CONSTITUTED ACCEPTANCE OF PROPOSED ARBITRATION AGREEMENT**

*Rajesh Gupta v. Morgan Stanley Smith Barney, LLC*
2019 WL 3886452
United States Court of Appeals, Seventh Circuit
August 19, 2019

When Rajesh Gupta began working as a financial advisor with Morgan Stanley in 2013, he signed an employment agreement containing an arbitration clause. CARE, the Morgan Stanley dispute resolution program that applied to U.S. employees, did not then require employees to arbitrate employment discrimination claims, but stated that "may change." On September 2, 2015, Morgan Stanley amended its CARE program to compel mandatory arbitration for all employment-related disputes, including discrimination claims. Morgan Stanley sent an email to all U.S. employees, providing that the new agreement would be mandatory for all employees unless an employee individually elected to opt out and including a link to an opt-out form. Gupta did not submit an opt-out form or respond to the email and continued to work for Morgan Stanley. After alleging that he was forced to resign because of imminent military leave, Gupta sued Morgan Stanley for discrimination and retaliation in violation of the Uniformed Services Employment and Reemployment Rights Act. Morgan Stanley moved to compel arbitration pursuant to the terms of the 2015 CARE arbitration program and agreement. The court granted Morgan Stanley's motion and certified its ruling for interlocutory appeal, which the Seventh Circuit accepted.

The United States Court of Appeals for the Seventh Circuit affirmed. Gupta contended that he never accepted Morgan Stanley's September 2, 2015 offer amending the CARE program, asserting that an employer cannot form a contract by an employee's silence simply by proving email delivery of an offer and a failure to opt out. The Court disagreed, finding that Gupta's silence and inaction in the face of Morgan Stanley's September 2nd email constituted acceptance of its proposed arbitration agreement. The pre-2015 CARE program explicitly stated that its terms were subject to change after an announcement in advance. Morgan Stanley emailed the changes to Gupta, gave him time to review, provided an opt-out form, conspicuously displayed the deadline to opt out, posted a company intranet reminder of the policy and opt-out date, and informed that silence would be construed as acceptance. These actions supported the company's expectation of a response, as did the fact that they had repeatedly communicated with Gupta via email during his tenure with the company. The conduct of Morgan Stanley and Gupta indicated mutual assent to mandatory arbitration. Because Gupta's claims fell within the scope of the arbitration agreement, the lower court did not err in compelling the parties to arbitrate those claims.

## California

- **EMPLOYEE MAY NOT BE COMPELLED TO ARBITRATE UNPAID WAGES PORTION OF PAGA CLAIM**

  *Lorena Mejia v. Merchants Building Maintenance, LLC*
  2019 WL 3798067
  Court of Appeal, Fourth District, Division 1, California
  August 13, 2019

  Lorena Mejia worked for Merchants Building Maintenance (MBM), a maintenance company providing janitorial services. Mejia was subject to a collective bargaining agreement (CBA) requiring employees to arbitrate their private wage and hour disputes on an individual basis. Mejia alleged that the defendants engaged in a number of Labor Code violations, and brought a one-count Private Attorneys General Act (PAGA) complaint under Labor Code Section 558. She sought both underpaid wages and the $50 to $100 per violation penalties available under Section 558. MBM moved to compel individual arbitration of the portion of Mejia's claim pertaining to unpaid wages, and sought to stay the remaining portion of her claims. The court denied the motion to compel and MBM appealed.

  The Court of Appeal, Fourth District, Division 1, California affirmed. PAGA allows workers to recover civil penalties that otherwise would only be recoverable by the State of California. A PAGA claim is not a dispute between an employee and employer arising out of their contractual relationship, but a dispute between an employer and the state, which alleges directly or through its agency – the Labor and Workforce Development Agency or aggrieved employees – that the employer has violated the Labor Code. The California Supreme Court held in *Iskanian* that individual employees could not contractually agree to arbitrate or waive any pre-dispute PAGA claims. The question here was whether a single PAGA claim seeking to recover Section 558 civil penalties may be split between that portion of the claim seeking an amount sufficient to recover unpaid wages and that portion of the claim seeking the assessment imposed for each wage violation ($50 for initial violation and $100 for each subsequent). The Court held that it could not, as PAGA actions are fundamentally law enforcement actions designed to protect the public and not to benefit private parties.

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