September 25, 2019

ADR Case Update 2019 - 19

Federal Circuit Courts

- **FAA §1 MAY APPLY TO PASSENGERS AS WELL AS GOODS**

  Singh v. Uber Technologies, Inc.
  2019 WL 4282185
  United States Court of Appeals, Third Circuit
  September 11, 2019

  Jaswinder Singh brought a putative class action against Uber in New Jersey, alleging that Uber misclassified him and other similarly-situated drivers as independent contractors rather than employees, resulting in the drivers being unable to earn overtime compensation and to incur business expenses for Uber's benefit. Uber removed the action to federal court and moved to dismiss and compel arbitration pursuant to a previously-signed arbitration provision (the Raiser Agreement). Singh opposed the motion based on FAA §1, which provides that nothing in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Singh argued that to the extent he had an agreement with Uber, it fell within the ambit of the residual clause – the "any other class of workers" portion – of §1. The court granted the motion to compel arbitration and dismissed the action, ruling that Singh did not fall within the §1 residual clause because that clause only extended to transportation workers who transport goods, not those who transport passengers. Singh appealed.

  The United States Court of Appeals for the Third Circuit vacated and remanded. The Court held that the residual clause of §1 was not limited to transportation workers who transport goods, but may also apply to those who transport passengers, so long as they are engaged in interstate commerce or in work so closely related as to be in practical effect part of it. Because neither the Complaint nor incorporated documents sufficed to resolve the question of whether Singh belonged to a class of workers that were "engaged in interstate commerce", the Court remanded to the district court to determine whether the arbitration agreement between drivers and Uber fell within the FAA exclusion.

- **COURT CALLS AWARD "INCOHERENT" -- REMANDS WITH INSTRUCTIONS FOR COURT TO VACATE IF REWRITE INSUFFICIENT**

Robin Weiss v. Sallie Mae, Inc.
2019 WL 4308634
United States Court of Appeals, Second Circuit
September 12, 2019

After Robin Weiss defaulted on her student loan, Sallie Mae (now Navient Solutions, LLC/NSL), called Weiss' cell phone multiple times a day to collect the debt. Weiss sued Sallie Mae under the Telephone Consumer Protection Act (TCPA), alleging unlawful use of an automated telephone dialing system (ATDS). The parties proceeded to arbitration, pursuant to an agreement in the student loan promissory note. The arbitrator found that Weiss was a member of the settlement class in *Arthur v. Sallie Mae*, which included persons who received calls from Sallie Mae between October 2005 and September 2010. The arbitrator determined that NSL provided Weiss with the required notice of the settlement, including the opportunity to file a consent revocation, absent which calls would not stop and the borrower's prior consent would be deemed to have been given. The *Arthur* settlement agreement also contained a general release provision under which class members were "deemed to have fully released and forever discharged Sallie Mae" and NSL from any and all claims and causes of action related to the use of an ATDS. The arbitrator did not mention the release in his decision, finding that Weiss's failure to submit a consent revocation precluded recovery for calls to her old cell phone but permitted recovery for calls to her new cell phone between September 2011 and September 2012. The arbitrator awarded Weiss $108,500 in damages. NSL moved to vacate and Weiss cross-moved to affirm. The court vacated the award, finding that by failing to apply the terms of the settlement agreement, which barred recovery for claims until and including the date of the agreement, the arbitrator manifestly disregarded the law. Weiss appealed.

The United States Court of Appeals for the Second Circuit vacated and remanded. The Court found it impossible to reconcile the award of damages with the determination that the plaintiff was a member of the settlement class and received notice of its terms. Because the arbitrator did not mention the general release in his decision, the Court was unable to ascertain whether the arbitrator based his decision on the four corners of the *Arthur* settlement and its accompanying class notice or whether the arbitral award was issued in manifest disregard of the law. In light of this, the Court vacated and remanded the case to the district court to remand to the arbitrator with instructions either to interpret and apply the terms of the *Arthur* settlement's general release provision or to explain why that provision did not bar Weiss's claims and "if necessary, *to vacate or modify the arbitral award*." (emphasis added)

- **ANTITRUST CLAIMS FELL WITHIN PURVIEW OF BROAD ARBITRATION CLAUSE**

In Re: Remicade (Direct Purchaser) Antitrust Litigation
2019 WL 4383407
United States Court of Appeals, Third Circuit
September 13, 2019

Rochester Drug Cooperative (RDC) was a purchaser and wholesaler of Remicade, a drug manufactured by Johnson & Johnson (J&J). RDC and J&J's Distribution Agreement contained a dispute resolution clause providing that any controversy or claim "arising out of or relating to" the agreement would proceed to mediation and if mediation was unsuccessful, then to arbitration. RDC brought claims under Sections 1 and 2 of the Sherman Act, alleging that J&J engaged in anticompetitive conduct to maintain Remicade's monopoly. J&J moved to compel arbitration on the basis that those claims arose out of or related to the Agreement. The court denied J&J's motion to compel. J&J appealed.

The Court of Appeals for the Third Circuit reversed and remanded. The Court held that applicable state law (here, New Jersey) governed the scope of an arbitration clause in the first instance. The terms "arising out of or relating to" have been read by NJ courts to indicate an extremely broad agreement to arbitrate any dispute relating in any way to the contract. The NJ Appellate Division previously held that the phrase "any unresolved disputes arising out of this Agreement" encompassed antitrust claims challenging allegedly anticompetitive conduct that resulted in overcharges based on the underlying contract.

The Court rejected RDC's argument that even if the arbitration agreement were broad enough to encompass RDC's antitrust claims, the claims were nonetheless outside the scope of the

Agreement because the provision failed to comply with NJ's rule of contractual interpretation requiring that waivers of constitutional or statutory rights be stated clearly and unambiguously. That rule had been applied only in situations where parties had unequal bargaining power, such as employment and consumer contracts, and the NJ Appellate Division held on several occasions that the rule did not extend to commercial contracts. Here, the agreement was a commercial contract involving highly sophisticated participants in the pharmaceutical market.

Florida

- **EMPLOYER FAILED TO ESTABLISH EXISTENCE OF AGREEMENT TO ARBITRATE**

  CEFCO c/b/a Which Wich Superior Sandwiches v. Odom
  2019 WL 4248465
  District Court of Appeal of Florida, First District
  September 9, 2019

  Jaime Odom sued CEFCO, alleging that while employed as a CEFCO marketing manager, she was sexually harassed, retaliated against, and not paid the wages she earned. CEFCO filed a motion to compel arbitration and stay proceedings, pursuant to the Mutual Arbitration Agreement that Odom entered into during her onboarding process. Odom asserted that she was never presented with the agreement and did not see it until CEFCO filed its motion. The court denied the motion to compel and CEFCO appealed.

  The District Court of Appeal of Florida, First District, affirmed. A party may not be forced to arbitrate absent a valid, written agreement to arbitrate. CEFCO contended that it presented ample proof that Odom received, reviewed, and signed the Agreement. However, the Agreement did not contain a date or any reference to Odom, and Odom contended that she never saw or signed the agreement. CEFCO filed an affidavit of the VP of HR, who spoke to general onboarding practices but who did not claim to have personal knowledge of the onboarding process for Odom. Odom filed an affidavit explaining that she never went through onboarding and instead worked with a store manager, who hired her and said "he would take it from here." CEFCO did not dispute Odom's claims. For the first time in its reply brief, CEFCO asserted that the trial court should have conducted a full evidentiary hearing. By raising this argument for the first time in its reply brief, CEFCO waived the argument. CEFCO offered no competent evidence to create a genuine issue of material fact regarding the existence of the Agreement between the parties so as to warrant a trial on the matter. In the alternative, CEFCO petitioned for a writ of certiorari based on the court's denial of its motion to stay proceedings, asserting that it was harmed by being required to engage in discovery not limited in scope to matters related to arbitration while the issue of arbitrability was still pending. Contrary to CEFCO's understanding, the issue was not pending – the trial court's decision on arbitrability was final.

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

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