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March 13, 2019

ADR Case Update 2019 - 5

Federal Circuit Courts

- **AWARD VACATED -- ARBITRATOR EXCEEDED POWERS**

Williamson Farm v. Diversified Crop Insurance Services
2019 WL 939004
United States Court of Appeals, Fourth Circuit
February 27, 2019

Williamson Farm had two crop insurance policies with Diversified Crop Insurance Services. The policies were sold pursuant to the Federal Crop Insurance Act (FCIA) and administered by the Federal Crop Insurance Corporation (FCIC). The policies included arbitration provisions. Due to mistakes on the part of insurance agents, Williamson Farm's claims for crop loss and prevented planting were denied. Williamson sought arbitration under the policies and the arbitrator found in his favor, awarding him \$97,692.30 related to crop loss and \$77,668.50 related to prevented planting. The arbitrator trebled the damages and awarded attorneys' fees. Williamson moved to confirm; Diversified moved to vacate. The court granted the motion to vacate, finding that the arbitrator exceeded her powers. Williamson appealed.

The United States Court of Appeals for the Fourth Circuit affirmed. Because the policies involved federal crop insurance, the arbitrator was required to look not only to the contract, but also to the statutes and regulations associated with the federal crop insurance scheme. These regulations require that if there is a dispute involving policy interpretation, then the parties – including arbitrators – must obtain an interpretation from the FCIC. Faced with policy ambiguities, the arbitrator resisted the requirement, saying that if she could not interpret policy provisions, then she had “little jurisdiction to decide anything.” By not obtaining an FCIC interpretation to resolve ambiguities and interpreting the provisions herself, the arbitrator exceeded her powers. The arbitrator also lacked the authority to award extra-contractual damages. She was obligated to follow Final Agency Determinations previously issued by the FCIC, which provided that extra-contractual damages could not be awarded in arbitration and could only be sought through judicial review. The award could not be confirmed in part based on contract damages because damages were combined and it was impossible to separate contractual from extra-contractual.

- **ORDER NOT AN “ARBITRAL AWARD” ENTITLED TO ENFORCEMENT**

Castro v. Tri Marine Fish Co
2019 WL 942967
United States Court of Appeals, Ninth Circuit
February 27, 2019

Castro’s employment contract with Tri Marine Fish Co. included a mandatory arbitration provision “applicable to all disputes or claims arising out of Castro’s employment” and requiring arbitration to occur in and subject to the procedural rules of American Samoa. After sustaining an injury at work, Castro negotiated a settlement agreement of his disability claims against Tri Marine. The agreement was negotiated in person in the Philippines. Upon agreeing to the terms, Castro and Tri Marine went to a nearby office building, where they met with a maritime voluntary arbitrator, Gregorio Biarez, who reviewed the settlement documents and signed a one-page document, labeled an “order,” which recognized the settlement. Upon learning that he would need more surgery, Castro sued Tri Marine for additional expenses. Tri Marine removed the case to federal court and moved to confirm the order as a foreign arbitral award under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The court confirmed the order and dismissed the case. Castro appealed.

The United States Court of Appeals for the Ninth Circuit reversed in part, vacated in part, and remanded. The arbitrator’s order was not an “arbitral award” entitled to enforcement under the Convention. The order was issued after the parties had already agreed to settle their dispute. The purported arbitration did not follow the parties’ agreement to arbitrate in American Samoa, instead taking place in an office lobby in the Philippines, a far cry in venue and law from the agreed procedure. Nothing in Castro’s conduct demonstrated an intent to arbitrate in the Philippines. The Court took no position on Castro’s suggestion that the absence of an arbitral award called into question the federal jurisdiction and remanded for the district court to assess.

- **QUESTION WHETHER WRONGFUL DEATH CLAIM SUBJECT TO ARBITRATION CERTIFIED TO COURT**

GGNSC Administrative Services LLC v. Jackalyn Schrader
2019 WL 926091
United States Court of Appeals, First Circuit
February 26, 2019

Jackalyn Schrader, who had power of attorney for her mother, Emma, executed admission documents upon Emma’s admission to the Golden Living Center Heathwood, a nursing home overseen by GGNSC. The documents included an Alternative Dispute Resolution Agreement. When Emma died, Jackalyn brought a wrongful death action against GGNSC. The court granted the motion to compel, finding that there was a valid agreement to arbitrate and that the agreement was neither procedurally nor substantively unconscionable. The court then considered whether Jackalyn’s wrongful death claims, which she brought in her capacity as the personal representative of her mother’s estate, were derivative of claims that Emma could have brought such that the claims were subject to arbitration. With no state opinion deciding the issue, the district court made an “informed prediction” that the Massachusetts Supreme Judicial Court (SJC) would hold that a wrongful death claim was a derivative claim. It granted the motion to compel and Jackalyn appealed.

The United States Court of Appeals for the First Circuit may, on its own motion, certify questions to the SJC when those questions may be determinative of the pending cause of action and when there is no controlling precedent that answers them. This case met both conditions. The Court thus exercised its discretion to certify the questions: Is the wrongful death claim of Emma Schrader’s statutory heirs derivative or independent of Emma Schrader’s own cause of action? And if the answer to the first question does not resolve the issue presented to the federal court, is Jackalyn Schrader’s wrongful death claim nonetheless subject to Emma Schrader’s Agreement to arbitrate claims against GGNSC?

- **ARBITRAL CONTRACT INTERPRETATION REASONABLE**

Economy Linen and Towel v. International Brotherhood of Teamsters
2019 WL 984816
United States Court of Appeals, Sixth Circuit
March 1, 2019

Economy Linen and Towel, which rents linens and apparel to healthcare facilities in Ohio, subcontracted with a firm after facing a shortfall of drivers in 2015. The Teamsters Local Union 637 filed a grievance on the grounds that the new drivers earned a higher hourly rate than union-represented employees. An arbitrator ruled for the union and the court affirmed. Economy appealed.

The United States Court of Appeals for the Sixth Circuit affirmed. Federal courts review arbitration decisions with a “deferential gaze”, looking to ensure that the arbitrator 1) did not commit fraud or other dishonesty; 2) resolved a dispute fairly committed to arbitration; and 3) at least arguably construed the collective bargaining agreement. The arbitration decision in question passed this test. Neither side alleged fraud. The arbitrator acted within his authority, pursuant to Article 14.05 of the arbitration agreement that empowered him to decide all grievances and disputes between the parties as to the interpretation and application of the contract. The arbitrator reasonably interpreted the contract, citing the relevant contract provisions, analyzing each of them, setting out the parties’ competing arguments, and ultimately adopting one interpretation.

- **PARTIES AGREED TO ARBITRATE ARBITRABILITY**

Gray v. Uber
United States District Court, M.D. Florida, Tampa Division
2019 WL 962760
February 27, 2019

Phillip Gray, a former Uber driver, asserted claims against Uber for defamation and constitutional violations after Uber deactivated his account following a passenger’s allegation of sexual harassment. Uber moved to compel arbitration.

The United States District Court, M.D. Florida, Tampa Division, granted the motion to compel. The Court considered whether the parties agreed to arbitrate the dispute. Gray did not contest the fact that a valid agreement to arbitrate existed between Uber and Gray; instead, he argued that he opted out of arbitration. A driver can opt out of the Uber Services Agreement Arbitration Provision within 30 days of the date of acceptance by sending Uber an email or letter with the driver’s information and intention to opt out. Uber’s records reflected that Gray did not opt out within 30 days. Gray asserted that he opted out “over 3 years ago” but provided no evidence of doing so, thus creating no issue of material fact concerning the parties’ agreement to arbitrate. Gray also asserted that Uber released him from the contract when it deactivated his account and breached the contract, which rendered the contract null and void, including issues involving the enforceability of the Services Agreement and its Arbitration Provision. This Court previously held, in relation to an identical provision, that the delegation clause provided that disputes regarding interpretation or application, including enforceability, revocability, or validity, would be decided by an Arbitrator. The parties agreed to arbitrate the arbitrability of this matter.

California

- **EMPLOYER NOT ENTITLED TO COMPEL ARBITRATION OF PAGA CLAIM**

Correia et al., v. NB Baker Electric
2019 WL 910979
Court of Appeal, Fourth District, Division 1, California
February 25, 2019

Mark Correia and Richard Stow sued former employer NB Baker Electric (Baker) for breach of contract, statutory unfair competition, and wage and hour violations, and sought civil penalties

under the Private Attorneys General Act of 2004 (PAGA). The court granted Baker's petition for arbitration on all causes of action except for the PAGA claim. Baker appealed.

The Court of Appeal, Fourth District, Division 1, California affirmed. The Court disagreed with Baker's contention that Correia's opposition to the arbitration petition was untimely. It was not clear which statute applied for timing purposes: the arbitration petition statute or the general motions statute. Even if it was the former, the Code of Civil Procedure allows a court to extend the time for filing opposition for good cause. Baker did not show that the court did not have good cause and/or that it would suffer prejudice if the court considered the motion. Baker asserted that the court's reliance on the California Supreme Court decision in *Iksanian* was inconsistent with the U. S. Supreme Court's *Epic Systems*. The Court determined that it remained bound by *Iksanian*, which analogized a PAGA claim to a qui tam action and held that a PAGA claim was outside FAA coverage because it was not a dispute between an employer and an employee arising out of a contractual relationship, but a dispute between an employer and a state. *Epic* did not address the specific issues before the *Iksanian* court involving a claim for civil penalties brought *on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum. Baker also asserted that the court should have ordered the PAGA claim to arbitration. In a PAGA representative action, a claim could not be compelled to arbitration based on an employer's pre-dispute arbitration agreement absent evidence that the state – the real party in interest per *Iksanian* - consented. There was no such evidence here.

New York

- **MASTER ARBITRATOR'S AWARD HAD EVIDENTIARY SUPPORT**

In Re Ilan Miller v. Elrac LLC
Supreme Court, Appellate Division, First Department, New York
2019 WL 1028814
March 5, 2019

The Supreme Court, New York County, denied a petition to vacate the award of a master arbitrator affirming the award of a lower arbitrator denying a petitioner no-fault benefits. An appeal was taken.

The Supreme Court, Appellate Division, First Department, New York affirmed. Where there is compulsory arbitration involving no-fault insurance, the standard of review is whether the award is supported by evidence or other basis in reason. The master arbitrator's award had evidentiary support in the record and was not arbitrary and capricious, irrational, or without a plausible benefit. The master arbitrator reviewed the no-fault arbitrator's determination and the parties' submissions, agreeing that the medical exam report provided established a basis to conclude that the petitioner required no further treatment. He considered the petitioner's evidence as well. He found the no-fault arbitrator reached the decision in a rational manner and the decision was not arbitrary and capricious, incorrect as a matter of law, in excess of policy limits, or in conflict with other no-fault arbitration proceedings – and thus there were no grounds for vacatur.

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

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