ADR UPDATE

AUTHOR*

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In this column, I highlight the most significant arbitration decisions over the last few months, starting with cases published since the January 2023 ADR Update written by my fellow ADR Update columnist, Ramit Mizrahi. Space permitting, in my tri-yearly column, I will also share reflections on mediation, arbitration, and alternate dispute resolution.

FAA PREEMPTION

Chamber of Commerce v. Bonta, 62 F.4th 473 (9th Cir. 2023)

In what is perhaps the most significant Fair Employment and Housing Act (FEHA) case decided during this period, the Ninth Circuit held that the Federal Arbitration Act (FAA) preempts California's A.B. 51, California's end to "forced arbitration." A.B. 51, in part, adds Cal. Lab. Code § 433, which makes it a misdemeanor for an employer to require an applicant or existing employee to sign an arbitration agreement as a condition of employment. Seeking to circumvent preemption by the FAA, the California Legislature included a provision that if the parties entered into such an arbitration agreement, it would nevertheless be enforceable. *See* Cal. Lab. Code § 432.6(f).

In *Chamber of Commerce v. Bonta*, the Ninth Circuit determined that this penalty-based scheme to prevent the formation of arbitration agreements violates the equal-treatment principle inherent in the FAA, and evinces a hostility toward arbitration that is contrary to FAA's intent to encourage arbitration. Thus A.B. 51 is preempted. The State of California argued that the Court could sever the criminal provisions set forth in Cal. Lab. Code § 433 and uphold the balance of A.B. 51. However, the Ninth Circuit determined that because all of the provisions of A.B. 51 work together "to burden the formation of arbitration agreements," it could not sever section 433 under the severability clause in section 432.6(i), finding that the severability clause related only to the provisions of section 432.6. Further, the Ninth Circuit would not presume that the California Legislature wished to invalidate a generally applicable provision such as section 433. Judge Lucero's lengthy dissent questioning the preemptive scope of the FAA is worth a read. Will California's next move, if any, be to return to the Legislature? Or will California seek the attention of the U.S. Supreme Court? Stay tuned.

WAIVER

Armstrong v. Michaels Stores, Inc., 59 F.4th 1011 (9th Cir. 2023)

Two Supreme Court decisions on arbitration informed the opinion in this case. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Court held that arbitration agreements requiring individual arbitration, not class or collective arbitration, are enforceable, and in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), the Court concluded that the FAA restricts courts from creating arbitration-favoring procedural rules.

Teresa Armstrong signed an arbitration agreement as part of her employment with Michael's Stores. When an employment dispute arose, she filed a complaint in October 2017, which was removed to federal court. In the initial joint case management statement as well as at the case management conference, Michael's expressed its intention to compel arbitration after conducting discovery. Michael's served interrogatories and requests for production of documents regarding both Armstrong's PAGA claims as well as her individual claims. No discovery motions were filed. In 2018, the Supreme Court decided *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which held that arbitration agreements requiring individual arbitration, or class or collective arbitration, are enforceable. Two weeks after *Epic Systems* was decided, Michael's asked Armstrong to voluntarily dismiss her non-PAGA claims, which she refused to do. In August 2018,

Michael's moved to compel arbitration, which the court granted. Following the confirmation of an arbitration award in Michael's favor, Armstrong appealed on the basis that Michael's waived its right to the arbitral forum because it waited too long to move for arbitration. The Ninth Circuit affirmed the district court's order compelling arbitration on the following grounds: Michael's repeatedly reserved its right to arbitration; did not ask the district court to weigh in on the merits; and did not engage in meaningful discovery. Thus, although Michael's did not immediately move to compel arbitration, its actions did not amount to a relinquishment of the right to arbitrate. The Ninth Circuit relied heavily on *Morgan v. Sundance, Inc.*, 142 S. Ct. at 1713-14.

Hill v. Xerox Business Services, LLC, 59 F.4th 457 (9th Cir. 2023)

In *Hill*, another Ninth Circuit case regarding waiver, the Court found that Xerox did not express an intent to arbitrate, served extensive discovery, moved for partial summary judgment, and waited until class certification to assert its right to arbitration. Xerox relied on a futility argument, that it could not file a motion to compel arbitration without knowing what the arbitrable claims would be. The Ninth Circuit disagreed, citing to *Morgan v. Sundance, Inc*, 142 S. Ct. 1708 (2022). Thus, Xerox's actions were deemed inconsistent with an intention to arbitrate.

ISSUE PRECLUSION OF PAGA CLAIMS

Rocha v. U-Haul Co. of California, 88 Cal. App. 5th 65 (2023)

In the published portion of this opinion, the Second District Court of Appeal, Division 1, rendered an important decision that creates a split of authority with that of the Fourth District Court of Appeal, Division 2, in *Gavriloglou v. Prime Healthcare*, 83 Cal. App. 5th 595 (2002).

The *Rocha* Court explained that principles of issue preclusion determine whether plaintiff employees have standing to bring their proposed PAGA claims following arbitration of their individual Cal. Lab. Code claims. Unlike a settlement of individual claims, which is not an adjudication on the merits, an arbitrator's finding determining that the employees did not meet their burden of establishing the elements of the Cal. Lab. Code violation being adjudicated in arbitration precludes the employees from then establishing standing in court using the same Labor Code violation alleged in their individual claims, if the threshold requirements of issue preclusion are met. First, the issue must be identical. Second, the issue must actually have been litigated in the prior proceeding. Third, the issue must have been decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Fifth, the party against whom preclusion is sought must be the same as or in privity with the party to the former proceeding.

In *Rocha*, the Rocha brothers arbitrated their individual claims while the PAGA complaint remained stayed by the Court. The arbitrator found that the Rochas did not prove their individual Cal. Lab. Code § 1102.5 claims. The Rochas then sought to bring their section 1102.5 claims as part of their PAGA complaint in court. The Court of Appeal held that they were precluded from bringing section 1102.5 claims as part of their PAGA complaint, because all of the factors of issue preclusion were met. In doing so, the Court of Appeal explained in detail why it disagrees with *Gavriloglou v. Prime Healthcare*. In *Gavriloglou*, the Fourth District Court of Appeal held that the arbitration award in the employer's favor was not entitled to preclusive effect in the employee's later PAGA action, because the capacity in which they appeared was different, even though the arbitrator found that the alleged Cal. Lab. Code violations did not occur.

Given the extensive number of PAGA cases in which individual Cal. Lab. Code claims are arbitrated prior to the Court's adjudication of PAGA allegations based on the same violations, it will be noteworthy to see how employees and employers handle this disagreement regarding whether the different capacity of the employee in bringing an individual claim and in bringing a PAGA claim would likely be a factor in determining issue preclusion. Hopefully, the California Supreme Court will resolve the conflict.

RETROACTIVITY AND UNCONSCIONABILITY: ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

Murrey v. Superior Court, 87 Cal. App. 5th 1223 (2023)

Cassandra Murrey filed a petition for extraordinary writ when the trial court compelled arbitration of her complaint that alleged unlawful harassment based on gender and sex, failure to prevent harassment, Cal. Lab. Code violations, and retaliation for opposing discrimination and harassment. Murrey filed her harassment complaint in March 2021. In March 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. §§ 401, 402 (Act), the first amendment to the FAA in nearly 100 years. The Act applies to pre-dispute arbitration agreements and pre-dispute joint action waivers in the context of sexual assault and sexual harassment

cases filed after its enactment. This case holds that the Act applies to contracts signed before or after the Act, in which the case is filed after the Act. However, the Act is not retroactive as to cases, such as Murrey's, that were pending at the time the Act went into effect. The Court of Appeal did grant the writ and return the case to the trial court, but did so on grounds of unconscionability.

This opinion contains an excellent discussion and analysis of unconscionability. General Electric required Murrey to sign an arbitration agreement as a condition of her employment as a product sales specialist for ultrasound equipment. The appellate court found this was a contract of adhesion that concealed both the arbitration rules and the name of the arbitration provider, giving only the employer the authority to select the designated rules and organization, depending on the work location, with no notice to the employee of which rules or organizations would be applicable. In its briefing, GE provided a declaration that it used AAA rules, but that representation was nowhere in the arbitration agreement. Because the rules were not in the agreement and could be changed at any time, there was no way for the employee to determine if the rules were fair. Additionally, the agreement mandated arbitration of claims that an employee would be likely to bring, while excluding from arbitration claims, such as intellectual property, that an employer would be likely to bring. Further, the discovery provisions in the agreement were internally inconsistent, and placed a greater burden on the employee to justify additional discovery. The appellate court also found the pre-arbitration dispute resolution process to be one-sided and lacking in neutrality. The arbitration agreement limited the number of witnesses to five, and the number of hearing days to two. While not per se unconscionable, the court determined that this favored the employer, as an employee would likely need more than two days to present her evidence, given the claims. The writ was granted, finding that the highly secretive and one-sided nature of the agreement contained a high degree of both procedural and substantive unconscionability.

Iyere v. Wise Auto Group, 87 Cal. App, 5th 747 (2023)

In this case, the employees opposed the motion to compel arbitration on both formation and unconscionability grounds. The trial court denied the employer's motion to compel on both grounds.

To deny a motion to compel arbitration based on unconscionability, there must be both procedural unconscionability and substantive unconscionability. As to procedural unconscionability, the employees claimed they were handed a stack of documents to quickly sign, and they did not actually read them. As to substantive unconscionability, the employees asserted that because the agreement was governed by the FAA, it violated Cal. Lab. Code § 925 (which prohibits a requirement that an employee working and residing in California be forced to adjudicate employment claims outside of California or from being deprived of the application of California law). However, the appellate court pointed out that the FAA is a rule of procedure and does not preclude application of substantive California law. The appellate court also found that the agreement, while giving the employer the option of choosing between two named arbitration providers, was not substantively unconscionable, where the two named providers were well-recognized and the choice would not give the employer an advantage. Additionally, the employers also raised the fact that the agreement did not specify the minimum factors ensuring fairness set forth in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000). However, the appellate court reiterated the principle that if an arbitration agreement covers FEHA claims and is silent as to the elements required by the *Armendariz* factors, courts will infer those terms.

DEADLINES TO VACATE OR CORRECT AN AWARD AND CIVILITY

Darby v. Sisyphian, LLC, 87 Cal. App. 5th 1100 (2023)

"A party who has missed the [California Arbitration] Act's (Cal. Code Civ. Proc. §§ 1280-1294.4) carefully crafted deadlines has sacrificed its right to seek to vacate or correct the arbitration award before the trial court." This important opinion clarifies the deadlines for filing a motion to vacate or correct an arbitration award.

The deadline for a petition to confirm an award is four years from the date the petitioner is served with the award. The deadline for a petition to vacate or correct the award is less straightforward because the California Arbitration Act prescribes two ways to do so, each with its own deadline. A party seeking to vacate or correct an award in a standalone petition has 100 days from the date the petitioner was served with the award. On the other hand, a party seeking an order vacating or correcting an award in its response to a prior-filed petition to confirm that award has only 10 days to serve its response from the time the responding party is served with the petition to confirm.

The question answered by this case is what happens if the first party to serve files a motion to confirm the award? Is the deadline of the party seeking to vacate the award 100 days from the date the petitioner is served with the award or 10 days after the motion to confirm is served? The answer is whichever deadline is shorter. Therefore, if the petition to confirm is filed fewer than 90 days after

the award is served, the competing petition to vacate or correct, no matter whether styled as a response or a standalone motion, must be filed and served within 10 days of the petition to confirm. The 100-day deadline is jurisdictional and therefore inflexible. The 10-day deadline can be extended in only one of two situations: (1) a written stipulation to extend; or (2) a finding of good cause to extend and where such extension would not unduly prejudice the other party. See Cal Code Civ. Proc. § 1290.6. The detailed explanation provided by this appellate opinion provides a helpful roadmap in navigating deadlines.

While relegated to footnote 4, the appellate court drew critical attention to plaintiff's motion to compel as follows:

> Plaintiff's motion also accused the arbitrator of "misinterpet[ing] or conveniently forget[ting]" the terms of the order striking portions of her complaint, condescendingly offered to "refresh the arbitrator's memory," implied that the arbitrator did not "take its promises to act neutrally seriously," and asserted that "[it][was] hard to assume anything other than bias" against her by the arbitrator. Apart from exhibiting Herculean levels of hubris for lambasting the arbitrator for not remembering details of an 11-month old order that plaintiff elected not to address in her briefing, the tone exhibited in that motion was discourteous and disrespectful to a degree that transgresses the standards lawyers should exhibit toward the arbiter of any tribunal in which they appear.

The author's comment: There are many ways to present positions in written briefs, whether to an arbitrator, judge, or the Court of Appeal, and counsel can do so in a way that will argue the party's position without personal attacks on the arbitrator or opposing counsel. Personal attacks indicate a lack of civility. The existence of this footnote suggests that attorneys consider the probable effect of their language on those considering their arguments when they highlight an error. Here, the appellate court agreed with plaintiff that she was entitled to her attorney fees for proving violations of overtime, minimum wage, and wage statement violations and that the arbitrator erred in denying all attorney's fees due to fees not being available for meal and rest break violations. However, the Court called out the manner in which the arbitrator's error was argued in briefing.

COMPELLING ARBITRATION OF NON-SIGNATORIES

Hernandez v. Meridian Management Services, LLC, 87 Cal. App. 5th 1214 (2023)

In this case, defendants, who did not sign an arbitration agreement with plaintiff, sought to compel arbitration. The appellate court sets forth a helpful primer on the principles of equitable estoppel, agency and third party beneficiaries, because those principles relate to the argument of the non-signatories seeking to compel arbitration.

Plaintiff worked for Intelex Enterprises, LLC and several other firms in the same building that were "legally separate but functionally related." Plaintiff signed an arbitration agreement with Intelex, but not with the other firms. In her complaint, she alleged that the other firms each shared the same address, had the same human resources manager, same controller, same payroll department, same risk manager, and same information technician. The complaint did not mention Intelex. The other firms filed a motion to compel arbitration, showing that Intelex and the other firms were jointly owned and operated, and located in the same building. In seeking to compel arbitration, the other firms argued equitable estoppel, agency, and third party beneficiaries. The appellate court affirmed the trial court's order denying the motion to compel. The other firms did not sign the arbitration agreement. They did not establish equitable estoppel because they could not show that plaintiff was trying to profit from an unfair action. Neither did they present proof of agency. They are not third party beneficiaries of Intelex's arbitration agreement.

This case presents very interesting analyses. First, the appellate court explained that it is not unfair for plaintiff to make the decision to exclude Intelex and thereby tailor her complaint so as to avoid arbitration. After all, there is nothing unfair about a party preferring to appear in court or preferring to appear in arbitration. As the trial court noted, "[p]eople make tactical 'bargains' like this all the time." Equitable estoppel typically applies where a signatory has sued both another signatory and a non-signatory for identical claims, the misconduct or misconduct is identified and a signatory can show that it would be unfair to allow the non-signatory to exploit the mistake or misconduct. In a case of first impression, the Court of Appeal found that where one party to the contract was never a party to the case, the lynch pin of the estoppel doctrine, fairness, must be applied. Here, the other firms did not explain the unfairness, if any, they would suffer from a ruling denying arbitration. Second, the appellate court reviewed the elements of agency. Agency is a fact-intensive inquiry. A court cannot assume a joint employer relationship simply because companies share officers and have offices in the same building. Agency is a consensual relationship. Here, the other firms offered no evidence that they had authority to act on behalf of Intelex. Third, the other firms did not present evidence to show that they would benefit from the contract, that the

motivating purpose of the contract was to provide benefit to the third party, and whether permitting a third party to bring its own breach of contract action would be consistent with the objectives of the contract and the reasonable expectations of the contracting parties. Here the other firms could not show that plaintiff and Intelex sought to benefit the other firms.

DELEGATION DOCTRINE

Cornett v. Twitter, Inc. 2023 WL 187498 (N.D. Cal. Jan, 13, 2023)

This district court decision highlights the importance of the specific language in an arbitration agreement, or, as the saying goes, the devil is in the details. When presented with the issue of who determines whether an arbitration agreement is unconscionable, one starts with the general rule that the court, not the arbitrator, decides unconscionability. *Oto LLC v. Kho*, 8 Cal. 5th 111, 138 (2019). However, parties to the agreement may delegate gateway issues, including unconscionability, to the arbitrator if the language doing so is "clear and unmistakable." *Henry Shein, Inc. v. Archer White Sales, Inc*,. 139 S. Ct. 524, 530 (2019) (quoting *Rent-a-Car, West, Inc. v. Jackson*, 561 U.S. 63, 79 (2010)). What happens if the arbitration agreement delegates to the arbitrator "the disputes arising out of or relating to interpretation or application of this Agreement, including the enforceability, revocability or validity of the Agreement or any portion of the Agreement"?

Here, Twitter employees sued Twitter, Inc. on behalf of themselves individually and a putative class of Twitter employees, alleging that recent layoffs violated federal and state laws. Twitter moved to compel arbitration of the individual claims, which the employees opposed on unconscionability, mentioning in a footnote that the delegation clauses in the arbitration agreements "are not clear and unmistakable." The District Court disagreed, finding that the language in the arbitration agreements establishes that the parties clearly and unmistakably agreed to arbitrate the question of arbitrability.

ENDNOTES

* Hon. Michelle R. Rosenblatt (Ret.) has been a mediator and arbitrator on a wide range of civil disputes with ADR Services, Inc. since 2016, when she retired from the bench after 23 years of judicial service. Judge Rosenblatt taught judicial education throughout her career on the bench and is a frequent participant in continuing education programs. She served for five years as Editor of the California Judges Association magazine, *The Bench*.

1. *Adolph v. Uber Technologies, Inc.*, nonpublished opinion, 2022 WL 1073583 (2022), *review granted* (Jul. 20, 2022); S274671/G059860, G060198.