ADR UPDATE

AUTHOR*

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Dear Reader, welcome to my first column covering mediation, arbitration, and all things ADR! In reflecting on the role of this column, which we have revived after a one-year hiatus, I aim to keep you up to date on the latest cases, and maybe share some reflections, space permitting. The deluge of arbitration cases never stops (by my count, there were about 60 published decisions in the past year). Space and time constraints mean that I will likely give you mostly big-picture overviews of the most important cases—enough to pique your interest so you can decide which ones are worth reading and digging into further. As important arbitration decisions often come down in wage-and-hour cases, I will aim not to cover anything that my fellow columnists and contributors have already written about. (On that note, I highly recommend you take a look at our November 2022 features discussing *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), and its impact on PAGA cases, as well as this month's column by Lauren Teukolsky covering some post-*Viking* decisions.) This issue's column will focus on some recent cases worth noting, going back several months.

AGGRESSIVE SETTLEMENT COMMUNICATIONS & ANTI-SLAPP PROTECTIONS

Flickinger v. Finwall, 85 Cal. App. 5th 822 (2022)

Flickinger is a colorful case addressing where the line is drawn with respect to anti-SLAPP (Cal. Code Civ. Proc. § 425.16) protections for aggressive pre-litigation communications. In *Flickinger*, the working relationship between a homeowner and a contractor broke down with remodeling work still incomplete. Each threatened the other. The homeowner threatened to sue the contractor for not completing the work and not getting required permits, and sent a demand letter seeking $125,000. The contractor's defense was that the homeowner had not wanted the permits. He claimed that the homeowner had shared, while drunk, that this was because he was paying for the work with illegal kickbacks received from vendors while working for Apple. The contractor, through counsel, rejected the demand in a response containing the following language: "If [plaintiff] initiates litigation, [the contractor's] position will not change and he will aggressively defend himself. I suggest you discuss with [plaintiff] how such litigation may result in Apple opening an investigation into [plaintiff's] relationships with vendors." The homeowner filed suit, prevailed, and was awarded damages. He then filed a second suit against the contractor and his counsel, including for civil extortion and a Ralph Civil Rights Act (Cal. Civ. Code § 51.7) violation. The defense filed an anti-SLAPP motion, which the trial court denied. It determined that the response to the demand letter amounted to extortion as a matter of law, depriving it of anti-SLAPP protections. The Court of Appeal reversed. It applied *Flatley v. Mauro*, 39 Cal. 4th 299 (2006), and concluded that the letter fell within the bounds of professional conduct such that it was protected by the anti-SLAPP statute. The Court of Appeal reasoned that the letter made no "threat" other than that the contractor would "aggressively defend himself," and that the litigation itself could result in negative repercussions. This is not a threat to report the plaintiff to prosecuting authorities or take other actions deemed extortionate.

ARBITRATION WAIVER

Davis v. Shiekh Shoes, LLC, 84 Cal. App. 5th 956 (2022)

The Court of Appeal affirmed the trial court's denial of the employer-defendant's motion to compel arbitration based on waiver where the defendant had waited for 17 months before filing its motion. The Court determined that there was no reasonable explanation for the delay, rejecting arguments that the employer lacked counsel for several months, experienced pandemic-related court disruptions, and viewed the claims as being primarily against a co-defendant. The Court further held that the employer took actions inconsistent with an

intent to arbitrate, including requesting a trial date, actively participating in litigation, acquiescing to discovery and trial scheduling, and making court appearances. As the Federal Arbitration Act (9 U.S.C. §§ 1-14) (FAA) applied, no showing of prejudice was necessary under *Morgan v. Sundance, Inc.* 142 S. Ct. 1708 (2022).

Desert Reg'l Med. Ctr., Inc. v. Miller, 87 Cal. App. 5th 295 (2022)

Desert Regional Medical Center (DRMC) appealed the trial court's denial of its petition to compel arbitration based on delay. The Court of Appeal affirmed, holding that DRMC waived its right to arbitrate when it failed to file its petition for over four years, and instead participated in proceedings before the Labor Commissioner (as permitted in its arbitration agreement), filed a de novo appeal of the decision in the trial court, attempted to remove the action to federal court, filed motions of related cases, objected to written discovery, and sought sanctions, among other things. The Court of Appeal further rejected DRMC's argument that the issue of waiver should have been decided by the arbitrator, not the court.

Villareal v. LAD-T, LLC, 84 Cal. App. 5th 446 (2022), as modified (Nov. 2, 2022)

An employer-defendant in a Fair Employment and Housing Act (Cal. Gov't Code §§ 12900-12999) (FEHA) case sought to compel arbitration based on an agreement it had entered into using an unregistered fictitious business name. The trial court denied its motion because it had failed to comply with the fictitious business name registration requirement. The employer appealed. It then registered its fictitious business name while the appeal was pending, nearly a year after its motion was denied. The Court of Appeal vacated the trial court's denial of the motion to compel arbitration (as the fictitious business name statement had been filed), but remanded with instructions to address whether the employer waived its right to compel arbitration by delaying its filing of the statement.

WITHDRAWAL FROM ARBITRATION BASED ON UNTIMELY PAYMENTS

De Leon v. Juanita's Foods, 85 Cal. App. 5th 740 (2022)

The Court of Appeal held that Cal. Code Civ. Proc. § 1281.98 established a "bright-line rule" that a drafting party's failure to timely pay outstanding arbitration fees within 30 days constitutes a material breach, allowing the plaintiff to withdraw claims against that party from arbitration and to proceed in court. It cited with approval holdings in *Espinoza v. Superior Court*, 83 Cal. App. 5th 761 (2022) and *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621 (2022), interpreting section 1281.97 similarly. Interestingly, *De Leon* involved two employers, one that timely paid arbitration fees (Aerotek) and another that did not (Juanita's Foods). The trial court held that the employee was entitled to withdraw his claims against Juanita's Foods from arbitration, but that his claims against Aerotek would proceed in arbitration first, with the lawsuit against Juanita's Foods stayed pending the outcome of that proceeding.

Williams v. W. Coast Hosps., Inc., 86 Cal. App. 5th 105 (2022)

In a consumer case involving elder abuse/wrongful death, the Court of Appeal affirmed the trial court's order lifting a stay and permitting plaintiffs to resume litigating in court after the defendant failed to timely pay arbitration fees under Cal. Code Civ. Proc. § 1281.98. In doing so, it rejected the defendant's arguments that plaintiffs were first required to obtain a determination from the arbitrator that the defendant had defaulted on its obligations, or that these statutory provisions applied only to mandatory predispute arbitration agreements.

UNCONSIONABILITY ANALYSIS

Mills v. Facility Sols. Grp., Inc., 84 Cal. App. 5th 1035 (2022)

In *Mills*, the Court of Appeal affirmed the trial court's denial of a motion to compel arbitration based on unconscionability, and agreed that the agreement was so permeated with substantive unconscionability that those terms could not be severed. It had at least six substantive unconscionable terms, including that it: barred the plaintiff from recovering the filing fee if he prevailed and required the employee to pay the costs of postponing the hearing; required him to pay the costs of appeal and a second hearing; had an improper fee-shifting provision; did not provide for adequate discovery (no right to any written discovery); barred the tolling of statute of limitations periods; and had an invalid PAGA waiver. As there were multiple substantively unconscionable terms and severing them would amount to a rewriting of the agreement, the trial court was deemed correct in declining to sever them. Of note, in another case filed by the same plaintiff against the same defendant, a different trial judge had found the unconscionable terms severable. However, the Court of Appeal determined that that order was not final, so claim and issue preclusion did not apply.

Beco v. Fast Auto Loans, Inc., 86 Cal. App. 5th 292 (2022)

Beco is another case in which the Court of Appeal affirmed the trial court's denial of a motion to compel arbitration based on unconscionability. As a preliminary matter, the Court of Appeal held that there was not a clear and unmistakable delegation clause where the agreement stated that it covered "any dispute concerning the arbitrability of any such controversy or claim," and that incorporation by reference of the AAA rules did not delegate authority to the arbitrator to decide the enforceability of the agreement. The unconscionable terms included limited discovery entirely at the arbitrator's discretion, a shortened statute of limitations period, requiring the employee to bear his own fees and costs without the ability to recover them, and exposing the employee to liability for arbitration costs. The Court of Appeal also held that the trial court did not abuse its discretion in determining that the agreement was permeated by unconscionability which could not be remedied by severance. *See also Navas v. Fresh Venture Foods, LLC*, 85 Cal. App. 5th 626 (2022) (covered in Wage and Hour Case Notes, p. 14).

REVIEW OF ARBITRATION AWARDS

Taska v. RealReal, Inc., 85 Cal. App. 5th 1 (2022)

In a written decision, titled "Award," an arbitrator determined that plaintiff Elizabeth Taska failed to meet her burden on her claims and was not entitled to fees and costs under FEHA, but that neither was defendant The RealReal (TRR) because the claims were not frivolous or meritless. Two months later, the arbitrator reversed course in a new written decision, titled "Final Award," deeming Taska's conduct "unreasonable, meritless, frivolous, and vexatious" such that TRR was entitled to $53,705.43 in fees and costs. The arbitrator then issued a "Corrected Final Award" later that month to correct a calculation error, bringing the amount to $73,756.43. Taska petitioned the court to vacate the portion of the Corrected Final Award related to fees and costs, arguing that the arbitrator exceeded her authority by amending the Award; TRR petitioned to confirm the entire Corrected Final Award. The trial court agreed with Taska, confirming the Corrected Final Award only with respect to the liability determination. It entered judgment in favor of TRR, with each side to bear their own fees and costs. TRR appealed. The Court of Appeal affirmed, holding that the arbitrator exceeded her authority under Cal. Code Civ. Proc. §§ 1284 and 1286.6. The first "Award" included determinations on all the issues submitted in the arbitration, such that once the 30-day period for correction under § 1284 ran, the award became final and the arbitrator's jurisdiction ended.

HayDay Farms, Inc. v. FeeDx Holdings, Inc., 55 F.4th 1232 (9th Cir. 2022)

In this non-employment breach of contract case, a three-arbitrator tribunal awarded the plaintiffs more than $21 million in damages. The defendant sought to vacate the award in federal district court, arguing that it exceeded the tribunal's powers under the FAA. The district court agreed, vacating $7 million from the award on the basis that this portion of the award manifestly disregarded California law because it amounted to a windfall for the plaintiffs, but confirmed the rest. The Ninth Circuit reversed in part, holding that vacateur was improper because the award was not completely irrational, nor did it exhibit a manifest disregard of law. The Ninth Circuit acknowledged that the defendant's position was "sympathetic," and that the tribunal likely misread the contract and rejected the "best interpretation." Nevertheless, because the grounds for vacateur are extremely narrow, even a seemingly wrong award would be upheld so long as the arbitrator even arguably construed or applied the contract.

OTHER ARBITRATION DECISIONS

Vaughn v. Tesla, 87 Cal. App. 5th 208 (2023)

In *Vaughn*, the Court of Appeal held that injunctions sought under the FEHA are "public injunctions," and that the FAA does not preempt California's rule prohibiting waiver of the right to seek such injunctions. As such, it affirmed the trial court's order denying Tesla's motion to compel arbitration as it pertained to plaintiffs' request for a public injunction enjoining Tesla from committing further violations of the FEHA. It also affirmed the trial court's denial of the motion to compel arbitration of claims based on conduct that occurred when two of the plaintiffs worked for Tesla through staffing agencies before they joined as direct employees, as Tesla's arbitration agreement contained language that could be construed as applying only to claims related to direct employment (claims occurring after direct employment began were ordered into arbitration).

Suski v. Coinbase, Inc., 55 F.4th 1227 (9th Cir. 2022)

Plaintiffs filed a putative class action case against the cryptocurrency exchange Coinbase, alleging wrongdoing in connection with a sweepstake that it held. The plaintiffs had signed a Coinbase user agreement with an arbitration provision. They later entered into Coinbase's sweepstakes, which had Official Rules containing a forum selection clause stating that California courts had exclusive jurisdiction over all sweepstakes-related disputes. After suit was filed, Coinbase moved to compel arbitration. The district court denied the motion. It ruled that, because the two

agreements conflicted, there was a question of contract formation, which was for the court to decide. It then held that the forum selection clause in the official rules superseded the arbitration provision of the user agreement, and denied the motion to compel arbitration accordingly. On appeal, the Ninth Circuit affirmed, agreeing with the district court's reasoning.

Zhang v. Superior Ct., 85 Cal. App. 5th 167 (2022), *reh'g denied* (Nov. 18, 2022)

Zhang is an interesting case in which an arbitration agreement with a clear and unmistakable delegation clause tests the limits of the protections of Cal. Lab. Code § 925. It involved claims between Dentons U.S. LLP and one if its former equity partners, Jinshu "John" Zhang. Dentons initiated an arbitration action against Zhang in New York, and later a motion to compel arbitration in New York, and he filed a wrongful termination action in California. Dentons sought to stay Zhang's action pending completion of the arbitration in New York, while he argued that Cal. Lab. Code § 925 rendered the New York courts incompetent to rule on the motion to compel arbitration. Ultimately, the Court of Appeal held that the parties delegated issues of arbitrability to the arbitrator, including whether Zhang was an employee who may invoke Section 925. In essence, "the applicability of Labor Code section 925 is a question of arbitrability that may be delegated to the arbitrator"—even if that arbitrator is in another state.

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