ADR UPDATE

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IN CIRCUIT SPLIT, NINTH CIRCUIT HOLDS THAT DISTRICT COURT CAN DISMISS ACTION WHEN ALL CLAIMS SUBJECT TO ARBITRATION

Forrest v. Spizzirri, 62 F.4th 1201, 1203 (9th Cir. 2023)

Delivery drivers sued their employer for violations of Arizona and federal wage and hour laws. The employer removed the case to federal court, then moved to compel arbitration and to dismiss the case. The plaintiffs conceded that all of their claims were subject to arbitration but sought to have the case stayed rather than dismissed. They argued that the Federal Arbitration Act (FAA), requires that a district court stay a case pending arbitration. Section three of the FAA provides that a court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement" (so long as the party is not in default in proceeding with arbitration). 9 U.S.C. § 3 (emphasis added). The district court rejected this argument and granted the employer's motion, compelling arbitration and dismissing the case without prejudice. The plaintiffs appealed.

The Ninth Circuit affirmed. Established Ninth Circuit precedent provides that, when all claims are subject to arbitration, "notwithstanding the language of [section three], a district court may either stay the action or dismiss." *Forrest*, 62 F.4th at 1204-025 (quoting *Johnmohammadi v. Bloomingdale's, Inc*., 755 F.3d 1072, 1074 (9th Cir. 2014)). The court explained that, "[a]s a three-judge panel we are compelled to apply circuit precedent unless it is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Id.* at 1205 (cleaned up). Thus, the district court did not abuse its discretion in dismissing rather than staying the case.

In a concurrence, Judge Graber (joined by Judge Desai) encouraged the Supreme Court to take up the issue to resolve a circuit split. She further encouraged the Ninth Circuit to take the case en banc in the meantime so that it could follow what she viewed to be required by the FAA.

ARBITRATOR COULD NOT BE DISQUALIFIED BASED ON INFORMATION CONTAINED IN VOLUNTARY DISCLOSURE

Sitrick Group, LLC v. Vivera Pharmaceuticals, Inc., 89 Cal. App. 5th 1059 (2023)

This non-employment, non-consumer case reaffirms the established principle that a party cannot disqualify an arbitrator based on a disclosure that is not legally required. Sitrick Group, a crisis management company, sued a pharmaceutical company client (Vivera) that hired it to help address negative publicity but failed to pay its $292,773.32 bill. Sitrick filed its demand for arbitration with Judicial Arbitration and Mediation Services (JAMS), and soon after the parties selected an arbitrator in the matter. Days later, the arbitrator issued a disclosure checklist that provided that he would entertain future offers of employment or new professional relationships from parties or lawyers in the matter. The checklist provided that, in non-consumer matters (as this case was designated), the arbitrator would not inform the parties of any such offers or new matters. It further provided that that these disclosures constituted a waiver of any further disclosure requirements regarding subsequent employment involving the same parties, lawyers, or law firms. Vivera did not object.

The following year, the arbitrator agreed to serve as the arbitrator in another matter involving Sitrick (represented by the same law firm). Months later, he disclosed this retention. Vivera then moved to disqualify him. JAMS denied the motion. It reasoned that the disclosure was a courtesy and not required in a non-consumer case, and further that the retention did not suggest a bias or

inability to be impartial. The arbitrator then held a three-day hearing, in which Vivera chose not to participate. He ruled in Sitrick's favor, awarding it $556,639.98, including attorney's fees, costs, and interest. After Sitrick filed petitions to confirm the arbitration award, Vivera asked the trial court to vacate the award, arguing that the arbitrator's disclosures were inadequate. The trial court confirmed the award and Vivera appealed.

The court of appeal affirmed. The California Arbitration Act (CAA) provides that a "proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial," including "matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council." Cal. Code Civ. Proc. § 1281.9. The court of appeal held that these ethics standards do not require an arbitrator in a non-consumer case to disclose a new matter involving the same party or counsel when the arbitrator already informed the parties of the intention to do so without subsequent disclosures. As such, "[a] disclosure that is not required cannot be the basis for vacating an arbitration award, late or not."

ARBITRATION AGREEMENTS ENFORCEABLE AFTER DETERMINATION OF NO SUBSTANTIVE UNCONSCIONABILITY

Fuentes v. Empire Nissan, Inc., 90 Cal. App. 5th 919 (2023)

In this case, authored by Associate Justice John Shepard Wiley Jr., the court of appeal addressed the enforceability of a Nissan dealership's arbitration agreement. The agreement was substantially similar to the one that the California Supreme Court held to be unconscionable in *OTO, L.L.C. v. Kho*, 8 Cal.5th 111 (2019), and to one held to be unconscionable in *Davis v. TWC Dealer Group, Inc.*, 41 Cal. App. 5th 662 (2019).

The arbitration agreement was printed in a "strikingly minute" font that crammed about 900 words into three vertical inches. The record copy was "blurry to boot," to the point of being completely illegible. The plaintiff argued that the illegible and indecipherable nature of the agreement rendered it both procedurally *and* substantively unconscionable. She further argued that the arbitration agreement was substantively unconscionable for additional reasons, including that it lacked mutuality because she was required to sign two trade secret contracts that allowed the defendants to seek injunctions in court, that the separate contracts created confusion, that the arbitration agreement did not explain how to initiate arbitration, and because the defendants did not sign the agreement. The trial court agreed with her, and denied the defendants' motion to compel arbitration on unconscionability grounds. The defendants appealed.

The court of appeal reversed, holding that the arbitration agreement was enforceable because it contained no substantive unconscionability. In doing so, the court rejected the argument that the agreement's tiny font/illegibility rendered it substantively unconscionable, refusing to "double count" this as both procedurally and substantively unconscionable. The court explained that the law enforces contracts against those who cannot read them at all—those who are blind, illiterate, or signed a contract in a foreign language—absent unconscionability in their terms. The court rejected the plaintiff's other arguments about substantive unconscionability. It read the two trade secret agreements as providing the defendants with a right to seek trade secret injunctions only in arbitration (preserving mutuality). It held that the employer's failure to sign its own agreement did not render it lacking in mutuality; at most this went to whether a contract exists at all, which was not an issue in the case. It determined that any confusion created by separate contracts was an issue of procedural rather than substantive unconscionability.

The court of appeal distinguished *Kho* and *Davis*, including because both involved administrative Berman hearings, and *Davis* also involved attorney misconduct. The court of appeal also explicitly disagreed with the *Davis* court's substantive unconscionability analysis on several other grounds, dedicating the final section of the opinion to this discussion.

Presiding Justice Maria E. Stratton dissented. She would have held that the *Kho* and *Davis* holdings regarding unconscionability were on point. The complete unreadability of the agreement created an extremely high degrees of procedural unconscionability, such that only a low degree of substantive unconscionability was needed to invalidate it. She would have held that the agreement contained such substantive unconscionability, including unknowable terms making it one-sided and not mutual, its giving the employer the unilateral right to change or modify the agreement at any time without notice, its apparent prohibition on PAGA actions in any forum, and the multiple trade secrets contracts creating confusion about employer exceptions to arbitration.

Basith v. Lithia Motors, Inc., 307 Cal. Rptr. 3d 654 (Ct. App. 2023)

Coincidentally, on the same day the *Fuentes* decision was published, the same panel decided a second case involving substantially similar arbitration language used by a different Nissan dealership. The primary difference is that, in this

case, the plaintiff was presented with arbitration provisions in two separate formats—a short one on paper as part of a "General Manager Compensation Plan," and a longer one titled "Agreements" through an online system. The first one contained a paragraph providing for binding arbitration, governed by the FAA and carried out in conformity with the CAA. The second contained similar language to that in *Fuentes*, but visible on a screen, with the ability to enlarge or magnify the text as needed. The plaintiff signed both agreements, the first by hand, and the second electronically.

Here, too, the court of appeal held that the arbitration agreement was valid because it contained no substantive unconscionability. It incorporated by reference *Fuentes's* recitation of the governing law and its discussion of how *Fuentes* and *Basith* were distinguishable from *Kho* and *Davis*. The court rejected the plaintiff's argument that the agreement's language created substantive unconscionability because it was confusing and implied that he was barred from filing an administrative charge with a governmental agency. The court explained that a later sentence made clear that he could indeed do so, and further that arguments about legalese go to procedural unconscionability, akin to arguments about font size. How a contract is conveyed does not change whether its substance is fair.

Once again, Presiding Justice Stratton dissented, referencing the reasons expressed in her dissent in *Fuentes*.

MOTION TO COMPEL ARBITRATION DENIED WHEN CLAIMS FALL OUTSIDE OF SCOPE OF AGREEMENT

Jackson v. Amazon.com, Inc., 65 F.4th 1093 (9th Cir. 2023)

An Amazon driver filed a putative class action against Amazon alleging that the company wiretapped drivers' communications and monitored their closed Facebook groups when they were not working. The claims were all statutory, including causes of invasion of privacy under the California Constitution and violations of the California Invasion of Privacy Act, the Federal Wiretap Act, and the Stored Communications Act. Amazon moved to compel arbitration, arguing that its 2019 Terms of Service Agreement (2019 TOS) contained a broad arbitration clause and that, in the alternative, its 2016 Terms of Service Agreement (2016 TOS) applied to the claims filed. The district court denied Amazon's motion. It determined that the 2016 TOS applied because Amazon had not shown that the plaintiff had individualized notice of the 2019 TOS. The 2016 TOS arbitration provision stated that it applied to "any dispute or claim . . . arising out of or relating in any way to this Agreement, including . . . participation in the program or . . . performance of services." *Id.* at 1101. The district court ruled that the plaintiff's claims fell outside of the scope of this arbitration provision because the claims were not related to performance under that agreement. Amazon appealed.

The Ninth Circuit affirmed. First, it held that an order denying a motion to compel arbitration is immediately appealable, contrary to plaintiff's argument that the court lacked jurisdiction to hear the appeal. The court then held that the 2016 TOS applied, as Amazon's declaration that it notified drivers of the 2019 TOS via email was insufficient to establish that the plaintiff received notice and gave some indication of assent to it. Finally, the court held that the lawsuit's claims did not relate to the 2016 TOS. All were statutory claims that existed independently of the contract and were unrelated to the drivers' participation in or performance of services under the driving program.

Judge Graber concurred in part and dissented in part. She agreed that the court had jurisdiction to hear the appeal, and that the 2016 TOS applied. But she would have held that the arbitration provision in the 2016 TOS covered the matters alleged in the complaint such that arbitration should have been ordered.

SECTION 998 COST-SHIFTING APPLIES WHEN OFFER REJECTED AND SUBSEQUENT SETTLEMENT IS LESS FAVORABLE

Madrigal v. Hyundai Motor Am., 90 Cal. App. 5th 385 (2023), as modified on denial of reh'g (May 9, 2023)

A plaintiff who enters into a settlement agreement providing for payment in an amount that is less than a previously rejected Cal. Code of Civil Procedure section 998 offer in exchange for a dismissal with prejudice must now take heed: section 998's cost-shifting provisions may apply. In this non-employment lemon law case, as a matter of first impression, the court held that the penalty provisions of section 998 apply in such cases, as the meaning of the term "judgment" in section 998(c)(1) is to be interpreted broadly, to include dismissals with prejudice stemming from settlement agreements.

Associate Justice Ronald B. Robie concurred in part and dissented in part. He pointed out that section 998(c)(1) applies when the plaintiff *fails to obtain* a more favorable judgment, and that this language suggests applicability when there is a lesser result stemming from *unilateral action by the plaintiff*, rather than from a compromise between the parties. Thus, he would not apply this provision to negotiated settlements. He further noted that section 998 is intended to encourage settlements, and applying section 998(c)(1) to later settlements would "stifle negotiations and discourage settlement, fail to compensate the injured party, and inject uncertainty into the section 998 process." It would further lead to disputes over whether the ultimate settlement was more or less favorable when it incorporates nonmonetary terms.

Parties entering into settlement agreements after the rejection of higher section 998 offers can avoid uncertainty going forward by explicitly delineating what will happen with respect to attorneys' fees (e.g., each party to bear their own fees/costs).

ENDNOTE

* Ramit Mizrahi, founder of Mizrahi Law, is an employment law mediator. She is Chair of the Pasadena Bar Association Labor & Employment Law Section, former Chair of the CLA Labor & Employment Law Section, and an Executive Editor of this publication. She is a graduate of Yale Law School, the London School of Economics, and UC-Berkeley's Haas School of Business. She has been recognized as one of the Top 100 Super Lawyers (2023) and Top 50 Women Super Lawyers in Southern California (2022, 2023). She can be reached at ramit@mizrahilaw.com.