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ADR Cases

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ADR Cases By Clinton Burke, Jacob Glasser, and J.D. Hoyle

Federal Privilege Law Governs Evidence Admissibility

In *Wilcox v. Arpaio*, 2014 WL 2442531, ___ F.3d ___ (9th Cir. 2014), the court held that federal, not state, privilege law governs the admissibility of evidence arising from mediation of federal and state law claims. Because the county failed to argue any available federal privilege, the court held that the county had waived any privilege argument and that e-mails and testimony concerning the mediation were admissible as evidence. To read more: http://cdn.ca9.uscourts.gov/datastore/opinions/2014/06/02/12-16418.pdf.

Federal Arbitration Act Preempts State Law in California

Petition for certiorari in *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. Rptr. 3d 269 (Cal. 2013) was denied on June 9, 2014. On remand for reconsideration by the US Supreme Court, the Supreme Court of California held that the Federal Arbitration Act preempts state law requiring a Berman hearing to assist employees in recovering lost wages prior to arbitration. *See AT&T Mobility LLC v. Concepcion* 563 U.S ___ (2011), vacating the Supreme Court of California's *Moreno* judgment and remanding for further consideration in light of *Concepcion*. But the Supreme Court of California also held that the Berman statute's provision designed to lower the costs and risks for employees in pursuing wage claims could still be considered to determine whether an arbitration provision was unconscionable. To read more: http://www.courts.ca.gov/opinions/archive/S174475.PDF.

Testimony from Mediation Found Admissible as Evidence

In *Milhouse v. Travelers Commercial Insurance Co.*, __ F. Supp.2d __ (C.D. Cal. 2013), the district court found that allowing the parties' mediation statements to be admitted as evidence in trial did not result in prejudicial error. By not objecting to the disclosure of mediation statements before or during the course of the trial, the plaintiff was found to have waived its objection post-trial. Additionally, the court explained that had the objection been properly raised, it would have been overruled, as the statements' disclosure was necessary to rule on whether the parties were acting in bad faith and to understand why settlement could not be reached.

Dodd-Frank Does Not Prohibit Arbitration of Non-Whistleblower Claims

In *Santoro v. Accenture Fed. Serves, LLC*, 748 F.3d 217 (4th Cir. 2014), the court held that the Dodd-Frank whistleblower provision to forgo arbitration applies only to plaintiffs bringing whistleblower claims. Dodd-Frank does not prohibit the arbitration of non-whistleblower claims against publicly traded companies simply because an arbitration agreement failed to carve out Dodd-Frank exceptions for non-whistleblower employees. To read more: http://www.ca4.uscourts.gov/Opinions/Published/122561.P.pdf.

"High-Low" Stipulation Holds Up

In *Horath v. Hess*, 225 Cal. App. 4th 456 (Cal. Ct. App. 2014), the parties created an agreement stipulating that the arbitral award must be at least $44,000 and at most $100,000. After arbitration, an award of $366,527.22 was rendered for the plaintiff. A petition to confirm the award, which the defendant failed to challenge in a timely manner, was filed. The court held the defendant liable for $100,000 in damages based on the parties' "high-low" written stipulation, notwithstanding the failure to challenge the larger arbitral award in a timely manner. To read more: http://www.courts.ca.gov/opinions/documents/D063124.PDF.

Omission of Arbitration Clause Does Not Prevent Compelling Arbitration

In *Huffman v. Hilltop Co., LLC*, 747 F.3d 391 (6th Cir. 2014), the Sixth Circuit reversed a district court's order denying Hilltop's motion to compel arbitration. The court determined that omitting an arbitration clause from a contract's survival clause does not clearly imply that the parties intended for the arbitration clause to expire with the conclusion of the employment contract. The court looked to "the contract as a whole — the survival clause and its relationship to the other clauses in the agreement." The absence of other clauses from the survival clause, including noncompete, severability, and integration together with the strong presumption of arbitration, led to the court's decision. To read more: http://www.ca6.uscourts.gov/opinions.pdf/14a0056p-06.pdf.

Court, Not FINRA, Should Determine Arbitrability

In *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2014), the Ninth Circuit reversed the district court's denial of a preliminary injunction to prevent arbitration and held that "the court, rather than FINRA, must determine the arbitrability of the dispute." The court found that the "the forum selection clauses in the parties' contracts superseded any right to FINRA arbitration." The Ninth Circuit interpreted the agreed-upon forum selection clauses as clear indications that the parties did not intend to arbitrate disputes. To read more: http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/31/13-15445.pdf. ◆

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