Neutral Notes

The Jacobs Center for Justice and Alternative Dispute Resolution™

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The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

SUPREME COURT CLARIFIES RIGHTS REGARDING POWER OF ATTORNEY IN NURSING HOME CONTRACTS

In Kindred Nursing Centers Limited Partnership, et al. v. Clark, et al., the U.S. Supreme Court examined the utilization of powers of attorney in agreements, particularly dealing with nursing homes. Plaintiffs Beverly Wellner and Janis Clark were the wife and daughter, respectively, of Joe Wellner and Olive Clark, two now deceased residents of a Kindred Nursing Home (called the Winchester Centre for Health and Rehabilitation). At all times in this case, Beverly and Janis each held a power of attorney designating her as an "attorney in fact" and affording her broad authority to manage her family members' affairs.

Beverly and Janis each signed an arbitration agreement with Kindred on behalf of her relative. Both individuals brought separate suits against Kindred in Kentucky state court for substandard care resulting in the deaths of their family members. Kindred moved to dismiss, arguing that the arbitration agreements prohibited bringing their disputes to court. After consolidating the cases, the Kentucky Supreme Court affirmed those decisions by a divided vote.

The Kentucky Supreme Court held that both arbitration agreements were invalid. On appeal, the U.S. Supreme Court said that the Kentucky high court failed to put arbitration agreements on an equal plane with other contracts: "And so it was that the court did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement - namely a waiver of the right to go to court and receive a jury trial."

The Court said - "No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees." In footnote 1 the Supreme Court further stated: "Making matters worse, the Kentucky Supreme Court's clear-statement rule appears not to apply to other kinds of agreements relinquishing the right to go to court or obtain a jury trial. Nothing in the decision below (or elsewhere in Kentucky law) suggests that explicit authorization is needed before an attorney-in-fact can sign a settlement agreement or consent to a bench trial on her principal's behalf…. Mark that as yet another indication that the court's demand for specificity in power of attorney arises from the suspect status of arbitration rather than the sacred status of jury trials."

The Supreme Court opined that the Kentucky court "hypothesized a slim set of both patently objectionable and utterly fanciful contracts that would be subject to its rule…." By its finding, the Court (KY.) revealed the kind of "hostility to arbitration" that led Congress to enact the FAA and the court stated that "[a]nd doing so only makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreement and black swans."

The Supreme Court stated, in a footnote, that "the rule must apply generally, rather than single out arbitration."

The Court continued that the rule selectively found arbitration contracts invalid and that such selective enforcement was problematic under Concepcion. The Court further stated "[a]nd still more: Adopting the respondents' view would make it trivially easy for States to undermine the Act - indeed, to wholly defeat it…. And why stop there? If the respondents were right, States could just as easily declare *everyone* incompetent to sign arbitration agreements…. The FAA would then mean nothing at all - its provisions rendered helpless to prevent even the most blatant discrimination against arbitration."

Cont'd on p. 3, column 3

DISPUTE OVER LEGAL REPRESENTATION CAN END IN ARBITRATION

In Jason Shore and Coinabul LLC v. Johnson & Bell, plaintiffs filed a complaint, motion for temporary restraining order, and motion to temporarily seal, claiming plaintiffs' confidential information was at risk because of defendant's IT security failures. Plaintiffs' motion to unseal the case was granted but defendant filed a motion to direct plaintiffs to proceed to arbitration on an individual basis and enjoined class arbitration.

Johnson & Bell represented plaintiffs Jason Shore and Coinabul LLC in Hussein v. Coinabul, LLC, et al. The client engagement letter had the following provision in it:

> Although we do not expect that any dispute between us will arise, in the unlikely event of any dispute under this agreement, including a dispute regarding the amount of fees or the quality of our services, such dispute shall be determined through binding arbitration with the mediation/ arbitration services of JAMS Endispute of Chicago, Illinois. Any such arbitration shall be held in Chicago, Illinois[,] unless the parties agree in writing to some other location. Each party to share the costs of the arbitration proceeding equally. Each party will be responsible for their own attorney's fees incurred as a result of the arbitration proceeding.

The Hussein case ended after an order of default judgment was entered against Coinabul and Jason Shore. Jason Shore was dismissed with prejudice via stipulation.

Plaintiffs alleged in their complaint that defendant's information technology infrastructure was compromised by three instances of a "JBoss Vulnerability" and that their confidential information was exposed because of those vulnerabilities.

The motion to seal stated that the documents initiating the case should be filed under seal because they revealed an explicit detail how defendant left its clients' confidential information unsecured and unprotected.

The motion to temporarily seal was granted but shortly thereafter the problem was fixed.

On July 12, 2016, plaintiffs filed a related complaint in arbitration as well as a demand for class arbitration before JAMS.

IS CLASS ARBITRATION A GATEWAY ISSUE?

The Court noted that the Supreme Court and Seventh Circuit Court of Appeals have not yet specifically ruled on whether the availability of class arbitration is a gateway issue. In other words, if it were a gateway issue it would likely be for the court to decide.

The Third, Fourth, and Sixth Circuits have held that the class arbitration question is a question of arbitrability for a court to decide.

The Fifth Circuit has held that class arbitration is a procedural question for the arbitrator. In this district, meaning the Northern District of Illinois, the courts are divided with most holding that the availability of class arbitration is a procedural question and not a gateway issue.

The Court stated that most courts in the district have "analogized consolidated arbitration and class arbitration in holding that class arbitration is a procedural question." But it noted in looking closely at Seventh Circuit authority that "consolidating claims does not 'change the stakes,' and 'whether it would be simpler and cheaper to handle twelve claims separately or together' is a procedural issue."

It stated that class action proceedings, however, are fundamentally different.

The Court looked closely at the arbitration provision and stated there was no "clear and unmistakable evidence that the parties agreed to arbitrate issues of arbitrability."

Similarly, the client engagement letter did not explicitly or implicitly agree to the use of class arbitration. Thus, the Court ruled that plaintiffs should proceed to arbitration "individually, and there is no basis for class arbitration."

PRACTICE NOTE: Again, the specific language of the clause is critical - where it will be arbitrated, by whom, what rules apply, and for whom the clause shall apply.

NO B.S. IN ILLINOIS

A recent opinion from the District Court for the Northern District of Illinois, in In the Matter of Motta, reported an Order entered against an attorney due to her behavior in court. The Complaint stated that she was continuously disruptive during the two-week trial. Some of her misconduct occurred during witness testimony when she visibly reacted by rolling her eyes and making comments in the presence of the jury. Probably the most objectionable conduct which the court characterized as an egregious instance after an objection was overruled she rolled her eyes and said "f*****g b******t."

The court imposed serious sanctions and suspended her from the bar for ninety days but more significantly suspended her from the trial bar for one year.

PRACTICE TIP: Words and decorum count. I only wish arbitrators had the same authority.

ARBITRATOR SELECTION NOT PROPERLY BEFORE THE COURT

In Bordelon Marine, L.L.C. v. Bibby Subsea ROV, L.L.C., the Fifth Circuit Court of Appeals dismissed Bordelon's challenge to one of the arbitrators on the arbitration panel, among other issues. Bordelon did not challenge the district court's conclusion that the underlying dispute needed to be resolved by arbitration.

Bordelon originally sued Bibby in Louisiana state court in an action for damages and for a writ of attachment arising out of a disagreement over the chartering of an offshore vessel. Bibby removed the state court action to federal court and moved the district court to stay the litigation pending arbitration based on arbitration clauses in the contracts between the parties. However, a dispute arose among the parties regarding the selection of arbitrators. Bordelon filed a motion to reopen the case to enforce the method of appointment of arbitrators contending that Bibby violated the arbitration clauses by appointing a certain arbitrator.

The District Court ordered that Bibby's motion was granted, that the claims raised in Bordelon's state court petition are subject to arbitration, and that arbitration was compelled. The Order did not mention whether the case was stayed.

The Court of Appeals concluded that the district court never entered a final judgment or dismissed Bordelon's state law claims and "therefore, this court lacks appellate jurisdiction under section 16(a)(3).

Bordelon also argued that appellate jurisdiction existed separately under section 16(a)(1)(b) permitting appeals from orders denying a petition under section 4 of this title to order arbitration to proceed.

The Appellate Court analyzed appropriate titles in the Federal Arbitration Act. Section 4 allows for a party to petition the district court for an order directing arbitration to proceed in the manner provided for in the arbitration agreement, "whereas section 5 allows for a district court to intervene in the selection of an arbitrator." The Court said, in a footnote, that section 5 "authorizes a court to intervene 'to select an arbitrator …' in three instances: (1) if the arbitration agreement does not provide a method for selecting arbitrator; (2) if the arbitration agreement provides a method for selecting arbitrators but any party to the agreement has failed to follow that method; or (3) if there is 'a lapse in the naming of an arbitrator or arbitrators.'"

The Fifth Circuit stated that although it is not dispositive, the title of the motion itself suggested that Bordelon was challenging Bibby's selection of arbitrators. In the body of the motion Bordelon asserted that "section 4 allowed Bordelon to contest Bibby's failure to arbitrate as provided in the agreement; however, in conclusion, it also referenced section 5. Furthermore, in Bordelon's reply, it explicitly argued that the district court could settle the dispute about the selection of arbitrators under section 5."

The U.S. District Court resolved this dispute under section 5. The Court of Appeals rejected the appeal because it characterized Bordelon's motion under section 4 rather than section 5. The Court stated that "we reject Bordelon's attempt to re-characterize the district court's section 5 order appointing arbitrators as an order denying Bordelon's motion under section 4…. The district court unquestionably did not *deny* arbitration; it ordered arbitration in this case." In other words, "Bordelon's argument is not based on the failure of the district court to order arbitration but on a failure, in Bordelon's view, to select arbitrators in a way Bordelon views as correct - a section 5 issue." The Court stated simply that because the order that Bordelon appealed was not a denial of a petition under Section 4, appellate jurisdiction did not exist under section 16(a)(1)(B).

PRACTICE NOTE: Pleadings must be precise; captioning and titles are not dispositive, particularly if the underlying issue is not exactly what has been pled. The question of arbitrator selection can only be raised on a limited basis under the Federal Arbitration Act.

Supreme Court Clarifies Rights Regarding Power Of Attorney In Nursing Home Contracts (*Cont'd from pg. 1)*

The Supreme Court vacated the Kentucky decision and returned the matter for further consideration. It noted that the Kentucky Supreme Court "specifically impeded the ability of attorneys-in-fact [utilizing powers of attorney] to enter into arbitration agreements." By doing so, the court "thus flouted the FAA's command to place those agreements on an equal footing with all other contracts." Justice Gorsuch took no part in the consideration of this case.

PRACTICE NOTE: The Supreme Court spoke firmly that arbitration agreements must be treated like all other contracts and not singled out for discriminatory treatment. If they are, those findings will be rejected.

AGREEMENTS TO ARBITRATE USUALLY HAVE TO BE ENFORCED

In Salas v. GE Oil & Gas, the Fifth Circuit Court of Appeals reviewed a decision of the U.S. District Court, which had earlier granted GE's motion to compel arbitration and dismissal of the case. The District Court later reopened the case and withdrew its prior Order compelling arbitration. The Fifth Circuit vacated and remanded. It found the District Court lacked jurisdiction to withdraw its own Order.

Claims were brought for discrimination and retaliation. Under GE's "Solutions" program, Salas, despite being employed by a predecessor company, agreed to participate in the arbitration program. He brought suit in District Court under Title VII. GE moved to compel and its motion was granted.

Curiously, the parties did not move forward with arbitration. Each side blamed the other for the delay. In February 2016, Salas filed a motion to compel arbitration which GE opposed as redundant. After a telephonic conference on the motion, the District Court issued an order on March 13, 2016 reopening the case withdrawing its earlier Order compelling arbitration. On appeal, the Fifth Circuit said the District Court noted that the parties had "failed" to arbitrate.

In its ruling in the telephonic conference, the court, in effect, denied an application to compel arbitration. The Appellate court found that it had jurisdiction and that GE's motion for reconsideration tolled the time to appeal.

The Court of Appeals stated that the fact that the District Court fully dismissed this case is "not necessarily fatal to the court's exercise of jurisdiction." In its March 30, 2016 Order the District Court "neither determined whether the parties' agreement to arbitrate was valid nor enforced that agreement. Instead, the court found that the parties had 'failed' to arbitrate and withdrew its prior order compelling arbitration. This was not permitted under the FAA." Emphasis added.

The Court of Appeals sent this matter back to the District Court to determine whether an agreement to arbitrate still existed and to enforce that agreement.

PRACTICE NOTE: Generally, agreements to arbitrate mean just that. It is simply unclear from the facts, in Salas, how that agreement was obviated in the famous March 30, 2016 telephone conference and subsequent order.

THIRD CIRCUIT EXCLUDES CLASS CLAIMS BASED ON HANDBOOK PROVISION

In Irene Novosad, et al. v. Broomall Operating Company LP, et al., the Court of Appeals recently interpreted a clause in the employer's dispute resolution program book. Plaintiffs were former employees of Broomall. They filed this action as a class and collective action under the Fair Labor Standards Act and analogous Pennsylvania Wage and Hour statutes. They alleged defendants failed to pay proper overtime compensation.

Broomall moved to compel arbitration, pointing to an arbitration clause in the Employment Dispute Resolution Program book that plaintiffs agreed to as employees. The clause made arbitration "the only means of resolving employment related disputes." However, the clause also stated it "covers only claims by individuals and does not cover class or collective actions."

The District Court read these clauses as unambiguous and denied defendants' motion to compel arbitration.

The Third Circuit affirmed basically because the arbitration clause's plain language excluded class and collective actions from mandatory arbitration. It stated that defendants' contrary argument would render the provision of the clause "superfluous." The Court declared that "[i]t makes little sense for the clause to state that it 'covers only claims by individuals and does not cover class or collective actions' only to require arbitration of such suits."

Despite the strong federal policy favoring arbitration, the Court of Appeals said that policy "has its limits, and courts apply the presumption of arbitrability 'only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand.'"

The Court found that clause "unmistakably provides that plaintiffs' class and collective actions need not be subject to arbitration."

PRACTICE NOTE: While employers make great efforts to limit or eliminate class claims, the nature of the agreement between the parties is critical for courts interpreting those claims when applications are made to arbitrate the dispute between the parties.

OUT OF LUCK ON EQUITABLE ESTOPPEL

In Conway Family Trust v. Commodity Futures Trading Commission, the Seventh Circuit rejected an attempt to apply equitable estoppel to essentially get another bite at the apple.

The Conway Family Trust lost $3.6 million trading futures contracts. They contended that errors were made by Dorman Trading, LLC, a futures commission merchant, and asked the Commodity Futures Trading Commission (CFTC) to order Dorman Trading to make reparations. The statute authorized CFTC to provide relief and claims must be filed within two years of their accrual. The Trust did not present a claim until almost three years after it closed its account with Dorman and the CFTC dismissed the complaint as untimely.

Within two years of losses the Trust did make a claim with the National Futures Association which referred the matter to arbitration. The panel of arbitrators awarded the Trust about $500,000 against several respondents but ruled in favor of Dorman Trading because the Trust's contract set a one year time limit for financial claims.

The Trust was not satisfied with this result and sought additional relief based upon what it labeled as equitable tolling.

The Court of Appeals rejected this approach and said equitable tolling requires two elements: one, that he has been pursuing his rights diligently, and two, that some extraordinary circumstance stood in his way and prevented timely filing. The Trust did not establish either element nor did it contend that it had done so.

The Court said "[t]his is doubly wrong." It noted that arbitral awards are not subject to collateral attack and stated "we must assume that the panel's decision is sound."

It also stated that the arbitral award "right or wrong, has nothing to do with equitable tolling."

Finally, the Court concluded as follows:

> Almost any losing litigant would prefer another shot at victory. We need not consider whether sequential arbitral and reparations proceedings ever are permissible. (Parallel proceedings are not allowed, 17 C.F.R. §12.24(c), but the regulation does not address sequential proceedings.) A litigant who wants to preserve the option of requesting awards from multiple bodies must at a minimum satisfy the time limits that apply to each. The Trust did not do so and must bear the consequences of its choice.

PRACTICE NOTE: Time limits and statute of limitations are critical and parties, whether pursuing arbitration or other relief and remedies, must pay careful attention to them.

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