The Non-Subscriber Case Law Update

A Bi-Monthly Publication Dedicated to Detailing Recent Cases Pertaining to Non-Subscription Issues.
April, 2007

RECENT ISSUES REGARDING ARBITRATION.

In September 2006, the United States District Court for the Eastern District of Texas, Marshall Division and specifically, Judge T. John Ward, addressed a non-subscriber arbitration agreement in the context of an employee injury negligence claim and an ERISA claim for denial of benefits in Sosa v. Parco Oilfield Services, Ltd, 2006 U.S. Dist Lexis 70312 (E.D. Tex. 2006). The Plaintiff filed suit in federal court arising out of a workplace injury and denial of benefits by the employee injury benefit plan. In his suit, the Plaintiff brought common law negligence and ERISA causes of action against the Employer/Defendant. The Employer asserted the entire case should be referred to arbitration based upon the arbitration agreement contained within the ERISA benefit plan. In response to the motion to refer to arbitration, the Plaintiff claimed that the arbitration provision amounted to a pre-injury waiver of his right to assert a negligence claim against his employer and this pre-injury waiver violated the fair notice and conspicuous requirements set forth by the Texas Supreme Court. Judge Ward ruled whether the provision amounted to a pre-injury waiver or violated the conspicuous and fair notice requirements were issues for the arbitrator to decide. The Plaintiff also challenged the agreement's application to the negligence claims by arguing the agreement lacked consideration and was procedurally unconscionable. The court dismissed both arguments. In short, the court referred the common law negligence causes of action to arbitration. With regard to the ERISA portion of the lawsuit, the court ruled that the arbitration agreement could not be applied to the ERISA cause of action for denial of benefits since Department of Labor regulations do not permit arbitration of ERISA claims. Of note, the court did not address, and there is no indication the Plaintiff posed the argument that the ERISA benefits claim and the workplace injury negligence claim should be tried together rather than in separate forums. As a result, the argument that the workplace injury (an arbitrable claim) should not be pursued separate from the ERISA claim (a non-arbitrable claim) is not foreclosed. However, this case gives non-subscriber employers seeking to compel arbitration in this situation a leg up.

House Bill 1730 seeks to prohibit pre-injury agreements including arbitration agreements. Of course, this has caused some concern in the non-subscriber community. However, chances are that the bill, if ever enacted, would not be enforceable in the face the Federal Arbitration Act. The Federal Arbitration Act pre-empts state laws that attempt to preclude or limit arbitration agreements. In 1992, the Texas Supreme Court in Anglin v. Tipps, 842 S.W.2d 266 (Tex. 1992) addressed the Deceptive Trade Practices Act's (DTPA) prohibition against waiver of judicial determination of suits under the DTPA. The key was that the court found the arbitration provision was a part of a contract that impacted interstate commerce. As a result, the court held the Federal Arbitration Act pre-empted the DTPA's non-waiver provision and overturned the trial court's order denying arbitration. If and when House Bill 1730 is passed, the Anglin case will certainly be cited by those attempting to avoid application of the prohibition against pre-injury arbitration agreements. It will be difficult for courts of appeal to ignore the clear correlation between the DTPA's non-waiver provision as applied to arbitration agreements and House Bill 1730's attempt to preclude pre-injury arbitration agreements. Where the employer needs to exercise care in drafting its arbitration agreement is to make sure reference is made to the business or the employment involving interstate commerce. Such a reference is necessary to insure the Federal Arbitration Act applies to the agreement in order to avoid application of House Bill 1730.

Comment:

Since the Texas Legislature passed the amendment to the Texas Labor Code precluding pre-injury waiver agreements, arbitration has become non-subscribing employers' best pre-injury device to control potential risk and liability. One of the primary advantages to arbitration is the Federal Arbitration Act which pre-empts many state laws which attempt to preclude the use of arbitration. Further, arbitration possesses such a favored position under the law that, when the agreement is drafted correctly and presented to the employee correctly, it is difficult for an employee – plaintiff's attorney to avoid application of an arbitration agreement.

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