The Non-Subscriber Case Law Update

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Application of Arbitration Agreements to Third Parties

Below are two cases which address drafting arbitration agreement for application to third parties to the employer/employee relationship.

In re Bayer Materialscience, LLC, 2007 WL 3227662 (Tex. App. – Houston [1st Dist.] 2007), the employer (Brock Services, Ltd) had a three page arbitration agreement which was made a part of the application for employment. The agreement to arbitrate was conditioned upon the applicant being considered for employment. The agreement also contained language which covered not only the employer but also the employers "customers, clients and/or any other person(s) under contact" with the employer. The agreement also covered the owners of any and all property upon which the employee may work or had worked. In September 2006, several Brock Services employees were injured in an explosion while working at Bayer's plant. Suit was brought against Bayer and Bayer sought to compel arbitration. The Houston Court of Appeals found that there was no language giving Bayer the right to enforce the arbitration agreement nor was there any indication that the drafter of the arbitration agreement contemplated that Bayer would be benefited by the employee's agreement to arbitrate. The court stressed that the maker of the contract (employer) must not only identify the third party (customer) but also give them the right to enforce the contract.

Of note, the Beaumont Court of Appeals came to a different conclusion on almost the same set of facts in In re Citgo Petroleum Corporation, 2007 WL 4938701 (Tex. App. – Beaumont, 2008). Nearly the same language was used in a dispute resolution agreement between Pat Tank, Inc and their employee as was used in the Brock Services agreement. The employee's personal injury suit named not only Citgo but also a vendor of Pat Tank, Stoneburner-Verrett Electric Company. The Beaumont Court cited to the Bayer Materialscience opinion from the First District Court of Appeals and then proceeded to distinguish the First Court of Appeals opinion by citing to Pat Tank, Inc's services contract with Citgo. The Beaumont Court found that since the service contract contained a broad indemnity provision which required Pat Tank to indemnify Citgo for personal injury suits brought by Pat Tank's employees against Citgo and also specified certain duties that Pat Tank had to fulfill with regard to their employees pertaining to training and supervision, that Pat Tank intended for the arbitration agreement to benefit Citgo. The court also recognized that the contract between Citgo and Pat Tank was executed prior to the arbitration agreement between Pat Tank and its employee. The court found that Pat Tank's duty to indemnify Citgo would be one reason Pat Tank would require its employee to arbitrate disputes as Pat Tank would inevitably be responsible for any judgment Citgo was ordered to pay. The court also stated it was not necessary to specifically identify Citgo; that it was sufficient to refer to "customers." Of note, the court found that Stonerburner-Verrett could not enforce the arbitration agreement because as a vendor it was neither a customer nor client of Pat Tank. A final interesting point was the employee claimed that Citgo waived arbitration by participating in preliminary discovery. The court found that depositions of the Plaintiff and his spouse along with obtaining medical records were not sufficient to waive Citgo's right to compel arbitration. The court referenced cases which require a substantial invocation of the judicial process to obtain a favorable result before seeking arbitration as circumstances which led to the waiver of the party's right to compel arbitration. The court also cited cases of waiver when a party took advantage discovery procedures available through the judicial process which were not available in arbitration.

One final case that is, off topic, but bears addressing is the United State Supreme Court Case of Hall Street Assoc v. Mattel, Inc, 128 S.Ct. 1396 (2008). Several commentators have opined that Mattel spells the end of arbitration of employee claims. In Mattel, the Supreme Court struck down a procedural method by which employers were obtaining review of unfavorable arbitration awards in federal court. What was occurring is an arbitrator would rule contrary to the law, the employer would seek review by the federal court where the case was originally filed. Federal judges were reversing the awards in the proper circumstances. The Supreme Court found that the procedural quirk the employers were taking advantage of did not apply and that the extremely narrow basis for court review of arbitration awards contained within the Federal Arbitration Act applied. Rightly so, commentators believe that employers will be less likely to use arbitration because they can no longer have their cake and eat it too. However, I do not believe this rule is applicable to non-subscription arbitration because it is far less likely that a judge will overrule an arbitrator's liability finding. Whereas, employment discrimination liability law is much more employer oriented, non-subscription law is much more employee friendly. As such, an employer would be much less likely to request review.

Comment:
What can be learned from these two cases aside from these two courts seem to be talking out of both sides of their mouths? 1. Specific identification of third parties whom the arbitration agreement is intended to benefit is not necessary but is helpful. 2. Make sure to include language in the arbitration agreement providing that third parties can enforce the agreement.

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