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Federal Circuit Courts

- **GRANTING MOTION TO COMPEL ARBITRATION NOT STATE ACTION**

Roberts, et al., v. AT&T Mobility
2017 WL 6275537
United States Court of Appeals, Ninth Circuit
December 11, 2017

Plaintiffs brought a putative class action, asserting consumer protection and false advertising claims against AT&T. AT&T moved to compel arbitration. Plaintiffs opposed the motion on First Amendment grounds, arguing that an order forcing arbitration violated the Petition Clause. The court granted the motion to compel, holding that there was no state action. Plaintiffs appealed.

The United States Court of Appeals for the Ninth Circuit affirmed. A threshold requirement of any constitutional claim is the presence of state action. Under *Lugar v. Edmonston Oil Co., Inc*., AT&T's conduct must be attributable to the state. Plaintiffs brought a direct First Amendment challenge to the FAA and its Supreme Court interpretations, asserting that state action existed because the government was the relevant state actor as to the direct challenge, not AT&T. The Court found that AT&T's conduct was not fairly attributable to the state and that plaintiffs could not convert AT&T into a state actor simply by framing the FAA challenge as direct. Doing so would obliterate the distinction between private and government action.

Plaintiffs argued that *Denver Area Education Telecommunications Consortium, Inc., v. FCC* (518 US 727) made proving private arbitration clause drafters to be state actors unnecessary. The Court found that plaintiffs could not invoke *Denver Area* to evade the *Lugar* requirement to show that AT&T was a state actor. The Court interpreted *Denver Area* narrowly; it was a splintered decision, applicable in the unique context of cable systems.

Plaintiffs argued that even if the *Denver Area* argument failed, they could still show state action under *Lugar* because the government sufficiently encouraged AT&T to arbitrate: the FAA mandate and the Supreme Court's corresponding enforcement of "consumer adhesion forced arbitration contracts" encouraged the drafting of such contracts, thus making the State responsible for their burgeoning use. The Court found that this stretched the encouragement test too far. For a private party to be a state actor, there must be a close nexus between the state and the challenged action of the private

entity. Here, there was not. The challenged action was the requirement that the plaintiffs arbitrate their dispute. No federal law required them to waive their right to litigate; there was no state action simply because the state enforced the private agreement. The FAA has no provision resembling the sort of coercive regulations that would rise to the level of encouragement necessary to prove state action.

- **ASSERTION OF ARBITRABILITY WHOLLY GROUNDLESS**

Archer and White Sales, Inc., v. Schein Inc., Danaher Corporation, et al.
2017 WL 6523680
United States Court of Appeals, Fifth Circuit
December 21, 2017

Archer brought suit against Schein, alleging violations of the Sherman Act and the TX Free Enterprise and Antitrust Act and seeking damages and injunctive relief. The magistrate judge granted Schein's motion to compel arbitration. The district court reversed; Schein appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. The Court applied the two-step test adopted in *Douglas v. Regions Bank*: 1) did the parties clearly and unmistakably delegate the issue of arbitrability and 2) was there a plausible argument for the arbitrability of the dispute? If the argument that the claim at hand fell within the scope of the arbitration agreement was wholly groundless, then the district court may decide the gateway issue of arbitrability despite a valid delegation clause.

The language in question provided "any disputes arising under or related to this agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property…) shall be resolved by binding arbitration in accordance with the arbitration rules of the AAA." A contract expressly incorporating AAA Rules may be read to present clear and unmistakable evidence of delegation. Schein argued, however, that disputes about arbitrability did not fall within the carve out clause and thus belonged to the arbitrator. The Court did not weigh in, moving to the second inquiry of *Douglas*: was the argument that the claim fell within the scope of the agreement wholly groundless? Though this is a narrow exception, the Court found that it must apply where – as here – an arbitration clause expressly excluded certain types of disputes. The carve out was for actions seeking injunctive relief; there was no plausible argument that the arbitration clause applied to an action seeking injunctive relief.

Schein argued that even if the district court was correct to decide the arbitrability question, it erred in its decision. Because the Court found Schein's arguments for arbitrability wholly groundless, it affirmed the district court's holding that the claims were not arbitrable.

- **EMPLOYEE'S INDIVIDUAL FLSA CLAIM SUBJECT TO ARBITRATION**

Rodriguez-Depena v. Parts Authority, Michigan Logistics, Northeast Logistics, aka Diligent
877 F.3d 122
United States Court of Appeals, Second Circuit
December 12, 2017

Rodriguez-Depena (R-D) sued three employers, alleging that he was denied overtime pay in violation of the FLSA. The court ordered arbitration, pursuant to the arbitration clause in R-D's employment contract with Diligent, and R-D appealed.

The United States Court of Appeals for the Second Circuit affirmed. Statutory claims are arbitrable unless Congress "has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." In the absence of any such indication, R-D unsuccessfully urged the Court to preclude arbitration. The Court found R-D's FLSA claims against his three employers arbitrable under his contract with Diligent, even though not all employers were parties to the contract, arbitration could be expensive, and R-D had limited ability to read English. R-D's dispute with the non-signatories was factually intertwined with his dispute with Diligent and there was no indication that the arbitration cost would preclude vindication of R-D's rights.

- **INCORPORATION OF JAMS COMPREHENSIVE RULES AND PROCEDURES EVINCES PARTIES' CLEAR AND UNMISTAKABLE AGREEMENT TO ARBITRATE ARBITRABILITY**

Simply Wireless v. T-Mobile
2017 WL 6374105
United States Court of Appeals, Fourth Circuit
December 13, 2017

Simply Wireless (SW) brought action against T-Mobile, alleging violations of the Lanham Act and Commonwealth of Virginia law. T-Mobile filed a Motion to Dismiss and a Notice of Intent to Seek Arbitration, pursuant to an arbitration agreement between the parties. The court dismissed the complaint without prejudice to allow the parties to arbitrate. SW appealed.

The United States Court of Appeals for the Fourth Circuit affirmed the dismissal on alternate grounds. Neither party contested the validity of the agreement, which provided "Any claims or controversies…arising out of or relating to this Agreement…shall be resolved by submission to binding arbitration…administered pursuant to the JAMS Comprehensive Rules and Procedures…" The dispute centered on who was to determine arbitrability: the court or the arbitrator. The Court found that the broad arbitration clause did not provide the clear and unmistakable evidence necessary to delegate the arbitrability question to the arbitrator. The Court next considered, for the first time, whether the parties' express incorporation of JAMS rules – which empower an arbitrator to resolve arbitrability disputes – constituted clear and unmistakable evidence and joined its sister circuits in finding that it did. The Court disputed SW's contention that this interpretation would send every arbitration demand, no matter how frivolous, to an arbitrator; a district court need not enforce a delegation provision when a party's assertion that a claim falls within an arbitration clause is wholly groundless.

- **ARBITRAL IMMUNITY NOT APPLICABLE TO FALSE ADVERTISING CLAIM**

Hopper v. American Arbitration Association
2017 WL 6569571
United States Court of Appeals, Ninth Circuit
December 26, 2017

Hopper chose to take his claim to AAA because it promised to provide "neutrals." Hopper later filed a false advertising claim against AAA, asserting that AAA could not guarantee the neutrality of its arbitrators because they were independent contractors. The court dismissed the case on the grounds of arbitral immunity. Hopper appealed.

The United States Court of Appeals for the Ninth Circuit reversed and remanded for further proceedings, providing that "arbitral immunity extends to claims that arise out of a decisional act and exists to 'protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.'" Hopper's claim was predicated on AAA's commercial advertisement, which was distinct from the decisional act of an arbitrator. Adjudication of claims that arose before a formal arbitration relationship would not lead to undue influence or reprisals by dissatisfied litigants.

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