November 14, 2018

ADR Case Update 2018 - 21

Federal Circuit Courts

- **UNWRAPPING PACKAGE WITH PURCHASE AGREEMENT CONSTITUTED ACCEPTANCE OF AGREEMENT TO ARBITRATE**

  Dye et al. v. Tamko Building Products
  2018 WL 5729085
  United States Court of Appeals, Eleventh Circuit
  November 2, 2018

  Plaintiffs Dye and Bohn (Dye) hired roofing installation companies to install Tamko roofing shingles on their homes. The shingles crumbled while under warranty and Dye filed a putative class action, seeking damages and declaratory relief for breach of express and implied warranties, product liability, negligence, and violation of the Florida Deception and Unfair Trade Practices Act. Tamko moved to compel arbitration, per the mandatory arbitration clause printed on the outside of every shingle wrapper. The court granted the motion and dismissed the complaint, finding that Dye was bound to arbitrate because he accepted the terms of Tamko's purchase agreement through the roofers. Dye appealed.

  The United States Court of Appeals for the Eleventh Circuit affirmed. The Court found that the shingle wrappers conveyed a valid offer of contract terms, including that any product-related dispute must be arbitrated rather than litigated. Purchase terms on the exterior of every package of shingles, with "IMPORTANT" before the agreement, and the mandatory arbitration clause in all caps, provided conspicuous notice that a reasonable, objective person would understand as an invitation to contract. The Court disagreed with Dye's assertion that the nature of the product, in a big box usually delivered to a contractor, distinguished this case. This language on a big box was not surprising in an age when fewer purchases are face to face. Dye had other options to obtain this information – phone, online – but did not. Dye asserted that even if there was a valid means of making an offer, he did not accept the offer – the roofers did. Dye did not dispute that the roofers were his agents for purposes of purchasing and installing shingles. Accepting purchase terms – here, the mandatory arbitration clause - was incidental to the act of purchasing.

- **LACK OF MUTUALITY WITH ARBITRATION PROVIDER SELECTION CLAUSE WAS SUBSTANTIVELY UNCONSCIONABLE**

Beltran v. AuPair Care, Inc. and Interexchange
1018 WL 5571319
United States Court of Appeals, Tenth Circuit
October 30, 2018

Beltran and other au pairs brought a putative class action against AuPair Care, alleging violations of antitrust laws, Racketeer Influenced and Corrupt Organizations Act (RICO), Fair Labor Standards Act (FLSA), and state laws. AuPair Care moved to compel arbitration. The court denied the motion, finding the arbitration provisions procedurally and substantively unconscionable. AuPair Care appealed.

The United States Court of Appeals for the Tenth Circuit reversed and remanded. The arbitration clause at issue provided that any dispute would be decided by neutral arbitration in California, before an arbitration provider selected by AuPair Care and that the prevailing party would be entitled to recover attorney's fees and costs, including the costs of arbitration. The Court found that the Agreements were procedurally unconscionable to a moderate degree because they were adhesive contracts, presented to the au pairs on a take-it-or-leave-it basis. The Court also found that the Agreements had significant substantive unconscionability. The clause lacked mutuality, allowing APC, the party with superior bargaining power, to choose an arbitration provider. APC argued that concerns of bias in selection were negated because it had the power to select a provider – not an arbitrator – and because the clause required neutral arbitration. The Court concluded that the clause allowing APC to select unilaterally the arbitration provider had the same inherent unconscionability as allowing it to select the arbitrator. The inclusion of the term "neutral arbitration" did not negate this defect. Because there was only one substantively unconscionable clause, the contract was not permeated by unconscionability – and the clause could be severed from the agreement.

Georgia

- **SETTLEMENT AGREEMENT INCOMPLETE AND UNENFORCEABLE**

Buchanan v. Buchanan
2018 WL 5603164
Court of Appeals of Georgia
October 30, 2018

Kathyrn Buchanan filed a petition for divorce from her husband, Joseph, requesting an equitable distribution of marital property that included two homes in GA and three in FL. In March 2017, the parties met to discuss the property and Kathyrn took handwritten notes of the meeting, which Joseph signed. Kathyrn put these notes together in a typed "Divorce Agreement," and presented it to Joseph. Joseph refused to sign the agreement. Soon after, he gave Kathyrn a check for $1700 for the "Big Red-Trailer-Scrape." Kathyrn moved to enforce the "settlement agreement" from March 2017, asserting that the parties agreed and that the $1700 check was consideration for the agreement. The court granted the motion, finding that the parties agreed to all property issues with respect to the divorce proceedings at the March meeting. Joseph appealed, arguing that the handwritten memo was unenforceable because it was incomplete.

The Court of Appeals of Georgia reversed and remanded. The trial court erred in ruling that the handwritten memo was a full settlement with regard to all of the property issues between the parties. The memo addressed only two of the three Florida homes. The court addressed the third FL home but was unclear on who owned the property. The memo provided that the rental home in GA would be appraised but did not address who was responsible for the appraisal or the appraisal method. In a written divorce agreement, the method of appraisal of real property was a substantive term and without it, a settlement agreement was incomplete.

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