January 8, 2020

ADR Case Update 2020-1

Federal Circuit Courts

BANKRUPTCY COURTS' DISCRETION TO REFUSE TO ENFORCE ARBITRATION AGREEMENTS UNCHANGED BY *EPIC SYSTEMS*

In the Matter of Henry v. Educational Financial Service (a division of Wells Fargo Bank)
United States Court of Appeals, Fifth Circuit
944 F.3d 587
December 16, 2019

Stephanie Henry took out student loans from Wachovia – later, Wells Fargo's subsidiary, EFS. The loan agreement contained an arbitration clause.

More than a decade later, Henry filed for bankruptcy. She made various payments according to the court's plan, and five years later received a discharge.

Even after EFS got notice of the discharge, they continued to try to collect the debt. Henry filed an action in bankruptcy court and EFS filed a motion to compel arbitration.

The bankruptcy court denied the motion, reasoning that the claims did not arise under the loan agreement and that EFS had an obligation to abide by the terms of the discharge. EFS appealed.

The United States Court of Appeals for the Fifth Circuit affirmed, finding that prior law (the *National Gypsum* case) holding "that bankruptcy courts have discretion to refuse to compel arbitration in proceedings seeking enforcement of a discharge injunction" remained good law, even following the Supreme Court's decision in *Epic Systems*. The Court referred to cases indicating that the FAA could be overridden by "a contrary congressional command," and that *Epic*'s requirement that the Congressional "intention must be clear and manifest" was met in this case. The Court rehearsed the holding of *National Gypsum* -- protection of the central purposes of the bankruptcy code – and found it a sufficiently clear and manifest Congressional intention to warrant denial of the motion to compel.

SMARTPHONE APP USER NOT BOUND BY ARBITRATION CLAUSE IN APP'S TERMS OF USE

Wilson v. Huuuge, Inc.

United States Court of Appeals, Ninth Circuit
2019 WL 6974430
December 20, 2019

Huuuge makes a “casino app” which allows smartphone users to gamble, first with some free chips and then with chips they buy from Huuuge. Sean Wilson played for a little more than a year and then brought a putative class action alleging violations of Washington state gaming and consumer protection laws. Huuuge brought a motion to compel based on language on its apps’ Terms page. The district court denied the motion because “Huuuge did not present any evidence of Wilson’s actual knowledge” of the binding arbitration clause. Huuuge appealed.

The United States Court of Appeals for the Ninth Circuit affirmed the denial of the motion to compel. It found that Huuuge failed to notify users effectively of the existence and importance of the Terms – not even requiring that users acknowledge their existence before playing. Moreover, the Terms are hard to find and can be acknowledged only through a link that requires manual cutting and pasting of a new URL into the user’s browser. The Court described the app as “littered with flaws” and the Terms page “not just submerged – they are buried twenty thousand leagues under the sea.”

The Court concluded, "[i]nstead of requiring a user to affirmatively assent, Huuuge chose to gamble on whether its users would have notice of its Terms. The odds are not in its favor. Wilson did not have constructive notice of the Terms, and thus is not bound by Huuuge’s arbitration clause in the Terms. We affirm the district court’s denial of Huuuge’s motion to compel arbitration.”

“MANIFEST DISREGARD” AND “OWN BRAND OF JUSTICE” LEAD TO VACATUR

Monongahela Valley Hospital Inc. v. United Steel Paper and Forestry, AFL-CIO CLC
United States Court of Appeal, Third Circuit
2019 WL 7286693
December 30, 2019

Monongahela Valley Hospital employees about 1,100 people, about half of whom are in the union. The CBA has a provision giving final say over vacation days to the hospital, but with a requirement that the hospital reimburse employees for provable losses associated with a unilateral schedule change.

Carol Konsugar requested vacation and was denied. She grieved the denial as a CBA violation and filed for arbitration.

The arbitrator concluded that the CBA “precluded the hospital from denying senior employees…their desired vacation when there is no operating need.” The arbitrator sustained the grievance and the hospital moved to vacate. The United States District Court granted the motion to vacate and the union appealed.

The United States Court of Appeal started its opinion by stating “[w]e have the rare situation where not even our heavy degree of deference to arbitrators can save an arbitration decision and award.” The Court found that the arbitrator ignored plain language in the contract vesting the final say over vacation to the hospital. (In a confusing turn of phrase, the Court stated that the arbitrator “manifestly disregarded the CBA.” Typically, this phrase is used only to describes departure from known law.)

The Court also found the arbitrator exceeded the scope of his authority when he added “operating need” as a factor in determining vacation requests. “Where an arbitrator injects a restriction into a contract to which the Hospital did not agree and to which the bargaining unit employees are not entitled, he dispenses his own brand of industrial justice and should be overturned.”

Texas

SUBSTANTIAL INVOCATION OF JUDICIAL PROCESS CONSTITUTES WAIVER OF RIGHT TO ARBITRATE

Pounds v. Rohe
Court of Appeals of Texas
2019 WL 6904547
December 19, 2019

Thomas Pounds passed away, and his estate became the result of a dispute between his common law wife, Reva Jean Rohe, and his son, Wade Pounds. The dispute resulted in a settlement agreement containing an arbitration provision.

Rohe filed a petition in the probate court for accounting and distribution. She asked the administrator of the estate (Black) for reimbursement of several mortgage payments. Pounds intervened, filed a motion for summary judgment and the motion was denied.

Rohe started a separate action seeking reimbursement, and after Black denied the petition, she sued about that. Pounds filed a motion to compel arbitration of Rohe's reimbursement claim. Black joined.

The trial court denied the motion, ruling that Pounds had waived his right to arbitrate by substantially invoking the judicial process, and in particular, by filing and losing the motion for summary judgment. Pounds appealed.

The Court of Appeals of Texas affirmed. The Court first found that Rohe did not "waive the defense of waiver" by failing to assert it at the time of the filing of the motion for summary judgment. The Court then discussed Pound's and Black's failure to bring arbitration up earlier, noting that their "delay was not only substantial, it was knowing and unexplained." The two clearly tried to have the matter disposed of, in court, on the merits. Finally, the Court acknowledged that this course of action prejudiced Rohe, and that the motion to compel was properly denied.

Maryland

AWARD VACATED AS A VIOLATION OF PUBLIC POLICY

Amalgamated Transit Union, Local 1300 v. Maryland Transit Administration
Court of Special Appeals, Maryland
2019 WL 7046396
December 23, 2019

The Maryland Transit Administration (MTA) fired driver Christopher Wilson for physically assaulting his estranged stepfather and co-worker with fists and a penknife. The incident was caught on MTA security cameras.

Wilson's union brought the matter to arbitration, where the arbitrator found that Wilson violated MTA's anti-violence and anti-weapons policies, but that the firing was not for "just cause," as required by the CBA. The arbitrator also found a violation of the progressive discipline policy and ordered Wilson to be reinstated, albeit without back pay.

MTA appealed and the circuit court granted MTA's motion to vacate based on a violation of public policy. The union appealed to the Court of Special Appeals of Maryland.

The Court affirmed the vacatur, stating "Because the arbitrator's factual findings leave the wrongdoing in this case clear (i.e., because we are not confronted with mere suspicion of wrongdoing), we have no difficulty in identifying an explicit and well-defined public policy that would be violated by the enforcement of the contract as interpreted by the arbitrator in this case. Maryland public policy, explicitly set forth in State Pers. & Pens. § 11-105, provides that serious acts of workplace violence, like Wilson's stabbing of Rosebrough, give a state agency cause for automatic termination of employment…We simply hold that the collective bargaining agreement at issue, as interpreted by the arbitrator through his award, is unenforceable on public policy grounds. Accordingly, the arbitral award reinstating Wilson must be vacated."

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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