ARBITRATION

SUPREME COURT HOLDS STATUTORY GROUNDS PROVIDED BY THE FEDERAL ARBITRATION ACT FOR EXPEDIATED JUDICIAL REVIEW MAY NOT BE MODIFIED BY AGREEMENT

Hall St. Assocs., L.L.C. v. Mattel, Inc., ____ S. Ct. ____ (2008).

FACTS: This case began as a lease dispute between landlord, petitioner Hall Street Associates ("Hall St."), and tenant, respondent Mattel, Inc. ("Mattel") The leases provided that the tenant would indemnify the landlord for any costs resulting from the failure of the tenant or its predecessor lessees to follow environmental laws while using the premises.

Tests of the property's well water in 1998 showed the apparent residue of manufacturing discharges by Mattel's predecessors between 1951 and 1980. After the Oregon Department of Environmental Quality ("DEQ") discovered even more pollutants, Mattel stopped drawing from the well and signed a consent order with the DEQ providing for cleanup of the site.

After Mattel gave notice of intent to terminate the lease in 2001, Hall Street filed this suit, contesting Mattel's right to vacate on the date it gave, and claiming that the lease obliged Mattel to indemnify Hall Street for costs of cleaning up the land. Following a bench trial, Mattel won on the termination issue, and after an unsuccessful try at mediating the indemnification claim, the parties proposed to submit to arbitration. The district court was amenable, and the parties drew up an arbitration agreement, which the court approved and entered as an order. One paragraph of the agreement provided that "[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." Arbitration took place, and the arbitrator decided for Mattel. In particular, he held that no indemnification was due, because the lease obligation to follow all applicable federal, state, and local environmental laws did not require compliance with the testing requirements of the Oregon Drinking Water Quality Act ("Act"); the arbitrator characterized the Act as dealing with human health and not environmental contamination.

The Court found that case law rejected the landlord's argument that general review was allowed for an arbitrator's legal errors.

Hall Street then filed a Motion for Order Vacating, Modifying and/or Correcting the arbitration decision on the ground that failing to treat the Act as an applicable environmental law under the terms of the lease was legal error. The district court agreed, vacated the award, and remanded for further consideration. The court expressly invoked the standard of review chosen by the parties in the arbitration agreement, which included review for legal error and the proposition that the Federal Arbitration Act ("FAA") leaves the parties "free . . . to draft a contract that sets rules for arbitration and dictates an alternative standard of review."

On remand, the arbitrator followed the district court's ruling that the Act was an applicable environmental law and amended the decision to favor Hall Street. This time, each party sought modification, and again the district court applied the parties' stipulated standard of review for legal error, correcting the arbitrator's calculation of interest but otherwise upholding the award. Each party then appealed to the Court of Appeals for the Ninth Circuit, where Mattel contended that their recent decision in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, left the arbitration agreement's provision for judicial review of legal error unenforceable. 341 F.3d 987, 1000 (9th Cir. 2003). Hall Street countered that *Kyocera* was distinguishable, and that the agreement's judicial review provision was not severable from the submission to arbitration.

The Ninth Circuit reversed in favor of Mattel, holding that under *Kyocera* the terms of the arbitration agreement controlling the mode of judicial review were unenforceable and severable. The court of appeals instructed the district court on remand to return to the application to confirm the original arbitration award (not the subsequent award revised after reversal), and confirm that award, unless the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11.

After the district court again held for Hall Street and the Ninth Circuit again reversed, the Supreme Court of the United States granted certiorari to decide whether the grounds for vacatur and modification provided by §§ 10 and 11 of the FAA are exclusive.

HOLDING: Vacated and remanded.

REASONING: The issue examined by the Supreme Court of the United States was whether statutory grounds for prompt vacatur and modification could be supplemented by contract. The Court found that case law rejected the landlord's argument that general review was allowed for an arbitrator's legal errors. While the FAA allowed parties to tailor many features of arbitration by contract, the Act's textual features did not provide for enforcing a contract to expand judicial review following the arbitration. The Court determined that 9 U.S.C.S. § 9, which had no textual hook for expanding judicial review, did not authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. Rather, 9 U.S.C.S. §§ 10 and 11 provided exclusive regimes for the review provided by the FAA.

Even though the Supreme Court agreed that the lower court properly held that the FAA confined its expedited judicial review to the grounds listed in 9 U.S.C.S. §§ 10 and 11, a remand was necessary to consider whether the arbitration agreement should have been treated as an exercise of the district court's authority to manage its cases under Fed. R. Civ. P. 16. The Supreme Court of the United States held that §§ 10 and 11 respectively provided the FAA's exclusive grounds for expedited vacatur and modification.

CLASS ACTION BAN IN ARBITRATION CLAUSE IS ENFORCEABLE

Gay v. CreditInform, 511 F.3d 369 (3rd Cir. 2007).

FACTS: Mary Gay purchased services related to monitoring and improving her credit history from Intersections, Incorporated. Gay's purchase agreement included an arbitration provision that stated that any claim arising out of the product would be settled by binding arbitration. When a dispute arose as to the purchase of her credit repair services, Gay filed a class action lawsuit against Intersections under both the Credit Repair Organizations Act ("CROA") and the Pennsylvania Credit Services Act ("CSA").

Pursuant to the arbitration provision, the district court ordered the parties to arbitrate their dispute. Gay appealed from the district court's order arguing that the court should construe the use of the term "court" within the language of the CROA as recognizing that the CROA granted a consumer the right to file suit for an alleged violation of the statute in a judicial forum on a class action basis. Gay did not point to any language in the CSA to support her claim. In addition, Gay contended that the CROA and the CSA prohibit a consumer from waiving the right to file a suit on a class action basis.

HOLDING: Affirmed.

REASONING: A party seeking to avoid arbitration for a statutory claim has the burden of establishing that Congress intended to preclude arbitration of the same claim. Congress's intention "may be found in the text, legislative history, or in an 'inherent conflict' between arbitration and the statute's underlying purposes." In the present case, the court held that repeated references to "court" in both the CROA and the CSA, in sections that described the relief available to consumers for violations of these acts, as well as the CROA's explicit reference to "class actions," did not confer a right on consumers to pursue relief in a judicial forum or to litigate their claims on a class action basis. The court further explained that, although the statutes clearly contemplate consumers' actions being brought in a judicial forum and, in the case of the CROA, on a class action basis, they neither contain provisions creating such rights nor indicate that Congress or the state legislature intended to exclude claims asserted under the CROA or the CSA from arbitration agreements.

In regard to Gay's claim that the CROA and the CSA prohibit consumers from waiving the right to file a class action suit, the court held that because these statutes did not create a statutory right to file a class action suit in the first place, it is, therefore, inconceivable that the anti-waiver provisions of these statutes could extend to said right. Furthermore, the court held that, although the anti-waiver provision in the CSA is broader than that of the CROA, allowing the anti-waiver provision to preclude the enforcement of an arbitration provision would violate the Federal Arbitration Act.

INDIVIDUAL WITH MEDICAL POWER OF ATTORNEY CAN CONSENT TO ARBITRATION CLAUSE

Owens v. Nat'l Health Corp., ____ S.W.3d ____ (Tenn. 2007).

FACTS: Mary Francis King executed a durable power of attorney for health care naming Gwyn C. Daniel and William T. Daniel as King's attorneys-in-fact. The power of attorney authorized the attorneys-in-fact "to ASSIST me in making health care decisions, and to make health care decision [sic] for me if I am incapacitated or otherwise unable to make such decisions for myself." The power of attorney provided directions to King's attorneys-in-fact concerning her care in the event she developed "a terminal condition" or was "in an irreversible coma or permanent vegetative state." The power of attorney further provided:

> At any time, my Attorney-in-Fact shall have the right to examine my medical records and to consent to their disclosure whether I am incapacitated or not. I grant to my Attorney-in-Fact the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my Attorney-in-Fact to assist me to make, or to make on my behalf.

Three weeks after executing the power of attorney, King was admitted to a nursing home owned, operated, and managed by National Health Corporation ("NHC"). The Admission and Financial Contract contained a mediation and arbitration clause which provided that the patient may request mediation of "any claim arising out of the contract or breach thereof or any tort claim." Additionally, the contract contained a binding arbitration clause which stated that any claim initiated by either party prior to written notice of mediation would be resolved by binding arbitration.

Dorothy Owens, as conservator of King, filed suit against NHC for injuries sustained by King during her stay at NHC. In response, NHC filed a motion to stay proceedings and compel arbitration. The trial court denied NHC's motion to compel arbitration, and concluded that the power of attorney does not authorize the attorneys-in-fact to make legal decisions for King. They held that the durable power of attorney for health care should not be so broadly construed as to be considered a power of attorney for legal care. The court of appeals reversed the trial court's ruling and Owens appealed.

HOLDING: Affirmed.

REASONING: Tennessee Code Annotated section 34-6-201(2) defines health care to mean "any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition, and includes medical care as defined in section 32-11-103(5)." Section 34-6-201 then defines health care decision to mean "consent, refusal of consent or withdrawal of consent to health care." The court held that the decision to admit King to the nursing home clearly constituted a "health care" decision. The court reasoned that an agreement to arbitrate is binding because that action was necessary to consent to health care.

Furthermore, section 34-6-204(b) expressly states that the attorney-in-fact may make health care decisions for the principal to the same extent as the principal, if the principal had the capacity to do so. If the attorney-in-fact was unable to enter into the contract, it would defeat the purpose of a durable power of attorney for health care. The mentally incompetent could be caught in legal limbo. Since King could have signed the nursing home contract had she been competent, her agent was authorized to sign the arbitration agreement on her behalf.

PARTY APPEALING DECISION OF ARBITRATOR HAS BURDEN OF PROOF

Statewide Remodeling, Inc., v. Williams, 244 S.W.3d 564 (Tex. App.—Dallas 2008).

FACTS: John and Eddie Lee Williams contracted with Statewide Remodeling for the construction of a conservatory sunroom. The contract contained an arbitration clause. Dissatisfied with the work performed by Statewide, Williams filed a lawsuit for damages. In their original petition, the Williamses requested the trial court to enter an agreed order appointing an arbitrator and abating the suit. Arbitration proceeded according to the agreements made by the parties and was conducted primarily by written submission. The parties submitted position statements to the arbitrator which included affidavits of witnesses and other exhibits in support of their arguments. The arbitrator then conducted a hearing so the parties could offer testimony. No transcript of the arbitration hearing was made. The arbitrator awarded Williams $18,000 to "repair the room interior and take necessary steps to alter or replace the roof" and $15,500 in attorneys' fees and arbitration costs.

Statewide filed a motion in the trial court to vacate the arbitration award. Statewide argued the arbitrator's award was unsupported by the evidence. Further, Statewide argued that the Williamses did not ask for the cost of repair as a measure of damages. Rather, Statewide contended that the Williamses requested only rescission and a refund of the contract price of $52,656. Statewide attached to its motion to vacate: (1) both parties' position statements with attached affidavits and supporting exhibits which were submitted to the arbitrator; (2) a sworn affidavit of Statewide's attorney stating he had been present during the arbitration hearing and that Williams did not present any evidence of the cost of repair; and (3) numerous additional documents, including letters and the text of a voice mail message between counsel.

After the trial court heard arguments from the parties on the motion to vacate, the court denied Statewide's motion to vacate and sustained the arbitration award.

HOLDING: Affirmed.

REASONING: The court of appeals affirmed the trial court's holding because Statewide failed to provide a transcript of the arbitration hearing. When a non-prevailing party seeks to vacate an arbitration award, it bears the burden in the trial court of bringing forth a complete record that establishes its basis for vacating the award. Statewide had the burden to provide a complete transcript of the arbitration hearing to the trial court in order to receive an accurate review of the arbitrator's decision. Statewide only provided the trial court with the parties' position statements with attached affidavits and supporting exhibits, a sworn affidavit from Statewide's attorney, and other documents. These documents failed to constitute a complete record of the arbitration proceeding. Therefore, the court held that the trial court did not err in holding that Statewide had the burden of bringing forth a complete record of the arbitration proceedings, including a transcript of the arbitration hearing.

BANKRUPTCY

MEDICAL MALPRACTICE CLAIM AGAINST DOCTOR IS DISCHARGEABLE

Ditto v. McCurdy, 510 F.3d 1070 (9th Cir. 2007).

FACTS: John McCurdy performed an unsuccessful breast augmentation surgery on Janie Ditto. In 1989, Ditto sued McCurdy in state court for negligence and fraud alleging that McCurdy exercised inadequate care, failed to obtain informed consent because he did not disclose the risks of the surgery, and did not disclose his lack of qualifications to perform the surgery. In 1992, Ditto won judgment against McCurdy. McCurdy appealed the judgment and filed for bankruptcy.

In 1996, the bankruptcy court granted Ditto's motion for summary judgment under 11 U.S.C. § 523(a)(6), which grants exception to discharge for any debt "for willful and malicious injury by the debtor," holding that the debt was nondischargeable. The next year, the Hawaii Supreme Court affirmed the negligence claims, but reversed the fraud claim. McCurdy then filed a Rule 60(b) motion with the bankruptcy court to set aside the judgment of nondischargeability. Both the bankruptcy court and the district court denied this motion, but the appellate court remanded with instructions to grant the motion.

In 1998, after McCurdy filed the claim, but before it was granted, the United States Supreme Court in *Kawaauhau v. Geiger*, clarified the meaning of the § 523(a)(6) exemption from discharge. 523 U.S. 57 (1998). The Court held that § 523(a)(6) did not encompass debts arising from reckless or negligent afflictions of injury. On rehearing in the bankruptcy court, McCurdy moved for summary judgment. The bankruptcy court granted his motion and the district court affirmed. Ditto appealed.

HOLDING: Affirmed.

REASONING: Prior to *Geiger*, § 523(a)(6) was governed by *In re Cecchini*, 780 F.2d 1440 (9th Cir. 1986). Under *Cecchini*, the debtor need not have acted with a specific intent to injure. Ditto contended that the old *Cecchini* standard should apply rather than applying the new *Geiger* decision retroactively. The court stated that Supreme Court rulings of federal law apply to cases still open on direct review. When a judgment has been set aside pursuant to Rule 60(b), the case stands as if that judgment had never occurred in the first place. Because Ditto's judgment was set aside pursuant to Rule 60(b), the case was still open on direct review and therefore the *Geiger* ruling applied.

Alternatively, Ditto argued that she met the enhanced standard of *Geiger* because McCurdy's failure to disclose vitiated her consent to the procedure, rendering his actions a battery. The court distinguished between medical battery and negligent failure to disclose. The former occurs when a doctor fails to get any authorization or has gone well beyond the authorization given. The latter is a breach of the doctor's duty to disclose all material risks a patient would need to make an informed decision. The court held that informed consent sounded in negligence rather than in battery, therefore, failure to obtain informed consent,