ARBITRATION

DECEPTIVE MEETING VOIDS LAW FIRM'S ARBITRATION CLAUSE

Daspit Law Firm, PLLC v. Herman, ___ S.W.3d ___ (Tex. App. 2020).
https://www.leagle.com/decision/intxco20200826540

FACTS: Plaintiff Eric Herman was injured in a car accident and met with a non-attorney employee ("the employee") of Daspit Law Firm ("Appellant") to discuss the accident. During the meeting, the employee asked Herman to sign a document. Herman asked if it was a contract, and the employee told him that it was not a contract but a way to gather information for future legal representation. Herman requested a copy of the document and the employee refused. Despite the employee's representation that the document was not a contract, the document was a lawyer–client agreement in which Appellant agreed to represent Herman. The contract also contained an arbitration agreement requiring any disputes about the contract or appellant's representation of Herman to be arbitrated in Harris County. Herman left the meeting not knowing whether he had hired an attorney. Herman and Avant Law firm ("Avant"), Herman's new counsel, discovered the misrepresentation when Herman's insurer paid a personal injury claim for the accident, addressing the check to Herman, Avant, and Appellant.

The court rejected that argument and held that the arbitration clause was procedurally unconscionable and void.

Avant filed suit, seeking a declaratory judgment to determine whether Appellant's contract with Herman was void. Appellant filed a motion to abate the lawsuit and to compel arbitration of the claims, relying on the attorney–client agreement Herman had signed. The trial court denied the motion to compel arbitration. Appellant appealed.

HOLDING: Affirmed.

REASONING: Appellant argued that the trial court abused its discretion by denying the motion to compel arbitration. The court rejected that argument and held that the arbitration clause was procedurally unconscionable and void.

The court considered factors surrounding the contract formation such as the atmosphere, the alternatives presented to parties, whether the contract was illegal or against public policy, and whether it was oppressive or unreasonable. Herman testified that the meeting with Appellant's employee was less than ten minutes. The employee seemed aware that the document contained an arbitration agreement but rushed Herman into signing the misrepresented document and refused to give further explications. Additionally, Herman argued that Appellant's employee did not permit Herman to read the arbitration provision before signing the document.

Under the Federal Arbitration Act, arbitration is dismissed when the plaintiffs were so deceived, they did not understand they were contracting. Under the Texas Arbitration Act, a court may not enforce an arbitration agreement if the court found it was unconscionable at the time it was made. Based on the facts, the court held that the trial court could have reasonably concluded the conduct by a law firm toward Herman was sufficiently shocking to constitute procedural unconscionability concerning the arbitration agreement. Therefore, the trial court did not abuse its discretion by denying Appellant's motion to compel arbitration of Herman's claims.

ARBITRATION AWARDS CANNOT BE MODIFIED UNLESS A MATERIAL MISCALCULATION APPEARS ON THE FACE OF THE AWARD

Mid Atl. Cap. Corp. v. Bien, 956 F.3d 1182 (10th Cir. 2020).
https://www.leagle.com/decision/infco20200414058

FACTS: Ms. Bien and Mr. Wellman invested money with the brokerage firm Mid Atlantic Capital Corporation. When their investments performed poorly, Ms. Bien and Mr. Wellman initiated arbitration proceedings against Mid Atlantic alleging unreasonably risky investments. During arbitration, Ms. Bien and Mr. Wellman's expert witness proposed two methods to calculate their losses: "net out-of-pocket losses" of $292,411 *or* "market-adjusted damages" between $484,684 and $618,049. In their final prayer for relief, they requested only the market-adjusted damages calculation. The arbitration contract specifically provided, "'[t]he arbitrators do not have to explain the reason(s) for their award.'" The arbitration panel awarded Ms. Bien and Mr. Wellman initial-investment-loss damages of $292,41, compensatory damages of $484,683, attorney's fees and arbitration costs.

Mid Atlantic moved the district court to modify the arbitration award. Mid Atlantic argued Ms. Bien and Mr. Wellman received double recovery because the damage awards nearly matched the expert testimony of both proposed damage calculations. The district court denied Mid Atlantic's motion and held 9 U.S.C. § 11(a) requires the court to only examine the face of the award for "evident material miscalculation of figures." The district court concluded that it lacked authority to modify the award because the alleged double counting at issue appeared only upon looking to the arbitration record. The amended final judgment ordered Mid Atlantic to pay the arbitration award. Mid Atlantic appealed the district court's denial of its motion to modify the arbitration award.

HOLDING: Affirmed.

REASONING: Mid Atlantic argued that when looking for an evident material miscalculation of figures in an arbitration award, § 11(a) did not limit a court to the face of the award. Mid Atlantic argued that the only way to make this determination was to look at the record, otherwise the results would be arbitrary.

The court rejected this interpretation and held that § 11(a) had "a face-of-the-award limitation." The court read §11(a) within the context of the entire statutory scheme giving plain meaning to the relevant words of the provision. The court concluded its ability to modify an award is limited to only "obvious, significant mathematical errors" from the face of the award. If courts could open the door to look at the arbitration record, then

it would defeat the primary purpose of the Federal Arbitration Act to ensure efficient private litigation and to avoid cumbersome judicial review.

The court further reasoned that if Mid Atlantic's construction was accepted, then it would undermine the extremely deferential standard of review courts give arbitration awards. Because arbitration is a matter of contract, it would be inappropriate for the court to rewrite the parties' agreement. Persuasive authority from the other circuit courts and New York state courts supported the holding. The court did not opine as to the type of information needed to determine a material miscalculation evident on the face of the award. Instead, the court held "there was no math issue," and Mid Atlantic failed to meet its burden of identifying an evident material miscalculation of figures that appeared on the face of the award.

FAA DOES NOT APPLY TO INDEPENDENT CONTRACTOR'S CLASS ACTION WAGE CLAIMS

Waithaka v. Amazon.com, Inc, 966 F. 3d 10 (1st. Cir. 2020).
https://law.justia.com/cases/federal/appellate-courts/ca1/19-1848/19-1848-2020-07-17.html

FACTS: Plaintiff-Appellee, Bernard Waithaka, was a "last-mile" delivery driver for Defendant-Appellants, Amazon.com, Inc. and its subsidiary, Amazon Logistics, Inc. Waithaka signed up for the job through the Amazon Flex ("AmFlex") smartphone application. Waithaka was hired as an independent contractor and agreed to the AmFlex Independent Contractor Terms of Service (the "Agreement").

Waithaka filed a class action against Amazon on behalf of himself and other delivery drivers who worked for the appellants in Massachusetts and were classified as independent contractors. Amazon moved to compel arbitration pursuant to the Agreement. The district court denied the motion, holding that Waithaka's Agreement was exempt from the Federal Arbitration Act ("FAA"). Amazon appealed.
HOLDING: Affirmed.
REASONING: The court determined that §1 of the FAA providing an exemption for "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applied only to employment contracts for transportation workers. The court further held that the term "contract of employees" applied to agreements to perform work, including those of independent contractors.

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Thus, the court concluded that Waithaka was a transportation worker for purposes of the §1 exemption because last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers "engaged in…interstate commerce," regardless of whether the workers themselves physically cross state lines. Therefore, the court held that the FAA did not govern the dispute and provided no basis to compel arbitration required by the dispute resolution section of the Agreement.

COURT REFUSES TO COMPEL TCPA CASE TO ARBITRATION

Briggs v. Pfvt Motors Llc, ___ F. Supp. 3d ___ (D. Az. 2020).
https://law.justia.com/cases/federal/district-courts/arizona/azdce/2:2020cv00478/1235958/28/

FACTS: Plaintiff Karen Briggs purchased a vehicle from Defendant PFVT Motors. The Retail Order For a Motor Vehicle Agreement ("Agreement") between Plaintiff and Defendant contained an arbitration clause. Several years after purchasing the vehicle, Plaintiff began receiving calls from Defendant seeking new business. Plaintiff requested Defendant stop contacting her but continued to receive calls.

Plaintiff filed suit, alleging Defendant violated the Telephone Consumer Protection Act ("TCPA"). Defendant filed a motion to compel arbitration, claiming that the arbitration clause from the Agreement governed the TCPA claim.
HOLDING: Denied.
REASONING: Defendant argued the TCPA claim fell within the arbitration clause of the Agreement.

The court held that an arbitration clause must encompass the dispute at issue. This suit was the result of the Defendant's extra-contractual actions, which were unrelated to the promises outlined in the Agreement. The Agreement was for the purchase of a vehicle; however, this suit concerned the Defendant's subsequent attempts to solicit new business. The arbitration clause did not "touch matters" with the subject of the suit so it did not encompass the dispute.

ARBITRATION DOES NOT REQUIRE SIGNATURE TO BE ENFORCEABLE UNLESS EXPRESS LANGUAGE REQUIRES IT

STRONG POLICY FAVORING ARBITRATION APPLIES ONLY AFTER A VALID AGREEMENT IS ESTABLISHED

SK Plymouth v. Simmons, 605 S.W.3d 706 (Tex. App. 2020).
https://www.leagle.com/decision/intxco20200416529

FACTS: Jean Elizabeth Simmons sued Appellants SK Plymouth, LLC, SK E&P Operations America, LLC (SKEPOA), and Joey Jun, for wrongful termination of employment.

Based on an arbitration agreement signed by Simmons when she began employment with SKEPOA, Appellants filed a motion to compel arbitration under the Federal Arbitration Act ("FAA"). Simmons asserted that the arbitration agreement was not enforceable because SKEPOA had not signed the agreement. The trial court denied Appellants' motion to compel arbitration. Appellants appealed.
HOLDING: Reversed and remanded.
REASONING: Simmons argued that SKEPOA was required to sign the arbitration agreement. The court rejected that argument by reasoning that the arbitration agreement did not contain any provision expressly requiring the agreement to be signed by the

parties in order to make it binding or modify it. Simmons further pointed to the initial employment offer, which stated that in order to begin her employment, Simmons was required to sign the company's arbitration agreement.

The court rejected this argument, reasoning that a requirement that Simmons signed the arbitration agreement as condition of her employment did not indicate an intent by the parties to require SKEPOA to sign the agreement to show its assent. The court reasoned that while signature and delivery are often evidence of a mutual assent required for a contract, they are not essential. The court pointed to the Supreme Court of Texas where they held that the FAA did not require parties to sign an arbitration agreement for it to be valid so long as the agreement was written and agreed to by the parties. That court made clear that it has never held that an employer must sign the arbitration agreement before it may insist on arbitrating a dispute with its employee.

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Furthermore, the court held that while there is a strong policy favoring arbitration, this policy does not apply to the initial determination whether there is a valid arbitration agreement. The presumption favoring arbitration arises only after the party seeking to compel arbitration establishes a valid agreement to arbitrate because the purpose of the FAA is to make arbitration agreements as enforceable as other contracts, not more so.

SUPREME COURT REFUSES TO REVIEW RULING ENDORSING CLASS ACTION ARBITRATION

Jock v. Sterling Jewelers Inc., 942 F.3d 617 (2d Cir. 2019), cert. denied, No. 19-1382, __ S. Ct. __, 2020 WL 5882321 (U.S. Oct. 5, 2020).
https://law.justia.com/cases/federal/appellate-courts/ca2/18-153/18-153-2019-11-18.html

FACTS: Plaintiff Laryssa Jock and her co-Plaintiffs-Appellants were a group of current and former retail sales employees of Sterling Jewelers (Sterling). Jock filed suit against Sterling, alleging she and other female employees were paid less than their male counterparts on account of their gender in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. All employees were required as a condition of their employment to sign a "resolve program" agreement which mandated that they participate in arbitration.

The case was brought to the Second Circuit four times. In Jock I, the arbitrator issued an award in favor of then-named plaintiffs. The Second Circuit reversed, holding that the district court impermissibly substituted its own legal analysis for that of the arbitrator. Following Jock I, the arbitrator issued a class certification determination that certified a class of approximately 44,000 women. The district court denied Sterling's motion to vacate the class determination award. Sterling appealed. In Jock II, the Second Circuit reversed and remanded, clarifying that Jock I did not squarely address whether the arbitrator had the power to bind absent class members. On remand, the district court vacated the arbitrator's determination ruling after determining that (1) the "resolve" agreement did not give the arbitrator authority to certify the class and (2) the fact that named plaintiffs and the defendant submitted the question of whether the "resolve" agreement allowed for class procedures to the arbitrator also did not give the arbitrator that authority. This appeal followed.

HOLDING: Supreme Court Petition Denied; Second Circuit reversed.

REASONING: The district court held that the deferential standard does not apply when absent class members did not affirmatively opt into the arbitrator's proceeding and thereby consented to the arbitrator's authority to decide whether the resolve agreement permits class procedures. The Second Circuit Court of Appeals disagreed and reasoned that the district court wrongly relied on its original view that the arbitrator wrongly interpreted the resolve agreement to permit class procedures.

Appellants argued that the absent class members had authorized the arbitrator to determine whether the resolve agreement permits class procedures. Appellants contended that all Sterling employees signed such agreement and all Sterling employees agreed that, if any of them initiated a putative class proceeding, the arbitrator in that proceeding would be empowered to decide class-arbitrability—and, if he or she found it appropriate to certify a class encompassing other employees' claims. The Second Circuit agreed, reasoning that although the absent class members had not affirmatively opted in to the arbitration proceeding, by signing the resolve agreement, they consented to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration. Furthermore, the resolve agreement provided that "questions of arbitrability" and "procedural questions" "shall be decided by the arbitrator." The Supreme Court suggested that the availability of class wide arbitration is a "question of arbitrability" and refused to review the petition. Thus, the Supreme Court denied a petition for writ of certiorari.

The resolve agreement provided that "questions of arbitrability" and "procedural questions" "shall be decided by the arbitrator."

QUESTIONS OF ARBITRATION AGREEMENT FORMATION MUST BE DECIDED BY A COURT

Fedor v. United Healthcare, Inc., 976 F.3d 1100 (10th Cir. 2020).
https://cases.justia.com/federal/appellate-courts/ca10/19-2066/19-2066-2020-09-16.pdf?ts=1600272056

FACTS: Plaintiff-Appellant Dana Fedor was an employee of Defendant-Appellee United Healthcare, Inc. ("UHC"). Fedor signed an arbitration agreement when she commenced employment with UHC in 2013. However, UHC periodically updated its arbitration policy and the "active at time" version was the 2016 version. Unlike former versions, the 2016 policy contained a delegation clause establishing that an arbitrator would resolve dis-

putes regarding the policy's "interpretation, enforceability, applicability, unconscionability, arbitrability or formation, or whether the Policy or any portion of the Policy is void or voidable."

Fedor filed a collective suit alleging that UHC violated the Fair Labor Standards Act ("FLSA") and New Mexico's wage law. UHC moved court to compel arbitration. The district court compelled arbitration based on the 2016 policy and noted that Fedor challenged "only the validity of the contract as a whole," rather than specifically challenge the delegation clause within the 2016 policy. Fedor appealed.

HOLDING: Vacated and remanded.

REASONING: Fedor argued that the 2016 arbitration agreement was never formed between herself and UHC. She also argued that for arbitration policies containing delegation clauses, courts must first determine whether an agreement to arbitrate was formed before sending the case to an arbitrator. The court agreed, holding that a delegation clause cannot be severed from an agreement that did not exist; therefore, before severing and enforcing the delegation clause from an arbitration agreement, questions of the agreement formation must first be decided by a court.

While issues such as the "scope" and "enforceability" of an arbitration clause can be committed to an arbitrator through a delegation provision, courts must always resolve whether the clause was agreed to by the parties.

Analyzing the Supreme Court's directives in *Rent-A-Center, West. Inc. v. Jackson*, the court admitted that a delegation clause can typically be "severed" from an arbitration agreement and can thus prevent a court from deciding certain arbitrability issues unless a litigant challenged the clause directly. However, the court then noted that not all arbitrability issues can be delegated. Analyzing *Granite Rock Co. v. International Brotherhood of Teamsters*, the court concluded that while issues such as the "scope" and "enforceability" of an arbitration clause can be committed to an arbitrator through a delegation provision, courts must always resolve whether the clause was agreed to by the parties. Finally, the court held that courts must first determine whether an arbitration agreement was indeed formed before enforcing a delegation clause therein.