ARBITRATION

AMERICAN EXPRESS WAIVES ARBITRATION BY FILING STATE COURT ACTION

Barnett v. Am. Express Nat'l Bank, ___ F. Supp. 3d ___ (S.D. Miss. 2021).
https://casetext.com/case/barnett-v-am-express-natl-bank

FACTS: Plaintiff, Michelle Barnett, disputed multiple fraudulent charges on her account with Defendant American Express National Bank ("Defendant"). Allegedly, despite knowing the charges were fraudulent, Defendant still reported the account as being charged off to Credit Bureaus and damaged Barnett's credit. The parties executed a valid arbitration agreement in 2013. In September and October 2018, Barnett, on three different occasions, in writing, sent letters to American Express expressing her desire to exercise her right to arbitrate the claim that she owed the "fraudulent" charges. Defendant nevertheless filed a collections suit against Barnett for the charged-off account in May 2019 in Mississippi state court.

In August 2020, Barnett sued Defendant for violations of Fair Credit Reporting Act, and Defendant removed the case to the federal district court. Defendant then filed a Motion to Compel Arbitration in accordance with the 2013 arbitration agreement.

HOLDING: Motion Denied.

REASONING: Barnett argued that Defendant waived its right to arbitration because it substantially invoked the judicial process by filing its state court collections action against her.

The court agreed with Barnett, finding that American Express waived arbitration by filing a state court action against Barnett and failure to respond to Barnett's requests for arbitration despite Barnett's multiple attempts. The court thus denied American Express' Motion to Compel Arbitration.

WAIVER OF RIGHT TO COMPEL ARBITRATION IS CLAIM SPECIFIC AS TO STATE CLAIMS AND DID NOT EXTEND TO LATER-PLED FEDERAL CLAIMS

Forby v. One Techs., L.P., ___ F.4th ___ (5th Cir. 2021).
https://www.lenderlawwatch.com/wp-content/uploads/sites/9/2021/09/Forby-v-One-Technologies-LP.pdf

FACTS: Plaintiff Vickie Forby brought claims against Defendant, One Technologies Capital ("One Tech"), for violating Illinois's Deceptive Trade Practices Act ("ICFA") and for unjust enrichment, claiming that One Tech tricked consumers into signing up for "free" credit reports that were not free, due to a month-to-month subscription that consumers would have to opt-out of once they received their credit reports. The district court denied One Tech's motion to dismiss the ICFA claim. One Tech then motioned to compel arbitration, and the district court granted the motion.

On appeal, the Fifth Circuit Court of Appeals ruled that One Tech had waived its right to arbitration because it sought dismissal of the claims at the district court, and would prejudice Forby, who would have to re-litigate her claims in front of an arbitrator after One Tech already tested its arguments with a district court judge. On remand, Forby filed additional claims under the Credit Repair Organizations Act ("CROA"). One Tech moved to compel arbitration for the amended complaint, and the district court denied the motion. One Tech appealed.

HOLDING: Reversed and Remanded.

REASONING: One Tech argued that its prior waiver of arbitral rights did not extend to the federal claims Forby raised for the first time in her second amended complaint.

The court agreed with One Tech, stating that there is a strong presumption against finding a waiver of arbitration. A waiver is evaluated under a two-step test: 1) whether a party substantially invoked the judicial process, and 2) whether this caused the other party prejudice. For waiver purposes, "a party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate."

In this case, One Tech never invoked the judicial process for the CROA claim because it was a claim later added by the amended complaint, and One Tech immediately moved to compel arbitration.

RIGHT TO COMPEL ARBITRATION WAIVED BY WAITING TOO LONG

Marino Performance, Inc. v. Zuniga, ___ So. 3d ___ (Fla. Dist. Ct. App. 2021).
https://law.justia.com/cases/florida/fourth-district-court-of-appeal/2021/20-1463.html

FACTS: Plaintiffs filed a class action complaint, alleging that Defendant Marino Performance ("Marino") engaged in deceptive practice. Marino answered the complaint, and each party engaged in discovery and other pretrial matters. Days before the class certification hearing, Marino filed its motion to compel arbitration, raising the issue of arbitration for the first time. Circuit court entered an order on the motion for class certification, finding that Marino waived the right to compel arbitration for the unnamed class members. Marino appealed.

In order to find arbitration waived, the trial court must find that the party attempting to arbitrate act inconsistently with the arbitration right.

HOLDING: Affirmed.

REASONING: Marino argued that its pre-certification conduct could not operate to waive its right to arbitrate since the right didn't exist at that time. Plaintiffs argued that Marino acted inconsistently with its arbitration rights by not asserting its intent to arbitrate before engaging in extensive discovery.

The court agreed with the Plaintiffs, stating that in order to find arbitration waived, the trial court must find that the party attempting to arbitrate act inconsistently with the arbitration right. A key factor in deciding this is whether a party has

substantially invoked the litigation machinery prior to demanding arbitration.

The court found that since Marino did nothing to signal that it was preserving its arbitration right in the event of class certification prior to filing its motion to compel on the eve of the certification hearing and did not raise the arbitration right when filing its answer or responding to discovery requests, it engaged in a litigation strategy of "outcome-oriented gamesmanship." Therefore, Marino waived its right to arbitration as to unnamed class members.

ARBITRATION AGREEMENT UNENFORCEABLE UNDER TAA AND FAA

Nationwide Coin & Bullion Reserve, Inc. v. Thomas, 625 S.W.3d 498 (Tex. App. 2020).
https://casetext.com/case/nationwide-coin-bullion-reserve-inc-v-thomas

FACTS: Plaintiff June Thomas made nine collectible coin purchases from Defendant Nationwide Coin & Bullion Reserve, Inc. ("Nationwide"), each for under $50,000. While Thomas was trying to resell the Chinese Gold Panda Coin back to Nationwide, Nationwide sent Thomas an invoice containing Terms and Conditions with arbitration provision included. Thomas refused to sign.

Thomas sued Nationwide for DTPA violations. Nationwide responded with a motion to compel arbitration. The trial court denied Nationwide's motion, entitling Thomas actual and treble damages under the DPTA. Nationwide appealed.
HOLDING: Affirmed.
REASONING: Nationwide argued that there was a valid arbitration agreement under both Texas Arbitration Act and the Federal Arbitration Act. The court disagreed with Nationwide by holding no enforceable arbitration agreement existed under either TAA or FAA.

The TAA does not apply to agreements for purchases under $50,000, unless the arbitration agreement is in writing, signed by each party, and signed by each party's attorney. Since Thomas's purchases were each less than $50,000 and Thomas refused to sign the arbitration agreement, TAA could not apply.

The FAA also requires the arbitration agreement to be signed by parties in order to be enforceable. The court dismissed the idea that Thomas, a non-signatory, could be bound to the arbitration agreement because Nationwide expressed its intent to have her signature on the invoice upon their repurchase of the Gold Panda Coin. Therefore, neither TAA nor FAA could apply to the agreement between the parties.

DTPA CLAIM SUBJECT TO ARBITRATION AND CHOICE OF LAW CLAUSE

Tex. Star Nut & Food Co. v. Barrington Packaging Sys. Grp., Inc., ___ F. Supp. 3d ___ (W.D. Tex. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-txwd-5_21-cv-00444/pdf/USCOURTS-txwd-5_21-cv-00444-0.pdf

FACTS: Plaintiff, Texas Star Nut and Food Co. d/b/a Nature's Eats ("Nature's Eats"), entered into a contract with Defendant, Barrington Packaging Systems Group, Inc. ("Barrington"), to purchase a customized bagging machine. The contract required Barrington to deliver the bagging machine within 75 days of receiving a monetary deposit. After Nature's Eats paid the deposit, Barrington failed to deliver the machine within 75 days as promised.

Nature's Eats filed suit, alleging DTPA violations, breach of contract, fraud and negligent misrepresentation. Barrington moved to compel arbitration, or alternatively, to transfer venue to the Northern District of Illinois for that court to make the arbitration decision.

Applying state-law contract principles, the court held the parties entered into an enforceable arbitration agreement.

HOLDING: Motion granted.
REASONING: Barrington argued that the parties entered into an agreement containing an arbitration clause and choice of law clause, and the agreement was enforceable. Nature's Eats argued, if compelled, the clauses would deprive them of their rights and remedies under the DTPA.

The court agreed with Barrington's argument, holding that the DTPA claim was subject to the arbitration and choice of law clauses. Applying state-law contract principles, the court held the parties entered into an enforceable arbitration agreement. First, the court reasoned that if Nature's Eats was challenging the contract as a whole, not just the arbitration provision, then the case would go before the arbitrator. Second, if Nature's Eats was challenging just the choice-of-law provision, then it was binding unless countervailing public policy demands otherwise. Nature's Eats could not rely on the anti-waiver provisions of the DTPA to avoid the choice-of-law provision. Third, if Nature's Eats was just challenging the arbitration provision, the case would go before the arbitrator because the DTPA claim was intertwined and related to the breach of contract claim.