

RECENT DEVELOPMENTS

ARBITRATION

EMPLOYEE HANDBOOK DOES NOT CREATE ENFORCEABLE ARBITRATION CLAUSE

O'Bryan v. Pember Cos., Inc., ___ F. Supp. 3d ___ (N.D. Wisc. 2021)

<https://www.employmentclassactionreport.com/wp-content/uploads/sites/8/2021/05/Opinion-and-Order.pdf>

FACTS: Plaintiff, Randy O'Bryan brought a proposed class and collective action against Defendant, Pember Companies, Inc., for unpaid wages under the Fair Labor Standards Act and Wisconsin wage laws. O'Bryan contends that his former employer, Pember, violated his and other employees' rights by failing to pay for travel time and failing to include nondiscretionary payments in

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the regular rate of pay for the purpose of calculating overtime rate..

After O'Bryan filed suit, Pember moved to compel O'Bryan to arbitrate their claims based on the dispute-resolution policy contained in Defendant's employee handbook.

HOLDING: Motion denied.

REASONING: Pember contends that the

handbook's dispute-resolution section requires O'Bryan to arbitrate his claims on an individual basis. O'Bryan contends that the parites did not have a valid agreement to arbitrate because of the acknowledgement form's disclaimer.

The court agreed with O'Bryan. They reasoned that the words “neither a contract of employment nor a legal document.” provided more than just the disclaimer that this was not an employment contract. It provided that neither Pember nor Pember's employees had any enforceable rights under the employee handbook. Thus, the court held that the written acknowledgment disclaimed any intent that the handbook created a binding contract.

AMAZON CANNOT FORCE ARBITRATION OF MINOR'S PRIVACY SUIT

B.F. v. Amazon.com Inc., ___ F.3d ___ (9th Cir. 2021).

<https://law.justia.com/cases/federal/appellate-courts/ca9/20-35359/20-35359-2021-04-23.html>

FACTS: Plaintiffs, who are minor children, alleged that Defendant Amazon's Alexa service had intercepted or recorded their communications without their consent, in violation of various wiretapping laws. Plaintiffs themselves did not sign any arbitration agreement with Amazon, but their parents signed the agreements when they activated their Amazon accounts.

Amazon moved to compel arbitration, and the district court denied the motion. Amazon appealed.

HOLDING: Affirmed.

REASONING: Amazon argued that because Plaintiffs' parents had signed the arbitration agreements when they activated their Amazon accounts, Plaintiffs who had close relationships with the signatories should also be subject to compel arbitration.

The court rejected this argument by holding that when non-signatories did not knowingly exploit the contract, and when non-signatories brought claims that did not arise out of the contract, they were not bound to arbitrate. In this case, Plaintiffs were not asserting any right or looking to enforce any duty created by the contracts between their parents and Amazon. Instead, Plaintiffs brought only state statutory claims that did not depend on their parents' agreements. Further, the close relationship argument failed because it was generally used only by non-signatories to bind signatories, not the reverse.

THE SECOND CIRCUIT AFFIRMS DECISION TO DENY A MOTION BY DONALD TRUMP TO COMPEL ARBITRATION OF CLAIMS RELATED TO THE MULTI-LEVEL MARKETING SCHEME ACN

Doe v. Trump Corp., ___ F.3d ___ (2d Cir. 2021).

https://www.sdneyblog.com/files/2021/08/20-1228_opn-1.pdf

FACTS: Plaintiffs-Appellees (“the Does”) are an anonymous group of individuals who felt they were fraudulently induced to enter into business with non-party appellant, ACN Opportunity, LLC (“ACN”) as a result of statements made by Defendants-Appellants the Trump Corporation, Donald J. Trump, and members of the Trump family (“Trumps”). ACN, a multi-level marketing company, enlists individuals to work as “Independent Business Owners.” The Trumps allegedly received large payments from ACN to endorse ACN as a business opportunity that would likely result in a “reasonable probability of success.” Based off statements made by the Trumps regarding ACN, the Does entered into business relationships with ACN by paying an enrollment fee and agreeing to submit any disputes to arbitration. Each of the Does lost a significant amount of money as a result of the relationship with ACN.

Plaintiffs-Appellees filed a class action suit, alleging claims of racketeering violations, conspiracy to conduct racketeering, and numerous violations of California, Maryland, and Pennsylvania law. Defendants-appellants moved first to compel arbitration under the principles of equitable estoppel and then to compel arbitration generally. The district court denied both motions. Defendants-appellants appealed.

HOLDING: Affirmed.

REASONING: Defendants argue that the district court erred in denying their motion because (1) the question of arbitrability must be decided by the arbitrator; (2) they are entitled to enforce the arbitration agreement under principles of equitable estoppel; and (3) they did not waive their right to arbitration.

The court disagreed by holding that the defendants were not entitled to have their arbitration agreement enforced under equitable estoppel principles and that there was no jurisdiction in the district court over ACN's motion to compel. The court's

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reasoning focused heavily on whether the case should have been resolved in district court or arbitration. Does entered into an

The court held that the Trumps failed to meet the “close relationship among the signatories to the arbitration agreement” requirement of the doctrine of equitable estoppel.

Does and ACN. Second, the Trumps did not raise that the issue of arbitrability was to be determined by the arbitrator, and they did not offer a compelling reason for the court to consider their forfeited argument for it. Additionally, since the Trumps were non-signatories, there was no sufficient relationship to compel the Does to arbitrate the matter. Finally, because ACN did not raise the argument that they were entitled to invoke equitable estoppel to compel the Does to arbitrate their claims in district court, ACN forfeited their right to raise the argument on appeal.

FORMER EMPLOYEE MUST ARBITRATE GATEWAY QUESTIONS

Anderson v. Charter Commc'ns, Inc., ___ F.3d ___ (6th Cir. 2021).

<https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0285n-06.pdf>

FACTS: Plaintiff-Appellant Peter W. Anderson, Jr. was a former employee of Defendant-Appellee Charter Communications, Inc., dba Spectrum (“Charter”). Anderson was an employee at Charter for 18 years before being fired in 2018 after co-workers reported him using offensive language at work. In 2017, Charter began a “Solution Channel” dispute-resolution program, which allowed employees to arbitrate employment disputes with the company in the event of termination. Notice of the program was sent via email, and employees were given a choice to opt-out within 30 days. If an employee did not opt-out, they agreed to arbitrate any employment disputes with Charter. Anderson did not choose to opt-out within the given 30-day time period.

Anderson alleged his co-workers’ allegations of inappropriate language were false, and he brought several state-law claims against Charter in state court. Charter removed Anderson’s suit to federal court, then moved to compel arbitration. The district court held that Anderson had to arbitrate his claims and dismissed Anderson’s case with prejudice. Anderson appealed.

HOLDING: Affirmed.

REASONING: Anderson argued that the arbitration agreement did not cover his claims and was unenforceable because it was “unconscionable.” He also argued that the arbitration agreement did not have adequate consideration to be valid.

The court rejected Anderson’s reasoning, holding

that Anderson was properly compelled to arbitrate his claims against Charter under the Federal Arbitration Act (“Act”). Anderson’s claims that the arbitration agreement did not cover his claims were incorrect because the language of the agreement “unambiguously” left the coverage issue for the arbitrator to resolve. The agreement stated “all disputes related to the arbitrability of any claim or controversy” against Charter should be submitted to arbitration. Second, his claim that the agreement was “unconscionable” also must be left to the arbitrator to decide. Anderson never attempted to challenge the district court’s holding that the agreement delegates the enforceability of the agreement to the arbitrator. Also, his argument was against the agreement as a whole, not a specific provision. If Anderson had attacked the delegation clause instead of the whole agreement, the court would have resolved that claim before compelling arbitration. Finally, the agreement had adequate consideration because both parties agreed to arbitrate, and each party gave up the right to litigate claims against each other.

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After O’Bryan filed suit, Pember moved to compel O’Bryan to arbitrate their claims based on the dispute-resolution policy contained in Defendant’s employee handbook.

HOLDING: Motion denied.

REASONING: Pember argued that the handbook’s dispute-resolution section required O’Bryan to arbitrate his claims on an individual basis.

The court rejected Pember’s argument, holding that the parties did not have a valid agreement to arbitrate because of the acknowledgment form’s disclaimer. The words “nor a legal document” provided more than just the disclaimer that this was not an employment contract. It provided that neither Pember nor Pember’s employees had any enforceable rights under the employee handbook. Thus, the court concluded that the written acknowledgment denied any intent that the handbook created a binding contract.

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THE BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND RESOLVED A CONFLICT BETWEEN THE STRONG PRESUMPTION IN FAVOR OF ENFORCING ARBITRATION AGREEMENTS AND THE BANKRUPTCY CODE'S EMPHASIS ON CENTRALIZATION OF CLAIMS

In re McPherson, ___ B.R. ___ (Bankr. E.D. Md. 2021).
https://www.govinfo.gov/content/pkg/USCOURTS-mdb-1_21-bk-10205/pdf/USCOURTS-mdb-1_21-bk-10205-0.pdf

FACTS: Before filing his chapter 11 bankruptcy, John McDonnell McPherson (the “Debtor”), and Camac Fund, L.P. (“Camac”) entered into a Litigation Funding Agreement (the “Funding Agreement”). Under the Funding Agreement, Camac was to extend financing to the Debtor in exchange for a percentage of the Debtor’s interest in certain whistleblower litigation cases. Disputes arose between the parties under the Funding Agreement, and Camac invoked its rights under the Funding Agreement’s arbitration clause.

The Debtor filed a response disputing the validity of the arbitration and a stay motion after filing his chapter 11 case.

HOLDING: Motion denied.

REASONING: The Debtor argued that the arbitration clause’s application to this case inherently conflicted with key objectives of the bankruptcy code. The Debtor further argued that that the court could resolve all of the parties’ disputes within the context of the Debtor’s chapter 11 plan of reorganization and the related claims administration process.

The Bankruptcy claims were non-arbitrable because they would not exist absent the bankruptcy case and thus extended from the bankruptcy itself.

The court rejected this argument and observed that the arbitration clause in the Funding Agreement was arguably narrow in scope and would not encompass all of the claims asserted by the

parties in either the arbitration proceeding or the Chapter 11 case.

The court held that it must bifurcate the disputes in this matter with the Bankruptcy Claims staying in the bankruptcy case and the Contract and Non-Bankruptcy Claims remaining subject to arbitration. The Bankruptcy claims were non-arbitrable because they would not exist absent the bankruptcy case and thus extended from the bankruptcy itself. The court recognized that a debtor might be able to plead an action in a way that transforms certain pure state law claims into claims under the Bankruptcy Code but found that those concerns were not warranted in this case. Because the FDCPA non-bankruptcy claims and the contract claims were claims that existed prior to and independently of the bankruptcy proceedings, the court held that these categories of claims were non-core and lifted the stay to allow the arbitration proceedings to continue.