JULY 22, 2019

MANDATE TO ARBITRATE: SIXTH CIRCUIT UPHOLDS ENFORCEABILITY OF MANDATORY ARBITRATION PROVISIONS

On July 8, 2019, the Sixth Circuit issued an employer friendly opinion strengthening the enforceability of routinely included mandatory arbitration provisions in employment contracts. In its opinion, the court rejected a former employee's claim that "two completely different and conflicting terms" for resolution of all legal disputes rendered the mandatory arbitration clause in his employment contract invalid.

In *White v. ACell Inc*[1], the Plaintiff Todd White ("White") signed two separate agreements before commencing employment as a Michigan-area territory manager for defendant ACell, Inc. ("ACell"), a Maryland-based medical device manufacturer. The first contract titled "Employment Terms and Conditions for Sales Representatives" ("Terms Contract") contained a forum selection clause that provided, in relevant part:

> Any lawsuit relating to your employment with ACell may be filed **only in the state court located within Howard County, Maryland, or the federal courts located in the United States District of Maryland**.[2]

The second contract signed by White, titled "Employee Proprietary Information, Inventions, and Non-Competition Agreement" ("Employment Contract"), contained a mandatory arbitration clause and stated in relevant part:

> **Any dispute between us, regardless of whether such dispute relates to this Agreement... shall be resolved by mandatory binding arbitration... with such arbitration to take place in Montgomery County, Maryland**. Notwithstanding the foregoing, at the Company's sole option, the Company may forego arbitration of disputes relating to violations... [and] the parties hereto expressly consent to the personal jurisdiction of the state and federal courts of Montgomery County, Maryland.[3]

In 2018, White's employment was terminated and after his claims against ACell for violation of the Michigan Whistleblower Protection Act and retaliation in violation of the federal False Claims Act were dismissed by the District Court on grounds that the claims were in the wrong state and the wrong forum, the Sixth Circuit reviewed and affirmed.

The Sixth Circuit rejected White's argument that "the terms of the two provisions—one providing for arbitration; the other for litigation—conflict such that there could not have been a meeting of the minds on the matter of dispute resolution."[4] Analyzing the issue under Maryland law, the Sixth Circuit held:

- "White's signature on both contracts" along with the signature of an ACell representative on one contract and ACell's acceptance of the second contract "through its conduct, demonstrated mutual assent to the terms" of both.[5]
- The district court correctly attempted to construe "as a whole, to interpret their separate provisions harmoniously, so that, if possible, all of them may be given effect," rather than rendering them void."[6]
- It was reasonable to conclude that the parties "contemplated that the provisions...would be read in conjunction with and consistent with" each other.[7]
- Importantly, the Terms Contract's use of "may" in its forum selection clause, as opposed to the Employment Contract's use of "shall" in its mandatory arbitration provision, demonstrated that the latter was mandatory while the former was not.

Consequently, the Sixth Circuit dismissed White's claims, concluding that while any litigation to compel arbitration or enforce an arbitration award [by either party] *may be* brought in Howard County, any disputes brought by White against ACell *must be* arbitrated in Montgomery County.

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PRACTICAL TAKEAWAYS

The *White v. ACell* opinion highlights a few important considerations for employers seeking to include both mandatory arbitration provisions and forum selection clauses in their agreements:

- If an employee is signing multiple agreements (e.g., employment contract and a separate non-compete), review all agreements collectively for consistency and be mindful of mandatory vs. permissive language in the areas of forum selection clauses and mandatory arbitration provisions.
- When signing multiple agreements, consider referencing the agreement that includes mandatory arbitration in all other agreements.
- Most importantly, make certain the agreement containing the arbitration provision is fully executed to ensure there is mutual assent to arbitration.
- Consider reserving your right to seek judicial enforcement, including injunctive relief, for certain types of breaches or issues such as violation of noncompete provisions.

If you have any questions, please contact:

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[references]

[1] _____ Fed.Appx.___, (6th Cir. 2019) (Case No. 18-2037, E.D. Michigan)

[2] *Id.* at 1.

[3] *Id*. at 2.

[4] *Id*. at 4.

[5] *Id.* at 4.

[6] *Id.* at 4.

[7] *Id.* at 5.

[/references]

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