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MPT-1: *In re Field Hogs, Inc.*

LeBlanc v. Sani-John Corporation

Franklin Court of Appeal (2003)

In 1998, Jacques LeBlanc began servicing and cleaning Sani-John's portable toilets in Franklin City under a service contract. The service contract, drafted by Sani-John, contained a provision requiring arbitration in Franklin of "any controversy or claim arising out of or relating to this agreement, or the breach thereof."

Pursuant to this contract, Sani-John supplied LeBlanc with all chemicals required to clean and service the toilets. After several months, LeBlanc allegedly suffered injury from exposure to these chemicals. LeBlanc filed a complaint against Sani-John, alleging in tort that Sani-John had failed to warn him of the dangerous and toxic nature of these chemicals and had also failed to provide him with adequate instructions for their safe use.

Sani-John sought to compel arbitration pursuant to the contract. The district court found that LeBlanc's claims "arose out of or related to . . . his contract with defendant Sani-John; they were for personal injuries LeBlanc received while performing on that contract." The court granted Sani-John's motion to compel arbitration.

LeBlanc appeals, arguing that the arbitration clause in his contract with Sani-John does not subject him to arbitration over his tort claims against Sani-John. The arbitration clause here provided:

> Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration.

Franklin courts generally favor arbitration as a mode of resolution and have adopted broad statements of public policy to that end. In *New Home Builders, Inc. v. Lake St. Clair Recreation Association* (Fr. Ct. App. 1999), we held that all disputes between contracting parties should be arbitrated according to the arbitration clause in the contract unless it can be said with positive assurance that the arbitration clause does not cover the dispute. As we said then and reaffirm here, only *the most forceful evidence* of purpose to exclude a claim from arbitration can prevail over a broad contractual arbitration clause. *Id*.

Arbitration promotes efficiency in time and money when a dispute between parties is

contractual in nature. However, when a dispute is not contractual but arises in tort, our courts have been reluctant to compel arbitration. Some courts have limited arbitration clauses where tort claims are concerned. In *Norway Farms v. Dairy and Drovers Union* (Fr. Ct. App. 2001), for example, the court of appeal opined that "absent a clear explicit statement in a contract directing an arbitrator to hear tort claims by one party against another, it must be assumed that the parties did not intend to withdraw such disputes from judicial authority."

This approach suggests that unless the parties have explicitly included tort actions within the scope of an arbitration clause, they must not have intended such claims to be subject to arbitration.

Cases in other jurisdictions suggest that, even where the arbitration clause explicitly covers tort claims, public policy may bar compelling arbitration of such claims. For example, in *Willis v. Redibuilt Mobile Home, Inc.* (Olympia Ct. App. 1995), the Olympia Court of Appeal reversed a trial court's order compelling arbitration of a products liability claim. The relevant arbitration clause provided:

> Any claim, dispute, or controversy (whether in contract, tort, or otherwise) arising from or related to the sale of the Mobile Home shall be subject to binding arbitration in accordance with the rules of the Olympia Arbitration Association.

The Olympia court reasoned that the plaintiffs' products liability claims "did not require an examination of the parties' respective obligations and performance under the contract." *Id*. Further, the court suggested that "[t]he tort claims are independent of the sale. Plaintiffs could maintain such claims against defendants regardless of the warranty and the sale transaction." *Id*.

In the case at hand, the arbitration clause contains no explicit reference to tort claims but requires arbitration only of those disputes "arising out of or relating to this agreement, or the breach thereof." In our view, for the dispute to "arise out of or relate to" the contract, the dispute must raise some issue the resolution of which requires construction of the contract itself. The relationship between the dispute and the contract does not exist simply because the dispute would not have arisen absent the existence of a contract between the parties.

If such a connection to the contract is not present, the parties could not have intended tort claims to be subject to arbitration under a clause covering only claims "arising out of

or relating to" the contract. If the duty allegedly breached is one that law and public policy impose, and one that the defendant owes generally to others beyond the contracting parties, then a dispute over the breach of that duty does not arise from the contract. Instead, it sounds in tort. An arbitration clause that covers only contract-related claims (like the clause at issue here) would not apply.

We do not reach the question of how to interpret an arbitration clause that explicitly includes tort claims within its scope. We are troubled by the Olympia court's view that parties may never agree to arbitrate future tort claims. We see no reason to go so far. We note only that parties should clearly and explicitly express an intent to require the arbitration of claims sounding in tort. In turn, courts should strictly construe any clause that purports to compel arbitration of tort claims.

The contract in this case does not clearly and explicitly express the requisite intent. Therefore, the judgment of the trial court is reversed, and the matter is remanded for reinstatement of LeBlanc's complaint.

Reversed and remanded.

Howard v. Omega Funding Corporation

Franklin Supreme Court (2004)

Defendant Omega Funding Corp. (Omega) extends loans to consumer borrowers. In December 1999, Omega entered into an automobile loan contract with plaintiff Angela Howard, a 72-year-old woman with only a grade-school education and little financial sophistication. The $18,700 loan was secured with a security interest in the car purchased by Howard and bore an annual interest rate of 17 percent.

The loan contract contains an arbitration agreement that allows either party to elect binding arbitration as the forum to resolve covered claims. Regarding costs, the agreement provides as follows:

> At the conclusion of the arbitration, the arbitrator will decide who will ultimately be responsible for paying the filing, administrative, and/or hearing fees in connection with the arbitration.

The agreement also contains a severability clause, which states that

> [i]f any portion of this Agreement is deemed invalid or unenforceable, it shall not invalidate the remaining portions of this Agreement, each of which shall be enforceable regardless of such invalidity.

Howard, whose only source of income was Social Security benefits, was eventually unable to make the loan payments. Omega repossessed the automobile and later sold it at auction, leaving a deficiency of $16,763.00. Howard then sued Omega in Franklin District Court, alleging violations of the Franklin Consumer Fraud Act. Thereafter, Omega filed a motion to compel arbitration pursuant to the contract and a motion to dismiss. Howard opposed the motions, arguing that the arbitration clause was itself unconscionable. The district court granted Omega's motion to compel arbitration and dismissed Howard's complaint. The court of appeal affirmed, and we granted review.

When a party to arbitration argues that the arbitration agreement is unconscionable and unenforceable, that claim is decided based on the same state law principles that apply to contracts generally. Franklin law expresses a liberal policy favoring arbitration agreements. Our law, however, permits courts to refuse to enforce an arbitration agreement to the extent that grounds exist at law or in equity for the revocation of any contract. Generally recognized contract defenses, such as duress, fraud, and unconscionability, can justify judicial refusal to enforce an arbitration agreement.

Unconscionability sufficient to invalidate a contractual clause under Franklin law requires both procedural unconscionability — in that the less powerful party lacked a reasonable opportunity to negotiate more favorable terms and in that the process of signing the contract failed to fairly inform the less powerful party of its terms—*and* substantive unconscionability—in that the terms of the contract were oppressive and one-sided. Here, Omega has conceded procedural unconscionability. That leaves us with Howard's contention that the provisions relating to costs are substantively unconscionable.

Our lower courts have had difficulty in reviewing arbitration clauses that allocate costs. To some extent, this difficulty arises from the variety of cost-allocation measures under review. In *Georges v. Forestdale Bank* (Fr. Ct. App. 1993), the court of appeal reviewed a provision requiring the consumer to pay a small initial fee to the arbitrator and requiring the seller to cover all remaining costs. The court confirmed that "the cost of arbitration is a matter of substantive, not procedural, unconscionability" but concluded that the relatively minimal cost of the initial fee did not render the clause substantively unenforceable.

In *Ready Cash Loan, Inc. v. Morton* (Fr. Ct. App. 1998), the court of appeal reviewed an arbitration provision in a consumer loan agreement that divided the costs of arbitration. The clause limited the borrower/consumer to paying 25 percent of the total costs of arbitration and required the lender to pay 75 percent, regardless of who initiated the arbitration. Despite the unequal division, the court of appeal invalidated the clause, reasoning that "the clause . . . does not relieve the chilling effect on the borrower, given the potential expansion of costs involved in disputing substantial claims." *Id.*

In *Athens v. Franklin Tribune* (Fr. Ct. App. 2000), the court of appeal invalidated an arbitration clause in an employment contract that permitted the arbitrator to award costs. In *Athens*, the costs of arbitration included a filing fee of $3,250, a case service fee of $1,500, and a daily rate for the arbitration panel of $1,200 per arbitrator.[1] The court of appeal noted that "the provision at issue in *Ready Cash* allocated a portion of the costs to the consumer. The provision in this case potentially allocates all the costs to the consumer, serving as a greater deterrent to potential disputants."

Finally, in *Scotburg v. A-1 Auto Sales and Service, Inc.* (Fr. Ct. App. 2003), the court of appeal reviewed an arbitration clause that

[1] In a typical arbitration clause, parties select a private arbitration service, such as the National Arbitration Organization. In so doing, parties typically adopt that service's rules and procedures.

was completely silent on the allocation of costs. The defendant argued that the court should adopt the reasoning of a line of Columbia cases which held that absent a showing by the plaintiff of prohibitive cost, such arbitration clauses were enforceable. The *Scotburg* court rejected that argument and, relying solely on Franklin law, concluded that "the potential chilling effect of unknown and potentially prohibitive costs renders this clause unenforceable as a matter of substantive unconscionability."

These cases provide no clear framework within which to analyze the arbitration clause in the present case. The clause here leaves the allocation of costs to the discretion of the arbitrator. If Howard did not prevail in arbitration, then she could be forced to bear the entire cost of the arbitration. This prospect could discourage Howard and similarly situated consumers from pursuing their claims through arbitration.

We remand for a factual determination of the costs that the plaintiff might bear in the absence of the original cost and fee clause. If those costs exceed those that a litigant would bear in pursuing identical claims through litigation, we direct the trial court to reinstate Howard's claim and to deny Omega's motion to compel arbitration.

Vacated and remanded.