PLUNKETT COONEY

Arbitration Agreement Applicable to Third Party Claims but not Civil Rights Claim

December 9, 2010

Claudia D. Orr
(313) 983-4863
corr@plunkettcooney.com

The Bulletin

Recently, in *Cullen v Klein*, the Michigan Court of Appeals required a physician to arbitrate his claims against co-workers who were not parties to his arbitration agreement. However, the physician was allowed to proceed in court with his disability discrimination claim because the agreement did not clearly inform the physician that he would be waiving his right to adjudicate civil rights claims. This is a drafting mistake that could have been easily avoided with proper legal advice.

In 2005, Marc Cullen and four other physicians entered into employment and stock option agreements containing an arbitration clause and formed Michigan Pediatric Surgery Associates, P.C. (MPSA). The agreements provided that "[a]ny dispute or controversy **arising out of or relating to** this agreement or to the interpretation or the breach thereof (except for matters which may only be resolved in court by way of injunctive relief), shall be referred to and determined by arbitration in Detroit, Michigan." (emphasis added). Two years later, MPSA implemented a computerized billing system which, because of a medical condition, Cullen could not utilize without incurring debilitating headaches. Eventually, Cullen's inability to perform this function resulted in the Board of Directors voting to terminate his employment.

Cullen filed a lawsuit in Wayne County Circuit Court claiming discrimination under the Michigan Persons with Disabilities Civil Rights Act and numerous claims against the other four physicians/co-workers including defamation, tortious interference with business relationship, and civil conspiracy. The circuit court denied the defendants' motion to dismiss finding the arbitration clause inapplicable to the claims asserted. The appellate court granted the defendants' request for leave to appeal.

The appellate court reiterated that whether an arbitration agreement applies to asserted claims depends on the answers to the following questions: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract."

The court also expressed "disapproval of segregating disputed issues 'into categories of 'arbitrable sheep and judicially-triable goats. Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." Simply put, the scope of an arbitration agreement is a matter of contract between the parties and courts are to determine their intent in construing the terms.

The court found the language at issue to be sufficiently broad to encompass disputes that involved non-parties to the agreement because Cullen's claims were "arising out of or relating to" the agreement and "intimately intertwined with the employment and stock purchase agreements, his relationship to his co-employees, and his co-employees' behaviors as officers and directors of MPSA. The plain language of the arbitration clause establishes that the parties intended to arbitrate all disputes flowing from their business and professional relationships."

However, the arbitration agreement lacked any reference, at all, to statutory civil rights claims making it wholly insufficient under *Rembert v Ryan's Family Stead Houses*. To require arbitration of such claims, the agreement must provide "clear notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum and opting instead to arbitrate these claims." Therefore, Cullen was not required to arbitrate his claim of disability discrimination.

To be enforceable as to civil rights claims, arbitration agreements must provide, in addition to clear notice, the right to counsel, reasonable discovery, a fair hearing and a neutral arbitrator. The agreement should also reference the state or federal arbitration act and provide that any award may be entered and enforced by a court of competent jurisdiction. Ideally, the agreement should also reference the commercial or employment rules of the American Arbitration Association and/or require claims to be submitted to the Association.

To determine whether an arbitration agreement is right for your company and to ensure it is enforceable, you should consult with an experienced employment attorney. Had MPSA done so, Cullen would have been required to arbitrate all of his claims.