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Tenth Circuit Deals Another Blow To Opponents Of Arbitration

By Scott M. Pearson and Carrie P. Price

On January 28, 2014, the Tenth Circuit held that the Federal Arbitration Act preempted an unconscionability challenge to an arbitration provision under New Mexico law. The case is particularly noteworthy because New Mexico has been a hotbed of resistance to arbitration, and because the decision could pave the way for enforcement of arbitration clauses requiring only one of the parties to arbitrate its claims.

In *THI of New Mexico at Hobbs Center, LLC v. Patton*, No. 13-2012, 2014 WL 292660 (10th Cir. Jan. 28, 2014), the district court had found a nursing home's arbitration clause unconscionable because it allowed litigation of guardianship, collection and eviction actions -- all of which arguably would be commenced by the nursing home, while requiring malpractice and other claims by residents to be arbitrated. Reversing the district court, the Tenth Circuit reasoned that, even accepting the plaintiff's position that the clause is one-sided, an "unconscionability determination cannot be based on the notion that arbitration is inferior to litigation in court."

THI could have far-reaching implications, as its reasoning theoretically could allow enforcement of an arbitration clause requiring one party to arbitrate its claims while the other is permitted to litigate. After all, if a court cannot base an unconscionability determination on a finding that litigation is better than arbitration, it should not matter if one party must arbitrate while the other may litigate. The court recognized this possibility, noting that the Fifth Circuit had invalidated an arbitration provision which required the consumer to arbitrate all claims but allowed the company to choose between litigation and arbitration in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 168-71 (2004). However, the *THI* court declined to reach this issue "because under the agreement in this case, neither party can unilaterally choose a dispute-resolution forum," and the district court's decision impermissibly "express[ed] the view that arbitration is inferior."

Although *THI* is a predictable result of the recent United States Supreme Court decisions on FAA preemption, it should not be viewed as a license to reintroduce anti-consumer provisions into arbitration agreements. Plaintiffs are continuing to fight the arbitration battle not only in courts, but also in Congress and before rulemakers such as the Consumer Financial Protection Bureau. Caution is therefore warranted. As always, we will continue to monitor and report on significant developments in this area.

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