Is Your Employment Arbitration Agreement Enforceable?

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Green Tree and the "Cost Prohibitive" Arbitration

With the recent slate of pro-arbitration decisions coming out of the Supreme Court and Second Circuit, employers in New York are likely feeling confident that their arbitration agreements will survive any challenge to enforceability. In contrast, employees who have signed arbitration agreements are likely resigned to arbitration, as nearly every recent attempt to invalidate an arbitration agreement has been rejected.

However, there is a rarely tested argument for invalidating many arbitration agreements. The argument – namely, that arbitration agreements renders a potential plaintiff's ability to vindicate statutory rights "cost prohibitive" – derives from the Supreme Court's decision in Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000). In that decision, the Court noted that: "[i]t ***may well be*** the case that the existence of large arbitration costs could preclude a litigant [] from effectively vindicating [his or her] federal statutory rights in the arbitral forum." Thus, while the Court found the arbitration agreement at issue in that case enforceable, it left open a path to challenge arbitration agreements on the basis that arbitration would render a potential plaintiff's ability to vindicate statutory rights "cost prohibitive."

Green Tree, of course, begs the question: when will an arbitration agreement be invalidated pursuant to the doctrine of cost-prohibitiveness?

To begin, the burden is on the party seeking to avoid arbitration. Moreover, rather than speculating with regard to a mere risk of overly burdensome cost, the party seeking to avoid arbitration must point to actual and known costs of arbitration. However, different courts have considered different factors in applying the Green Tree doctrine.

In Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 (4th Cir. 2001), the Fourth Circuit Court of Appeals focused on the individual's actual ability to pay the costs of arbitration. Finding that the individual seeking to avoid arbitration in that case had failed to demonstrate that he could not pay the costs of arbitration, the court refused to invalidate the arbitration agreement at issue. In Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003), the court considered an additional factor; namely, whether other similarly-situated individuals also subject to the same arbitration agreement might be deterred from vindicating their rights as a result of the costs of arbitration.

The Second Circuit Court of Appeals has not yet opined on the Green Tree doctrine. However, while most District Court cases follow the holding in Bradford, there are certain decisions that show a greater willingness to invalidate arbitration agreements.

- In Ball v. SFX Broadcasting, Inc., 165 F.Supp.2d 230, 240 (N.D.N.Y. 2001), the court invalidated an arbitration agreement on grounds of prohibitive expense. In doing so, the court explained that "it is

sufficient for an employee seeking to avoid arbitration to show a likelihood that he or she will be responsible for significant arbitrator fees, or other costs which would not be incurred in the judicial forum." Thus, it could be argued that any costs associated with arbitration that significantly exceed the filing fees in court could invalidate an arbitration agreement.

- In E.E.O.C. v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 448 F. Supp. 2d 458, 463 (E.D.N.Y. 2006), the court refused to invalidate an arbitration agreement because the party seeking to avoid arbitration had not shown a likelihood of incurring significant costs. However, the court noted that "it is clear that if the arbitration costs are in the range of $6,000 to $11,250 . . . these costs would be prohibitively expensive in comparison to the filing fee she is required to pay to commence a proceeding in federal court . . . [and] with reasonable certainty [] would deter a significant number of claimants."

Ball and Rappaport are very employee-friendly decisions, and should give employers pause when drafting arbitration agreements. These cases demonstrate that there are legitimate arguments for invalidation of certain arbitration agreements.

For employees, this is good news, as the arbitral forum is generally considered less favorable for employee-plaintiffs seeking to vindicate their statutory rights. Thus, prior to initiating arbitration, an employee contemplating legal action should seek the assistance of an employment lawyer with a comprehensive and expert-level understanding of any potential arguments for invalidation.

For employers, cases like Ball and Rappaport highlight the necessity of seeking counsel when drafting arbitration agreements. Arbitration agreements must be drafted carefully and with a complete understanding of relevant case law. Otherwise, the arbitration agreements will potentially be subject to invalidation. This is particularly troubling because many employers use the same arbitration agreement for many of their employees.

For more information, both employees and employers can contact:

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