LITIGATION NEWS

ABA Litigation Section

TOP STORY

Arbitration Compelled Based on Unsigned Fee Agreement

By Leah E. Trahan – July 6, 2023

A state court of appeals upheld an order compelling arbitration between a law firm and its client based on a provision in an unsigned fee agreement. The court reasoned that the agreement's execution provision did not require a signature and the parties had "reaped many benefits" of the agreement. ABA Litigation Section leaders approve of the decision but suggest that additional steps on the part of the law firm may have averted some litigation.

Unsigned Fee Agreement Leads to Arbitration Fight

In *Zimmerman v. Sherman*, the plaintiff engaged the defendant law firm to assist with the purchase of real property. The firm's fee agreement explained that, while the firm might be engaged on other future matters, the initial engagement was limited to that purchase. The agreement included an arbitration clause covering "any controversy arising out of or related to" the attorney-client relationship. The agreement warned that the client's right to a jury trial was waived "[b]y executing and returning this agreement," but also said that it would govern the parties' relationship "[e]ven if you elect not to return a signed agreement to us."

The buyer did not sign the fee agreement and proceeded to form a corporation for the property transaction, which the firm helped set up. Later, the buyer again engaged the firm to negotiate a contract between the corporation and a renovator of the property. When renovations went overbudget and produced defective work, the firm obtained a $1.2 million award against the renovator for the corporation.

Moving for attorney fees, the firm filed an affidavit asserting that the fee agreement's arbitration provision governed representation for both the purchase and renovation of the property. Notably, a draft brief including this language was emailed to the buyer, who replied "Looks good."

The attorney-client relationship soured when the award could not be immediately collected, leading to termination of the relationship. When the firm demanded payment for outstanding fees, the buyer filed suit. The firm successfully moved to compel arbitration and secured an award, which was confirmed by the Denver County District Court.

Buyer and Corporation Bound by Arbitration Provision

The Colorado Court of Appeals agreed that the arbitration provision encompassed the fee dispute. "When arbitration provisions use broad language such as this, a presumption favoring arbitration arises, and the scope of the arbitration is equally broad," the court explained.

Pointing to the contract law principle that specific provisions control over general ones, the court rejected the buyer's assertion that the unsigned arbitration provision was unenforceable. The arbitration attachment stated the client waived a right to sue "[b]y executing and returning this agreement." But the fee agreement which incorporated the attachment made it enforceable even if the agreement went unreturned.

The court also rejected the argument that the corporation, which was not a party to the attorney's engagement, was not obligated to arbitrate. The corporation was prohibited from "enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations," the court held. It then remanded the case, so that the lower court could determine the amount of costs that should be awarded to the law firm.

The court's opinion "reflects the intent of the parties as evidenced by their conduct," says Ronald L. Williams, Philadelphia, PA, cochair of the Litigation Section's Construction Litigation Committee. This is the application of a broad, well-drafted arbitration provision, and the attorneys proceeded in the correct manner to recover their claims, he adds.

"You enjoyed the services and the goods that were provided to you irrespective of whether this agreement was signed and therefore you need to arbitrate your grievances as a result of a contract," summarizes Miranda L. Soto, Miami, FL, cochair of the Section's Attorneys' Liability Subcommittee of the Professional Liability Litigation Committee. "You looked at the menu. You saw the prices. You ordered the wine. You ordered the food. You ordered the dessert, and you ate everything. After the bill comes, you say 'No, the wine was terrible. The food was horrible. The dessert was melted and now I don't want to pay,'" she elaborates.

Enforcement Litigation May Have Been Avoidable

Some clashes here could have been prevented by following best practices, including avoid conflict over the arbitrability of a claim against an entity which might have changed over time. "Lawyers always need to remember that they need to get engagement letters and that they need to get them back. If they had a signed agreement here, that would have resolved a lot of these issues," advises Jason Domark, Miami, FL, cochair of the Section's Commercial & Business Litigation Committee.

Attorneys are advised to consult the Model Rules of Professional Conduct and the rules of their jurisdiction for guidance, notes Soto. "You need to make sure that your arbitration clause is clear and unambiguous and delegates the arbitrability to the arbitrator," Soto adds. Everyone might agree that the relationship is ongoing and continuous at the time of engagement. "But when things turn sour, they will come back and say no, that was a different agreement and therefore, I don't need to arbitrate," warns Soto.

Leah E. Trahan is a contributing editor for Litigation News.

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Related Resources

- Kelso L. Anderson, "Nonsignatories May Enforce Arbitration Agreement," *Litigation News* (Sept. 21, 2020).
- Robert Bartkus, "Waiving Right to Court and Jury by Sophisticated Commercial Parties," *Practice Points* (Apr. 12, 2023).
- Susan F. Dent, "Arbitration Clause in Your Agreement? Use It or Lose It!" *Litigation News* (Dec. 10, 2021).
- Jonathan R. Engel, "Court Enforces Arbitration Clause in Email," *Litigation News* (Mar. 3, 2020).