



Florida EMPLOYMENT

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Law Letter

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ALTERNATIVE DISPUTE RESOLUTION

Arbitration agreements back in the headlines, thanks to Florida lawsuit

Over the last several years, the use of arbitration agreements has been on the rise. Many employers have established arbitration policies and chosen to include arbitration provisions within their employment contracts. What happens, however, when an employee challenges the enforceability of the entire employment agreement? How does the arbitration provision affect such a challenge? The U.S. Supreme Court recently decided a case out of Florida that sheds light on that important issue.

Facts

Buckeye Check Cashing is a Florida business that provides check-cashing arrangements for its customers. Under those arrangements, Buckeye provides the customer with cash in exchange for a personal check for the amount of the cash plus a service charge. As part of each transaction, the company requires the customer to sign a "deferred deposit and disclosure agreement," which contains an agreement to arbitrate any claims relating to the deposit agreement.

John Cardegna and other Buckeye customers filed a class-action lawsuit in Florida state court alleging that the company charged unlawfully high interest rates as part of its check-cashing transactions. They claimed that the interest rates violated various Florida laws and caused the deposit agreement to be criminal. Under the arbitration provision in the agreement, Buckeye asked the trial court to compel arbitration.

The trial court refused to compel arbitration, stating that it was the judge's role to decide whether the deposit agreement itself was unlawful. The Florida appellate court reversed the trial court, however. It held that because the

customers' opposition was to the entire deposit agreement and not just the enforceability of the arbitration provision, the issue should go to the arbitrator rather than a judge. The Florida Supreme Court, however, agreed with the trial court and in so doing reversed the appellate court's decision. Buckeye appealed that decision to the U.S. Supreme Court.

Supreme Court's decision

In a nearly unanimous opinion (only Justice Clarence Thomas disagreed), the Supreme Court reversed the Florida Supreme Court and ordered that the dispute be submitted to arbitration. Relying on previous Supreme

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Court cases interpreting the Federal Arbitration Act (FAA), which sets forth the national policy favoring arbitration, the Court set forth three propositions that, when put together, decided the issue.

First, the FAA establishes that arbitration provisions may be severed from the rest of a contract and enforced. Second, unless the challenge is to the arbitration provision rather than the entire agreement, the validity of the underlying agreement should be first addressed by the arbitrator. Finally, those principles aren't limited to federal court but apply with equal force in cases filed in state court. Applying them, the Court found that it was appropriate for an arbitrator to determine whether the deposit agreement was unlawful.

The Court recognized that its decision could lead to enforcing an arbitration clause (by compelling arbitration) that the arbitrator might ultimately find is part of an unlawful and void agreement. Nonetheless, it found that the alternative, which risked denying an arbitration provision in an agreement that's ultimately found valid by the judge, was inconsistent with the policy favoring arbitration. Forced to choose one side or the other, the Court chose the side that favored arbitration. *Buckeye Check Cashing, Inc. v. Cardegna et al.*, No. 04-1264 (Feb. 21, 2006).

Why should you care?

Since this case dealt with a commercial arbitration provision, you might be asking yourself what relevance it has to your company's arbitration policy. The FAA is the same law that promotes arbitration in the employment context. This case clearly reinforces the strong federal policy in favor of arbitration agreements. To the extent an employee challenges an employment agreement containing an arbitration provision, the principles outlined in the Supreme Court's opinion indicate that a judge would compel arbitration so that the arbitrator decides the challenge. That's the outcome an employer with an arbitration policy would want.

It's notable that the challenge in this case was to the entire deposit agreement of which the arbitration provision was a part and didn't focus on the arbitration provision itself. That's an important distinction because if the challenge had been only to the creation of the agreement to arbitrate (for example, a claim that the employer fraudulently induced the employee to agree to arbitrate claims), then the trial judge, not an arbitrator, would have decided the issue.

Of course, whether an arbitration policy is a good idea for your company is a separate question and one that will be influenced by a variety of factors, including your company's overall strategy for handling employment disputes and the likelihood of claims. Keeping your employment counsel involved in whether and how to develop an arbi-

tration policy will put you in the best possible position to ensure that any policy you decide to implement is ultimately enforceable. ❖

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