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Does Your Dispute 'Arise Under' or 'Relate To' the Arbitration Agreement?

Judge Abraham J. Gafni (Ret.)
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How carefully do you consider the scope of your agreement to arbitrate? Experience reflects that parties will often negotiate the terms of their business arrangement with care. After reaching an understanding on all substantive matters, however, and impatient to complete their work, they often opt for a cookie-cutter arbitration provision that, -subsequently, may not provide the mandatory dispute resolution procedure expected.

Recent cases from Florida and Virginia reflect how inattention to the arbitration provision may later frustrate a party seeking to enforce it.

In *Saunders v. St. Cloud 192 Pet Doc Hospital*, 5D17-45, (Fla. 5th DCA, Aug. 11) (an opinion that has apparently not yet been deemed final and is subject to revision or withdrawal), Amanda Saunders had been hired by Pet Doc as a managing doctor of veterinary medicine. She later brought suit claiming constructive discharge due to sexual discrimination in violation of a county ordinance as well as Pet Doc's negligence in hiring, training and supervision.

Pet Doc responded that the court was without jurisdiction because Saunders' employment contract stated that, "Any claim that arises out of or relates to this agreement or the breach of it, shall be settled by arbitration in accordance with the rules of the American Arbitration Association." Pet Doc contended that Saunders' claims arose "from the parties'

employment relationship that only existed as a result of the parties' execution of the employment agreement", and, thus, fell within the scope of the arbitration clause.

In further support of this argument, Pet Doc referred to a clause in the employment agreement itself that specifically addressed harassment and discrimination. That clause clearly set forth Pet Doc's policy that the workplace must be free of such harassment and other forms of discrimination, and that it had a zero-tolerance policy for such harassment or discrimination.

In reversing the trial court's order compelling arbitration, the Florida appellate court determined that Saunders' claim did not identify any specific provision of the employment agreement that had been breached. In particular, Saunders had not alleged that the sexual harassment breached any express provision barring sexual discrimination, and, therefore, the claims neither arose out of nor related to the employment agreement.

This conclusion, was based upon an earlier holding of the Florida Supreme Court, reflecting "that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement ... For a tort claim to be considered 'arising out of or relating to' an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself."

Here, while the agreement created a legal relationship between Saunders and Pet Doc, her claims did not relate directly to any specific duty created under the contract itself; rather, they only addressed Pet Doc's duties under a county ordinance relating to employer sex discrimination and common law negligence. In fact, the identical claims she was making could have been raised even without the agreement. Accordingly, that the claims may relate generally to her employment "does not require consideration of the - underlying employment contract."

But, Pet Doc argued, what about the specific reference in the employment agreement to its zero-tolerance policy regarding workplace harassment and discrimination; did this not, in fact, reflect that the claim did arise out of the agreement?

In what appears to be a very narrow construction of both the agreement and arbitration clause, the appellate court rejected this argument because, in its opinion, "the language of this provision addresses only Pet Doc's duty to terminate anyone who harasses or discriminates and Saunders' duty to comply with this policy, presumably by not harassing or discriminating against any of her co-workers. Saunders did not allege that Pet Doc breached the employment agreement by failing to comply with its zero-tolerance policy." Therefore, there was no basis to conclude that the parties had contemplated that such claims arose under or were related to the agreement.

A similar result was reached by the U.S. Court of Appeals for the Federal Circuit in *Evans v. Building Material Corporation of America d/b/a GAF-ElK,* (858 F. 3rd 1377, 2017).

In 2007, RNB had filed a design patent application for a three-dimensional roofing model. In 2009, it entered into an agreement under which GAF agreed to promote the RNB roof to GAF's network, and RNB would sell the product to GAF contractors.

The agreement further provided that, "If any dispute or disagreement arises under this agreement ... then such dispute or disagreement shall be submitted to final and binding arbitration in accordance with the rules of American Arbitration Association."

RNB sued GAF for design patent infringement that included claims of trade-dress infringement as well as unfair competition due to GAF's marketing its own product that competed with the RNB product.

The appellate court affirmed the trial court's denial of GAF's motion to dismiss or stay action pending arbitration.

After deciding that under the "wholly groundless standard' it had the right to determine arbitrability without referring this issue to the arbitrator (the "wholly groundless standard" should, perhaps, be reviewed in another article), the court noted that whether GAF's assertion of arbitrability is "wholly groundless" must be based on the "scope of the language of the arbitration provision".

The court found that, "Here, the relevant arbitration provision reaches only claims 'arising under' the 2009 agreement"; it did not contain broader language such as "relating to" the agreement. If the agreement uses, "arising under," the issue is "whether claims are related to the interpretation and performance of the contract itself," whereas if the claim is 'relating to' the agreement, a claim may be arbitrable if it has a "'significant relationship' to the contract, regardless of whether it arises under the contract itself."

Here, the court determined that the counts for patent infringement, trade-dress infringement and unfair competition "related, not to GAF's carrying out its obligations established by the 2009 agreement, which concerned GAF's promotion of RNB products, but rather to GAF's making and selling its own competing roofing products Those claims do not involve any issue 'related to the performance or interpretation of the contract itself.'" Therefore, the demand for arbitration was "wholly groundless."

A review of these cases should make clear how important it is to consider the sufficiency of "arising under," "relating to" or other language casually inserted into an arbitration agreement.

For example, in *Saunders*, perhaps Pet Doc should have recognized the need to state in the agreement that alleged statutory or ordinance violations by an employer, as well as disputes arising under or related to the agreement, should similarly be subject to arbitration. One might compare in this regard *14 Penn Plaza v. Pyett*, 556 U.S.247 (2009), in which the Supreme Court held that a union contract specifically requiring arbitration of discrimination claims involving violation of specified statutory rights were enforceable.

Similarly, in *RNB*, one can envision language being drafted that would have broadened the concept of activities relating to the parties' business dealings, thereby subjecting the dispute to the arbitration.

Of course, it is recognized that any arbitration provision that references a specific activity may allow a counter-argument that unmentioned activities are inferentially excluded. Nonetheless, it would seem prudent for counsel in many cases to review carefully the potential areas where disputes might subsequently arise, and provide for them specifically while further indicating that their listing is not intended to either limit or eliminate other unspecified potential claims from the arbitration requirement. •

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