Unwittingly Submitting to Mandatory Arbitration Provision

Judge Abraham J. Gafni (Ret.)
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Parties may relinquish their right to litigate in court in many ways. They click a box on a computer screen, open a container containing a purchased product or turn on an electrical device, and, by so doing, they agree to submit all disputes with another party to binding arbitration.

But are there situations where they may be so bound even though no such limited affirmative steps have been taken?

A recent opinion from the U.S. District Court for the Eastern District of Virginia reflects how an attorney found herself in such a situation when her law firm compelled her to arbitrate her dispute with the firm, in *Craddock v. LeClairRyan*, Civil Action No. 3:16-cv-11, (E.D. Virginia, April 12, 2016).

In October 2012, Michele Burke Craddock had applied to become a shareholder in the LeClairRyan firm. In December 2012, she was sent a copy of the shareholder agreement, together with information on her shareholder health benefits and how she might finance her capital contribution. She was promoted to shareholder on Jan. 1, 2013. However, she neither signed the shareholder agreement at that time nor was she prompted by the law firm to do so for an extended period thereafter, according to the opinion.

In subsequent months, notwithstanding several disputes relating to Craddock's capital contribution (which were resolved) she was still not asked to sign the shareholder

agreement. Rather, Craddock continued as a typical shareholder with respect to - compensation, benefit plans, voting and being held out as a shareholder, the opinion said.

Eventually, after almost two years, the law firm stated that Craddock had "inadvertently failed" to sign the shareholders' agreement and demanded that she do so immediately, the opinion said.

At that point, Craddock did, in fact, review certain financial information and sign the shareholder agreement. However, she struck various provisions in the agreement, including those relating to mandatory arbitration. The law firm refused this modified agreement and Craddock never signed an unmodified agreement. As a result, she could not continue with the firm.

Craddock filed a discrimination charge with the U.S. Equal Employment Opportunity Commission, which issued a right to sue notice.

The court granted the law firm's motion to dismiss the lawsuit and compel arbitration in accordance with the provisions of the shareholder agreement. In deciding that the agreement was binding, the court dealt with the following questions:

1. Was Craddock's signature the exclusive manner of accepting the Shareholder Agreement?

In reviewing the agreement, the court focused on the following provision: "Each shareholder understands that by signing this agreement he or she agrees ... to submit any claims arising out of his or her relationship with the corporation to binding arbitration."

Craddock contended that as the agreement "sets forth only one manner of - acceptance—a signature" and, as she had never signed, the contract was never formed.

The court rejected this argument because while the agreement did refer to acceptance through signing, that was just one, but not necessarily the only, acceptable manner of acceptance. In such circumstances "when a contract lists one possible manner of acceptance without stating that such a manner is the only permissible manner of acceptance," according to the Restatement (Second) of Contracts Section 30, "contract law treats the possible manner as a suggestion, and leaves the offeree free to accept the contract in the suggested manner or in any other reasonable manner."

As the language in the shareholder agreement only suggested a signature as one valid manner of acceptance, other reasonable manners that had not been excluded would also satisfy the requirement of contract acceptance.

2. Did Craddock's conduct from Jan. 1, 2013, to Nov. 24, 2014, reasonably evince acceptance of the Shareholder Agreement?

The parties agreed that acceptance of the agreement might be shown through words or acts. Silence and inaction, however, would not typically reflect such acceptance. In the

Restatement (Second) of Contracts Section 69(1)(a) it was written that, "However, silence does constitute acceptance of an offer and its terms where the offeree: accepts the benefits of the offer; has a reasonable opportunity to reject the offer; and understands that the offer is made with the expectation of compensation."

The court found that Craddock did meet the requirements of acceptance in that she had held herself out as a shareholder, been compensated as such, participated in benefit plans afforded only to shareholders and voted on shareholder issues.

Moreover, Craddock had received a copy of the shareholder agreement in the month prior to being promoted to shareholder. That was a reasonable period within which she might have reviewed the agreement and advised that she was rejecting it in whole or in part.

In addition, it was clear that she was expecting compensation in the form of a shareholder bonus that would be used to pay out her capital contribution as a -shareholder.

Finally, Craddock's request for promotion to partnership was an "explicit statement by the offeree" reflecting her intent to accept the shareholder agreement.

Thus, by their actions "both parties to this dispute did objectively manifest their acceptance and intent to be bound from Jan. 1, 2013, onward," the court said.

3. Must all parts of the arbitration agreement under the Federal Arbitration Act (FAA), including the signature, be in writing?

The FAA does, in fact, refer only to binding arbitration agreements that are in writing. Craddock argued that there was no such written agreement that was signed by the parties.

This argument was similarly rejected. Here, the agreement was in writing, but "the FAA does not require an arbitration agreement be signed by the parties entering into the agreement." Craddock had accepted the shareholder agreement "and its written, binding FAA–enforceable arbitration provision by her conduct between Jan. 1, 2013, and Nov. 24, 2014."

4. But wasn't the Shareholder Agreement rejected by Craddock?

Craddock contended, however, that when the law firm finally insisted that she sign the shareholder agreement she did, in fact, reject the arbitration provisions. She claimed that her striking of those provisions constituted both a rejection and proposal of a new offer.

Too late, said the court. The rejection and counteroffer by Craddock would ordinarily be part of the contract formation process. But here, by her actions over almost two years, Craddock had accepted the agreement that was, consequently, already in effect. Her subsequent actions seeking to strike out portions of the in-force agreement could, at best, be viewed as an attempt to modify an existing agreement or, at worst, as a nullity.

Lesson to Be Learned

Both Craddock and the law firm were at risk by reason of their failure to take formal action finalizing the agreement following its presentation. Indeed, one can envision a reverse situation in which the law firm was seeking court litigation and Craddock was opting for arbitration.

Here, the agreement was found to be binding upon Craddock principally because she had applied for and received certain benefits that clearly reflected her acceptance of the agreement even without signing.

But what if her actions had not been so clear? What if there had not been a passage of almost two years, but only a few months, or she had not started her buy-in payments as yet, or her first compensation payout as a shareholder had not yet been made? In such circumstances, might the court have been reluctant to accept these lesser activities as equivalent to the formal execution of a written agreement?

In summary, if you are serious about your dispute resolution provisions, assure that they have been finalized with all of the formality of the other critical aspects of your agreement. Otherwise, you may find yourselves, as did the law firm in this case, seeking to enforce a mandatory arbitration provision based upon action or inaction of an ambiguous and inconclusive nature. •

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