March, 2016

I. ARBITRATION AGREEMENTS

Arbitration Provision Must Be Sufficiently Conspicuous to the Parties

The case *Noble v. Samsung Electronics America*, No. 15-3713 (D.N.J. March 12, 2016) involves allegations that Samsung misrepresented the battery life of one of its smart watch products. Samsung made claims that the smart watch's battery would last 24 to 48 hours without charging. Plaintiff David Noble alleged that the battery on his smart watch lasted about four hours before he had to recharge it. Unsatisfied with its performance, Noble replaced his watch twice, but plaintiff alleges that both times the replacement watches he received had the same problem.

The watch's guide booklet contained a Standard Limited Warranty with an arbitration provision (the "Arbitration Agreement") beginning on page ninety- seven of the guide book. The Arbitration Agreement contained an opt-out provision, which permits the purchaser to "opt out of this dispute resolution procedure by providing notice to SAMSUNG no later than 30 calendar days from the date of the first consumer purchaser's purchase of the Product." Plaintiff claimed he was not aware of the arbitration agreement.

Plaintiff filed a law suit in June 2015 on behalf of himself and other users of the smart watch, raising claims for fraud under the New Jersey Consumer Fraud Act and under common law, negligent misrepresentation, breach of express and implied warranty and unjust enrichment.

Samsung filed a motion to compel arbitration arguing that the claims must be arbitrated in light of the arbitration provision contained in the product's guide booklet. Noble responded that he did not agree to be bound because he did not have actual notice of the provision and was not on constructive notice given how Samsung concealed the Arbitration Agreement within the Guide Booklet.

The court rejected Samsung's argument that the parties can be bound to agreements included inside product packaging ("shrink wrap" agreements). The court acknowledged that while this is the law in New Jersey, in this matter plaintiff maintained that he did not have actual notice of the arbitration provision. In addition, the Court could not conclude that Noble had reasonable notice of the Arbitration Agreement since Samsung provided no evidence of writing on the outside of the package that informed purchasers of the important information inside the booklet. The court held that in order for an arbitration provision to be sufficiently conspicuous under New Jersey law, the consumer must have a fair opportunity to know that it exists. "[T]he issue is whether the terms therein were readily ascertainable or unreasonably hidden." The court held that here the arbitration agreement was not sufficiently conspicuous and denied Samsung's motion..

Third Party Who Signed Nursing Home Admission Agreement with Arbitration Provision, on Behalf of Decedent, Cannot be Forced to Arbitrate Wrongful-Death Claim.

In *Burkett v. St. Francis Country House*, 2016 PA Super 15 (Pa.Super., January 25,

2016), St. Francis Country House, is a nursing home facility where the decedent, Nannie Burkett ("Decedent"), resided at the time of her death. Upon admission to the facility on June 14, 2010, Roy Burkett ("Burkett"), son of Decedent, executed a Nursing Facility Admission Agreement ("Admission Agreement") provided by St. Francis on behalf of his mother. Pursuant to the Admission Agreement, Burkett was designated as a "Responsible Person." The Admission Agreement contained a mandatory arbitration clause covering any personal-injury claims the resident might have.

On October 18, 2012, Burkett filed a complaint, alleging that while Decedent was a resident at the facility, she sustained serious and permanent injuries, which were directly and proximately caused by the negligence of the facility. The complaint included counts of negligence, vicarious liability, wrongful death, and survival action. St. Francis filed an answer and new matter on February 8, 2013. Seven days later, St. Francis also filed a motion to compel arbitration. Burkett responded with an opposition to the motion to compel arbitration. St. Francis' motion to compel arbitration was denied by the trial court.

On appeal, St. Francis argued the trial court erred in denying its motion to compel arbitration because this dispute is governed by the FAA and all of Burkett's claims should be submitted to arbitration based on the following: (1) a valid agreement to arbitrate exists in the Admission Agreement; and (2) all claims made against St. Francis, including those pursuant to the Survival Act and the Wrongful Death Act fall within the scope of the Arbitration Clause.

With regard to the first element, the court found that Burkett does not dispute that he entered into an agreement on the behalf of the Decedent with St. Francis. Therefore, it need not examine whether a valid agreement to arbitrate exists. Regarding the second element, the court evaluated the trial court's reliance on *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651 (Pa. Super. 2013), *app. denied*, 86 A.3d 233 (Pa. 2014), *cert. denied*, 134 S. Ct. 2890 (U.S. 2014) in determining whether the mandatory arbitration clause extended to a third party.

St. Francis argued that the trail court's reliance on *Pisano* was misplaced as that case was improperly decided and should be overturned The court found that the recent decision in *Taylor v. Extendicare Health Facilities, Inc.*, 113 A.3d 317 (Pa. Super. 2015), *allocatur granted*, 122 A.3d 1036 (Pa. Sept. 23, 2015), controls this matter. The court held that, pursuant to *Taylor*, despite that wrongful-death and survival actions were distinct from one another, wrongful-death and survival claims should be consolidated. The court adopted the Taylor court's rationale that such a policy did not violate the FAA, because arbitration was not prohibited. Instead the policy was focused only on consolidation in order to promote judicial economy and avoid conflicting or duplicative rulings.

As such, the court affirmed the trial court order and held that Burkett who signed the nursing home admission agreement containing an arbitration provision, on behalf of his deceased mother, and was otherwise not a party to the agreement, could not be forced to arbitrate a wrongful-death claim.

II. FEDERAL COURTS

An Equally Divided Supreme Court Holds Spousal Guarantors Cannot Bring Discrimination Claim Against Creditors Under the Equal Credit Opportunity Act ("ECOA")

In *Hawkins v. Community Bank of Raymore*, 577 U.S. ___ (March 22, 2016), the Community Bank of Raymore in Missouri approved $2 million in residential development loans to a local company, on the condition that the spouses of the two men who owned the business also signed the guarantee. The spouses, Valerie Hawkins and Janice Patterson, agreed to do so. After the company failed to make payments on the loans in April 2012 and the bank declared them to be in default, it demanded payment from both

the business and the two women who were co-guarantors.

The plaintiffs sued the bank, arguing that it had unlawfully required them to execute the guaranties and that the bank's requirement constituted discrimination against them on the basis of their marital status in violation of ECOA. The district court granted summary judgment concluding that the plaintiffs were not "applicants" within the meaning of ECOA and, as a result, the bank had not violated ECOA by requiring them to execute the guaranties. The plaintiffs appealed arguing that the Fed's regulation provided "the term [applicant] includes guarantors."

The Eighth Circuit affirmed the district court's order of summary judgment in favor of the bank. The court applied the Supreme Court's Chevron deference, which requires that courts defer to agency interpretations of federal statutes when the statute is ambiguous and the agency interpretation is not unreasonable. Using the Chevron analysis, the Eighth Circuit ruled that the meaning of the word "applicant," as used in ECOA, was not ambiguous. The Eighth Circuit thus declined to defer to the Fed's expanded definition of "applicant" and affirmed the district court's order granting summary judgment in favor of Raymore. Hawkins and Patterson petitioned the Supreme Court for a writ of certiorari, which the Court granted.

The Supreme Court was faced with two issues: (1) Whether "primarily and unconditionally liable" spousal guarantors are unambiguously excluded from being Equal Credit Opportunity Act (ECOA) "applicants" because they are not integrally part of "any aspect of a credit transaction"; and (2) whether the Federal Reserve Board has authority under the ECOA to include by regulation spousal guarantors as "applicants" to further the purposes of eliminating discrimination against married women.

The Supreme Court upheld the Eighth Circuit's decision that spousal guarantors could not bring a discrimination claim against creditors under the Equal Credit Opportunity Act ("ECOA") because the guarantors did not qualify as "applicants" protected by the ECOA. The judgment was affirmed by an equally divided Court. This first 4-4 decision from the Supreme Court since the death of Justice Scalia leaves unresolved, on a national level, whether the Board of Governors of the Federal Reserve acted within its authority when it revised Reg. B and changed the definition of "applicant" under the Equal Credit Opportunity Act to include the spouses of persons who guaranty commercial debt.

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