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Indiana Court Addresses the Enforceability of Arbitration

In a week of relative silence from the Seventh Circuit and a litany of published but not groundbreaking decisions out of the Indiana Court of Appeals, the Hoosier Litigation Blog turns to a decision from the Indiana Court of Appeals that chose to uphold a mandatory arbitration provision in a contract. This may come as little surprise, but your author is not the biggest fan of mandatory arbitration provisions. Especial is my disgust with such provisions in consumer transactions where the inherent cost of arbitration functions as a barricade from the enforcement of contractual rights. I have long contended that such provisions function to render a contract illusory due to a functional failure of mutuality of obligation as the terms of the agreement render enforcement of any other term against the dominant party impossible. My diatribe completed, let us begin this week's discussion.

This week, the Indiana Court of Appeals weighed in on the enforceability of an arbitration provision where the named arbitrator no longer exists. The case, *Anonymous, M.D. v. Hendricks*, is the third time in as many years that the court has had occasion to address the issue. This is the first time that the court has seen fit to uphold the arbitration provision. The first two cases were functionally companion cases, in so much as each was against a payday loan provider, was a class action, and utilized the same named plaintiff. The first was *Geneva-Roth, Capital, Inc. v. Edwards* handed down in November 2011. *Geneva-Roth* was the first Indiana case to address the growing national dilemma of whether an

arbitration provision was void due to impossibility because the selected arbiter was unavailable. This dilemma was the result of a consent decree negotiated with the State of Minnesota with the National Arbitration Forum (NAF) as a resolution to the case *Swanson v. National Arbitration Forum, Inc.*

Because the NAF was no longer accepting consumer arbitration matters after July 24, 2009, there was a legion of consumer contracts with provisions that had chosen the NAF as the arbiter that now were laid bare to uncertainty. In *Geneva-Roth*, the court of appeals upheld Marion County Circuit Judge Louis Rosenberg's decision to find the arbitration provisions void for impossibility. The basis for the court of appeal's decision was that the choice of forum was an integral part of the arbitration provision. Thus, the failure of the integral part defeated application of the provision.

In the second case, *Apex 1 Processing, Inc. v. Edwards*, decided two months later, the court was addressed with the exact same issue, the exact same argument, the exact same reasoning, by the exact same trial judge, and the exact same verbiage in the arbitration provision. Consequently, the court followed the lead of the *Geneva-Roth* panel and upheld Judge Rosenberg's decision. In both cases, the defendant sought review by both the Indiana Supreme Court and the Supreme Court of the United States. Neither granted discretionary review.

As I noted at the outset, *Anonymous, M.D. v. Hendricks* struck against the success rate of plaintiffs. The critical difference in *Anonymous, M.D. v. Hendricks* was the inclusion of a line in the agreement that was conspicuously absent in the two prior cases. The agreement stated,

> If the National Arbitration Forum is unwilling or unable to serve or the parties mutually agree not to utilize the National Arbitration Forum for whatever reason, then the parties shall mutually agree on some other Alternative Dispute Resolution Service or method to administer the binding arbitration proceeding.

Because the arbitration agreement had specifically contemplated the inaccessibility of the NAF, the court concluded that utilization of the NAF was not an integral part of the arbitration provision. Therefore, the court upheld the provision.

While many may see this as a devastating defeat to plaintiffs' rights in Indiana, and certainly many defense-focused attorneys will proclaim it so, this case far from forecloses future challenges to arbitration provisions in consumer transactions. A little known fact about the *Geneva-Roth* decision was that Judge Rosenberg had actually found two reasons to not enforce the arbitration provision.

The first was the impossibility due to the lack of the NAF. Because that was sufficient grounds for the court of appeals, that was the only issue addressed. However, tucked away in footnote 11 is reference to the other basis – unconscionability of enforcement. You see, under Indiana law, an arbitration provision is interpreted like any other contractual provision. That means, "[l]ike any other contract, arbitration agreements may be invalidated by generally applicable contract defenses such as fraud, duress, impossibility, or *unconscionability*."

The reason I am so familiar with the trial court decision in *Geneva-Roth* is because I was a law clerk on the case. In fact, I am actually referenced by name in the trial court opinion. In determining whether a contractual provision is unconscionable, a court must consider the relative bargaining power of the parties. In order to aid in the determination of that bargaining power, I conducted a survey of the terms offered by 60 online payday lenders. The survey was meant to roughly simulate the process by which the plaintiff found Geneva – that is, using a computer search engine. My survey revealed that every single payday lender's terms included an arbitration provision.

Although, I like to fancy myself an expert researcher, my survey was not offered as expert scientific testimony. Had it been so offered I would have had to conduct a random sample and shown it to be statistically defensible. That may have proven to be problematic. Nevertheless, the court found:

> [Mr.] Flora's study is nonetheless admissible as factual, lay testimony probative of the difficulty that an industrious, computer literate consumer would have faced in locating an Indiana payday lender who eschewed arbitration clauses. Mr. Flora did not give opinion testimony. He merely enumerated the results of his computer search. While this lay testimony is not as probative as a scientific survey would have been, in the absence of any proof or even allegation that the search was unreasonably restricted or the results were not accurately tabulated, the evidence is helpful to the Court in assessing whether [plaintiff] had a practical choice as to arbitration provisions.

I add this not to toot my own horn – which would be a tall task as the court of appeals basically determined my hours of work to be unnecessary – but to illustrate that there is still a viable avenue toward defeating arbitration provisions in Indiana upon a showing of unconscionability.

Join us again next time for further discussion of developments in the law.

Sources

- *Anonymous, M.D. v. Hendricks*, --- N.E.2d ---, No. 79A04-1304-CT-185, 2013 WL 5261235 (Ind. Ct. App. Sept. 18, 2013).

- *Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind. Ct. App. 2011), *reh'g denied* (Jan. 19, 2012), *trans. denied*, 969 N.E.2d 87 (Ind. 2012), *cert. denied*, 133 S. Ct. 650, 184 L. Ed. 2d 459 (U.S. 2012).

- *Swanson v. National Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct. Hennepin Co. July 14, 2009).

- *Apex 1 Processing, Inc. v. Edwards*, 962 N.E.2d 663, 666 (Ind. Ct. App. 2012) *trans. denied*, 969 N.E.2d 87 (Ind. 2012), *cert. denied*, 133 S. Ct. 650, 184 L. Ed. 2d 459 (U.S. 2012).

- *Edwards v. Geneva-Roth Capital, Inc.*, No. 49C01-1003-PL-013084, 2010 WL 6743896 (Ind. Marion Cnty. Cir. Ct. Dec. 29, 2010), *aff'd sub nom. Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind. Ct. App. 2011), *reh'g denied* (Jan. 19, 2012), *trans. denied*, 969 N.E.2d 87 (Ind. 2012), *cert. denied*, 133 S. Ct. 650, 184 L. Ed. 2d 459 (U.S. 2012).