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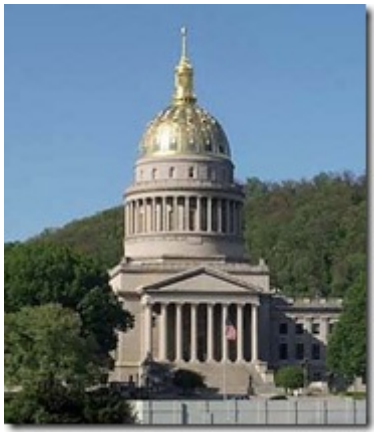
WV Supreme Court Enforces Employment Arbitration Agreement in Clites v. Clawges, 10-13-09

10-13-09: The West Virginia Supreme Court addressed the enforceability of employment arbitration agreements in State ex rel. Clites v. Clawges, 224 W. Va. 299, 685 S.E.2d 693 (2009) (opinion at Findlaw's web site). This *Clites* decision is discussed in my chart of West Virginia Supreme Court decisions.

Clites Goes To Work for TeleTech and Signs an Arbitration Agreement



The plaintiff, Jill Clites, went to work for TeleTech in October 2004 as a Customer Service Representative. During new employee orientation, Clites met with a human resources representative for about 90 to 120 minutes, during which time Clites reviewed and signed a large number of documents related to the orientation. In the record before the West Virginia Supreme Court, there were disputes over whether individual documents were discussed with Clites and whether she was required to sing all the documents during the orientation session, but it appears that during that session Clites signed an arbitration agreement which TeleTech required of most or all new employees.

Clites remained employed at TeleTech until July 12, 2007, when she was terminated. She then filed suit for sexual harassment and retaliation. Clites alleged she complained about the sexual harassment, that TeleTech failed to take appropriate corrective action, and that TeleTech retaliated against her for the complaint by firing her.

Clites Files Suit in West Virginia Circuit Court

Clites filed suit in West Virginia Circuit Court in Morgantown. TeleTech then invoked the arbitration agreement by filing a motion to dismiss the lawsuit and by filing a separate lawsuit in federal court arguing that Clites waived her rights to a jury trial by signing the arbitration agreement. In essence, TeleTech argued that Clites gave up her rights to file suit and to a jury trial by signing the arbitration agreement, and that her only remedy was to file an arbitration proceeding (with the American Arbitration Association) pursuant to the arbitration agreement.

Judge Russell Clawges ruled that the arbitration agreement was a "contract of adhesion",

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which simply means that it was a "standardized form, containing no individual terms, offered [by the employer] on essentially a take it or leave it basis." Contracts of adhesion are usually described as contracts offered by the substantially more powerful party in a transaction as allowing for now negotiation--offered on a "take it or leave it" basis. Courts sometimes but not always scrutinize "adhesion contracts" more carefully, especially where they do in fact reflect substantial disparities in negotiation power.

Judge Clawges did not automatically conclude that the arbitration agreement was therefore not enforceable. He looked at the more controversial terms: requiring arbitration to take place in Denver, Colorado (instead of near the place of employment, Morgantown, West Virginia), and requiring the parties to pay their own expenses incurred in the arbitration (which would make the arbitration proceeding significant more expensive for the plaintiff, compared to the cost of filing suit in West Virginia Circuit Court). Those terms would make arbitration significantly more burdensome and expensive for the plaintiff, compared to filing suit and seeking a jury trial. Those results would have made it significantly more likely that a Court would decide the arbitration contract to be "unconscionable", which would make it unenforceable.

TeleTech, to address these more burdensome terms of the arbitration agreement, stipulated (agreed) before Judge Clawges that the location of the arbitration would be Morgantown and that TeleTech would pay for all arbitration costs which would exceed what Clites would have had to pay to file suit in West Virginia Circuit Court.

Judge Clawges, based on the TeleTech stipulation, concluded that the arbitration agreement was not unconscionable, and there concluded it was enforceable.

Clites then appealed to the West Virginia Supreme Court.

The Federal Arbitration Act Does Not Preclude Review

The first issue for the Supreme Court was whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), precluded any scrutiny at all over the arbitration agreement in question. The United States Supreme Court has held that the "FAA" established the policy of favoring arbitration of disputes. Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 24 (1983). The US Supreme Court also held that the FAA preempts state laws which "undercut" the enforceability of arbitration agreements. Southland Corporation v. Keating, 465 U.S. 1, 11 (1984); Perry v. Thomas, 482 U.S. 483 (1987). This rule also applies to claims specifically created by state legislatures, such as the discrimination claims under the West Virginia Human Rights Act. Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

While the West Virginia Supreme Court in *Clites* recognized the fact that the FAA preempts state laws which would undercut the enforceability of arbitration agreement, it held that the "issue of whether an arbitration agreement is a valid contract if a matter of state contract law" and is "capable of state judicial review."

The Arbitration Agreement in Issue Was Not Unconscionable

So the West Virginia Supreme Court proceeded to review TeleTech's arbitration agreement to determine whether it was enforceable under West Virginia law.

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The standard for reviewing arbitration agreements was set out by the West Virginia Supreme Court as follows: An arbitration clause is "presumed" to be "bargained for" and is presumed to intend that the arbitration proceeding is the "exclusive means of resolving disputes arising under the contract". However, where a party alleges that the arbitration agreement was "unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion", then the question is whether the arbitration agreement was "bargained for and valid", and that question is a "matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract." (quoting Board of Education of the County of Berkeley v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E.2d 439 (1977) (Syllabus Point 3).

The West Virginia Supreme Court, like Judge Clawges at trial, concluded TeleTech's arbitration agreement was a "contract of adhesion". But that did not "necessarily means that it is invalid, and to determine its validity we look to other factors"

The next step was to determine "whether the Agreement is unconscionable or was thrust upon [the plaintiff] because [she] was unwary and taken advantage of." An analysis of unconscionability "must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract." (quoting Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Company of West Virginia, Inc., 186 W. Va. 613, 413 S.E.2d 670 (1991)).

The Supreme Court then focused on the fact that TeleTech's human resources employee had a meeting of substantial length (90 to 120 minutes) with Clites, and Clites was required, like all other new employees, to sign an arbitration agreement. Furthermore, apparently because of TeleTech's stipulation, the arbitration agreement required arbitration in Morgantown instead of Denver, and TeleTech agreed to pay the costs of arbitration beyond the costs of filing suit in Circuit Court.

The Court therefore held that TeleTech's arbitration agreement was not unconscionable and was therefore enforceable. The result of the decision is therefore that Clites will be required to pursue her claim before the American Arbitration Association, and will not be allowed to proceed to a jury trial in West Virginia Circuit Court.

Importance of the Clites Decision

The first important aspect of the *Clites* decision is that the reasonableness of an arbitration agreement should be examined in terms of the agreement itself *plus* any stipulations (agreements) by the employer that might soften the burdensome effects on the employee/plaintiff. The fact that TeleTech's arbitration agreement required the arbitration to take place in Denver, and required the employee to bear the substantially higher cost of arbitration, would likely have created problems for the enforceability of the agreement. But TeleTech's stipulations essentially removed those issues.

Therefore, employers faced with troubling terms in an arbitration agreement, from the standpoint of enforcing it in court, may stipulate after the employee files suit to modify the arbitration agreement to make it more likely to pass judicial scrutiny concerning its enforceability.

The second important aspect of *Clites* is that the Supreme Court carefully limited its ruling to the facts of that case, and indicated that under other circumstances it would carefully scrutinize the arbitration agreements:

- There may be questions of whether "sufficient consideration was given in exchange for the" arbitration agreement. The Court noted that it had previously ruled that an employer's "promise merely to review an employment application in exchange for a job applicant's promise to submit employment-related disputes not associated with the application process to arbitration does not represent consideration sufficient to create an enforceable contract to arbitrate such employment disputes." (quoting State ex rel. Saylor v. Wilkes, 216 W. Va. 766, 613 S.E.2d 914 (2005)).
- The Court notes that its precedent has "historically given close scrutiny to adhesion contracts that abrogate a party's constitutional entitlement to access to the courts."
- The court would be "troubl[ed]" by forum selection clauses, contained in contracts of adhesion, which would require an employee to arbitrate disputes "in far-away jurisdictions, remotely removed from the employee's actual place of employment or residence."
- It would be "troubling" for an arbitration agreement to require the employee to be "subject to the substantive law of a far-away jurisdiction".

This *Clites* decision is discussed in my chart of West Virginia Supreme Court decisions.

Written by Drew M. Capuder © (contact information); Voice: 304-333-5261; July 20, 2010

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