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Recent
Developments

NINTH CIRCUIT STRIKES BLOW TO ARBITRATION AGREEMENTS (February 5 , 2002)

Summary

Yesterday, the Ninth Circuit Court of Appeals once again struck down an employment-related arbitration agreement, this time in the case of [Circuit City Stores, Inc. v. Adams](#). In doing so, the court called into question the validity of *all* pre-employment arbitration agreements.

Details

The underlying action that led to yesterday's ruling has had a long history. The plaintiff, Adams, originally sued Circuit City in a California state court alleging sexual harassment and a variety of related claims. Circuit City then filed an independent action in federal court to compel arbitration under the Federal Arbitration Act, because Adams had signed a pre-employment Dispute Resolution Agreement. The federal court granted Circuit City's petition, but on appeal the Ninth Circuit Court of Appeals reversed and held that the Federal Arbitration Act did not apply to employment contracts. Last year, the United States Supreme Court reversed the Ninth Circuit's decision and ruled that the Federal Arbitration Act does apply to employment contracts, and furthermore explained its strong favor for arbitration as a speedy, less expensive remedy for employment disputes. The Supreme Court ordered the Ninth Circuit to revisit its decision in the *Adams* case.

Despite the Supreme Court's direction, the Ninth Circuit once again invalidated Adams' Dispute Resolution Agreement because, it ruled, the agreement was "unconscionable" under California law. To reach that decision, the court relied upon the California Supreme Court's 2000 decision in [Armendariz v. Foundation Health Psychcare Services, Inc.](#), which set minimum procedural safeguards for employment-related arbitration agreements. Seemingly important to the Ninth Circuit was that Circuit City required all applicants to agree to the Dispute Resolution Agreement as a condition of employment, as many employers do.

What this means

This is but one more step in the continuing struggle between the Ninth Circuit Court of Appeals on one hand, and the United States Supreme Court, other circuits, and the California state courts on the other hand. Without putting too fine a point on it, it is now more clear than ever that the Ninth Circuit just doesn't like employment-related arbitration agreements. (Some of you may recall that the Ninth Circuit was also the only circuit to rule that federal employment discrimination lawsuits couldn't be arbitrated.) This decision furthers that anti-arbitration philosophy. Given the United States Supreme Court's contrary, favorable views toward arbitration, and its overwhelming tendency to reverse the Ninth Circuit, it would not surprise us if the Supreme Court were to look closely at this decision if it were presented to them for review.

However, until that happens, this decision could be a troubling thorn in the side of employers,

particularly those who require prospective employees to agree to arbitrate employment-related disputes as a condition of employment. Indeed, plaintiffs' lawyers may now argue that requiring a pre-employment arbitration agreement is impermissible as a matter of law. In our view, a more reasonable view of this decision is that the pre-employment imposition of an arbitration agreement is but one of many factors to be considered by a court. (The key others are: (1) how costs are allocated; (2) what discovery is permitted; (3) what damages are recoverable; and (4) whether the arbitration obligation is mutual.) Assuming the Ninth Circuit is not overruled again, subsequent decisions will clarify exactly how stringent the federal courts will be with these factors.

But regardless of how one looks at it, the arbitration waters have now become murkier. And one of the more obvious results of this decision will likely be that employees who have signed arbitration agreements may now try to sue in federal court, where the hostility toward employment-related arbitration agreements continues to exist.

Perhaps the biggest lesson from *Adams* is that, at least in the Ninth Circuit, this area of law continues to be in flux. Accordingly, employers who are considering a pre-dispute arbitration agreement with employees may wish to wait until the smoke clears a bit before implementing any new initiatives.

This E-Update was authored by [Joe Connaughton](#). If you have any questions about this E-Update, please contact Mr. Connaughton or any PP&S attorney.

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Send comments to info@paulplevin.com. Last modified 2/7/02